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MESSAGE FROM THE PATRON-IN-CHIEF

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25th July, 2017

MESSAGE

It gives me immense pleasure that the National Law Institute University, Bhopal is publishing the next issue of the NLIU Law Review (Volume VI, Issue II).

The NLIU Law Review serves as a wonderful platform to expose law students, policy makers, lawyers and judges to the prominent and unresolved debates in the national and international legal regimes. More importantly, it offers profound perspectives on the solutions to the socio-legal anomalies that plague Indian society.

Since its inception, the Law Review has consistently encouraged and inspired law students to achieve scholarly excellence. I am confident that the Law Review will achieve more acclaim in the years to come and prove to be an indispensable legal resource for the legal fraternity. I extend my best wishes to the Law Review Team and hope that the upcoming issues are also equally engaging and insightful.


(HEMANT GUPTA)

MESSAGE FROM THE PATRON

It gives me great delight to present Volume VI Issue II of the NLIU Law Review to our readers. This Issue offers profound and refreshing perspectives on areas of law that are still nascent, raising questions that the Indian judiciary will inevitably be confronted with in the near future. I sincerely hope that the readers would find this Issue informative and thought-provoking.

The NLIU Law Review is the flagship publication of the National Law Institute University, Bhopal. It is an endeavor to facilitate intellectual discourse among law students and provide a platform for them to contribute to the existing legal literature through well-researched articles, case analysis and book reviews. All submissions are subjected to a detailed review process, wherein they are evaluated on grounds of originality and the strength of the content. The submissions that are received are evaluated by various Boards of the Law Review that assess the manuscript on the quality of content and eliminate plagiarized submissions. These contributions are then evaluated by the Peer Review Mechanism that operates under the guidance of the advisory board of legal luminaries.

The NLIU Law Review is the flagship publication of National Law Institute University, Bhopal and provides a platform that promotes innovation, originality and ingenuity through legal research in keeping with our avowed objectives. The Journal accepts submissions from students, lawyers, academicians and scholars in the form of well-researched and insightful articles, book reviews and case comments. These submissions go through a rigorous and intensive selection process wherein they are evaluated on grounds of technical accuracy and argumentation skills.

I would like to thank the Patron-in-Chief of the Law Review, Hon'ble Shri Justice Hemant Gupta, High Court of Madhya Pradesh for his valuable guidance in this endeavor. I extend my congratulations to Prof. Ghayur Alam for assisting with the production of the journal and guiding the student editors with his erudite inputs. I congratulate the Editorial Team for bringing out this Issue which is contemporary in its context and insight and wish them all the success for the upcoming issues. We look forward to your valuable comments and feedback.

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

A NOTE FROM THE FACULTY ADVISOR

This Issue of the NLIU Law Review in its selection of content aims to encourage discourse in the areas of both national and international law. It addresses contemporary developments in the legal arena and attempts to provide solutions to certain long-standing and contemporary concerns, taking into consideration the socio-political and legal dimensions involved. This is seen in our choice of Articles and Case Comments which move from a discussion of combating Islamic State to an enriching discussion of the landmark *Sasan Power* case.

The Law Review seeks to incorporate articles that push legal boundaries not only in terms of analysis and interpretation of the law but also in terms of solutions provided. All the articles and case comments submitted to the Review underwent an intense screening procedure with an aim of evaluating articles based on their creativity, argumentative and language skills.

The student body of the Journal has done a tremendous job in screening and evaluating the papers. It would not have been possible for us to bring out this Journal without the support of our students.

We take this opportunity to thank the Patron-in-Chief of the Journal and Chief Justice of the Madhya Pradesh High Court, Hon'ble Justice Hemant Gupta for his continuous encouragement. We are thankful to the Patron, Prof. (Dr.) S.S Singh, the Director of National Law Institute University, Bhopal for his guidance and support. All the contributors to this Journal deserve special thanks since they made this endeavor a success.

We invite comments and criticism on the Articles and Case Comments published herein and any suggestions to improve the quality of this Journal.

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

EDITORIAL NOTE

This Issue of the NLIU Law Review is a fascinating blend of international and national law issues. It includes articles and comments that provide in-depth analyses of contemporary legal concerns and in doing so, are not restricted to a mere domestic perspective.

In *Prohibition on the Use of Force and the ISIS Crisis*, the author explains the Use of Force doctrine under international law and analyses justifications invoked by States in claiming legality of their actions in foreign territories against the Islamic State of Iraq and Syria.

In *SEBI-FMC Merger: Challenges to Effective Implementation*, the author explains the reasons behind the 2015 unification of the Securities and Exchange Board of India Ltd and the Forward Markets Commission. The author also highlights how this merger serves to integrate commodities derivatives and securities trading and consequently, brings about a much-needed element of transparency.

Examining Violation of Adivasi Land Rights by the Mining Industry focuses on the flagrant disrespect exhibited by the State and private actors towards laws relating to the upliftment of the Adivasi community and an urgent need for strict compliance with the legal framework in place.

In *Consequences of Undue Delay in Passing Arbitral Awards and Imposition of Timelines as a Solution*, the author proposes fixing a timeline in arbitral proceedings to avoid delays in the passing of arbitral awards and to expedite the process. In another article, the author analyses the Whistle-blower Protection Act, 2011 and

conducts an economic analysis to justify better protection for whistleblowers within the ambit of the Act.

This Issue also includes three case comments. In *A. Ayyasamy v. A. Paramasivam*, the issue of arbitrability of fraud has been discussed in light of the principles of party autonomy and *kompetenz-kompetenz*. Further, in *Satya Pal Singh vs. State of Madhya Pradesh*, the procedure for preferring a leave to appeal has been analyzed in light of the Indian Criminal Code provisions. Lastly, in *Sasan Power Ltd. v. NAAC India Pvt. Ltd.*, the author analyses the doctrine of severability in arbitration agreements in addition to examining the question of whether an Indian party to an arbitration agreement can derogate from Indian law.

The Law Review Team hopes that the present Issue proves to be an insightful read for all its readers and that the collection of articles on various issues is both useful and appreciable. We welcome any feedback to improve the quality of our Journal.

Editorial Board

PROHIBITION ON THE USE OF FORCE, COUNTER-TERRORISM AND THE ISIS CRISIS

Vandita Khanna*

Abstract

The onset of terrorism has drastically impacted the evolution of the doctrine on the prohibition on the use of force in international law. This essay aims at providing a comprehensive survey of these modifications and plausible justifications invoked by States to claim legality of their actions in foreign territories against the Islamic State of Iraq and Syria. The underlying aim of tracing the evolution is to examine the contribution of the United States of America in moulding and effectively transforming international law through its extra-legal hegemonic interventions. Part 1 of this essay reflects on various constructions of the ambiguously worded Security Council Resolution 2249 (2015) to indicate that the UN machinery's failure to effectively address terror threats has given way to unilateral assessments of risk at the behest of individual States wedged in power politics. Part 2 of the essay addresses shifting interpretations of the use of force and its immediate applicability to the ISIS crisis:

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Section 1 of this Part explores the possibility of the use of defensive force against non-State actors without requiring attribution of their conduct to territorial States; Section 2 establishes the legality of American-led intervention in Iraq grounded in the principle of ‘intervention by invitation’; and Section 3 examines the viability of the grounds of collective self-defense and anticipatory self-defense that have been invoked by USA for its intervention in Syria. Part 3 of the essay appraises the detrimental implications of according ostensible legality to hegemonic interventions on the fundamentality of Article 2(4) of the Charter of the United Nations and the perpetuation of a xenophobic narrative all-pervading international law.

I. INTRODUCTION

In an attempt to couch its use of force in foreign territories in the language of legality, the United States of America (“USA”) has persistently invoked doctrines previously unacknowledged as norms within the realm of international law. The growing academic tendency to accept such principles to justify the legality of American interventions is a reinforcement of the hegemonic currency and an outright dismissal of the sovereign equality of States. This essay aims at tracing the evolution of the prohibition on the use of force through an analysis of Security Council (“SC”) Resolutions, State practice and decisions of the International Court of Justice (“ICJ”) in light of growing terror threats. The underlying theme of examining the legality of American-led interventions against the Islamic State of

Iraq and Syria (“**ISIS**”)¹ purports to highlight the American tilt in international lawmaking and avers that any response to combat terrorism is bound to remain ineffective if not in consonance with the fundamental principles of the Charter and Purposes of the United Nations (“**UN**”).

II. INTERPRETING SECURITY COUNCIL RESOLUTION 2249 (2015)

The prohibition on the use of force contained in Article 2(4)² of the Charter of the UN has increasingly shifted from being elevated to a jus cogens norm into one with a multitude of exceptions being carved out therefrom. Two such exceptions formally recognized within the Charter are that of the inherent right of self-defense in Article 51³ and collective security efforts in furtherance of SC authorizations under Article 39⁴ specifically and Chapter VII⁵ generally. SC Resolutions acting under the mandate granted by the UN are typically suggestive of the path of legality in order to combat acts of terror. As will be evident throughout the course of this essay, the 9/11 attacks have

¹The Islamic State of Iraq and Syria was originally a consolidation of the al-Qaeda in Iraq and various Sunni insurgent groups, which together referred to themselves as the Islamic State of Iraq and Levant (“**ISIL**”). On June 29, 2014 however, the insurgent group broke away from the al-Qaeda following power struggles and ideological differences. Since then, **ISIL** has been renamed as **ISIS**. While it has interchangeably referred to itself as the Islamic State (to legitimate a pan-Islamic Caliphate transcending geographical limits of Iraq and Syria), this essay refers to the insurgent group as **ISIS**, unless the context requires otherwise. See generally *Islamic State in Iraq and the Levant (ISIL)*, *ENCYCLOPEDIA BRITANNICA* (2015) <http://www.britannica.com/topic/Islamic-State-in-Iraq-and-the-Levant> (July 7, 2017).

²U.N. Charter art. 2, para 4.

³U.N. Charter art. 51.

⁴U.N. Charter art. 39.

⁵U.N. Charter art. 39-51.

drastically changed the way States perceive the prohibition on the use of force. This Part assesses differing interpretations accorded to the recent SC Resolution 2249 (2015)⁶ in order to ascertain whether in effect there exists a right to use force against the ISIS.

SC Resolution 2249 (2015) in response to the Paris attacks declared an express intention to combat the ISIL, constitutive of a “global and unprecedented threat to international peace and security”, “by all means”.⁷ The operative clause “calls upon member States...to take all necessary measures...to prevent and suppress terrorist acts committed specifically by ISIL...and entities associated with Al-Qaida...and to eradicate the safe haven they have established over significant parts of Iraq and Syria”.⁸ While failure to refer to Chapter VII does not ipso facto preclude a resolution from acquiring binding value,⁹ it does however restrain a resolution from authorizing the use of force beyond that which is already permitted in general international law.¹⁰ The contentious “call” to take “all necessary measures” has been interpreted as falling short of a blatant authorization.¹¹ If not reflective of a Chapter VII authorization, the next level of investigation ought to focus on its bearing on the use of force under

⁶S.C. Res. 2249, (Nov. 20, 2015).

⁷Security Council 'Unequivocally' Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses 'Unprecedented' Threat, MEETINGS COVERAGE AND PRESS RELEASES, UN NEWS CENTER (June 28, 2016) <http://www.un.org/press/en/2015/sc12132.doc.htm>.

⁸Id. at ¶5.

⁹Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1970 I.C.J. 16 (June 21).

¹⁰Marc Weller, Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence Against Designated Terrorist Groups, EJIL TALK (June 28, 2016) <http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/>.

¹¹Dapo Akande & Marko Milanovic, The Constructive Ambiguity of the Security Council's ISIS Resolution, EJIL TALK (June 28, 2016), <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>.

Article 51. Interpreted as a declaration officially reiterating ISIL as a permanent and active threat subsequent to attacks in Sousse, Ankara, Sinai, Beirut and Paris, a few have considered such a declaration to “relieve individual States from having to fulfil the criteria for self-defense when considering armed action in Syria”.¹² However, the use of self-defense to combat acts of terror is subject to compliance with the UN Charter specifically and international law generally. The inherent right of self-defense reiterated in the case of *Nicaragua v. United States*¹³ is still qualified by thresholds of immediacy, necessity and proportionality recognized in customary international law. Notwithstanding its ambiguous construction, the Resolution does not progress beyond making a reference to existing law on the use of force in counter-terrorism acts.¹⁴ However, a problematic implication of the SC merely reiterating existing law is the sanction that it accords to individual States to unilaterally determine the criteria to invoke exceptions to Article 2(4).

III. EXAMINING THE LEGALITY OF THE USE OF FORCE IN IRAQ AND SYRIA

This Part discusses the legality of the use of force against the ISIS based on an appraisal of ICJ decisions and customary international law. In the process of exploring the available justifications for American-led interventions, I endeavor to establish that in the absence of precise rulings on the present question of law by the ICJ, State practice has been overpoweringly dominant in ascertaining legality.

¹²Weller, *supra* note 10.

¹³*Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 181 (June 27), [hereinafter *Nicaragua*].

¹⁴Paulina Starski, “Legitimized Self-Defense” – Quo Vadis Security Council?, *EJIL TALK* (June 28, 2016), <http://www.ejiltalk.org/legitimized-self-defense-quo-vadis-security-council/>.

Section 2.1 of this Part addresses concerns regarding the availability of the use of defensive force against non-State actors, in the event that the ISIS is a non-State actor. It then proceeds to answer the question, whether attribution of actions by non-State actors to a State is a prerequisite to the lawful exercise of the right of self-defense. Section 2.2 assesses the viability of the doctrine of intervention by invitation in American-led airstrikes launched in Iraq. Section 2.3 then comprehensively examines whether collective self-defense on behalf of Iraq or in the alternative, anticipatory self-defense may be viably employed as legitimate grounds for the use of force in Syrian territory.

A. Is The Islamic State a Non-State Actor?

The term ‘non-State actor’ refers to an individual or organization that is “not allied to any particular country or State”.¹⁵ With regard to use of force discourse, it typically entails “cross-border terrorist groups or insurgent groups subject to Common Article 3[that mandates humane treatment of “...persons taking no active part in the hostilities” during an armed conflict not of an international character],¹⁶ or Additional Protocol II [that necessitates respect for and humane treatment of the wounded and sick, civil populations, and unarmed persons who have ceased to participate in similar hostilities],¹⁷ of the Geneva Conventions”.¹⁸ The ISIS currently possesses an executive apparatus,

¹⁵Non-state actor (2017), in Oxford Dictionary [online], <https://en.oxforddictionaries.com/definition/non-state-actor> (July 7, 2017); See also, NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 15 (Oxford University Press 2011).

¹⁶Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, Aug. 12, 1949, 75 U.N.T.S. 31, Art 3.

¹⁷Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, Art 4.

¹⁸Id.

a law enforcement agency,¹⁹ judicial machinery²⁰ and a written manifesto equated to a Constitution.²¹ Its fluctuating territory canvassing parts of Syria and Iraq along with a permanent population of Syrians and Iraqis, established social institutions, tax revenue mechanisms and healthcare clinics seem to make a *prima facie* strong case for statehood.²² While there are some who argue that ISIS is a State for assumedly fulfilling the bare minimum criteria of statehood laid down in the Montevideo Convention;²³ others have questioned whether ISIS in fact satisfies the individual requisites of ‘defined territory’ and ‘permanent population’ contained therein.²⁴ The ISIS has established itself in the territory of existing States of Syria and Iraq where people identify themselves as possibly Syrian or Iraqi and the States claim them to be their citizens. Wedged between unsteady territorial boundaries²⁵ and absence of consent of the people ISIS purportedly claims to guarantee citizenship rights to,²⁶ would ISIS

¹⁹Ghazi Balkiz & Alexander Smith, What Life Is Like Inside ISIS' Capital City of Raqqa, SYRIA NBC NEWS (June 23, 2016), <http://www.nbcnews.com/storyline/isis-uncovered/what-life-inside-isis-capital-city-raqqa-syria-n211206>.

²⁰UNHRC, Rep. of the Independent International Comm. of Inquiry on the Syrian Arab Republic: Rule of Terror: Living under ISIS in Syria, U.N. Doc. A/HRC/27/CRP.3, (2014).

²¹Olivia Flasch, The legality of the air strikes against ISIL in Syria: new insights on the extraterritorial use of force against non-state actors, 3 JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW 37, 46 (2016).

²²Zack Beauchamp, The 7 biggest myths about ISIS, VOX (June 28, 2016), <http://www.vox.com/cards/isis-myths-iraq>.

²³Montevideo Convention on the Rights and Duties of States, Dec. 26 1933, 165 L.N.T.S. 19, Art 1.

²⁴Andres Coleman, The Islamic State and International Law: An Ideological Rollercoaster?, 5(2) JOURNAL OF THE PHILOSOPHY OF INTERNATIONAL LAW 75, (2014).

²⁵Islamic State Caliphate Shrinks by 16 Percent in 2016, IHS Markit Says, BUSINESS WIRE (July 8, 2017), <http://www.businesswire.com/news/home/20161009005034/en/>, [“In 2015, the Islamic State’s caliphate shrunk from 90,800 sq. km to 78,000 sq. km, a net loss of 14 percent. In the first nine months of 2016, that territory shrunk again by a further 16 percent...”].

²⁶Coleman, *supra* note 24.

still conform to the Montevideo ingredients of statehood? Even if it were to be assumed that it would, ISIS indisputably has emerged as a result of unlawful use of force, and Judge Elaraby's Separate Opinion in the Wall Advisory Opinion²⁷ has affirmed the general principle that an illegal act cannot produce legal rights.²⁸ Additionally, despite fulfilment of the declaratory theory of statehood, the equally imperative constitutive theory remains unsatisfied on account of the large-scale non-recognition of the Islamic State as a State.²⁹ Former President of USA Barack Obama's following statement³⁰ is one of several instances exemplifying the non-fulfilment of the constitutive theory of statehood:

"Now let's make two things clear: ISIL is not "Islamic." No religion condones the killing of innocents, and the vast majority of ISIL's victims have been Muslim. And ISIL is certainly not a state. It was formerly al Qaeda's affiliate in Iraq, and has taken advantage of sectarian strife and Syria's civil war to gain territory on both sides of the Iraq-Syrian border. It is recognized by no government, nor the people it subjugates. ISIL is a terrorist organization, pure and simple. And it has no vision other than the slaughter of all who stand in its way..."

Furthermore, non-recognition is an indicator of the entity's inability to enter into diplomatic relations with other States, which would render the fourth Montevideo criterion unfulfilled as well.³¹

²⁷Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, Separate Opinion of Judge Elaraby, ¶3.1 [hereinafter the Wall Advisory Opinion].

²⁸Ex injuria jus non oritur, fn. 81 in supra note 15.

²⁹Flasch, supra note 21, at 46.

³⁰TRANSCRIPT: PRESIDENT OBAMA'S SPEECH ON COMBATING ISIS AND TERRORISM, CNN (July 7, 2017, <http://edition.cnn.com/2014/09/10/politics/transcript-obama-syria-isis-speech/>).

³¹Thomas D Grant, The Recognition of States: Law and Practice in Debate and Evolution 19, 30, 32–33 (Praeger 1999).

Therefore, ISIS acting independent of the established regimes in Iraq and Syria is a non-State actor.

a) *Can The Right of Self-Defense Be Invoked Against Non-State Actors?*

Traditionally, Article 51 has been conceptualized as a right that may be invoked against another State.³² A restrictive absolute prohibition on the use of defensive force against non-State actors was established in the *Wall* Advisory Opinion, which constrained the applicability of Article 51 to “*the case of an armed attack by one State against another State*”.³³ *Nicaragua*³⁴ too reinforces the notion that only effective control exercised by the territorial State over paramilitary and military operations conducted by the non-State actor would attract Article 51. Thus, it is imperative to attribute State responsibility for actions of non-State actors. Article 8 of the ILC Articles on State Responsibility resonates with the above.³⁵ However, post-9/11, the absolute prohibition has given way to more fluid interpretations of the impugned Article.³⁶ Monika Hakimi, Professor of Law at Michigan Law School, argues that a State may exercise its right of self-defense against non-State actors in the event that another State actively harbors or supports such non-State actors; is unwilling or unable to address the threat they pose; or if the threat is territorially situated within such State. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions³⁷ accepted the emergence of a perception that required a higher threshold of violence

³²Matthew C. Waxman, *Regulating Resort to Force: Form and Substance of the UN Charter Regime*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 151, (2013).

³³Wall Advisory Opinion, *supra* note 27, at 139.

³⁴Nicaragua, *supra* note 13.

³⁵G.A. Res. 56/83, (Dec. 12, 2001).

³⁶Christine Gray, *International Law and the Use of Force* 199 (3rd edn, OUP 2008).

³⁷Christof Heyns, (Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions), U.N. Doc. A/68/382 (Sept. 13, 2013), ¶89.

to justify resort to self-defense when responding to attacks perpetrated by non-State actors. An examination of State practice too seems to suggest acceptance of the legality of defensive operations against non-State actors.³⁸ Such an answer is inevitably dependent on whether a non-State actor is capable of conducting an armed attack, which forms a prerequisite for invocation of the right of self-defense. SC Resolutions 1368 (2001)³⁹ and 1373 (2001)⁴⁰ confirm the inherent right of self-defense against terrorist attacks without any particular mention of a restrictive approach of an armed attack only by one State against another. The *Nicaragua* case expanded the ambit of the prohibition of armed attacks beyond those carried out by regular armed forces and recognized sufficiency of “scale and effect” as the legitimate gravity threshold to ascertain whether an act of aggression (as understood under Article 3(g) of the Definition of Aggression⁴¹) would qualify as an armed attack.⁴² Notwithstanding its non-combatant status then, a terrorist organization carrying out an attack that fulfils the threshold requirement would then legitimize military action in response.⁴³ Dissenting opinions of Judge Buergenthal⁴⁴ and Judge Higgins⁴⁵ in the *Wall* Advisory Opinion undertake a literal investigation of Article 51 to conclusively determine that since there exists nothing in the Article that specifically precludes applicability

³⁸Monica Hakimi, *Defensive Force against Non-State Actors: The State of Play*, 91 *INTERNATIONAL LAW STUDIES* 2, 28 (2015).

³⁹S.C. Res. 1368, (Sept. 12, 2001).

⁴⁰S.C. Res. 1373, (Sept. 28, 2001).

⁴¹G.A. Res. 3314 (Dec. 14, 1974), Art 3(e).

⁴²*Nicaragua*, *supra* note 13.

⁴³J. Rowles, *Military Responses to Terrorism*, 81 *AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS* 307, (1987); See also Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11(1) *CARDOZO J. OF INT’L & COMP. LAW* 1, (2003-04).

⁴⁴*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136 (July 9), para 242 (declaration of Judge Buergenthal).

⁴⁵*Id.* at 215 (separate opinion of Judge Higgins).

against non-State actors, such an inherent right ought to be contained within the provision.

b) *Is Attribution Of Actions By Non-State Actors To A State A Prerequisite To The Lawful Exercise Of The Right Of Self-Defense?*

The conventional understanding of international legal norms perceived from the lens of ICJ decisions *prima facie* indicates a stringent requirement of attribution of conduct of non-State actors to a State. Article 8 of ILC's Articles on State Responsibility expressly imputes liability of the State in the event that private persons act "on the instructions of, or under the direction or control of"⁴⁶ the State, thereby positing a premium on real links and integral State involvement. Israel's construction of a security barricade bordering the West Bank was not construed to be a lawful exercise of Article 51, for Palestinian terrorist attacks could not be attributed to a State in the *Wall* advisory opinion.⁴⁷ *Nicaragua*⁴⁸ contemplated the existence of effective control as the stringent (and higher) threshold to impute State responsibility for conduct of private actors, in contrast to the subsequent decision in *Tadic*,⁴⁹ which adopted a broader overall control test. Particularly, the former test requires proven State participation in planning, direction, support, and execution of violent acts to impute State responsibility,⁵⁰ while the latter test accepts a realistic concept of responsibility in recognizing that if the State exercises overall control over a private armed group, through financing, equipping and generally participating in and supervising its military operation, there should exist no additional burden to establish that the host State demanded or directed the specific operation.⁵¹ It has however been argued that adjudication upon the legitimate use of defensive force against non-State actors, unless such armed

⁴⁶Gray, *supra* note 36, at art. 8.

⁴⁷*Id.* at 139.

⁴⁸*Nicaragua*, *supra* note 13.

⁴⁹*Prosecutor v Tadic*, Opinion and Judgment, No. IT-94-I-T, § 137 (May 7, 1997).

⁵⁰*Nicaragua*, *supra* note 13, at 86.

⁵¹*Supra* note 53, at 121, 145.

attacks are attributable to a State, was beyond the scope of questions of law presented to the ICJ⁵². Kimberley Trapp, a Senior Lecturer in Public International Law at University College London, has interpreted *Nicaragua*⁵³ and *Armed Activities*⁵⁴ as strictly tethered to opining on the legality of invocation of Article 51 against the government of the respective States.⁵⁵ This would effectively imply that there exists no principle of international law, especially under Article 38(1)(d) of the ICJ statute that expressly proscribes invocation of defensive force against non-State actors in the absence of State involvement.

Judge Kooijmans in the *Armed Activities* case asserted:

“if the attacks by irregulars would, because of their scale and effect, have had to be classified as an armed attack had they been carried out by regular armed forces... it would be unreasonable to deny the attacked State the right to self-defense merely because there is no attacker State, and the Charter does not so require”.⁵⁶

It has been argued that attribution is essential only when the injured State *“intends to use force against host State forces or facilities, or seeks to hold the host State liable for the damages resulting from the terrorist attack”*.⁵⁷ The rationale behind the same is the fear of granting impunity to acts of terror in the event that attribution fails to establish State responsibility. Further, such a void in international law would provide escape avenues to host States officially turning a blind eye to terrorist operations within their

⁵²Supra note 21, at 49.

⁵³Supra note 13, at 154-160.

⁵⁴Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Feb. 3, 2006, paras. 146-147.

⁵⁵Kimberley N Trapp, Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors, 56 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY ICLQ 141, 141-42 (2007).

⁵⁶Supra note 58, at 29-30.

⁵⁷Major Michael D. Banks, Addressing State (Ir-)responsibility: The Use of Military Force as Self-Defense in International Counter-Terrorism, 200 MILITARY LAW REVIEW 54, 84 (2009).

territorial compass.⁵⁸ However, a geographical nexus must necessarily be established between the terrorist organization and the host State in order to institute a “*call upon the legal responsibility of the host State to prevent the commission of terrorist attacks from within its borders*”⁵⁹ aimed at balancing competing interests of counter-terrorism and territorial sovereignty.

B. Whether State Consent Can Legally Justify American-Led Air Strikes in Iraq?

Typically, exercise of the right of self-defense is subject to several qualifiers, predominantly including, sovereign equality of States-the fundamental legend of international law; and renunciation of force in international relations.⁶⁰ The rationale behind the same is to posit the primary prerogative on the State within whose territorial boundary the non-State actor operates. However, such sovereign equality may be by-passed and use of force may be resorted to if such State validly consents to the same. The ground of State consent has been formally reinforced in *Nicaragua*,⁶¹ officially recognized in UNGA Resolution 3314 (xxix),⁶² and codified in Article 20 of the ILC Articles on State Responsibility.⁶³ The international community by and large has recognized the government in Iraq as functioning with an effective governance structure.⁶⁴ The Letter from the

⁵⁸ Interview with John Norton Moore, Walter L. Brown Professor of Law, Dir., Ctr. for Nat'l Sec. Law, Univ. of Va. Law Sch., in Charlottesville, Va. (Jan. 16, 2008).

⁵⁹ State Responsibility, [2001] 2 Y.B. Int'l L. Commentary 40-42, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (2007), Commentary to G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts. U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

⁶⁰ Davis Brown, Use of Force Against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses, 11 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 1, 30 (2003).

⁶¹ Supra note 13, at 126.

⁶² General Assembly Resolution on the Definition of Aggression No. 3314 (xxix), Article 3(e).

⁶³ G.A. Res. 29/3314, U.N. Doc. A/RES/29/3314 (Dec. 14, 1974).

⁶⁴ Frederic Gilles Sourgens, The End of Law: The ISIL Case Study for a Comprehensive Theory of Lawlessness, 39 FORDHAM INTERNATIONAL LAW JOURNAL 355, 396 (2015-16).

Permanent Representative of Iraq addressed to the President of the Security Council dated 20th September 2014⁶⁵ attests to the express consent of Iraq in requesting for American aid to “*lead international efforts to strike ISIL sites and military strongholds*” to combat the constant threat to Iraq and its citizens.

On one hand, States have, through statements⁶⁶ and overt practice,⁶⁷ supported the American-led intervention in Iraq, thereby attaching greater legitimacy to the prospects of ‘intervention by invitation’ during civil conflict as an emerging rule of customary international law. On the other hand, the legal plausibility of the same has been assailed by a few. For instance, Dapo Akande, Professor of Public International Law at the University of Oxford, has deconstructed the applicability of the ‘intervention by invitation’ norm in an internal war or civil conflict.⁶⁸ Interestingly, States participating and/or supporting the airstrikes in Iraq have restrained from opining on the prohibition of military assistance to governments in the midst of civil wars, which renders the existence of such a prohibition dubious at best. Akande proceeds to explore the possibility of establishing the legality of international intervention in Iraq based on an exception to the general prohibition. Characterization of ISIS as not merely an internal threat operating out of Iraq but as an increasingly global threat with an indubitable “safe haven” in Syria committed to the establishment of

⁶⁵UNSC, Letter dated Sept. 20, 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/691 (Sept. 22, 2014), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_691.pdf.

⁶⁶Background Briefing by Senior Administration Officials on Iraq, THE WHITE HOUSE (June 28, 2016), <https://www.whitehouse.gov/the-press-office/2014/08/08/background-briefing-senior-administration-officials-iraq>.

⁶⁷Summary of the government legal position on military action in Iraq against ISIL, GOV.UK (June 28, 2016), <https://www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil>.

⁶⁸Dapo Akande & Zachary Vermeer, The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars, EJIL TALK (June 28, 2016), <http://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/>.

a caliphate breaking borders in the Middle East,⁶⁹ enables an escape route to preclude treatment of the ISIS threat as a mere internal conflict. Theodore Christakis and Karine Bannelier, Professors of International Law at the University Grenoble-Alpes, France, seem to additionally posit fight against terrorism as another exception to the general civil wartime prohibition on the use of force.⁷⁰ Against such a backdrop, outright terrorist attacks by ISIS ought to be distinguished from the exercise of the right to self-determination in an internal conflict,⁷¹ and express consent by the Iraqi government is likely to successfully accord legitimacy to the impugned intervention.

a) Can Collective Self-Defense On Behalf Of Iraq Warrant International Intervention In Syria?

USA claims that their intervention in Syria is an exercise of the right of collective self-defense on behalf of Iraq in furtherance to Iraq's express request to combat ISIL and the "safe haven" created outside Iraqi territory.⁷² A State asking for assistance in its own self-defense⁷³ has been embedded in Article 5 of the NATO Treaty which requires

⁶⁹Matthew Weaver & Mark Tran, Isis announces Islamic caliphate in area straddling Iraq and Syria, THE GUARDIAN (June 28, 2016), <https://www.theguardian.com/world/2014/jun/30/isis-announces-islamic-caliphate-iraq-syria>.

⁷⁰Karine Bannelier & Theodore Christakis, Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict, 26 LEIDEN JOURNAL OF INTERNATIONAL LAW 855–874, 855-874 (2013).

⁷¹Raphael Van Steenberghe, The Alleged Prohibition on Intervening in Civil Wars Is Still Alive after the Airstrikes against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer, EJIL TALK (June 28, 2016), <http://www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer/>.

⁷²UNSC, 'Letter dated Sept. 20, 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council', U.N. Doc. S/2014/691 (Sept. 22, 2014), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3CF6E4FF96FF9%7D/s_2014_691.pdf.

⁷³Ashley Deeks, US Airstrikes Against ISIS in Syria? Possible International Legal Theories, LAWFARE BLOG (2014), <http://www.lawfareblog.com/2014/08/u-s-airstrikes-against-isis-in-syria-possible-international-legal-theories/> (June 16, 2016).

members of the collective to fight in response to an armed attack against any other member.⁷⁴ However, the legitimacy of this justification is overpoweringly contingent on the validity of Iraqi consent, which if withdrawn at any subsequent time, would simultaneously invalidate actions in Syria. Further, American-led interventions ought to be geographically restricted to the ostensible purpose of eliminating the ongoing ISIL threat in Iraq and help Iraqi forces regain control of Iraq's borders,⁷⁵ in the absence of Syrian consent.⁷⁶ A claim grounded on collective self-defense in a State distinct from the one expressing unequivocal consent would necessarily require an examination of whether there exists a norm of international law that legitimises infringement of territorial sovereignty of another State in the event that such State has been unable or unwilling to fulfil its own legal obligations.

Though Ashley Deeks, Associate Professor at the University of Virginia School of Law, argues that there exist no cases in which States have clearly asserted that they follow the “unwilling or unable” test out of a sense of legal obligation,⁷⁷ Johan van der Vyver, Professor at Emory Law School, has considered it to be a new norm of customary international law through an examination of American official statements in the absence of an express prohibition contained therein.⁷⁸ It is vital to dissociate this test from the purview of humanitarian intervention since the latter is perceptively aimed at toppling repressive governments, while the former may arguably be

⁷⁴North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

⁷⁵*Supra* note 69.

⁷⁶Olivia Gonzales, The Pen and the Sword: Legal Justifications for the United States' Engagement against the Islamic State of Iraq and Syria, 39 FORDHAM INTERNATIONAL LAW JOURNAL 133, 144 (2015-16).

⁷⁷Ashley Deeks, 'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 503, 503 (2012).

⁷⁸Johan D. van der Vyver, The ISIS Crisis and the Development of International Humanitarian Law, 30 Emory International Law Review 531 (2015-16).

employed against non-State actors.⁷⁹ The UN Secretary-General's comment recognizing the validity of intervention in Syria on the ground that the area is "no longer under the effective control of the government"⁸⁰ has been construed by some⁸¹ as an implicit endorsement of the test. However, against the contextual backdrop of only American officials proclaiming the test,⁸² past solely American support for the test in Pakistan⁸³ and Yemen,⁸⁴ a few States expressing reservations about the legality of intervention in Syria,⁸⁵ and inconsistent State practice at best,⁸⁶ it seems unlikely that the doctrine has crystallized yet.⁸⁷ Furthermore, Canada,⁸⁸ Australia,⁸⁹

⁷⁹Id. at 561.

⁸⁰Ban Ki Moon, Remarks at the Climate Summit press conference (including comments on Syria) UN News Center, (June 28, 2016), http://www.un.org/apps/news/infocus/speeches/statments_full.asp?statid=2356#.virmznfyz9a.

⁸¹Antonio Coco & Jean-Baptiste Maillart, *The Conflict with Islamic State: A Critical Review of International Legal Issues*, OUP, 14 (2015).

⁸²John O. Brennan Assistant to the President for Homeland Security & Counterterrorism, Strengthening Our Security and Adhering to Our Values and Laws, THE WHITE HOUSE (June 19, 2016), <https://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

⁸³Adam Entous & Siobhan Gorman, U.S. Slams Pakistani Effort On Militants, THE WALL STREET JOURNAL (June 25, 2016), <http://www.wsj.com/articles/sb10001424052748703298504575534491793923282>.

⁸⁴Barack H. Obama, President Obama's Speech at National Defense University: The Future of our Fight against Terrorism May, 2013, COUNCIL ON FOREIGN RELATIONS (June 23, 2016), <http://www.cfr.org/counterterrorism/president-obamas-speech-national-defense-university-future-our-fight-against-terrorism-may-2013/p30771>.

⁸⁵Dutch Parliament commits soldiers, F-16s to fight ISIS in Iraq, NL TIMES (June 28, 2016), <http://www.nltimes.nl/2014/09/24/parliament-commits-troops-isis-fight/>.

⁸⁶Kevin Jon Heller, Do Attacks on ISIS in Syria Justify the "Unwilling or Unable" Test?, OPINIO JURIS (June 28, 2016), <http://opiniojuris.org/2014/12/13/attacks-isis-syria-justify-unwilling-unable-test/>.

⁸⁷Jens David Ohlin, The Unwilling or Unable Doctrine Comes to Life, OPINIO JURIS (June 28, 2016), <http://opiniojuris.org/2014/09/23/unwilling-unable-doctrine-comes-life/>.

⁸⁸UNSC, 'Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council' (Mar. 31, 2015), UN Doc S/2015/ 221.

Turkey,⁹⁰ France⁹¹ and UK's⁹² support towards the doctrine seems imitational in their bandwagon strategy grounded in underlying political US and NATO allegiances, more than a concrete commitment indicative of opinio juris. The bipolar remnants of the Cold War (with Russia unsurprisingly denouncing US missile strikes on its ally, Syria⁹³) and the political (and strategic) allegiances of the said States arguably lead to a plausible judgment that is suspect of the emergence of the unwilling or unable doctrine as a new norm of customary international law. In the absence of the same, a determination as to the unwillingness or inability of Syria to combat terrorist operations conducted within its territory seems redundant.

b) Can Anticipatory Self-Defense Be Used As A Legal Justification For American Intervention In Syria?

It is apparent from the letter dated 23rd September 2014, from the US Ambassador to the UN addressed to the UN Secretary-General,⁹⁴ that the attempt to legitimize American intervention against the Khorasan group in Syria was based on the doctrine of anticipatory self-defense.

⁸⁹UNSC, 'Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council' (Sept. 9, 2015), UN Doc S/2015/693.

⁹⁰UNSC, 'Letter dated 24 July 2015 from the Chargé d'affaires a.i of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council' (July 24, 2015), UN Doc S/2015/563.

⁹¹UNSC, 'Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council' (Sept. 9, 2015), UN Doc S/2015/745.

⁹²UNSC, 'Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council' (Dec. 3, 2015), UN Doc S/2015/928.

⁹³U.S. allies show support for strikes on Syria, REUTERS (July 8, 2017), <http://www.reuters.com/article/us-mideast-crisis-syria-reaction-idUSKBN1790M4>.

⁹⁴Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

A primary analysis of the existence of a right of anticipatory self-defense requires characterization of formerly interchangeable phrases (anticipatory, pre-emptive, and preventive) as concentric circles presently, wherein anticipatory self-defense has been accorded sufficient legal backing for its higher degree of imminence in comparison to the latter two.⁹⁵ A comprehensive examination of the existence of such a right would require a survey of past ICJ decisions, particularly the *Caroline* case.⁹⁶ In that case, the British had destroyed an American ship, *Caroline*, under the belief that it was being utilized to support Canadian forces in a rebellion against the British colonial power.⁹⁷ During judicial proceedings, former American Secretary of State Daniel Webster claimed that a State can pre-emptively defend itself if there is a need that is “instant, overwhelming, and leaving no choice of means, and no moment for deliberation”.⁹⁸ The *Caroline* test has been affirmed by the Nuremberg Tribunal regarding Germany’s invasion of Norway in the Second World War, and invoked by the US in its response to cyber-attacks in the Middle East.⁹⁹ Judge Schwebel in the *Wall* Advisory Opinion concluded that a reading of Article 51 as being applicable “if, and only if, an armed attack occurs” would run contrary to the language and purpose of the Charter in keeping with contemporary global threats to international peace and

⁹⁵Kalliopi Chainoglou, *Reconceptualising Self-Defence in International Law*, 18 *KING’S LAW JOURNAL* 68-69, 61-94 (2007).

⁹⁶*Caroline Case*, 29 *BFSP* 1137-8.

⁹⁷James Dever & John Dever, *Making Waves: Refitting the Caroline Doctrine for the Twenty-First Century*, 31 *QUINNIPIAC LAW REVIEW* (2013).

⁹⁸James A. Green, *Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense*, 14 *CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 429, 435 (2006)

⁹⁹Olivia Gonzales, *The Pen and the Sword: Legal Justifications for the United States’ Engagement against the Islamic State of Iraq and Syria*, 39 *FORDHAM INTERNATIONAL LAW JOURNAL* 133, 149 (2015-16).

security.¹⁰⁰ Further, Vohn Glahn, Professor at the University of Minnesota,¹⁰¹ has substantiated his claim of SC acceptance of such a right through the example of the 1967 Six Day War, wherein the SC in failing to condemn Israel's use of anticipatory defensive force to thwart expected Arab invasion implicitly allowed it.¹⁰² An argument generally furthered in favour of the existence of such a right finds merit in its deterrent value to possibly compel States from allowing the creation of "safe havens" within their independent territories.¹⁰³ The High Level Panel of Experts' clarification recognizing a threatened State's right to "take military action as long as the threatened attack is imminent, no other means would deflect it, and the action is proportionate"¹⁰⁴ has been termed as a mere restatement of "long established international law".¹⁰⁵

Reference to the Khorasan group as a "network of seasoned Al-Qaida veterans" against whom airstrikes were launched to disrupt the "imminent attack plotting against the United States and western targets" by Pentagon spokespersons¹⁰⁶ is telling of the premium attached on the imminence and immediacy necessitating action. The

¹⁰⁰The Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, 2003 ICJ, Dissenting Opinion of Judge Schwebel, paras 247-248.

¹⁰¹G. Von Glahn, *Law Among Nations* 550 (4th ed. 1981), p. 133.

¹⁰²The Arabs Unite to Support War, N.Y. TIMES June 6, 1967, at A10.

¹⁰³Steven Westphal, *Counterterrorism: Policy of Pre-emptive Action*, USAWC STRATEGY RESEARCH PROJECT, p.7.

¹⁰⁴A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, (2004) UN Doc A/59/565, at para. 188, www2.ohchr.org/English/bodies/hrcouncil/docs/gaA.59.565_En.pdf (June 22, 2016).

¹⁰⁵Id.

¹⁰⁶Rear Adm. John Kirby & Lt. Gen. William Mayville, Department of Defense Press Briefing (Sept. 23, 2014), <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5505>.

ISIS similarly has been categorized as a “major threat” to the UK,¹⁰⁷ and a “global and unprecedented threat” by SC Resolution 2249 (2015) in both Iraq and Syria, which may arguably reiterate the imminent nature of attacks. Louise Arimatsu and Michael Schmitt, Professors at Exeter Law School, instate three factors, fulfilment of which would enable a legal invocation of the doctrine of anticipatory self-defense:¹⁰⁸ “capability to conduct an armed attack; the intent to launch one; and a need to act promptly lest the opportunity to effectively use defensive force be lost”.¹⁰⁹ Dr. Kalliopi Chainoglou, Lecturer at the University of Macedonia, speaks of components to satisfy the last element specifically, such as timing of the future attack; urgency of deflecting the attack; degree of threat; magnitude of harm the attack would potentially cause to the victim; and availability of non-forcible counter-measures.¹¹⁰

Applying the above criteria to the present ISIS crisis, it seems evident that both the Khorasan group and the Islamic State have the potential capability to conduct an armed attack, and repeated statements issued by them¹¹¹ indicate a clear intention to launch one too.¹¹² However, the imminence of such an attack against USA remains contentious and dependent on a factual analysis. One evasive channel utilized by USA in this sphere is the strategic referencing of ISIS as ISIL, since

¹⁰⁷Philip Hammond, U.K. Foreign Secretary, Foreign Secretary Statement on ISIL: Iraq and Syria (Oct. 16, 2014), <https://www.gov.uk/government/speeches/foreign-secretary-statement-on-isil-iraq-and-syria>.

¹⁰⁸Michael N. Schmitt, Preemptive Strategies in International Law, 24 MICHIGAN JOURNAL OF INTERNATIONAL LAW 513, 534–36 (2003).

¹⁰⁹Louise Arimatsu & Michael N. Schmitt, Attacking “Islamic State” and the Khorasan Group: Surveying the International Law Landscape, 53 COLUMBIA JOURNAL OF TRANSNATIONAL LAW BULLETIN 1, 16-17.

¹¹⁰Supra note 100, at 68-69, 75.

¹¹¹Kyle Shideler, ISIS’s New Threat is Anything But New, CENTER FOR SECURITY POLICY (Sept. 22, 2014), <https://www.centerforsecuritypolicy.org/2014/09/22/isiss-new-threat-is-anything-but-new/>.

¹¹²Supra note 116, at 18.

Obama has justified the interventions under the 2001 Authorization for Use of Military Force, which authorized the use of all necessary force against those who “planned, authorized, committed or aided” the 9/11 bombings.¹¹³ Al-Qaeda was a part of ISIL, however, it gave way to the creation of ISIS in 2013 on account of ideological divergence.¹¹⁴ Interestingly, USA insists on the al-Qaeda linkages with the ISIS in order to ensure that its airstrikes are in compliance with domestic congressional approval.¹¹⁵ In so doing, it claims the existence of an imminent attack ensuing from al-Qaeda and its affiliates, to strengthen its use of anticipatory defensive force. However, while there exists no concrete evidence attesting to the proximate nexus between al-Qaeda and the ISIS or the Khorasan group,¹¹⁶ it also seems misguided to allow intervention against non-State actors in Syria for the threat of an arguably imminent attack posed by another non-State actor, when these two sets of entities have distinctly parted ways.

IV. USE OF FORCE 2.0?

Till now, I have explored the legality of American-led interventions in Iraq and Syria. While airstrikes in Iraq seem by and large legitimate under international law on account of the doctrine of intervention by invitation, the events that have transpired in Syria

¹¹³AUTHORIZATION FOR USE OF MILITARY FORCE, Pub. L.No.107-40, 115 STAT. 224 (2001).

¹¹⁴Oliver Holmes, Al Qaeda Breaks Link with Syrian Militant Group ISIL, REUTERS (Feb. 3, 2013, 8:33 AM), <http://www.reuters.com/article/us-syria-crisis-qaeda-idUSBREA12NS20140203>.

¹¹⁵Supra note 83.

¹¹⁶Holly Yan, What’s the Difference between ISIS, al-Nusra, and the Khorasan Group?, CNN (Sept. 24, 2014, 3:01 PM), <http://edition.cnn.com/2014/09/24/world/meast/isis-al-nusra-khorasan-difference/>.

appear to be more complex.¹¹⁷ I examined the viability of two justifications among many that have been invoked to justify the legitimacy of action in Syria: collective self-defense and anticipatory self-defense. Upon an analysis of these extensions of Article 51, it appears that the “unwilling or unable” norm has not gained sufficient traction to be constitutive of customary international law, and in absence of imminent attacks, anticipatory self-defense is likely to be rendered a weak ground based on the current factual circumstances. However, underlying this ostensibly legal analysis is the following subtext: USA’s consistent push towards the emergence of the “unable or unwilling” test as an international law norm, and USA’s strategic manoeuvring of referring to ISIS as ISIL to supposedly attract an imminent attack from al-Qaeda, or attempt at establishing pre-emptive self-defense or the Bush Doctrine¹¹⁸ as a rule of international law. This Part argues that despite absence of evidence indicating crystallization of the abovementioned norms, the international community tends to confer legitimacy on hegemonic use of force by bringing extralegal exercise of hegemonic power within the ambit of legality. Dr. Achilles Skordas, Professor at the University of Bristol, bases such legitimacy in risk containment; failure to accord legality to hegemonic action in light of the polarity in the present power structure would “magnify the destabilization of the global system”.¹¹⁹ However, the American tilt in international lawmaking is abundantly clear in its posture towards diluting the once cardinal prohibition on

¹¹⁷Marc Weller, Islamic State crisis: What force does international law allow?, BBC News (June 28, 2016), <http://www.bbc.com/news/world-middle-east-29283286>.

¹¹⁸Originally a reference to the foreign policy of the George W. Bush’s administration, the Bush Doctrine entails the right of USA to pre-emptively secure itself against States that harbour or provide aid to terrorist groups in the aftermath of the 9/11 attacks. See, George Bush, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (June 20, 2016), <http://www.state.gov/documents/organization/63562.pdf>.

¹¹⁹Achilles Skordas, Hegemonic Intervention as Legitimate Use of Force, 16 MINNESOTA JOURNAL OF INTERNATIONAL LAW 407, 408 (2007).

the use of force. Notwithstanding the inception of contemporary threats, I argue that the approach of the international community has shifted from pursuing centralized action authorized under the Charter to unilateral assessments and interventions under the garb of contemporaneity and immediacy. What is at play is a more daunting fear, that of carving out enough exceptions to the prohibition on the use of force to render the doctrine and the Purposes of the UN redundant. Employment of phraseology expressing intent to “destroy”,¹²⁰ “disrupt and degrade”¹²¹ is testimony to the growing deviation from the preambular dedication to “save succeeding generations from the scourge of war”.¹²² Instead of fostering a centralized urgent action plan to expediently deal with contemporary terrorism threats, delegation of such responsibility to individual member States has allowed for a convoluted mesh of the doctrine on the use of force, especially when such determination is at the behest of the hegemon itself. It is important to preserve Article 51 as a defensive right,¹²³ and not one that can potentially be misused for offensive conduct in *jus ad bellum*.

V. CONCLUSION

During the course of this essay, I have attempted to challenge the necessity of this evil by examining the legality of American-led

¹²⁰Dutch prime minister compares bombing of Islamic State to WWII, DUTCHNEWS.NL (June 28, 2016), http://www.dutchnews.nl/news/archives/2014/10/dutch_prime_minister_compares_1/.

¹²¹UNSC, 7272nd Meeting, U.N. Doc. S/PV.7272 (Sept. 24, 2014), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7272.

¹²²U.N. Charter Preamble.

¹²³Nitish, The Use of Force against Terrorism: Does International Law fall Victim, LEGAL SERVICES INDIA (June 28, 2016), Legal Services India, <http://www.legalservicesindia.com/article/article/the-use-of-force-against-terrorism-does-international-law-fall-victim-1777-1.html>.

interventions in Iraq and Syria. While there has been a growing trend towards reading Article 51 as available against non-State actors absent any State involvement, the standards invoked in order to apply Article 51, especially in the case of Syria, appear problematic. On one hand, the collective self-defense argument is excessively contingent on the validity of Iraq's consent to intervene in ISIS safe havens on foreign territory. Here, I have attempted to establish that the "unwilling or unable" doctrine is essentially a by-product of an American push towards creation of such a norm in international law, and academic scholarship that remotely justifies the crystallization of such a norm is buying into the hegemonic discourse in the absence of consistent practice of other States. On the other hand, interventions against the ISIS are likely to fall short of proving imminence as required for a claim of anticipatory self-defense to succeed. In this case, I argued that the American manipulation of language to refer to ISIS as ISIL in order to reinforce its otherwise severed Al-Qaeda connections, and subsequent academic publications acknowledging the same as an emerging norm of international law, is an act of submission to the dominant hegemonic narrative. In its critical appraisal of the evolution of the prohibition on the use of force, this essay aimed at necessitating a reflection on the doctrine, its deviation from the peremptory Purposes of the United Nations and provide plausible solutions to counter terrorism in a centralized, collaborative manner that is flexible enough to adapt to contemporary threats and sufficiently rigid enough to prevent monist States from undermining fundamental principles of international law under the garb of politically accepted legality.

The dilution of the prohibition on the use of force has predominantly been characterized as a necessary evil to combat acts of terror perpetrated by non-State actors without allegiances to a particular State. Instead, it is submitted that a Comprehensive Convention against International Terrorism, a centralized mechanism under the SC to effectively and expressly take collective security measures to

combat acts of terror in compliance with the UN organ's mandate to restore and maintain international peace and security would enable a reading of Article 51 that is consonant with the Purposes of the Charter. The greater responsibility to be accorded to the SC may be attributed to the express recognition of its role in both Charter-acknowledged exceptions to Article 2(4). Instead of creating further exceptions to Article 2(4) to the extent that the exceptions become the norm, it is important to support a collaborative and cooperative approach to counter contemporary threats and strict measures to ensure that domestic penal systems are in compliance with Charter requirements.

INCENTIVES FOR BETTER PROTECTION OF WHISTLE-BLOWERS - AN ECONOMIC ANALYSIS

*Anushka Mittal**

Abstract

Whistle-blower protection is necessary across all sectors; public and private. In India, whistle-blowing in public sector is governed statutorily by the Whistle-blower Protection Act, 2011. It provides the procedure to file a complaint, conduct enquiry and provide protection to whistle-blowers. There have been many instances of whistle-blower deaths. The deaths caused by an activity such as whistle-blowing indicate the deep rooted malaise in the entire system of governance of a nation. The process to seek protection against threats is long drawn and time-consuming enough to cause detriment in the intervening period. Against this status quo, this article recommends a better mechanism to provide protection to the whistle-blowers. The recommendation aims to provide mandatory interim protection to an applicant. The recommendation tries to resolve the classic dilemma between a rule and a standard. The provision for whistle-blower

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protection, as it stands, is an ex-post standard whereby the enforcement and information cost is high. The recommendation proposes an ex-post rule regime whereby the promulgation cost, though high, would be justified due to the clarity and vital protection that it provides to the stakeholders.¹ The recommendation is based on the use of economic analysis which signifies a new approach to deal with an old issue.

I. INTRODUCTION

A whistleblower law is essential for an effective regime against corruption.² The murder of Mr. Satyendra Dubey due to disclosure of information related to corruption in the National Highway Authority of India awakened the government to enact a much needed legislation. Even then, the government drafted the Public Interest Disclosure and Protection of Informant (**PIDPI**) Resolution which provided the procedure for whistleblowing.³ Later, the Public Interest Disclosure and Protection to Person Making the Disclosures (**PIDPPMD**) Bill, 2010 was framed. It was subsequently renamed as the Whistleblower Protection Act, 2011 (hereinafter, the **WPA** or **Act**) and passed as such.⁴ It was notified in 2014 after it received

¹Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 DUKE LAW JOURNAL 557-629 (1992), <http://scholarship.law.duke.edu/dlj/vol42/iss3/2>.

²Whistleblower Protection and the UN Convention Against Corruption, TRANSPARENCY INTERNATIONAL, (July 26, 2016), http://www.transparency.org/whatwedo/publication/whistleblower_protection_and_the_un_convention_against_corruption.

³Report on the Public Interest Disclosure Bill, 179th Law Commission Report, 2001.

⁴Central Vigilance Commission Report, 2014, 7, 1-120, 2014, ¶1.11, <http://cvc.nic.in/ar2014.pdf>.

Presidential assent. In 2015, certain amendments were suggested. The Whistleblower Protection (Amendment) Bill, 2015 is currently pending in the Rajya Sabha.⁵ There has been widespread criticism of the Act and the proposed amendments. The Supreme Court has said that the veracity of the amendments can be checked once the amendments are effected as law.⁶ Amidst all the criticisms of the Act and the Amendment Bill, there is another limitation of the entire scheme which renders it weak.⁷ It is the actual level of protection assured to the whistle-blower which makes the legislation ineffective. This article aims to highlight the persistent lacuna in the legislation, in terms of the way the protection is provided to a whistle-blower.

The final grant of protection takes time and the whistle-blower may have been put in a dire situation due to the disclosure. Thus mandatory interim relief must be provided once a Complainant applies to the Competent Authority (hereinafter, the CA) for protection against victimisation, under the Act. This will not only change and improve the incentives for the whistle-blower but also make the CA more efficient due to diversion of resources for which a final decision must be taken as soon as possible.

The focus of the Article is on Chapter V of the Act. This Article will use tools of game theory and Hicksian analysis to provide a theoretical understanding of the benefits of the recommendation. The aforementioned methods will show the change in incentives for the

⁵The Whistleblowers Protection (Amendment) Bill, 2015, PRSINDIA.ORG, <http://www.prsindia.org/billtrack/the-whistle-blowers-protection-amendment-bill-2015-3784/>.

⁶Amit Anand Choudhary, Set up systems to protect whistle-blowers: SC to government, TOI (Jan. 7, 2016), <http://timesofindia.indiatimes.com/india/Set-up-system-to-protect-whistleblowers-SC-to-government/articleshow/50475061.cms>.

⁷Transparency International Secretariat, South Asia's Corruption Watchdog Need Sharper Teeth, (May 21, 2014), http://www.transparency.org/news/pressrelease/south_asias_corruption_watchdogs_need_sharper_teeth.

whistle-blower to make a disclosure. Part I provides the outline of the legislation, Part II provides the outline of the recommendation and Part III provides the economic analysis using game theory and partial equilibrium analysis.

II. METHODOLOGY

The impetus to choose the topic comes from the fact that the Law Commission of India in its 179th Report, introducing the PIDPI Bill, extensively talked about the economic effects of corruption, such as a bribe being a payment for better resource allocation etc.⁸ The modulation of a topic such as corruption strengthened the author's intuition to apply economic analysis to whistle-blower protection. In order to substantiate the issue and the recommendation objectively, an attempt was made to obtain statistics related to requests for protection filed by the whistle-blowers, from NCPRI and the Annual Reports of the Central Vigilance Commission. However, the attempts were rendered futile due to no response from both channels. Thus attempts have been made to reconstruct the issue using newspaper reports. It is pertinent to note here that what was said of the Public Interest Disclosure Protection Act, 1998 (UK) is equally true for India i.e. research is meagre and largely anecdotal. Rarely does the public learn of cases of whistleblowing that have not attracted media attention. The academic literature is comprised mostly of empirical case-studies of individual whistle-blowers, with the occasional survey, and is predominantly North American in origin.⁹ Though the paper is analytical, prescriptive and theoretical, the use of economics converts it into a model which can be depended upon to churn out conclusive

⁸Report on the Public Interest Disclosure Bill, 179th Law Commission Report, 2001.

⁹James Gobert & Maurice Punch, Article, Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998, 63(1) THE MODERN LAW REVIEW, 25-54 (Jan. 2000), <http://www.jstor.org/stable/1097463>.

results once variables such as cost of the recommendations are supplied.

A. *Outline of The Legislation*

The WPA was previously named Public Interest Disclosure and Protection to Person Making the Disclosures Bill, 2010. The change to WPA clearly highlights that the thrust of the legislation is towards the protection of whistle-blowers. The Preamble highlights three main functions viz. establishment of a mechanism to receive disclosures, engagement in enquiry, basis the disclosure and provision of adequate standards against victimisation of the whistle-blowers. The current regime must be judged on the benchmark of the objectives of an ideal whistle-blower legislation.

A whistle-blower legislation must address the following:¹⁰ (1) what types of perceived wrongdoing should be disclosed, (2) to whom such disclosures should be made initially and subsequently (if the initial disclosure does not prompt an investigation), (3) how and by whom the alleged wrongdoing should be investigated, (4) the mechanisms and procedures to encourage persons to disclose wrongdoing while protecting the whistle-blower from any disciplinary action or adverse consequence for reporting the wrongdoing, and (5) the steps to be taken if adverse consequences are or appear to be, imposed on the whistle-blower.

Against this benchmark of best practices, the WPA has provided a definition of a ‘Competent Authority’ in every public organisation under Section 3(b). The Competent Authority is the functionary that receives, takes an overview of and deals with the complaint. Before the legislation, this function was performed by the Central Vigilance

¹⁰Victoria Luxford, Whistleblower Protections, (July 26, 2016), <http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/Chapter%2012%20.pdf>.

Commission. This change is important for clarity of the procedure and reducing the burden on the Central Vigilance Commission as was previously loaded in the PIDPI Resolution. However, the definition clause falls short of defining key terms like ‘victimisation’, ‘discreet enquiry’ etc.¹¹ which are used throughout the legislation.

Chapter II is crucial for understanding the scope of the legislation and the major incentive for both the parties, namely, the whistle-blower and the Competent Authority. All disclosures received by the Competent Authority or its representative are public interest disclosures. Such disclosures can be made by anyone, a public servant, citizen or an NGO.

Chapter III outlines the mechanism for carrying out an enquiry. It outlines the statutory responsibility of keeping the identity of the whistle-blower confidential under Section 5. The first stage that a disclosure must pass is one of a discreet enquiry which is carried out by the Competent Authority itself. According to the statistics of the CVC Annual report, 2013, 94.6% of the complaints received under the PIDPI Resolution (which was in force before the WPA) pass through the barrier.¹² In 2014 also, 93.3% complaints passed the barrier.¹³ Once the disclosure passes this stage, the Competent Authority seeks information from the Head of the Department and carries out the more substantial investigation. If at any stage, the disclosure of identity of the whistle-blower becomes imperative, the CA shall do so only after the consent is provided by the whistle-blower. Section 6 provides the restriction on the scope of exercise of the power and provides the objective parameter within which the

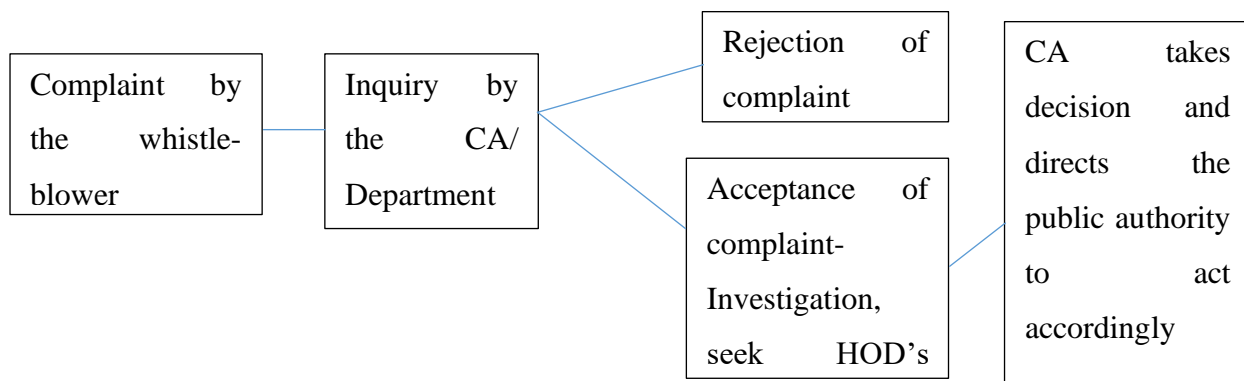
¹¹Kaushiki, Standing Committee Recommendations on the Whistleblower’s Bill, PRSINDIA.ORG (July 26, 2016), <http://www.prsindia.org/theprsblog/?p=1014>.

¹²Central Vigilance Commission Report, 2013, 7, 1-148, 2013, Table 6, <http://www.cvc.nic.in/ar2013.pdf>.

¹³Central Vigilance Commission Report, 2014, 7, 1-120, 2014, Table 6, <http://cvc.nic.in/ar2014.pdf>.

discretion to carry out the enquiry must be exercised. For example, it cannot be exercised for a disclosure which has been adjudicated by a court or a tribunal or is an exercise of bona fide discretion of the department etc. This ensures that the mechanism does not become one of appealing against adverse judgments.

Fig. 1



Chapter IV deals with the powers of the Competent Authority, in terms of, conducting the inquiry. Section 7 lists down the activities for which the Competent Authority shall function like a civil court. These include summoning and enforcing the attendance of any person, examination of the said person on oath, receiving evidence etc. Section 8 provides for certain kinds of information which are exempt from disclosure such as information prejudicial to the security and sovereignty of the nation. This list of exemptions has been increased by the 2015 Amendment and has been widely criticised,¹⁴ more so, because now it disallows disclosures which are prohibited under the Official Secrets Act, 1923. The list of exemptions now

¹⁴Legislative Brief, Whistleblowers Protection (Amendment) Bill, 2015, PRSINDIA.ORG, [http://www.prsindia.org/uploads/media/Public%20Disclosure/Brief%20Whistleblowers%20Protection%20\(Amendment\)%20Bill%202015.pdf](http://www.prsindia.org/uploads/media/Public%20Disclosure/Brief%20Whistleblowers%20Protection%20(Amendment)%20Bill%202015.pdf).

includes information which may harm the attempts of the department to apprehend an offender, information which is personal in nature etc. Section 9 and 10 provide for the machinery of enquiry. The Competent Authority has the power to frame regulations for the procedure to receive complaints. It can also take assistance from the CBI (set up under the Delhi Special Police Establishments Act, 1964).

Chapter V is an important chapter which deals with the way protection can be provided to whistle-blowers. Section 11(1) casts responsibility on the Central government to ensure that no whistle-blower or any person, who aids the enquiry, is victimised. Under Section 11(2), any person who apprehends victimisation may apply to the Competent Authority which may direct the government department to provide adequate protection. The proviso provides that a fair hearing must be provided to the government authority where the burden of proof rests on it to show that there has been no victimisation. Once the allegation is proved, the department or authority must act upon it. Section 12 states that the CA can exercise discretion on an application of the complainant to provide police protection. The obligation to conceal the identity takes a beating on reading Section 13. It states that the identity may be revealed if the CA so decides itself or the court directs it to. While the latter is within the scope of the statute, the former effectively compromises on the obligation of the CA as enshrined under Section 5. It is a glaring inconsistency which must be resolved as soon as possible. The CA has power under Section 14 to provide interim relief. (The final recommendation is based on the entire scheme of this Chapter whereby compulsory interim relief must be provided once an application for protection is made under section 11)

Chapter VI deals with the offences and penalties under the Act whereby non-cooperation to provide evidence is punishable with a penalty after a due hearing is provided to the authority (Section 15). Under Section 16, the disclosure of identity of the complainant by

negligence or mala fide intent is punishable with imprisonment. Section 17 punishes false, incorrect, misleading and false disclosures. Section 18 attributes the responsibility of the department over the HoD unless the offence was committed without the knowledge of the said HoD. Similar to this, Section 19 attributes responsibility to the director of a company for public companies covered by the statute. Section 21 and 22 deal with matters of jurisdiction by the Civil Courts whereby the jurisdiction is barred for all matters which the CA can deal with.

Chapter VII comprises of the standard clauses for amendments to the Act, its relation with other legislations and the requirement of an annual report to be furnished by the CA to the central government.

This is the brief outline of the legislation which is not largely contested in the Article.

B. Outline Of The Recommendation

The aim of the recommendation is twofold- firstly, to reduce discretion that can be exercised by the CA to provide protection to the Complainant and secondly, to provide protection to the whistleblower. There is an intuitively direct correlation between corruption and the amount of discretion that exists (more so, if there are no checks and balances). Corruption can motivate the extortion of bribes when inefficient rules provide bureaucrats with a high level of discretion.¹⁵

¹⁵Johann Graf Lambsdorffs, Corruption and Rent-Seeking, Public Choice, 113 (1/2), 97-125 (Oct., 2002), <http://www.jstor.org/stable/30025775>.

Corruption can be understood by the following formula: Corruption = (Monopoly) + (Discretion) – Accountability.¹⁶ Thus opportunities for corrupt behaviour develop¹⁷ –

- (i) whenever public functionaries have large discretion in exercising the powers and little accountability for their actions taken therefor;
- (ii) whenever government policies leave some gap, then these gaps create opportunities for middlemen or the actors of corruption.

As will be indicated in Part III, there is a possibility that the CA may exercise mala fide intention to reject a bona fide complaint under Section 5. However, the recommendation will provide the optimum check against such exercise of discretion.

The traditional model of whistle-blowing contains five stages:¹⁸

Stage 1- a trigger event

Stage 2- the observer considers the action to be problematic and takes action

Stage 3- action is taken

Stage 4- the process shifts to the organisation

Stage 5- the process returns to the observer to decide what to do

This paper attempts to suggest that Stage 2 is invariably dependant on Stage 4, 5 and everything that transpires in between. It is quite obvious that the actions are interdependent on each other but the Article makes an important recommendation as it shows that the

¹⁶ROBERT KLITGAARD, *CONTROLLING CORRUPTION* 75 (University of California Press 1988).

¹⁷Report on the Public Interest Disclosure Bill, 179th Law Commission Report, 2001 (Part I).

¹⁸Erika Henik, Mad as Hell or Scared Stiff? The Effects of Value Conflict and Emotions on Potential Whistle-Blowers, 80 (1) *JOURNAL OF BUSINESS ETHICS* 111-19 (2008), <http://www.jstor.org/stable/41219196>.

decision and final outcome depends not only on the immediately preceding or succeeding stage but a combination of various stages.

Anti-retaliation Provisions by themselves do not motivate whistle-blowers to take action. The law should be reformed to strengthen such provisions to make them substantively and procedurally fairer to both the parties.¹⁹

There is a close connection between whistle blower's protection and the right of employees to disclose corruption or mal-administration.²⁰ It is important to assess the most important impediment or the largest disincentive to whistle-blowing. It is generally believed to be the fear of reprisal and victimisation for which a legal regime is in place.²¹ Now, there are various forms of victimisation possible such as transfer, harassment, fear of death, etc. The CVC has informed the Supreme Court that it had received 244 cases of alleged harassment and threat to life to whistle-blowers from 2007-13. The number of such cases was 22 from 2004-06, it said.²² That amounts to roughly 20-30 cases per year.

The sole reason for this suggestion is that the number of protection seekers must face grave danger. This assumption is backed by the

¹⁹Jarod S. Gonzalez, A Pot of Gold at the End of the Rainbow: An Economic Incentives Based Approach to OSHA Whistleblowing, 14 EMP. RTS. & EMP. POL'Y J. 325 (2010).

²⁰Report on the Public Interest Disclosure Bill, 179th Law Commission Report, 2001, <http://lawcommissionofindia.nic.in/reports/179rpt1.pdf>

²¹It is so in the US, see Eric Yoder, Surveys show fear of retaliation keeps would-be whistleblowers from speaking up, THE WASHINGTON POST (June 17, 2014), https://www.washingtonpost.com/politics/surveys-show-fear-of-retaliation-keeps-would-be-whistleblowers-from-speaking-up/2014/06/17/9a574e12-f66d-11e3-a606-946fd632f9f1_story.html.

²²Amit Anand Choudhary, Whistleblowers harassed for exposing corruption: CVC to SC, TOI (Mar. 2, 2016), <http://timesofindia.indiatimes.com/india/Whistleblowers-harassed-for-exposing-corruption-CVC-to-SC/articleshow/51228549.cms>.

number of complaints received in a year, roughly 1000²³ under the PIDPI Resolution. So it is important to take care of these situations. It may be that the group of protection seekers suffer from paranoia or are genuinely threatened. In either case, temporary assistance of compulsory nature will be beneficial for all.

A criticism of the suggestion may be that the protection will be too expensive for the CA to undertake. It must be iterated that the compulsory interim protection is not only of the order of police protection. The CA may take any step as needed, it could be the one sought or what the CA feels to be appropriate and apply it accordingly. Moreover, different nations witness different troubles with respect to the whistle-blower context and thus the law must adapt accordingly.²⁴

The methodology clearly highlighted the lack of evidence with respect to a conclusive determination of such fears. However, there is common consensus that there is a very close connection between the public servant's willingness to disclose corruption in his organization and the protection given to him and his/her identity. If adequate statutory protection is granted, there is an increased likelihood that the government would be able to get substantial information about corruption.²⁵ The lack of adequate protection for whistle-blowers is a systemic problem across almost all jurisdictions.²⁶ Nevertheless, it has been pointed out that the way in which the retaliations and

²³Central Vigilance Commission Report, 2014, 7, 1-120, 2014, ¶2.32, <http://cvc.nic.in/ar2014.pdf>.

²⁴INTERNATIONAL PRINCIPLES FOR WHISTLE-BLOWER LEGISLATION, INTRODUCTION, https://issuu.com/transparencyinternational/docs/2013_whistleblowerprinciples_en.

²⁵Ethics in Governance, Second Administrative Reforms Commission, 4th Report (Jan. 2007), <http://righttoinformation.info/wp-content/uploads/2013/10/ARC-report-on-ethics-in-gov.pdf>.

²⁶WHISTLEBLOWING: INTERNATIONAL STANDARDS AND DEVELOPMENTS, (To be published in Sandoval, Irma E. (Editor) 2011. "Corruption And Transparency: Debating The Frontiers Between State, Market And Society", World Bank-Institute For Social Research, Unam, Washington, D.C.).

victimisation channel actually work, steps taken by a whistle-blower against them may ultimately be futile.²⁷ Where there is a threat to a whistle-blower, all possible and required action would be taken within an appropriate time frame to ensure that the threat does not actualize and where harm has already occurred, no further harm occurs.²⁸

The recommendation i.e. compulsory interim protection till the CA decides on the direction to be given to the authority after receipt of a complaint, must be based on international best practices. Against this backdrop, the principles laid down by Transparency International, titled 'International Principles for Whistle-blower Legislation - Best practices for laws to protect whistle-blowers and support whistleblowing in the public interest'²⁹ must be studied.

The relevant principle is Principle 14; Personal protection – whistle-blowers whose lives or safety are in jeopardy, and their family members, are entitled to receive personal protection measures. Adequate resources should be devoted for such protection.

The broad precedent for the recommendation lies under Section 22 of the Public Interest Disclosure Act, 2002, Australia whereby the complainant can apply to the Supreme Court for interim action. In India, interim action is within the discretion of the CA. The specific recommendation of mandatory interim relief may be unprecedented³⁰ but is necessary for the Indian context.

²⁷Judith A. Truelson, Protecting David from Goliath: On Blowing the Whistle on Systemic Corruption, 8(3) DIALOGUE 1-23 (1986), <http://www.jstor.org/stable/25610471>.

²⁸Note for Discussion on the Loksuraksha Whistleblower Protection Bill, http://www.thehindu.com/multimedia/archive/00761/Whistleblower_prote_761743a.pdf.

²⁹INTERNATIONAL PRINCIPLES FOR WHISTLE-BLOWER LEGISLATION, INTRODUCTION, https://issuu.com/transparencyinternational/docs/2013_whistleblowerprinciples_en.

³⁰Jarod S. Gonzalez, A Pot of Gold at the End of the Rainbow: An Economic Incentives Based Approach to OSHA Whistleblowing, 14 EMP. RTS. & EMP. POL'Y J. 325 (2010); supra note 20.

C. Economic Analysis

Law and economics is ‘the application of economic theory and econometric methods to examine the formation, structure, processes and impact of law and legal institutions’. The integration of economic analysis with traditional legal analysis is crucial to the effectiveness in the regulatory, enforcement and adjudicatory missions.³¹

There are markets wherever we look. The whistleblowing regime, from a decision to disclose to the outcome of the disclosure, also reflects a market. The good or the commodity that the parties are willing to trade is the disclosure, the incentive to carry out a trade in disclosures is public interest and the currency of trade is the legal framework or the law. The law has the potential to make the whistleblower wealthy enough that h/she can afford to make a disclosure for the public interest. Similarly, the law has to incentivise the CA to buy the disclosure or at least ensure that the value of the disclosure does not amount to the life of the whistle-blower.

a) Game Theory

The structural approach to policy evaluation emphasizes the use of explicit economic models in which the primitives—preferences, technologies and endowments—are specified and equilibrium allocations are derived from these primitives. The analysis of specific policies or regulations then requires the analyst to specify the details of the policy or regulation, and solve for the new equilibrium that would emerge in the presence of the policy or regulation.³² In the

³¹Sharon Brown-Hruska & Robert S. Zwiirb, Legal clarity and regulatory discretion—exploring the law and economics of insider trading in derivatives markets, 2(3) CAPITAL MARKETS LAW JOURNAL, 247 (2007), <http://cmlj.oxfordjournals.org/content/2/3/245.full.pdf>.

³²Richard Rogerson, Assessing the Economic Effects of Environmental regulations: A General Equilibrium Approach, (Feb. 2013),

discussions of complex policy issues, a model often serves primarily to provide a structure within which the various factors under study can be accounted for.³³

Chapter V specifically deals with protection against victimisation whereby the duty is cast upon the Central government to ensure that the public servant is not victimised. The Competent Authority is a quasi-judicial body with all the powers of a civil court for investigation under Section 7. Section 11(2) envisages a trial for providing protection to the complainant, once h/she applies to the competent authority for the same. Here, the public authority which is responsible for providing protection will be heard and a decision as to the appropriate level of security will be taken where the said authority will discharge the burden of proof.

The current regime is amenable to a game theoretic analysis due to the complex choice of disclosure which a complainant must make. There are incentives such as public interest, self-satisfaction³⁴ and disincentives like fear of retaliation and reprisal.³⁵

The first part will focus on the existing legal framework, how the law is while the second part would focus on the change after the recommendation is put in. It must be clarified that this

[https://yosemite.epa.gov/ee/epa/erm.nsf/vwan/ee-0572-05.pdf/\\$file/ee-0572-05.pdf](https://yosemite.epa.gov/ee/epa/erm.nsf/vwan/ee-0572-05.pdf/$file/ee-0572-05.pdf).

³³Antonio M. Borges, Applied General Equilibrium Models: An Assessment of their Usefulness for Policy Analysis, <https://www.oecd.org/eco/outlook/applied%20GE%20models.pdf>.

³⁴Anthony Heyes & Sandeep Kapur, An Economic Model of Whistle-blower Policy, 25(1) JLEO 157-182 (2009) different behaviours or morality also supports whistleblowing, <http://jleo.oxfordjournals.org/content/25/1/157.full.pdf+html>.

³⁵Erika Henik, Mad as Hell or Scared Stiff? The Effects of Value Conflict and Emotions on Potential Whistle-Blowers, 80 (1) JOURNAL OF BUSINESS ETHICS 111-119 (June 2008), <http://www.jstor.org/stable/41219196>, this article concludes that fear has pessimistic expectations for whistle-blowing.

recommendation is not the only one possible. This exercise is an attempt to provide a model for better allocation of incentives.

Situation: The decision making for a whistle-blower is rendered difficult because the absence of effective protection can pose a dilemma for whistle-blowers: they are often expected to report corruption and other crimes, but doing so can expose them to retaliation.³⁶

i. As the law is

The author will present a payoff matrix between the two participants, the whistle-blower and the Competent Authority.

Players

The whistleblower-P1

The Competent Authority-P2

Strategies

P1 has to decide whether to make the disclosure or not, given the circumstances of the legislation.³⁷

P2 is the decisive authority to act on the disclosure made by the whistle-blower. Thus it can decide to act or not act.

Assumption:

³⁶Observation by Transparency International, https://issuu.com/transparencyinternational/docs/2013_whistleblower_principles_en.

³⁷Jenny Mendelsohn, Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing, 8 WASH. U. GLOBALSTUD. L. REV. 723 (2009), http://openscholarship.wustl.edu/law_globalstudies/vol8/iss4/6; Anthony Heyes & Sandeep Kapur, An Economic Model of Whistle-blower Policy, 25(1) JLEO 157-82 (2009) different behaviours or morality also supports whistleblowing, <http://jleo.oxfordjournals.org/content/25/1/157.full.pdf+html>.

All complaints are bona fide and not false or vexatious. This assumption is important as resources for protection will be expended only for bona fide whistle-blowers. There may be an objection to this assumption as it implies that non-action by the CA is mala fide. This assumption is important because if the CA takes such a stance and does not act then it closes all possible avenues for the whistle-blower under the WPA. It cannot even approach the court contending the provisions of the WPA. This also gives an idea to the reader about the responsibility that must be shouldered by the CA when rejecting a complaint. This assumption also supports the payoff whereby the potential loss of life increases when a complaint is rejected for mala fide reasons.

There may also be instances where the CA rejects even a bona fide complaint. There is simply no guarantee that all bona fide complaints would be acted upon.³⁸ Since, this is a reasonable possibility, it can be translated into an assumption for present purposes. Since any action by the CA involves discretion, this is a realistic possibility.³⁹ The exercise of discretion at this stage is to take the first step once the CA receives a complaint i.e. undertake a discreet enquiry. It is ex-ante complaint for protection. Largely, discretion is difficult to incorporate into models.⁴⁰ Thus a decision of non-action by the CA is chosen as one possibility.

Payoffs:

³⁸See, Jarod S. Gonzalez, A Pot of Gold at the End of the Rainbow: An Economic Incentives Based Approach to OSHA Whistleblowing, 14 EMP. RTS. & EMP. POL'Y J. 325 (2010) for improper dismissal of complaints under the OSH Act, USA.

³⁹As seen in Avinash Kumar v. ArunaAsaf Ali Government Hospital, GNCTD, MANU/CI/0198/2015.

⁴⁰Max Schanzenbach, Comments on Discretion, Rule of Law, and Rationality by Brian Forst and Shawn Bushway, presented at Symposium on the Past and Future of Empirical Sentencing research, http://www.albany.edu/scj/documents/Discretion_Schanzenbach.pdf.

A simple benefit cost analysis has to be initiated using variable numbers that give an approximate idea of the decision making variables.

Benefits:

A disclosure is intended to effectively reduce, prevent or help in punishing corruption or any instance of bad faith in an organization setup such as a government department. The actionable disclosure is headed as Public Interest Disclosure under Section 4 of the WPA. The whistle-blower discloses with an intention of public interest. This is the sole and near sighted motivation for a complainant. There may be a possibility of a promotion or media idolation but these are far-fetched possibilities not necessarily on the mind of the whistle-blower when h/she makes an immediate decision. The benefit is assumed to be 10 units.

Costs:

There are various forms of risks that a whistle-blower must undertake such as revelation of identity, transfer, isolation by co-workers, harassment etc. Each of these is attributed a cost of 2 units. If the whistle-blower loses his/her life then the cost is infinite (∞) as there is no provision for compensation provided in the WPA. Thus it is difficult to attribute such a cost.⁴¹

⁴¹Although, costs of life have been estimated using different formulae for different contexts, it is still difficult to attribute a specific cost in this context as such an incident substantially reduces the chances of that disclosure happening ever again unless media attention is diverted to it.

Table 1

P1	P2		
		Act	Don't act
	Disclose	$2^{\#}, 8^{*}$	$10-\infty^{\alpha}, -10^{\beta}$
	Don't disclose	$-10^{\gamma}, 8^{\delta}$	$-10, 0^{\phi}$

Analysis:

According to the payoffs, P2 must always act.

When P2 acts then P1 must disclose while when P2 does not act then P1 must not disclose.

It is important to note here that since the assumption is that the non-action by the CA reflects a mala fide intention on the part of CA, the

[#]This is a benefit cost calculation viz. $10 - (2+2+2+2)$, for all forms of victimisation with a cost of 2 each = 2.

^{*}Simple deduction of 2 as administrative expense of investigation, enquiry etc.

^{α} This amounts to a situation where either the discreet enquiry concluded that no further action is required or the CA had ulterior motives not to act.

^{β} The entire potential benefit turns to a cost for the public at large.

^{γ} Opportunity cost whereby the CA was conducive to take action on the complaint. There may be a possibility of someone else making the disclosure whereby P1 loses out on the benefit.

^{δ} Another whistle-blower, apart from P1, makes a disclosure and the CA acts.

^{ϕ} Status quo is maintained whereby no disclosure, no possibility of any action.

disposal of application for protection under Section 11 may also yield obvious results of no protection, since it is discretionary and decided after providing an opportunity of hearing to the other party or government department.

*ii. As The Law Could Be*⁴²

Suggestion 1- once an application for protection is filed under Section 11(2), till the time the CA decides the step according to the proviso (after the trial), mandatory interim protection must be provided. This includes police protection as understood under Section 12.

Here all the variables, players, strategies, costs, benefits, assumption remain the same but the net payoffs change.

⁴²Note the author does not state how the law should be as this solution requires understanding the vagaries of realities statistically. Thus there may be other viable solutions on the same lines. Thus the suggestion is also numbered as 1.

Table 2

P1	P2		
		Act	Don't act
	Disclose	6 [#] , 6 [*]	10 ^α , -12 ^β
	Don't disclose	-10 ^γ , 6 ^δ	-10, 0 ^φ

Analysis:

As before, P2 must ideally act.

The payoffs for P1 have changed. P1 must always disclose due to net benefit.

[#]This is a benefit cost calculation viz. 10- (2+2+), for all forms of victimisation with a cost of 2 each = 6, since interim protection would mandatorily be provided on an application under Section 11(2), it will have some positive effect to reduce the cost to the whistle-blower.

^{*}Deduction of 4 due to administrative expense of investigation, enquiry and interim protection

^αThe probability of loss of life substantially reduces as P1 will now be more susceptible to seeking protection against victimisation.

^βThe whistle-blower is aware of the change in law; even if the CA decides not to act; P1 may apply for the protection. In that case, there is more loss to the CA due to loss of the entire public interest and an additional cost of -2.

^γOpportunity cost whereby the CA was conducive to take action on the complaint. There may be a possibility of someone else making the disclosure.

^δAnother whistle-blower, apart from P1, makes a disclosure and the CA acts.

^φStatus quo is maintained whereby no disclosure, no possibility of any action.

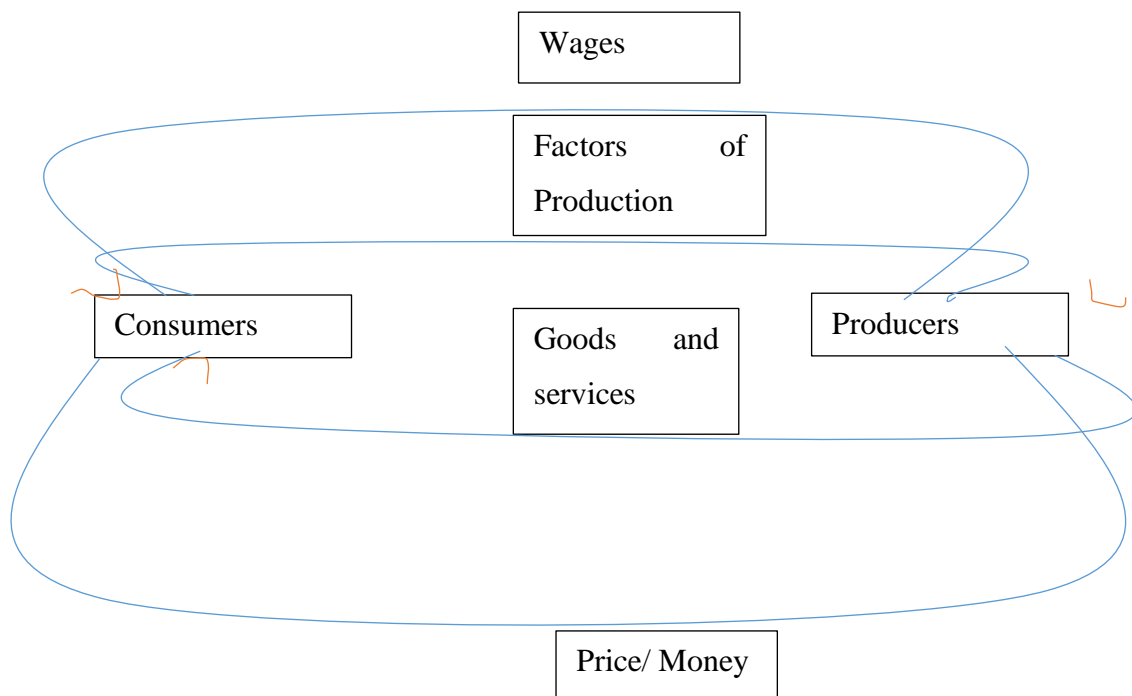
A pertinent point about the suggestion is that a whistle-blower can seek protection at any stage of the enquiry; even before his/her complaint is rejected under Section 5(6). A whistle-blower may rightly apprehend retaliation due to a complaint, even though it may not be acted upon and can use this provision. The assumption is mala fide action by the CA when it decides not to take action. Even so, such mala fide discretion would be exercised within the four corners of law. Thus, once a complainant files an application for disclosure and reasonably apprehends victimisation, it can apply for interim protection and reap the benefits, howsoever temporary it might be (because it will be compulsory).

Partial Equilibrium Analysis

The most comprehensive tool for an economic analysis is the general equilibrium analysis. However, existing literature only focuses on either (i) the case of an exchange economy, or (ii) partial equilibrium techniques.⁴³ The general equilibrium analysis, in macroeconomics, shows a circular flow of income where the producer derives the factor of production from the consumer and, in turn, pays the consumer wages from which the consumer then buys the goods that he/she has been instrumental in producing. This is the simplest explanation of an exchange economy.

⁴³Daniel M. Schydrowsky & Ammar Siamwalla, Monopoly Under General Equilibrium: A Geometric Exercise, 80(1) THE QUARTERLY JOURNAL OF ECONOMICS 147-153 (Feb. 1966), <http://www.jstor.org/stable/1880585>.

Fig. 2

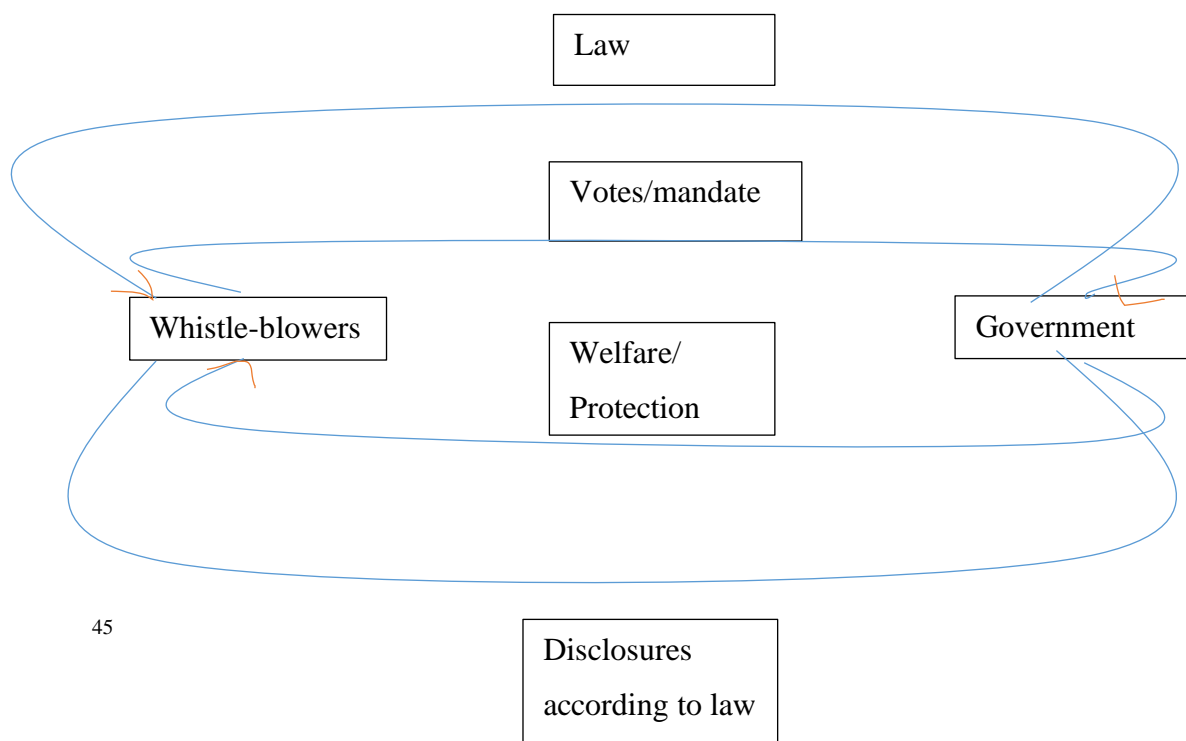


A general equilibrium analysis is most commonly used for competitive markets. However, the present situation is one where the producer, the government, is a monopoly⁴⁴ producing the legal framework (the currency), in exchange of the mandate and support given to it by the people (factors of production) so that the consumers (a small portion of the population) can use the law to provide disclosures and thus public interest. The consumers, firstly, represent

⁴⁴State as having monopoly on allocation of property rights, Johann Graf Lambsdorffs, *Corruption and Rent-Seeking*, 113(1/2) PUBLIC CHOICE, 101 (Oct. 2002), <http://www.jstor.org/stable/30025775>.

a very miniscule part of the population as whistle-blowers and do not compete with each other. In Pareto terms of a General Equilibrium analysis, the consumers trade and compete with each other for mutual gains; this is not possible for a disclosure based market due to the persistent fear amongst all whistle-blowers.

Fig. 3



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Thus a Hicksian analysis indicating partial equilibrium and the first law of demand has been chosen. Due to the extent of its assumptions for simplicity, it clearly shows how the law increases the incentives

⁴⁵Just like wages translate into prices for the good and services in Fig 2, similarly the law (currency) converts itself into the disclosure i.e. a disclosure can be made only by the 'use' of law.

for the whistle-blower to make a disclosure. Also, the majority of benefit-cost analyses are partial equilibrium analyses that include impact in one or a few markets, as compared to, general equilibrium analysis which takes into account a number of interrelated markets.⁴⁶ But partial analysis also has certain shortcomings; it is characteristic of complex systems that a sub-part may not share properties with the whole.⁴⁷

b) Hicksian Analysis

The Hicksian analysis of consumer demand (based on Partial Equilibrium analysis) is an important way to understand consumer behaviour in demand theory. It basically enunciates the law of demand i.e. an increase in demand with the decrease in price. This is called the price effect on demand. The price effect comprises of income effect and substitution effect. The Hicksian method diagrammatically shows the price effect as a combination of the two effects.

The prerequisite for an analysis of this kind is the characterisation of the entire scenario as a market. In this case, the whistle-blower is a consumer. The utility is derived from making a disclosure that leads to public interest. This can be understood as the unit of the utility. Now public interest can be derived from either making a disclosure herself or a disclosure by anyone else. There are many choices available to a potential whistle-blower, in terms of, blowing the whistle herself, helping another one, employing a strategy of group disclosure so that there is strength in numbers and the probability and

⁴⁶THE OXFORD HANDBOOK OF THE ECONOMICS OF GAMBLING (Leighton Vaughan Williams, Donald S. Siegel ed., 2013).

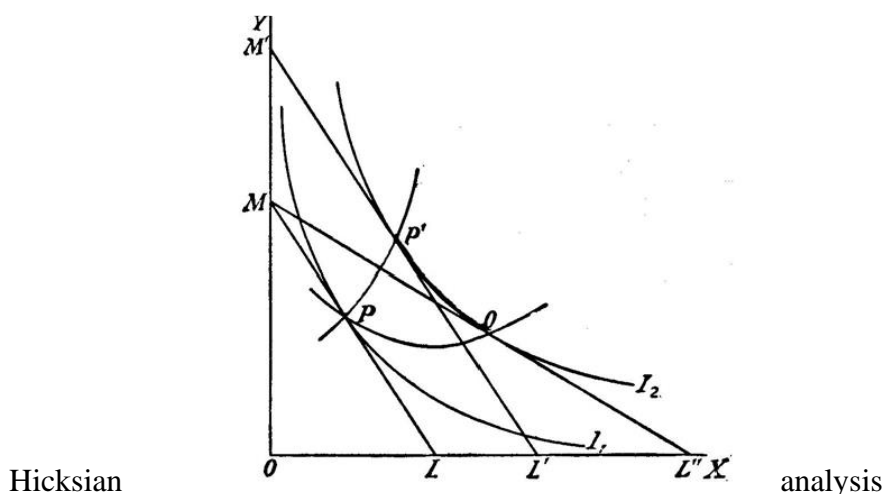
⁴⁷Henry E. Smith, Law and Economics: Realism or Democracy?, 32 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 127 (2009), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4046&context=fss_papers.

effect of any retaliation reduces etc. These are the various choices of goods available before a whistle-blower to satisfy her demand of public interest. The author distributes them into two categories: disclosure by the self and disclosure by other(s) or in conjunction with another. These are the two broad categories of goods available to the whistle-blower. The whistle-blower is indifferent between the two categories of disclosures as the final aim of public interest is being achieved. The constraint to the consumer demand is a budget line. The budget line is the value of the whistle-blower's life. This is the measure of the income available, to buy the good of disclosure. This is because, intuitively, the whistle-blower stops acting in any manner once there is a probable threat to the life of the whistle-blower.

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Good 2- disclosure by
another/ group
strategy/ helping the
other whistle-blower

Good 1- disclosure
by self



Hicksian

analysis

⁴⁸Hicks on Demand, Value and Capital by John R. Hicks, 5 fig.8, <http://la.utexas.edu/users/hcleaver/368/368hicks VCdemand.pdf>.

basically focuses on combining the effects of price change on income and demand.

The original budget line is LM with indifference curve I1. The point of tangency is P where the requisite combination of goods provides the whistle-blower with satisfaction. Now, if the recommendation is put in place, it amounts to

Price change of Good 1- mandatory protection after the application for protection is made.

From the perspective of the whistle-blower, this reduces the price for Good 1 and the whistle-blower will be incentivised to make disclosures herself.

The whistle-blower would like more of Good 1. There is a pivotal and rightward shift in the budget line to L'M. This indicates the law of demand. This does not mean a change in the value of life of the whistle-blower (which was the original budget line), but rather equivalence of the value of life of the whistle-blower as perceived by the whistle-blower herself and the law i.e. the law values the life as much as the person does because optimum allocation of resources for protection has taken place. The indifference curve tangent to this budget line is I2 at point Q.

This can be seen as a part of income and substitution effect.

Income effect- Assume that there is a proportional increase in income i.e. the new budget line is L'M'. This may be due to a decrease in value of life of the whistle-blower over some time which makes the whistle-blower less risk averse so that h/she can buy more goods or indulge in more such activities. This new budget line is tangent to I2 at point P'. The co-ordinates that P' represents on the X and Y axes is a new combination of goods that the whistle-blower can consume due to an increase in income. The X co-ordinate for P' represents the income effect. It represents a combination on I2, achieved by an

increase in income. Thus, the income effect of fall in price of Good 1 is represented by P'.

Substitution effect- The remaining portion on the X- axis i.e. price effect- income effect= substitution effect. The X co-ordinate for point Q represents the substitution effect. It is a substitution between the combination represented by P' and Q. Since both lie on I₂, they provide the same amount of utility. Here, the hypothetical assumption of an increase in income is removed and all units of Good 1 at P' are substituted with Q, because Q is tangent to I₂. Since the price of Good 1 has fallen for the whistle-blower, all combinations must be looked at from the position of Q.

III. LIMITATION

The cost matrix in the game theoretic analysis may come out to be different due to actual calculation of this compulsory protection. Herein, lie the figures which suggest that presently, very few whistle-blowers actually seek protection. This step may increase that number and lead to depletion of a huge amount of resources. The reaction to such use of resources would be a positive push on the authorities to act in a speedy, fast and effective manner. This may also reduce the perception of mala fide of intent of the CA which runs deep among laypersons, both within the organisation and outside it.

IV. CONCLUSION

The recommendation is vital in the Indian context due to the number of deaths that arise from instances of whistleblowing.⁴⁹ Thus, once a

⁴⁹Combining number of deaths of RTI activists and public servants turned whistle-blowers, Mehul Srivastava & Andrew MacAskill, Whistleblower Murdered Show

whistle-blower applies for police protection, the application should not be delayed or taken lightly. Human resource is capital with a corresponding value. In the context of whistleblowing in the public sector, the value of the human capital readily surpasses the value of other humans. Civil servants and bureaucrats pass through rigorous levels of testing to reach and obtain their positions of responsibility. In this context, the loss of even one bureaucrat for something of the order of whistleblowing reflects a colossal waste of resources.

Hazard of Exposing India Corruption, BLOOMBERG NEWS (Oct. 20, 2010), <http://www.bloomberg.com/news/articles/2011-10-19/whistleblowers-face-deadly-hazards-in-india>.

CONSEQUENCES OF UNDUE DELAY IN PASSING ARBITRAL AWARDS AND IMPOSITION OF TIMELINES AS A SOLUTION

*Leah Elizabeth Thomas**

Abstract

Arbitration is set apart from other forms of dispute resolution owing to the fact that it is a speedier and more expedient form of dispute resolution. However, this is not the case when the proceedings are drawn out due to a delayed award. Delays can be easily determined when the parties to the arbitration have agreed upon a fixed timeline in their agreement, but where the agreement is silent on a deadline, such delays have to be determined on a case to case basis. In most cases of delayed awards, Courts uphold the arbitrator's decision unless there is serious harm caused to the parties arising from the delay. Therefore, a delay can be grounds for parties to challenge an award or grounds to refuse recognition and enforcement of the award, but only if Courts find that such delay

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has caused grave harm to the interests of the party. A solution to mitigate a delay is to include a deadline within the arbitration agreement. Various national arbitration laws and institutional rules have provided for timelines within their provisions. Electing such laws or rules to govern the arbitration would de facto provide the parties with a deadline. However, while choosing a deadline, parties should keep in mind the nature of the dispute and fix a flexible and practical timeline which would suit the dispute. To a certain extent, the arbitrator must be empowered to extend the deadline if the matter calls for it. It may be concluded that a suitable timeline for arbitration could prevent unnecessary delays in the proceedings and expedite the process.

I. INTRODUCTION

Arbitration is often considered to be a faster mechanism than traditional litigation.¹ However, of late, a common criticism faced by arbitration is that arbitral tribunals take too long to render the awards. When there is such a delay, the purpose and intent of arbitration party-driven, expedient and cost-effective means of dispute resolution

¹Herbert M. Kritzer & Jill K. Anderson, The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, And Cost in The American Arbitration Association and The Courts, 8 THE JUST. SYSTEM J., 6, 7 (1983), <http://www.jstor.org.ezproxy.nujs.ac.in/stable/pdf/20877688.pdf>.

- is defeated.² In practice, this expectation of a timely arbitral award is usually not met. There have been instances where the parties have had to wait up to four years for the award after closure of arbitration proceedings.³ In most cases, however, the Courts are willing to defer to the arbitrator's decision unless, such an award creates actual or potential harm to the parties.⁴

Justice Brennan notes that, "an arbitration is a creature of contract."⁵ An arbitrator's authority is derived from an agreement between two parties and therefore they are protectors of the integrity of the whole process. Even where the parties have not expressly agreed upon a set time limit, it is the arbitrator's duty to render the award without any undue delay.⁶

One solution adopted by various national arbitration laws and institutional rules to combat delays is, to institute a timeline within which arbitral proceedings are to be completed. This would ensure quick and efficient proceedings and prompt awards. However, such timelines may also be counterproductive. This will be further examined in the following sections of the paper. Part II of this paper analyses the meaning of a delay and its impact on the award. It discusses whether an undue delay is a legitimate ground to challenge the award and take recourse against it. The section also examines

²M.L. Adelson & J.D. Hogarth, An Arbitrator's Duty to be on Time, American Bar Association, <http://apps.americanbar.org/litigation/committees/adr/articles/fall2015-1115-an-arbitrators-duty-to-be-on-time.html>.

³Stephen Wilske, Legal Challenges to Delayed Arbitral Award, 6(2) CONTEMP. ASIA ARB. J., 153 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2372088.

⁴Sims v. Building Tomorrow's Talent, LLC, No. 07-12-00170-CV (Tex. App. Apr. 30, 2014).

⁵United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960).

⁶Supra note 2.

whether this delay can affect recognition and enforcement of award through reference to various case laws and by taking a look at the position of laws in different jurisdictions. Part III, will examine various National Arbitration Laws and Institutional Rules which provide for an express time frame within which the award should be rendered in order throw some light on the general trend of such provisions. Part IV then seeks to analyse whether time limits provide an adequate solution to delays and also looks at the potential drawbacks of such time limits.

II. THE CONSEQUENCES OF A DELAYED AWARD

The importance of time, in arbitral procedures was concisely laid down in *Chartered Institute of Arbitrators v. John D. Campbell QC*: “Delay undermines the *raison d’être* of arbitration, weakens public confidence in the arbitral process, and denies justice to the winning party during the period of delay.”⁷ The fundamental question is whether time is of such importance that it would serve as grounds to challenge the award and initiate setting aside proceedings or as a reason to refuse recognition and enforcement of the award.

Where the agreement between parties makes a provision for the time limit, the parties are bound by the terms of the agreement. The Indian Supreme Court in *NBCC Ltd. v. J G Engineering Pvt. Ltd.* held that, where the agreement between parties stipulates the termination of arbitrators mandate due to passage of time, no extension of time would be possible by the unilateral act of one party.⁸

⁷*Chartered Institute of Arbitrators v. John D. Campbell QC*, Decision of the Tribunal, 8 (May 5, 2011).

⁸*NBCC Ltd. v. J G Engineering Pvt. Ltd.*, (2010) 1 UJ SC 0310. See also *Bharat Oman Refineries Ltd. v. M/s Mantech Consultants*, Apr. 16, 2012 (Appeal No. 143 of 2012), Bombay High Court.

It is easy to determine delay when the parties have already agreed upon the time limit in the arbitration contract, but when there is no explicit mention of this in the agreement it becomes important to understand what constitutes delay. The UNCITRAL Model Law mentions that the arbitrator is to carry on the proceedings without any undue delay, however, there is no mention of any time limit or a definition of delay.⁹ Time, however, cannot be infinite since the more time passes, the more the arbitrators' memories start to fade with respect to minor, yet, potentially important details. Subsequently, the delay would have a negative impact on the quality of the award.¹⁰ This however varies from case to case as all arbitrations need not rely on facts and evidence alone, but for those which are merely legal in nature and addresses the law, memory impairment would not play as big a role. There have been plenty of Courts which have set aside awards due to efflux of time and an equal number which have enforced the award despite a challenge. Therefore, it is difficult to impose a uniform timeline for all arbitration cases and hence this question regarding how much time would actually constitute a delay must be answered on a case-to-case basis.¹¹

A. *Undue Delay As A Ground For Challenging The Award*

The setting aside of an award is generally allowed in appropriate circumstances. Since there is no uniform law on this subject, Courts have adopted a case to case analysis of this issue.

⁹UNCITRAL Model Law, 1985, Article 14- If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination.

¹⁰Supra note 3.

¹¹Id.

Prior to the 2016 Amendment Act, Indian Arbitration Law had no provisions stipulating time limits or their consequences. However, various cases in the Indian Courts have discussed the issue. The earliest judgment was *Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd*¹², however, *Harji Engineering Works v. Bharat Heavy Electricals Limited*¹³ (“**Harji Engineering Works**”) was the first judgment to comprehensively deal with it. The award in this case was challenged on the ground that there was a substantial gap of three years between the award and the final hearing. The reasons stated by the Court for setting aside the award were that, it was only natural that the arbitrator could forget contentions and pleas raised during the arguments if there is a huge gap between the hearing and the award. Since the 1996 Act provided only for limited grounds on which an award can be set aside, the arbitrator is additionally responsible for rendering a prompt award. Abnormal delays without any explanation from the arbitrator, as was the scenario in this case, cause prejudice and such an award would be unjust.¹⁴

In *Peak Chemical Corporation v. National Aluminium* (“**Peak Chemicals**”), however, the court held that, “it is not considered expedient to simply set aside the impugned Award on the sole ground of delay in the pronouncement of the Award.”¹⁵ Arriving at a different judgement, this case was followed by *Union of India v. NIKO Resources* where the rendering of the final award was delayed by four years.¹⁶ The Court found that there was failure to deal with certain aspects that were raised and set aside the majority award since it suffered from patent illegality. While the delay alone did not lead to

¹²*Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd* AIR 2003 SC 2629.

¹³*Harji Engineering Works v. Bharat Heavy Electricals Limited*, 2008(4) Arb. LR. 199 (Delhi): MANU/DE/2531/2008.

¹⁴*Id.*

¹⁵*Peak Chemical Corporation v. National Aluminium Co. Ltd.*, MANU/DE/0356/2012:2012 II A.D. (Delhi) 304.

¹⁶*Union of India v. Niko Resources & Anr.*, MANU/DE/2914/2012.

the vitiating of the award, the illegality that arose from the delay caused it to be set aside.¹⁷ The different conclusions arrived at by the Courts in *Peak Chemicals* and *NIKO Resources* (“*NIKO Resources*”) turned on whether the delay caused an illegality in the award. While in *NIKO Resources* the party was affected by the adverse award caused by a delay, in *Peak Chemicals* the award was just and comprehensive despite the delay and therefore, the delay was an insufficient reason to set aside the award.

Oil India Ltd. v. Essar Oil raised similar questions before the Delhi High Court where, the parties contended that since Harji Engineering and *Peak Chemicals* were contradictory to each other, the case had to be referred to a larger bench.¹⁸ This contention was however rejected and the Court established that the two cases were not contradictory. The Court also observed that the outer limit for arbitration as per Rules of the Indian Council of Arbitration was two years and OIL participated in the proceedings with the knowledge that this provision had not been complied with.¹⁹ However, no prayer was made to expedite the process and neither was there a request to terminate the tribunal mandate as provided for by Section 14 and hence OIL had waived its right to object to such non-compliance.²⁰ The Court also noted the inconsistency in OIL’s plea, as they wanted to set aside only that portion of the award which was not in its favour but retain the part which was in their favour.²¹ Consequently, it was held that there was no illegality arising due to the delay and that the award was a

¹⁷Id.

¹⁸*Oil India Ltd. v. Essar Oil*, O.M.P. 416 of 2004 & I.A. No. 10758 of 2012.

¹⁹Id.

²⁰Id.

²¹Badrinath Srinivasan, Undue Delay in passing Arbitral Award a ground for Challenge, 2 INT’L J. OF L. AND POL’Y REV. (2013), <http://ssrn.com/abstract=2201338>.

well-reasoned one passed after consideration of all the contentions raised.²²

Therefore, the Courts in India are of the opinion that delay in itself is insufficient to set aside an award. The circumstances surrounding the delay and the consequences of it must be analysed to establish that the parties have suffered grievous harm that arose due to the delay. If the party that seeks to set aside the award has not objected to a delay they were aware of, then the party is deemed to have acquiesced and their right to challenge the award is waived.²³

This has been the trend not just in India but other jurisdictions have also approached this matter on a case to case basis and established that delay is not a ground for challenge in its substance and can be a contributory factor only. This is also evidenced from UK Courts which have established that a mere delay would not constitute a serious irregularity as per Section 68 of the UK Arbitration Act, 1996.²⁴ The delay should have caused significant and substantial injustice which subsequently would constitute a “serious irregularity”.²⁵ The “but for” test established in *Vee Networks v Econet Wireless International* can only be met if the arbitrator has failed to address all the issues put to it.²⁶ The test requires that the irregularity in the procedure caused the arbitrator to reach a certain conclusion but for which this unfavourable conclusion would never have been reached.²⁷ This is a high threshold that has been set to

²²Id.

²³Bharat Oman Refineries Ltd. v. M/s Mantech Consultants, Apr. 16, 2012 (Appeal No. 143 of 2012), Bombay High Court.

²⁴B.V. Scheepswerf Damen Gorinchem v. Marine Institute sub nom The Celtic Explorer, (2015) EWHC 1810 (Comm).

²⁵UK Arbitration Act, 1996, § 68.

²⁶Vee Networks Ltd v. Econet Wireless International Ltd, (2004) EWHC 2909 (Comm)).

²⁷Vee Networks Ltd v. Econet Wireless International Ltd, (2004) EWHC 2909 (Comm)).

eliminate any unmeritorious or frivolous claims that rely on minor technicalities that could render the entire process of arbitration redundant.

Similarly, Courts in the United States have also ruled that Courts have the discretion to enforce a late award if there has been no objection to the delay made prior to rendering of the award or if the party against whom the award went fails to prove the existence of a prejudice caused by the delayed award. Such prejudice must be evidenced by more than just poor faring under the terms of the award.²⁸ When such failure to prove prejudice is combined with lack of objection to the delay from the parties, such claims of late awards most often fail.²⁹ In *Hasbro Inc. v. Catalyst USA, Inc.*, the Court held that unless the parties had specifically in their contract agreed that time was of the essence, harsh penalties were not to be imposed for untimely performance of the contract.³⁰ Issuing a reasonable notice suggesting that time is of the essence to the arbitrators and all the parties involved, would be an example of a strict requirement to adhere to the agreed upon time limit.³¹

Therefore, across jurisdictions the Courts have adopted a similar approach towards delayed awards and one can conclude that a mere delay is not a sufficient ground to challenge the award and set it aside.

²⁸I Appel Corp. v. Katz No.02 Civ.8879, 2005 WL 2995387 (S.D.N.Y. Nov.9, 2005).

²⁹Blank Rome LLP v. Vendel, 29 Del. J. Corp. L. 208, 216 (Del. Ch. Aug. 5, 2003).

³⁰Hasboro Inc. v. Catalyst USA, Inc 367 F.3d 689 (7th Cir. 2004).

³¹Samuel Estreicher, Steven C. Bennett, Untimely Arbitration Awards, 235 (59) N.Y L. J. (2008), <http://www.jonesday.com/files/publication/923342f0-3be4-469b-8b66-a0bc854e272c/presentation/publicationattachment/10018645-9959-43ca-b25e-4581dacde5f7/estreicherbennett032806nylj.pdf>.

B. Delay As A Reason To Refuse Recognition And Enforcement Of Award

Whether a delay can affect the recognition and enforcement of award under New York Convention and what provision would apply has been subject to much academic debate.³² Where the parties have agreed upon a stipulated time limit, and this has not been met, Courts have taken varying stances based on jurisdiction. In France, even a minor surpassing of the time limit can lead to the non-recognition and non-enforcement of the award on grounds of violation of public policy.³³ The Italian Arbitration Act specifically lays down expiry of time limit indicated in the Act as a ground for setting aside the award.³⁴ In contrast to this German Courts tend to not deny recognition and enforcement of awards on grounds of delay.³⁵ In a 2014 *Swiss Federal Court case X v. Z*, the Court annulled an award passed a day after the time limit agreed upon by the parties. This decision confirmed that an agreement between the arbitrator and the parties accepting that the arbitrator's mandate would terminate if the award is not passed before the deadline would have the effect of modifying the original agreement between parties and such an agreement would be binding on the arbitrator and the parties. Such an award can then be annulled on the grounds of lack of jurisdiction.³⁶

Courts have made an effort to distinguish between those procedural defects which are essential and nonessential within the application of Article V(1)(d) of the New York Convention, although this distinction

³²Supra note 3.

³³Dubois & Vanderwalle v. Boots Frites, No. 29. Cour d'Appel, Paris, 22 September 1995.

³⁴Italy - Arbitration (Title VIII of Book IV of the Italian Code of Civil Procedure), Article 829(6)- "...if the award has been rendered after the expiry of the time-limit indicated in Article 820, subject to the provisions of Article 821".

³⁵Supra note 3.

³⁶*X v Z* dated 28 January 2014 4A_490/2013.

is not foreseen within this provision.³⁷ The essential defects are those which would have led to a different decision by the Court. However, an earlier decision by the arbitrator would make no difference to the arbitrator's award and would not constitute an essential defect.³⁸ Therefore, the impact of surpassing a deadline and rendering an award must be analysed before setting aside the award and an examination of whether any material difference would have arisen in the award had it been passed earlier, should be carried out.

Where the contract between parties is silent on the time limits, often the application of the New York Convention is considered. Even though there are no explicit grounds to lawfully refuse recognition and enforcement of arbitral award even in case of a significant delay, this does not necessarily mean that a late award cannot qualify as one of the grounds enumerated under Article V.³⁹

Article V(1)(b) of the New York Convention is the expression of due process. Arbitral tribunals have a duty to evaluate party submissions, give them due consideration and review them before rendering a final award.⁴⁰ Therefore, in the event of a considerable delay, the argument is that, the arbitrators will not be able to fulfil this duty as their recollection of submissions and proceedings would fade with time. When there is delay, there are chances that the judges' opinions are

³⁷New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Article V(1)(d) states "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;"

³⁸BayObLG, Decision of September 23, 2004, 4 Z Sch 005/04, 568 YEARBOOK COMMERCIAL ARBITRATION XXX 573 (2005).

³⁹New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Article V.

⁴⁰Supra note 3.

reconstructed rather than reproduced.⁴¹ Hence, parties have lost the guarantee of a proper consideration given to the case, thereby violating this article.

Article V(2)(b) of the New York Convention deals with the violation of public policy and this is closely interrelated with due process. Public policy standards are generally established based on national laws.⁴² It is relevant to take note of the *Harji Engineering Works* case here as the Court stated that “*abnormal delay without satisfactory explanation is undue delay and causes prejudice. Each case has an element of public policy in it. Arbitration proceedings to be effective, just & fair, must be concluded expeditiously.*”⁴³ Another recent judgement *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp (No 3)* the Court of Appeal found that, due to an extraordinary delay before the Nigerian courts for the setting aside proceedings, the stay on enforcement of award should be lifted subject to a determination by the High Court – for public policy reasons – on the fraud allegations raised by NNPC in Nigeria.⁴⁴

There is, however, no definite conclusion or uniform law that is followed in this regard, and once again each case will have to be analysed on a case to case basis but it is of utmost importance that parties’ conduct during arbitration should not show acquiescence to the delay.

⁴¹Gemeinsamer Senat der Obersten Gerichtshöfe des Bundes [GemS-OGB] [Joint Senate of the Supreme Courts of the Federal Republic of Germany] Apr. 27, 1993, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2603, 2605, 1993 (Ger.)]

⁴²New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Article V(2)(b) states “The recognition or enforcement of the award would be contrary to the public policy of that country.”

⁴³*Harji Engineering Works v. Bharat Heavy Electricals Limited*, 2008(4) Arb. LR. 199 (Delhi): MANU/DE/2531/2008.

⁴⁴*IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp (No 3)*, (2015) EWCA Civ. 1144, ¶170.

III. EXAMINING THE PROVISIONS FOR TIME LIMITS IN VARIOUS NATIONAL ARBITRATION LAWS AND INSTITUTIONAL RULES

The UNCITRAL Model Law, designed to assist States in harmonizing arbitration laws, is silent on delayed arbitral awards and its consequences and so are most national arbitration laws. It is generally up to the parties to decide whether they want to follow a set time limit in the arbitration contract. However, some jurisdictions like Turkey, Taiwan, Egypt, Syria, Sudan and of late, India, have incorporated time limits, within which an award must be rendered, into their national laws. Arbitral institutions also often provide for a time limit within their rules. This section will analyse some of these national arbitration laws and institutional laws that include a provision for time limits within which the publication of awards must be complete.

A. *Stance Taken By Various National Arbitration Laws*

Turkish International Arbitration Law, 2001 has been enacted based on the UNCITRAL Model Law and elements of Swiss Law. Article 10 (B) specifies a time frame within which the award must be made.⁴⁵ Article 10 (B) states that in the event of a sole arbitrator, the proceedings should be complete within one year from the appointment of the arbitrator. If there is more than one arbitrator, proceedings are expected to be completed one year from the date of issuance of first minutes of first hearing of the tribunal.⁴⁶ This provision applies when there has been no explicit agreement by

⁴⁵Turkey, GLOBAL ARBITRATION REVIEW,
<http://globalarbitrationreview.com/jurisdiction/1000209/turkey>.

⁴⁶Turkish International Arbitration Law, 2001, Article 10 (B).

parties and therefore if there is a mutual agreement this time period can be extended. In the event an agreement cannot be reached by the parties; the Civil Court of First Instance can extend the deadline upon application by one of the parties.⁴⁷ This time limit is to be taken very seriously as Article 15 (A)1.c very explicitly states, “*Awards may be set aside . . . [if] the award was not rendered within the arbitration term.*”⁴⁸ Therefore, any tribunal which has its seat in Turkey must seek a mutual agreement from parties for an extension of this time limit imposed as it may not be possible to conclude complex arbitration matters within the span of one year. This must be done in the earlier stages of arbitration as a consensual agreement may not be reached by the parties at a later stage if one party realizes that the award may not be in its favour.⁴⁹

Taiwan also follows a rather strict timeline which has been provided for in Article 21 of The Republic of China Arbitration Law, 1998. The Article states that the tribunal is to render its award within six months from the commencement of the proceedings and if the tribunal sees the need for an extension of three months can be provided.⁵⁰ However, if the parties do not agree to the extension of this timeline then the arbitration agreement becomes void and jurisdiction to decide the dispute would then fall to the Taiwan courts.⁵¹ There is a precedent by the Taipei District Court which has made adherence to the time limit mandatory. In that case, it was decided that although arbitrators were replaced, the tribunal failed to render a final award within the stipulated time and hence the party

⁴⁷Id.

⁴⁸Ziya Akinci, Arbitration Law Of Turkey: Practice And Procedure 161 (2011).

⁴⁹Supra note 3.

⁵⁰Republic of China Arbitration Law, 1998, Article 21.

⁵¹Ting Sun, Report on the 2011 Taipei International Conference on Arbitration and Mediation, THE CHINESE ARBITRATION ASSOCIATION, http://www.arbitration.org.tw/english/news_into.php?id=10.

was entitled to set aside the arbitral award leading to the annulment of the award.⁵²

The Egyptian Arbitration Law 1994, in Article 45 lays down that in the absence of an agreement between two parties, the final arbitral award is to be rendered within twelve months of the date of commencement of proceedings. Any extension decided by the tribunal cannot exceed six months unless agreed upon by the parties.⁵³ If the time limit has not been adhered to, the parties may request either an extension of the time period or termination of proceedings. In case of termination, the parties may bring the case to the court having initial jurisdiction to hear the case.⁵⁴ There is some controversy surrounding the number of extensions parties may request and some argue that the text of the article limits it, whereas some practically argue that unless repeated extensions are permitted, arbitration proceedings could have tragic endings.⁵⁵ This proposition was adjudicated upon in an Egyptian case in which the Egyptian Arbitration Law was *lex arbitri* and reference was made to ICC 1998 Rules. In this case, even after eighteen months the award had not been rendered.⁵⁶ The case finally reached the Cairo Court of Appeal which held that ICC Rules governing this issue under Egyptian Law did not make such a time limit mandatory but parties may otherwise agree to set one.⁵⁷

⁵²Supra note 3.

⁵³Egyptian Arbitration Law, 1994, Article 45(1).

⁵⁴Egyptian Arbitration Law, 1994, Article 45(2).

⁵⁵Mostafa A Hagra, The Egyptian Arbitration Law and Anti-Arbitration Injunctions Due to Expiry the Time Limit for the Final Award – Case Study, YOUNG ICCA BLOG, <http://www.youngicca-blog.com/the-egyptian-arbitration-law-and-anti-arbitration-injunctions-due-to-expiry-the-time-limit-for-the-final-award-case-study/>.

⁵⁶ICC Arbitration Case No. 14695/EC/ND.

⁵⁷Id.

Both Saudi Arabia and Jordan have similar texts in their Arbitration Laws but Article 37 of Jordanian Laws permits parties to repeatedly extend the deadline.⁵⁸ The Syrian Law does not provide for termination of proceedings but on expiry of the time limit, parties can submit the dispute to the Court of original jurisdiction. It also entitles parties to sue for damages caused by this delay by arbitrators.⁵⁹

The 2016 Arbitration Amendment Act introduced similar provisions in India intended to reduce delays, introduce timelines and minimize court interference. Section 29A stipulates that arbitral tribunal must render an award within twelve months from the date on which tribunal entered a reference.⁶⁰ With mutual consent of parties, this can be further extended up to another six months.⁶¹ For any further extension, the parties would have to apply to Indian Courts which may or may not grant it based on whether it finds sufficient cause.⁶² If such extension is denied, the arbitral tribunal is terminated and a new one is constituted to continue arbitration. However, if the extension has been granted but the Court finds that the tribunal's actions delayed the proceedings, the Court can order a reduction in arbitrator's fees by up to 5% for each month of such delay.⁶³

Section 29B provides for fast track arbitration which expedites the process to an extent such that, the arbitration would be complete in six months from the date the arbitral tribunal enters a reference. The parties should agree to this in writing and the procedure takes place

⁵⁸The Arbitration Law No. 31 of 2001, Article 37 states "...In all cases, the tribunal may extend such period provided that the extension shall not exceed six months unless the two parties have agreed on a period of time exceeding that period."

⁵⁹Syrian Arbitration Act, 2008, Article 37 states "...If the arbitration terms have expired and the arbitration board did not settle the dispute without an acceptable excuse, the arbitration party which suffered damage is entitled to refer to the competent court to demand an indemnity from the board."

⁶⁰Arbitration (Amendment) Act, 2016, § 29A (1).

⁶¹Arbitration (Amendment) Act, 2016, § 29A (3).

⁶²Arbitration (Amendment) Act, 2016, § 29A (5).

⁶³Arbitration (Amendment) Act, 2016, § 29A (4).

on the basis of written submissions without any oral hearings, unless the parties request for it or the arbitral tribunal considers it necessary.⁶⁴ The efficiency and application of these provisions of the Indian Arbitration Act and whether they will have their desired effect are yet to be seen.

B. Institutional Laws Governing Fixed Time Lines

Some arbitration institutions like ICC, KLRCA, CCA and AAA have included such a provision in their arbitration rules in order to expedite the process.

Article 30 of the International Chamber of Commerce rules (ICC) provides the tribunal with six months from the date of last signature to render its final award. The Court can extend this deadline based on a reasonable request from the tribunal.⁶⁵ The Court also has the option of fixing a different time limit based upon the procedural timetable established pursuant to Article 24(2).⁶⁶ This time limit established by the ICC is merely an administrative one as it is recognized that very few ICC awards that end in a final award could actually be rendered in a short span of six months. In practice, an arbitral timetable is submitted which gives a considerable amount of time. The Court also provides for extensions taking into account any new estimate provided by the tribunal.⁶⁷ In a 1988 decision by the *German Federal Supreme Court of Justice* such an extension was approved of when

⁶⁴Arbitration (Amendment) Act, 2016, § 29 B.

⁶⁵International Chamber of Commerce Rules, Article 30.

⁶⁶International Chamber of Commerce Rules, Article 24(2) states “During or following such conference, the arbitral tribunal shall establish the procedural timetable that it intends to follow for the conduct of the arbitration. The procedural timetable and any modifications thereto shall be communicated to the Court and the parties.”.

⁶⁷Supra note 3.

the ICC Court granted an extension to a Belgian sole arbitrator.⁶⁸ According to ICC's 2016 guidelines, arbitrator fees may be reduced by 5% to 20% depending on the delay and based on whether the delay is justified.⁶⁹ For example, some delays that arise like when parties request a pause on proceedings as they are attempting a settlement, would be a justified delay. However, merely stating that the issues which arose in the arbitration were of complex nature as a reason for delay would not justify a late award and the arbitrator's fee is likely to reduce.⁷⁰

The Kuala Lumpur Regional Centre for Arbitration Rules (**KLRCA**) in Article 8 stipulates three months from the date of delivery of the closing oral submissions or written statements to the arbitral tribunal. An extension can be provided either by the consent of the parties or by the Director of KLRCA.⁷¹

The Chinese Arbitration Association Rules (**CAA**) deals with delays in Article 41. Article 41 gives 10 days after the closure of hearings and if the time limit set forth under Article 21 of the Arbitration Act has not expired, arbitrators would be reminded to make the award.⁷² However, any delay would lead to the publishing of the arbitrators'

⁶⁸Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 4, 1988, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3090, 1988 (Ger.). See also Appellationsgericht [AG] [Appellate Court of Basel-Stadt], Jan. 2, 1984, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 44, 1985 (Ger.), Oberlandesgericht Karlsruhe [OLG] [Higher Regional Court of Karlsruhe], Jan. 4, 2012, SCHIEDSVZ 101, 106, 2012 (Ger.).

⁶⁹Cynthia Tang et al., HKIAC and ICC Take Steps to Tackle Costs and Delay in International Arbitration, GLOBAL ARBITRATION NEWS (Mar. 14, 2016), <https://globalarbitrationnews.com/hkiac-and-icc-take-steps-to-tackle-costs-and-delay-in-international-arbitration-2016-03-14/>.

⁷⁰Michael Mellwrath, ICC To Name Sitting Arbitrators And Penalize Delay In Issuing Awards, KLUWER ARBITRATION BLOG (Jan. 6, 2016), <http://kluwerarbitrationblog.com/2016/01/06/icc-to-name-sitting-arbitrators-and-penalize-delay-in-issuing-awards/>.

⁷¹Kuala Lumpur Regional Center for Arbitration Rules, art. 8.

⁷²Chinese Arbitration Association Rules, art. 41.

names in the Association's Publications, therefore ensuring that any arbitrator who cares about their reputation would ensure a prompt rendering of the final award.⁷³

Rule 41 of the Commercial Arbitration Rules of the American Arbitration Association (**AAA rules**) also provides a similar provision and requires a prompt award to be made by the arbitrator no later than thirty days from the date of closing of the hearing or the AAA's submission of final statements and proofs to the arbitrator.⁷⁴ Despite the straightforward wording of the provision, the question regarding what constituted a prompt award remains vague.⁷⁵ In *Koch Oil S.A. v. Transocean Gulf Oil Co.*, the Court held that even though the award was received by parties more than thirty days after the close of hearings, due to the fact that the award was signed (but not issued) within the thirty-day deadline, the challenge to the timeliness of the award was rejected.⁷⁶ Therefore, the AAA holds the power to interpret their own rules and the award cannot be vitiated on the grounds of mere technicalities that may arise.

⁷³Supra note 3.

⁷⁴American Arbitration Association, Rule 45 states "The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the due date set for receipt of the parties' final statements and proofs."

⁷⁵Supra note 31.

⁷⁶*Koch Oil S.A. v. Transocean Gulf Oil Co.*, 751 F.2d 551 (2d Cir. 1985).

IV. IMPOSITION OF PROTRACTED TIMELINES FOR ARBITRATION AND ITS DRAWBACKS

The main intention behind the imposition of a timeline is to make the process efficient and for a prompt delivery of the award. While such a timeline may be a sufficient strategy in some situations to ensure that tribunals are prompt, it is not without a few problems of its own. Firstly, arbitration as a dispute resolution mechanism maybe opted for by parties for a variety of matters ranging from disputes on contracts to labour law issues. The time required for an arbitration would hence vary, depending on the technicalities and legal complexities that are present in the case or even on the volume of evidence that maybe presented before the tribunal.⁷⁷ Therefore, setting a general timeline for all arbitration matters would ignore the vast range of issues that could arise. Timelines set in national laws or institutional rules may be unrealistic. This would affect the quality and enforceability of the award.⁷⁸

Most of the national laws and institutional rules require that the parties in need of an extension or in the case of a lapsed deadline are to approach courts to resolve the matter. One of the main factors attracting parties to arbitration is minimal court interference. If court approvals are required for a further extension of the deadline, this defeats the goal of minimising the role played by the courts.⁷⁹ And it would ultimately end up overburdening the courts which is the opposite of the intended effect of arbitration as an alternative dispute

⁷⁷Amendments to the Arbitration Act, THE FIRM: CORPORATE LAW IN INDIA (Oct. 30, 2016), http://thefirm.moneycontrol.com/news_details.php?autono=3893801.

⁷⁸Id.

⁷⁹Prakash Pillai & Mark Shan, Persisting Problems: Amendments to the Indian Arbitration and Conciliation Act, KLUWER ARBITRATION BLOG (Mar. 10, 2016), <http://kluwerarbitrationblog.com/2016/03/10/persisting-problems-amendments-to-the-indian-arbitration-and-conciliation-act/>.

resolution mechanism.⁸⁰ Additionally, on the lapse of the deadline, if the tribunal's mandate is also terminated, this may lead to the reconstitution of a new tribunal which would have to examine the matter presented before them from the start.⁸¹ By such time, the parties involved would have incurred various costs and expenses and restarting the entire arbitration procedure would defeat the imposition of a timeline in the first place.⁸²

Although deadlines encourage arbitrators to conclude proceedings swiftly, a possible disadvantage of a deadline is that parties may find it hard to find arbitrators who are willing to take up the arbitration and complete it within the specific time.⁸³ This may be the case, especially when the arbitrators could be held personally liable for delay and may risk having to pay a penalty.⁸⁴ In order to comply with the deadline, the tribunal may be forced to speed up the process and thereby not give the parties adequate time to present their case, or issue an award which is improperly reasoned due to the paucity of

⁸⁰Id.

⁸¹Kateryna Bondar, Efficiency in International Arbitration, http://gentiumlaw.com/wp-content/uploads/2017/01/ICC_YAF_event_Tbilisi_1-3_Dec_2016_-_Kateryna_Bondar.pdf.

⁸²Id.

⁸³Michael McIlwrath & John Savage, Chapter One: The Elements of an International Dispute Resolution Agreement, International Arbitration and Mediation: A Practical Guide (Kluwer Law International; Kluwer Law International 2010),

<http://www.kluwerarbitration.com.ezproxy.nujs.ac.in/CommonUI/document.aspx?id=kli-ka-1016002-n>.

⁸⁴Prior to the enactment of the Argentinian Arbitration Act, 2015, arbitration in Argentina was governed by the Civil Procedure Code which laid down in Article 756 that if the arbitral tribunal does not issue its award within the time limit stipulated in the Compromiso Arbitral, it will forfeit its right to be paid and may be liable for any damage or loss caused by the delay.

time.⁸⁵ Therefore, the deviation from due process could make the award vulnerable to challenge.⁸⁶

There are also chances that recalcitrant parties may employ means to use the statutory deadline to their own benefits by wasting as much time as possible to ensure that the deadline is not met.⁸⁷ Parties that realize that arbitration may not be going in their favour could bring forth various challenges that may not be relevant, call upon a large number of witnesses, or simply delay the hearings in order to delay the proceedings.⁸⁸ In such a scenario, a fixed deadline would only prove disadvantageous to the parties.

As expeditious as an arbitration concluded within a deadline may prove to be, the drawbacks impose serious challenges. Therefore, while imposing such time limits, pre-emptive measures should be taken to avoid any of the aforementioned shortcomings in the arbitration proceedings that would be detrimental to party interests.

V. CONCLUSION

Arbitration is ideally considered the speedier alternative to litigation and it is only natural that parties expect expediency. Arbitration is becoming a more popular dispute resolution mechanism day-by-day and with more people opting for arbitration and a disproportionate growth in the arbitrator's pool, chances of delays and long drawn out arbitration proceedings increase. The arbitrator has a duty to follow due process and issue a timely award. Delays could negatively impact

⁸⁵Victoria Clark, Time Limits for Awards: The Danger of Deadlines, BERWIN LEIGHTON PAISNER (Aug. 10, 2016), <http://www.blplaw.com/expert-legal-insights/articles/time-limits-for-awards-the-danger-of-deadlines>.

⁸⁶Id.

⁸⁷Supra note 51.

⁸⁸Id.

the quality of the award due to various reasons. Although in most scenarios a delay by itself is not enough to constitute an irregularity serious enough to pose a challenge to the award or grounds to refuse recognition or enforcement of the award, the arbitrators have a duty to carry out proceedings without any undue delay. A delay would have a negative impact on the award only when it can be proved that, had it not been for such a delay, the tribunal would have arrived at a different conclusion. Therefore, the delay must have caused a severe irregularity and must not be a mere technicality. The parties to arbitration should, therefore, consider including a time limit within the agreement or opt for national laws or institutional rules that include a provision for a deadline to govern the arbitration. While it is impossible to have a uniform standard for all arbitrations, one way to mitigate this is to include such a clause within the agreement so that arbitrators also have a fair idea as to the time frame within which the award is expected. However, such a timeline imposed by parties must be practical and should be set keeping in mind the nature of the dispute. It should provide for reasonable flexibility within the arbitration agreement itself. The arbitration agreement should ideally empower the arbitrator to a certain extent to be able to extend the timeline. The arbitrator would know the nuances of the dispute well enough to predict the amount of time required to render the award better than anyone else. This would also provide a solution to minimizing interference by the courts, thus preventing frivolous claims at the courts which are already overburdened. Thus, the inclusion of a practical deadline that is extendable at the will of the arbitrator in the agreement between parties may be the best way ahead in ensuring that awards are issued efficiently and promptly. Arbitral institutions and national laws have now recognised delays as a potential ground for challenging the award and are now actively seeking to tackle this issue by imposing timelines. However, the deadlines will be effective only when a balance is struck between

reasonable extension of the timeline as and when required and when these extensions are sought for legitimate reasons and not just frivolously. Co-operation by parties and vigilant arbitrators are thus, the key to restoring the integrity and expediency of arbitration proceedings.

**EXAMINING VIOLATION OF ADIVASI LAND
RIGHTS BY THE MINING INDUSTRY – A CASE
FOR CROSSING THE FENCE FROM
ANTHROPOCENTRIC TO ECOCENTRIC
PARADIGMS**

Rudresh Mandal & Sathvik Chandrasekhar***

Abstract

The adivasis of India today constitute a community marginalised by decades of historical injustice. The forests they traditionally occupy are regarded merely as natural endowments, valuable only for resource extraction. The adivasis residing in these forests - located in the mineral rich states of Jharkhand, Orissa, Chattisgarh and Madhya Pradesh have thus had to face maximum victimization at the hands of a tyrannical development agenda. This paper argues that the eventual outcome of adherence to the anthropocentric legislations enacted for the upliftment of adivasis is ecocentric in nature. While legislations such as the Scheduled Tribes And Other

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Traditional Forest Dwellers (Recognition Of Forest Rights) Act, 2006, Right To Fair Compensation And Transparency In Land Acquisition, Rehabilitation And Resettlement Act, 2013 and the Panchayat (Extension To Scheduled Areas) Act 1996 formalize inter alia the adivasis' right to free, prior and informed consent and usage of forest resources, this paper seeks to demonstrate the brazen disdain exhibited by the State and the mining lobby towards the aforementioned laws. Contextualising the said non-compliance with the law, Part I of this paper examines the historical injustice faced by the adivasis, and subsequently elucidates the manner in which adivasis construct their identity around their land. Part II then examines the existent legal framework on adivasi rights. It goes on to note a trend, wherein the legal regime, is largely anthropocentric in nature. Basing itself on such finding, Part III of this paper demonstrates the chasm (and not a mere gap) that exists between precept and practice, and connects this non-compliance to the erosion of the adivasi cultural identity. Part IV puts forth that while the said legislations are underscored by anthropocentric ideologies, if complied with, they translate into a realm of environmental protection, that is, a robust ecocentric paradigm.

I. INTRODUCTION

Debating on the Objective Resolution¹ on 13th December, 1946, Jaipal Singh, an adivasi, proclaimed that despite the history of the adivasi community being ‘one of continuous exploitation and dispossession by the non-aboriginals of India’, he was taking the members of the Constituent Assembly at their word that the nation would work towards a just and equitable society, bereft of marginalisation of the adivasis.² The Objective Resolution envisaged a new chapter in the advent of the nascent Indian democracy, based on ideals of equality, non-discrimination and justice. Seventy years later, the treatment meted out to the adivasis of India- the aboriginal population, is a far cry from the aforementioned spirit visualized by the framers of our Constitution. The scope of this paper is however limited to the rights of the tribes of Central India (Jharkhand, Orissa, Madhya Pradesh and Chattisgarh) That the North-Eastern tribes (tribes with greater a literacy rate and awareness of their rights) are located in a remote corner of India, has dissuaded the mining industry from establishing large-scale operations in the land occupied by them.³

Victims of a discriminatory development model⁴, the adivasi population has failed to both preserve their cultural identity as well as successfully integrate into the modern economy and polity. Identifying this predicament, and the centrality of forests and forest land to adivasi identity, adivasi rights centric legislations such as the Panchayat (Extension to Scheduled Areas) Act and the Forest Rights

¹A part of the Resolution stated that ‘adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes.’

²Constituent Assembly Debates, Volume 1, 143-44.

³Ramachandra Guha, Adivasis, Naxalites and Indian Democracy, 42 EPW 32, 3307 (2007).

⁴Id.

Act were enacted to undo the historical injustice meted out to the adivasis. The judiciary has continually reiterated the necessity of such adivasi right-centric legislations⁵ as a mechanism towards achieving an inclusive development model, where the rights of adivasis are sought to be balanced with development requirements. The implementation of these statutes has however been dismal. Both the adivasis as well as the environment at large have emerged as victims of poor implementation.⁶ While the benefits of land acquisition (the ‘environmental goods’) flow to the companies, the tribal population is burdened with pollution brought on by the industrial activities on such land (the ‘environmental bads’—increase in carbon dioxide, loss of biodiversity). The distribution of environmental cost and benefit is uneven and inequitable.⁷

This paper demonstrates the effect of the impact of land acquisition by the mining industry on the adivasis’ rights to free, prior and informed consent, usage rights, mineral-ownership rights and their right to life under Article 21 of the Constitution. With this backdrop, this paper highlights the importance of adherence to the legal framework on land acquisition vis-à-vis adivasi rights. Compliance not only ensures preservation of the adivasi cultural identity and safeguarding of their rights, but also consequently grants recognition to the environment as a distinct entity and accords it with deserved protection.⁸ In doing so, this paper asserts that legal structures influenced by ecocentrism (an approach ascribing rights to the environment) facilitate the attaining of environmental justice, rather than an anthropocentrism (an approach centred around human rights).

⁵Alakananda Hydro Power Company Ltd. v. Anuj Joshi and ors, 2013(3) EFLT 765.

⁶Kanchi Kohli et al., Implementing the Forest Rights Act: Lack of Political Will?, OXFAM INDIA (Nov. 15, 2015), <https://www.oxfamindia.org/sites/default/files/PB-implementing-forest-rights-act-lack-of-political-will-261115-en.pdf>.

⁷Michael Mayerfeld Bell, An Invitation To Environmental Sociology 24-25 (2012).

⁸This would necessarily require a transition into an ecocentric arena.

PART I

Perpetuating Historical Injustice: Tracing The Adivasi Predicament From Colonial To Contemporary Times

The development imperative of the State has brought to the fore concerns of entities that have been systematically excluded from reaping the benefits of such development. Not only are their legitimate interests disregarded, but also severely impaired. The most prominent of these entities includes the ecosystem – responsible for harbouring life, as well as the adivasis.⁹ With relentless consumerism leading to deterioration and pollution of forests, water bodies as well the air, the welfare of the vulnerable, voiceless adivasi community has emerged as the defenceless victim.

The historical disadvantage and injustice that the adivasi community in India has been faced with is immense, and almost irreversible. The ease with which the industrial and political lobby could acquire (often, forcibly) land inhabited by the adivasis is largely attributable to the specific dynamics of the adivasi economy, and their ingenuous modes of living.¹⁰

The fact that today a majority of the adivasis reside in forests and hills is not an overnight phenomenon, but is the culmination of a protracted process of internal colonialism. The demographic character prevalent in the adivasi belt of India is marked by a combination of minority status along with high population density. Clusters of adivasi villages often find themselves encircled by swathes of non-adivasi in the adjoining areas. This ‘enclavement’ is largely a consequence of a historical conflict between the adivasis and the technologically and

⁹Amulya Gopalkrishnan, *The Fear in the Forests*, 20 FRONTLINE 19 (2003).

¹⁰Shankar Chatterjee, *Land and the Adivasi*, 47 EPW 33, 4 (2012).

militarily superior mainstream community which resulted in the oppression of the former. Spanning hundreds of years, the adivasis have been gradually driven into 'refuge zones' (jungles and hills) thus providing the industrialists, backed by the State with the 'objective basis for resource emasculation of adivasi areas through a process of internal colonialism'.¹¹

The plight of the adivasis, exacerbated by years of calculated policies of the State has been continually highlighted by a number of Government appointed committees. The Elwin Committee in 1959 concluded that the poverty that was so ubiquitous amongst the adivasis was 'the fault of us, the 'civilised' people. We have driven (the tribals) into the hills because we wanted their land and now we blame them for cultivating it in the only way we left to them'.¹²

Later, the Dhebar Committee in 1960-61 observed that amongst the myriad problems being faced by the adivasis of India, alienation of land, rejection of forest rights as well as development-induced displacement were the forerunners. While the policies of the Government had occasionally alleviated the suffering of the adivasis, in a majority of situations, such policies had only exacerbated their hardship. The Five Year Plans for example contributed to widespread displacement of the adivasis.¹³ Such development had the potential to shake the very foundations of tribal life. On the question of forest rights, the Dhebar Committee identified that in India, the status of the adivasi, once the lord of the forest, had now reduced to that of a mere subject of the forest administration.¹⁴ Whenever an industrial activity or even a rehabilitation project is contemplated, every forest law and

¹¹Mihir Shah, First You Push Them in, Then You Throw Them Out, 40 EPW 47, 4896 (2005) [hereinafter MIHIR SHAH].

¹²Ministry Of Home Affairs, Report Of The Committee On Special Multipurpose Tribal Blocks, 20 (1960).

¹³Ministry Of Home Affairs, Report Of The Schedules Areas And The Scheduled Tribes, Vol. II, (1961).

¹⁴Id.

rule seems to fade into obscurity.¹⁵ Acres of forest land, along with their tribal inhabitants are ruthlessly exploited, often without any apparent exigency. The observations of these Committees are what provided the cornerstone for the formulation of an ecocentric model of development where conservation of the environment circumscribes within itself protection of tribal rights.

Ironically, it is the restrictive legal system that has perpetuated the social relegation of the adivasis and their economic impoverishment. The vague legal principle of 'eminent domain', whereby the State is empowered to appropriate privately owned land for a 'public purpose' was incorporated in the Land Acquisition Act, 1894. The term 'public purpose' was defined in an expansive manner,¹⁶ and this allowed for large-scale dispossession of land from the hands of the adivasis, even in the years following independence. Even in post-colonial times, the Land Acquisition Act of 1894 continued to operate in its original utilitarian paradigm, with the adivasis continuing to be evicted from their traditional lands indiscriminately. It was only in 2013 that The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 came into force.¹⁷ Secondly, in the oral culture followed by the adivasis, there existed a minimal conceptualisation of land as private property. Legal documentation of ownership was also invariably absent. Thus, in the Indian Forest Act, 1927, the British, relying on the ambiguous legal doctrine of 'res nullius' (a principle which allows the State to appropriate stretches of land, if the alleged owners do not have the requisite title documents), at one go, assumed ownership of forest

¹⁵Ramachandra Guha, Unacknowledged Victims, OUTLOOK (Apr. 14, 2010), www.outlookindia.com/website/story/unacknowledged-victims/265069.

¹⁶The scopious definition of 'public purpose' in Section 3(f) encircled a wide number of situations where the State could acquire land under the Act.

¹⁷Venkat Ananth, The evolution of the Land Acquisition Act, LIVEMINT, May 22, 2015.

land traditionally occupied by the adivasis, and evicted them in the process.¹⁸

Having been pushed into the aforementioned refuge zones by virtue of the practice of internal colonialism, the adivasis progressively developed a symbiotic relationship of dependence with these forests and hills. Today, they are the victims of a development model which is supposed to be inclusive. The adivasis are being relentlessly driven out of these refuge zones, located in mineral rich areas such as the forests of Jharkhand, Orissa, Chattisgarh and so on.¹⁹ Consequently, survival needs compel them to search for sustenance in the towns and cities, where they generally remain steeped in poverty, largely due to their lack of education and skill. Post-Independence, following deregulation of the mining industry in accordance with neo-liberal policies and the consolidation of the open market mechanism, the exploiting of forest resources by mining companies has only aggravated.²⁰ The surge of appropriation and destruction of common property resources (the water bodies and forests) has continued without considering the staggering social cost which the helpless adivasis have to bear.²¹ The fact that contemporary Indian society is marked by an absence of qualitative or quantitative insight into the adversity faced by the adivasis due to development projects, bears testimony to the sheer disregard our politicians, policymakers and industrialists have displayed towards the rights, perspective and experiences of the adivasi community.²²

¹⁸Rahul Banerjee, Adivasis and Unjust Laws, 42 EPW 39, 4010 (2007).

¹⁹MIHIR SHAH, *supra* note 11.

²⁰Brinda Karat, Of mines, minerals and tribal rights, THE HINDU, May 15, 2012.

²¹Dr. Romesh Singh, Mining and Its Impact on Tribals in India: Socio-Economic and Environmental Risks, 3 INTERNATIONAL JOURNAL OF SOCIAL SCIENCE AND HUMANITIES RESEARCH 2, 430 (2015) [hereinafter ROMESH SINGH].

²²Chitrangada Choudhury, Adivasis and the New Land Acquisition Act, EPW (Oct. 12, 2013), www.epw.in/journal/2013/41/web-exclusives/adivasis-and-new-land-acquisition-act.html.

However, India's development philosophy today has evolved into a paradigm wherein the intrinsic link between the adivasis and the forests they occupy have been recognized. Flowing from such recognition arose legislations such as the Forest Rights Act, 2006 (hereinafter the **FRA**) and policies such as the National Wildlife Action Plan, 2002, the National Biodiversity Strategy and Action Plan and later, the National Environmental Policy, 2006.²³ These policies revolve around the understanding that environmental conservation is an essential prerequisite towards ensuring the welfare of the tribal people. The demands of conservation and the demands of safeguarding adivasi rights cannot be separated from one another.

*A. The Derivation Of Adivasi Identity From Traditionally
Occupied Land*

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources..

- Preamble, United Nations Declaration on the Rights of Indigenous Peoples.²⁴

The identity of the adivasis almost solely revolves around the territory/land traditionally occupied by them. Not only is economic subsistence intricately inter-woven with land, but land is also central to the social identity of adivasis.²⁵ More importantly, the rights of adivasis over their ancestral land, is generally conceptualised around

²³Ramachandra Guha et al., *Deeper Roots Of Historical Injustice: Trends And Challenges In The Forests Of India* 55 (2012) [hereinafter GUHA et. al].

²⁴United Nations Declaration on the Rights of Indigenous Peoples, 2008, Preamble.

²⁵Asian Development Bank, *Land And Cultural Survival: The Communal Land Rights Of Indigenous Peoples In Asia* 15-16 (2009) [hereinafter ADB].

an understanding of the spiritual bond they share with the said land. For the adivasis, the economic importance of land pales in comparison to the religious and sentimental value of their ancestral land.²⁶ If they cannot enjoy the 'material and spiritual' elements associated with their land, the preservation and subsequent inter-generational transmission of their cultural legacy will be a distant dream.²⁷ It is through their harmony and intimate understanding of and spiritual relationship with the environment,²⁸ that the adivasis have sustainably managed and used the forests for years.

The centrality of land to the existence of tribal people necessitated recognition on part of the State to ensure that the rights of the tribals over their ancestral land were protected. The United Nations Declaration on the Rights of Indigenous Peoples (hereinafter **UNDRIP**) and the Indigenous and Tribal Peoples Convention, 1989 or the International Labour Organisation Convention No. 169 (hereinafter **Convention 169**) locate universally applicable human rights (thus, creating a moral as well as legal obligation for States to safeguard and fulfil these rights) and situate them within the paradigm of tribal people, emphasizing upon the collective nature of tribal rights and seeking to mitigate the historical as well as prevalent disadvantages and discrimination that they are compelled to deal with.²⁹ Underlying both the UNDRIP as well as Convention 169, is the principal understanding of the cultural, religious and economic relationship between tribal people and the land they inhabit. Article 13 of Convention 169, for instance, requires States to honour and

²⁶Jo Pasquallaci, 27 WISCONSIN INTERNATIONAL LAW JOURNAL 51, 55-57 (2009).

²⁷Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79.

²⁸Plan de Sánchez Massacre v. Guatemala, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116.

²⁹Birgitte Feiring, Indigenous peoples' rights to lands, territories, and resources, INTERNATIONAL LAND COALITION (2013), www.landcoalition.org/sites/default/files/documents/resources/IndigenousPeoplesRightsLandTerritoriesResources.pdf.

protect the plethora of values tribal people accord to the land they occupy.

While there exists little discussion on tribes qualifying as 'indigenous', ILO Convention 169 regards indigenous people as those who are the descendants of the inhabitants of a particular land, 'at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.'³⁰ The Convention further deems self-identification as indigenous as sufficient to attract the protections of the Convention.³¹ To this extent, the Supreme Court of India in *Kailas v. State of Maharashtra*³² recognised that the adivasis were indigenous people, since they were the descendants of the pre-Dravidian aborigines. Finally, the tribes of India identify themselves as 'adivasi', which translates into 'original inhabitants' i.e. indigenous, a term associated with pride and esteem, thus affording them the protection of the Convention. The Oraons of Jharkhand, for instance, established settlement in what is today, India, prior to even the Aryans.³³

The Inter-American Court of Human Rights, in *Saramaka People v. Suriname*,³⁴ concluded that the cornerstone of tribal identity is the land traditionally occupied by them. Tribal people thus have a right to maintain their 'spiritual relationship with the territory they have traditionally used and occupied'. Similarly, in India, the Supreme Court in *Orissa Mining Corporation Limited v. Ministry of*

³⁰Indigenous and Tribal Peoples Convention, 1989 (No.169), Article 1(1).

³¹Id. at art. 1(2).

³²*Kailas v. State of Maharashtra*, (2011) 1 SCC 793.

³³Virginius Xaxa, Tribes as Indigenous People of India, 34 EPW 3589, 3593-3595 (1999).

³⁴*Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172.

Environment and Forest³⁵ (hereinafter Orissa Mining Corporation), recognising the spiritual and religious relationship the Dongria Kondh tribe shared with the land traditionally occupied by them in the Niyamgiri hills, prevented Vedanta Resources from establishing a bauxite mine in the area. Earlier, the Court in *Samatha v. State of Andhra Pradesh*³⁶, a case concerning acquisition of tribal land for mining, also upheld the right of adivasis to their land and forests. Impliedly acknowledging that land lies at the heart of tribal identity, it went on to hold that if land were indiscriminately acquired by non-adivasis, it would ‘wipe out the very identity of the tribals’.

Despite the widespread statutory, as well as judicial recognition granted to the importance of land to the tribal community, at the grass-root level, this recognition has barely translated into reality. The right to property today being a constitutional right under Article 300A of the Constitution empowers the State to acquire adivasi lands by legislative action and leaves the adivasis without a subsequent adequate remedy. The Xaxa Committee noted the additional disadvantages faced by the adivasis due to the right to property not being a fundamental right.³⁷ Further, the failure of the Joint Forest Management programme to efficiently consolidate the long-term interests and traditional rights to the land occupied by the adivasis was also severely detrimental to their identity.³⁸ The acquisition of tribal land by development houses, destroys the adivasis’ sense of self and identity which is intimately associated with the land, as happened

³⁵*Orissa Mining Corporation Limited v. Ministry of Environment and Forest*, (2013) 6 SCC 476.

³⁶*Samatha v. State of Andhra Pradesh*, 1997 8 SCC 191.

³⁷Ministry Of Tribal Affairs, Report Of The High Level Committee On Socioeconomic, Health And Educational Status Of Tribal Communities Of India 253 (2014).

³⁸TV Ramchandra & AV Nagarathna, Joint Forest Management: Issues and Experiences, ENERGY & WETLANDS RESEARCH GROUP (2008), www.ces.iisc.ernet.in/energy/water/paper/Joint_Forest_Management/index.htm.

in Kandhamal, Orissa.³⁹ With the spiritual and economic practices of the adivasis often revolving around the land, indiscriminate land acquisition impedes their very identity. Further, when sacred land is no longer possessed by the adivasis, they cannot pass on their cultural legacies to the next generation, pushing their traditional identities to extinction. The following parts of this paper will go on to examine the extent of non-compliance with existent legal obligations and the need/importance to abide by the statutes, in order to not only ensure preservation of the adivasi identity, but of the environment at large.

PART II

II. A PERUSAL OF THE DOMESTIC AND INTERNATIONAL RIGHTS-BASED LEGAL REGIME ON ADIVASI LANDS & FORESTS

The process of land acquisition in India was chronicled by regressive colonial laws that empowered the State to grab '*terra nullius*'⁴⁰ land from the possession of the Adivasi community, regarded as intruders in the forests. This was often done under the guise of the 'public purpose' and 'eminent domain' doctrine without providing for any semblance of a consent-based mechanism⁴¹, which resulted in the systemic displacement of numerous tribes, like the *Oraon in Jharkand* and the *Dongria Kondh*, in Orissa. However, the Indian legal regime has transformed positively to accommodate indigenous claims over

³⁹Brannon Parker, Orissa In The Crossfire: Kandhamal Burning 55 (2011).

⁴⁰Terra nullius, or the 'land of no one', in this context refers to the land traditionally occupied by the adivasis, over which they do not have any documentation to prove ownership.

⁴¹The prevalence of these doctrines was seen in the Land Acquisition Act, 1894. This was the central legislation used by the State to forcibly acquire land.

land. This process has largely been aided by the Supreme Court, as the history of coercion and oppression was recognized by the Court on numerous occasions.⁴² Indigenous Rights have been cemented in Indian jurisprudence, relying on international instruments such as ILO Convention 169 and the UNDRIP. This transformation engineered by the Supreme Court, has in turn given rise to various attempts by the State formalize and enforce the right(s) of the indigenous communities over their land, by providing for various safeguards and mechanisms that strengthen the said right(s). Owing to such enactments, the helpless adivasi community, a primary stakeholder in the process of land acquisition, is provided with avenues enabling them to voice their concerns and safeguard their lands.

A. *The Constitution: Enshrined Principles And Judicial Pronouncement*

The cornerstone of the legal regime on land acquisition in India is provided by the Constitution, where the land rights of the adivasis found much-needed recognition. By categorising the adivasis as Scheduled Tribes,⁴³ the State acknowledged the historical persecution and the atrocities committed against them, with a view to reversing such injustices. Locating the claims of the adivasis in custom, the Constitution endeavours to uphold the symbiotic relationship between the adivasis and their land. The lands, over which the adivasi community has a 'customary right', have been termed as scheduled areas.⁴⁴

The rights of indigenous communities over their ancestral land have also been articulated as a fundamental right, by judicial dicta. The

⁴²Ipshita Chaturvedi, A Critical Study of Free, Prior and Informed Consent in the Context of the Right to Development — Can “Consent” be Withheld?, 5 JOURNAL OF INDIAN LAW AND SOCIETY 50 (2014).

⁴³Indian Const. art. 342.

⁴⁴Indian Const. V Schedule.

Supreme Court, has broadened the scope of Article 21 (the right to life) to encompass the land rights of the adivasi community. In *Samatha*⁴⁵ the Supreme Court, acknowledging the historical claim of the Adivasis reversed the prior transfers of tribal land made to private mining entities.

A neoteric instance, where the land rights of indigenous communities was enunciated vis-à-vis fundamental rights by the Supreme Court, was observed in *Orissa Mining Corporation*,⁴⁶ where the Court derived the right of consent of the Dongria Kondh, from their fundamental right to religious freedom. Yielding a remarkable fillip to notions of an inclusive development agenda, the Court held that the Dongria Kondh would decide whether the proposed bauxite mine affected their religious and cultural rights. However, the Court did not explore the question of whether there should exist limits upon the exercise of consent by the adivasis.

Specific Enactments With Respect To Land Acquisition: A Manifestation Of Environmental Concerns Through Consent And Consultation Mechanisms

There has been a marked change in the legal position, in favour of the indigenous communities, with a transformative revamp in the principles underlying land acquisition. By limiting the exercise of ‘eminent domain’ and affording statutory recognition to democratic notions such as the right to free, prior and informed consent (hereinafter FPIC), the Indian legislature has aspired to construct an inclusive development agenda.

The primary legislation on land acquisition is The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation

⁴⁵*Samatha v. State of Andhra Pradesh*, supra note 36.

⁴⁶*Orissa Mining Corporation Limited v. Ministry of Environment and Forest*, supra note 35.

and Resettlement Act, 2013 (hereinafter **LARR**). In a paradigmatic shift from the public purpose doctrine, crystallised in the Land Acquisition Act, 1894 (which currently stands repealed), the current regime provides various safeguards to the adivasis. Mandating consent from the adivasi community, for both private-public partnerships and private acquisitions,⁴⁷ the LARR Act seeks to reinforce the adivasis' right of FPIC. Additionally, the prior consent of the representative bodies such as the Gram Sabha has to be obtained.⁴⁸ Although Gram Sabhas do not entirely represent adivasi interest due to entrenched cultural differences, the consent requirement embodies protection which was not present earlier. There is also a provision for an independent body to conduct social impact assessments.⁴⁹ A social impact assessment has been envisaged to be a study conducted by an autonomous body of experts, to delineate the probable social aftermath of the land operations. It is distinct from an environmental impact assessment, as it aims to examine the 'social, cultural and economic' rather than the 'environmental' outcomes of the project. The assessment, as a requirement, must be undertaken in consultation with the affected communities. The LARR Act however, exempts the Coal Bearing Act (an Act notorious for its lack of social impact assessment and consent mechanisms and hence widely used by the mining industry to acquire land) from fulfilling the former's statutory requirements.⁵⁰ The dreadful effects of the above exemption on adivasi land rights have been elucidated in the subsequent chapter.

⁴⁷Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Section 2, Proviso (1).

⁴⁸Id. at § 4 (1).

⁴⁹Id. § 4.

⁵⁰When Land is Lost Do we Eat Coal: Coal Mining and Violations of Adivasi Rights in India, AMNESTY INTERNATIONAL (July 2016), https://www.amnesty.org.in/images/uploads/articles/COAL%20BREPORT_11_FIN_AL_on_27-7-2k16_LOWRES.pdf [hereinafter AMNESTY].

An enactment on similar lines is the Panchayat (Extension to Scheduled Areas) Act (hereinafter **PESA**), 1996. Instrumental in extending the 1993 Constitutional Amendments, which conferred powers of overseeing local developments on Panchayats to Scheduled Areas, the provisions of the Act, require any corporation intending to acquire tribal land to ‘consult’ (However, the Act does not define the term consult, and what such a consultation must entail, leaving it dangerously open to interpretation. The compliance requirements, prior to the acquisition of land, were subsequently elucidated by executive orders issued by the Ministry of Rural Development, mandating Corporations to obtain letters of consent from the Gram Sabhas in the region) the Panchayat or Gram Sabha before doing so. A further round of consultation must also be held before resettling or rehabilitating the affected parties. Additionally, executive orders were issued by the Ministry of Rural Development stating that corporations can acquire land only after obtaining letters of consent from the Gram Panchayats in the region.

The Gram Panchayats, situated in close proximity to forests, have been empowered to adjudicate on the usage of forest land for non-forest purposes, by the provisions of the FRA.⁵¹ The Act confers upon forest-dwellers the right to occupy and live on the forest land, the right to use the surrounding forest resources, right to FPIC, right to rehabilitation, the right to gain ‘traditional knowledge’⁵² using the surrounding ecosystems and any other traditional rights that were previously enjoyed by the communities.⁵³

⁵¹Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Act, 2006, § 6(1).

⁵²Id. § 3 (1).

⁵³This circumscribes all the traditional rights, except the right to hunt or trap animals.

The right of being consulted and FPIC has been extended to the realm of environmental protection, by way of the provisions of the Environmental Protection Act. The Ministry of Environment and Forests has mandated Environmental Impact Assessments (**EIA**) for industrial projects.⁵⁴ The procedure for the EIA, explicitly undertaken to further the objective of environmental protection, confers the right to object, a sub-set to the broader right of consent upon the local communities. The right to consent has been afforded to these communities, by way of providing for public consultations that are to be mandatorily held (before the industrial project is approved) with stakeholder communities who are likely to bear the burden of the environmental externalities of the project.⁵⁵

Further, the corporation intending to engage in such activity, has to submit a draft EIA report in English and the local language to the representative bodies of the region, who in turn are required to publicise the report and the proposed project, in order to invite public scrutiny.⁵⁶ Therefore, if the public presentation of the Environment Impact Assessment report does not receive any objections from the concerned communities, the corporation is considered to be compliant with the provisions of the EPA. Consequentially, the commencement of the corporation's activities is made contingent on receiving no objections from the concerned communities. The presence of such provisions reinforces the importance of the right of FPIC of the concerned communities. It also serves as an indicator of the rights-based approach taken by the legislature, pursuing the ultimate goal of

⁵⁴Environment Impact Assessment Notification, MINISTRY OF ENVIRONMENT AND FORESTS (Jan. 27, 1994), [envfor.nic.in/legis/eia/so-60\(e\).pdf](http://envfor.nic.in/legis/eia/so-60(e).pdf).

⁵⁵In the notification, issued by the Ministry of Environment and Forests on preparation of Environmental Impact Assessment reports, public consultations have been recognized as a stage in a four stage process consisting of screening, scoping, public consultation and appraisal.

⁵⁶Notification issued by the Ministry of Environment and Forests, MOEF (Sept. 14, 2006), envfor.nic.in/legis/eia/so1533.pdf [hereinafter EIA NOTIFICATION].

environmental protection, albeit through a legal framework of protection of adivasi rights. The end of safeguarding the environment is attempted to be achieved by adopting a human rights approach.

At a global level, the right to FPIC has also assumed great importance. Internationally, India has endorsed various instruments that have recognised the importance of consent and consultation of indigenous communities, prior to the process of land acquisition. The right to FPIC, part of the fabric of the right to self-determination of indigenous people⁵⁷ is a standard recognized globally by the UN Committees on Economic, Social and Cultural Rights, UN Committee on the Elimination of Racial Discrimination, United Nations Forum on Forests et al.⁵⁸ The UN Declaration on the Rights of Indigenous People (Articles 10, 11, 19, 28, 29) also regards this right as the crux of the movement towards ensuring the protection of tribal people's rights. The importance of FPIC in the context of environmental protection has also been recognised by the Nagoya Protocol⁵⁹ and the Convention on Biological Diversity.⁶⁰

Notwithstanding the environmental cost of the process of land acquisition (specifically arising from its aftermath – mining, dam construction and so on), the legal regime governing land acquisition has been schematised around the core objective of protection of the

⁵⁷Tara Ward, The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law, 10 NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS 2, 55 (2011).

⁵⁸P. Tamang, An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices, UNITED NATIONS (Jan. 2005), www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_tamang.doc.

⁵⁹The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization was ratified by India on 18th February, 1994.

⁶⁰The Convention on Biological Diversity is a multi-lateral treaty and was premised on anthropocentric principles such as sustainable development and fair, equitable sharing of benefits of natural resources.

rights of the adivasis over their land. This rights-based framework has continually been espoused by judicial doctrine, legislations as well as the Constitution. The same phenomenon is apparent in the realm of environmental protection. The Statement of Object and Reasons, of the Environment Protection Act, for example, refer to the Act as a general legislation directed towards attaining environmental protection. The protection and improvement of the environment is the axis around which the Act revolves.⁶¹ However, notifications issued by the Ministry of Environment, Forests and Climate (responsible for the implementation of the Act) under the Environmental Protection Act, have strived to fortify the land rights of the adivasis, by providing for public consultations and the right to object to corporate usage of the said land.⁶² An unequivocal human rights centric approach has thus been taken by the legal regime concerning land acquisition.*(emphasis added)* The following part of this paper goes on to examine the levels of compliance with this approach taken by the legislature and judiciary to safeguard adivasi rights.

PART III

III. NON-COMPLIANCE WITH THE RIGHTS-BASED LEGAL FRAMEWORK: A RECURRENT PHENOMENON

The gap and inconsistencies prevalent between ‘law on the books’ and the ‘law in action’ is a phenomenon apparent in all realms of law. However, while dealing with environmental law, this gap is often a chasm, and is spread over every level of the enviro-legal system.⁶³The

⁶¹Environmental Protection Act, 1986, The Preamble.

⁶²EIA NOTIFICATION, *supra* note 56.

⁶³Daniel Farber, Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law, 23 HARV. ENVTL. L. REV. 297, 297-301 (1999) [hereinafter FARBER].

coercive model (or deterrence model) to compliance with law is premised on the understanding that the bodies whose activity the law seeks to regulate are rational economic actors, complying with the law only at the stage where the benefits of non-compliance are exceeded by the costs of the same.⁶⁴ Per contra, as Gary Becker argues, potential deviants react *inter alia* to the probability of detection and subsequent punishment and ensure compliance at a point wherein it would be economically imprudent for them to violate the law.⁶⁵ However, if the offenders are not brought to book - if sanctions are not imposed upon them, the deterrence model fails and non-compliance with the law becomes recurrent. This is all the more applicable while discussing discords with environmental legislations, where the reasons for nonconformity are not restricted to mere anti-social conduct,⁶⁶ but are far more intricate, encompassing systematic non-compliance and development concerns.

In India, when it comes to law dealing with adivasi land rights and its interface with the mining industry, compliance is a rare sight. With the State indulging in violent repressive measures to curb adivasi protests against mining, as in Gadchiroli⁶⁷ in its attempt at pushing forward an aggressive development policy, the benefits of the industry's non-compliance with statutes such as the Forest Rights Act and the PESA Act far outweigh the costs. That the penalty imposed upon State authorities for violating provisions of the Forest Rights

⁶⁴Robert Glicksman & Dietrich Earnhart, Coercive vs. Cooperative Enforcement: Effect of Enforcement Approach On Environmental Management, 42 INT'L REV. OF LAW & ECON, 135-138 (2015).

⁶⁵Gary Becker, Crime and Punishment: An Economic Approach, 76 JOURNAL OF POLITICAL ECONOMY 2, 169-217 (1968).

⁶⁶FARBER, *supra* note 63.

⁶⁷Javed Iqbal, The Mining of Another Adivasi God, THE WIRE (2016), <https://thewire.in/62281/in-gadchiroli-the-mining-of-another-ativasi-god/>.

Act is pegged at a paltry thousand rupees,⁶⁸ bears dangerous testimony to the corporate- State nexus disrespecting adivasi rights.

**A. *Violation Of The Right To Free, Prior And Informed
Consent***

The requirement for obtaining consent and holding prior consultations, especially considering the intrusive character of large-scale development projects, is the pre-cursor to meaningful effectuation of the adivasis' right to health⁶⁹, a wholesome environment, religion and so on. For the adivasi community, the mechanism of FPIC is one of paramount importance. Not only does it empower the adivasis to exert control over their ancestral land, but it also enables them to pursue their right to development as a distinct segment of the populace, and thereby preserve their rapidly-disintegrating unique cultural identity.⁷⁰ The *Supreme Court, in Orissa Mining Corporation Limited v. Ministry of Environment and Forest* recognising the gravity of prior consent of the adivasis (whose traditional rights were being impeded) annulled the agreement between the mining corporation and the Government, since it excluded their consent.

However, there exists a massive disparity between precept and practice. A report published by Amnesty International points out that the consent of adivasis was completely ignored while the expansion of the Kasmunda mine was underway. Similarly, while acquiring adivasi land for the Basundhara West mine, the consent of the

⁶⁸Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Act, supra note 43, § 7.

⁶⁹Indigenous and Tribal Peoples' Rights over Natural Resources, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, cidh.org/countryrep/Indigenous-Lands09/Chap.VIII.htm.

⁷⁰Free Prior and Informed Consent: an indigenous peoples' right and a good practice for local communities, FAO, <http://www.fao.org/3/a-i6190e.pdf>.

adivasis was once again sidestepped.⁷¹ It seems to be common practice not only in India, but also worldwide that even in the rare cases when consent is obtained, in reality it is engineered⁷² often through the use of pressure tactics on villagers or by forging gram sabha resolutions, as was done in Orissa to facilitate iron ore mining.⁷³ In Singrauli, notwithstanding vehement opposition from the Forest Advisory Committee and the MoEF, licenses for mining were granted to two companies, with the apparent consent of the affected adivasis. Later, it was brought to light that the consent given by the adivasis, was in fact fraudulent, since it was never really given, and was constructed by the mining company, thus standing vitiated.⁷⁴

Such violations of the right to FPIC cast grave aspersions on the existence of the protective enactments with the adivasis being dependent on land for economic and cultural sustenance. A crucial reason for such violations is embodied in the Coal Bearing Act itself, which excludes social impact assessment systems and prior consultation and consent of adivasis likely to be affected by the said process. The clash between the consent requirements mandated by the Forest Rights Act and a lack thereof in the Coal Bearing Act creates a dangerous situation of confusion and uncertainty, facilitating deliberate misreading of the labyrinthine laws. The fact that in cases of land acquisition under the Coal Bearing Act, the Act ousts the

⁷¹AMNESTY, *supra* note 50.

⁷²Marcus Colchester & Fergus MacKay, In Search of Middle Ground: Indigenous Peoples, Collective Representation And The Right To Free, Prior And Informed Consent, 10TH CONFERENCE OF THE INTERNATIONAL ASSOCIATION FOR THE STUDY OF COMMON PROPERTY (May 7, 2004), http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/974/Colchester_Search_040508_Paper107d.pdf?sequence=1.

⁷³Chitrangada Choudhury, Making a hollow in the Forest Rights Act, THE HINDU, Apr. 8, 2016.

⁷⁴Usha Ramanathan, Where do Adivasis stand in Indian law?, INTERNATIONAL ENVIRONMENTAL LAW RESEARCH CENTRE (Feb. 27, 2015), www.ielrc.org/content/n1504.pdf.

application of the PESA Act only exacerbates the plight of the adivasis, whose rights to FPIC are disdainfully violated.⁷⁵

Despite the Supreme Court's recognition⁷⁶ of the importance of the right to FPIC, albeit in the context of the PESA Act only, unless the Government and the mining industry view the requirement to obtain 'consent' as a genuine humanitarian concern as and not as a mere barrier to overcome, true progress in this regard cannot be made. It is only through channels of treaties, international human rights statutes, national legislations, judicial pronouncements and 'inherent sovereignty'⁷⁷ that adivasis assert their right to FPIC in their endeavour to secure their indigenous value system, identity and practices. Unless this right is effectively protected, not only will the extinction of the adivasis be perpetuated, but community forest management programmes and ecocentric policies will be insurmountable tasks to implement.

B. Violation Of Usage Rights

For the adivasis who live in and around forests, the usage of forest produce such as medicinal plants and timber are imperative for not only their economic subsistence,⁷⁸ but also for a variety of socio-cultural purposes. In view of this dependency relationship between the adivasis and the forests,⁷⁹ Section 3(1) of the FRA, democratising governance of forests and establishing community ownership, empowered the adivasis to control and use the forest and its resources ('minor produce'). Further, the PESA Act also grants legal

⁷⁵AMNESTY, *supra* note 50.

⁷⁶Orissa Mining Corporation Ltd. v. Ministry of Environment and Forests, *supra* note 30.

⁷⁷COLCHESTER, *supra* note 72.

⁷⁸Numbers Of Forest 'Dependent' Peoples And Types Of People Forest Relationships, FAO, <http://www.fao.org/docrep/w7732e/w7732e04.htm>.

⁷⁹ The National Forest Policy, 1988 recognizes the 'symbiotic relationship between the tribal people and forests'.

recognition to adivasi usage rights. Thus, today, adivasis are legally entitled to the rights of usage of the forest land. However, violent social conflicts in the forests of India continue to occur and often revolve around the discord between commercial interests of the industries and the adivasis right to livelihood from the forest.⁸⁰

The mining industry, ably supported by the State provides strong opposition to relinquishing the State monopoly, originally conceptualized by the British, over the forest and its resources. The Joint Forest Management was only a meagre ‘incremental improvement in user rights of communities dwelling in and around forests.’⁸¹ Later, a report jointly published by the Ministry of Environment and Forests and the Ministry of Tribal Affairs noted that the status of the implementation of the Community Forest Rights⁸² (of which ‘usage rights’ is a subset) under the FRA was dismal and needed thorough improvement.⁸³ Notwithstanding the statutory recognition of adivasi usage rights, the violation of the same is attributable to state advocacy of the urgency of development needs.

For instance, the illegal acquisition of land for the purposes of mining by the South Eastern Coal Fields in Korba⁸⁴ and in the case of the Jurudi manganese mines⁸⁵ without providing adequate compensation

⁸⁰GUHA et. al, supra note 18, at 23.

⁸¹ADB, supra note 25.

⁸²Community Forest Rights refer to ‘the customary common forest land within the traditional or customary boundaries of the village or seasonal use of landscape in the case of pastoral communities, to which the community had traditional access’.

⁸³NC Saxena et al., Joint MoEF- MoTA Committee, Manthan – Report of National Committee on Forest Rights Act, GOVERNMENT OF INDIA (2010), <http://rajbhavan-maharashtra.gov.in/rajbhavan/pdf/tribalcell/FRA%20COMMITTEE%20REPORT%20N%20C%20SAXENA.pdf>.

⁸⁴Saumya Ranjan Nath, Illegal and unfair acquisition of mining land in Korba, DOWNTOEARTH (June 29, 2016), <http://www.downtoearth.org.in/news/illegal-and-unfair-acquisition-of-mining-land-in-korba-54627>.

⁸⁵Justice MB Shah Commission of Enquiry for Illegal mining of Iron Ore & Manganese, Second Report on Illegal Mining of Iron and Manganese Ores in the

and the benefit accruing from such acquisition to the adivasis have resulted in gross violations of usage rights enumerated under Section 3(1) of the FRA. For the adivasis living around the Tetariakhar mine, the gair mazrua land (common land) was their principal source of livelihood and sustenance for years, by virtue of its rich forest produce inter alia. The use of the draconian Coal Bearing Act, to acquire the gair mazrua land by Central Coalfields Limited left the Oraon community without their primary avenue of survival.⁸⁶ With the adivasis' right to the usage of the forest produce on these lands, their chances at mere sustenance are drastically reduced.

It is the adivasis who are burdened with the livelihood and social cost of mining, which has thus become a 'resource curse' for them.⁸⁷ Deep-rooted administrative intransigence towards the FRA and PESA provisions on usage rights is counterproductive in removing historical injustices faced by the adivasis. The alarming trend of illegal revocation of such community forest rights, (as evidenced by the recent scandal surrounding land acquisition by Adani Mining in Chattisgarh⁸⁸) is a process that, if allowed to continue significantly undermines the adivasis' rights to food and livelihood, and jeopardizes their chances of survival.

a) Violation Of The Ownership (And Benefits Therefrom) Rights Over The Minerals Of The Adivasis

State of Odisha, (Oct., 2013), <http://mines.nic.in/writereaddata/UploadFile/Second%20Report%20on%20Odisha%20Vol%20-%20II.pdf>.

⁸⁶AMNESTY, supra note 50.

⁸⁷Chitrangada Choudhury, Mining at Any Cost: The Odisha Government's Continued Dismissal of Adivasi Rights, THE WIRE (May 16, 2016), <http://thewire.in/35711/mining-at-any-cost-the-odisha-governments-continued-dismissal-of-adivasi-rights/>.

⁸⁸Kanchi Kohli, Mining is in the Way of Adivasi Forest Rights, Not the Other Way Round, THE WIRE (June 7, 2016), <http://thewire.in/40405/mining-is-in-the-way-of-adivasi-forest-rights-and-not-the-other-way-round/>.

Article 26 of The UN Declaration on the Rights of Indigenous Peoples, signed by India stipulates that indigenous people have rights over land and resources ‘traditionally owned, occupied or used’ by them.⁸⁹ Further, the State should accord ‘legal recognition and protection’⁹⁰ to them. Article 15(2) of ILO Convention 169 on tribal people goes further, and mandates the State to include indigenous people in exploration of natural resources conducted on their land, and to provide them with a share of possible benefits.

The Supreme Court of India in *Threesiamma Jacob v. Department of Mining*⁹¹ deconstructed the State’s dominant narrative that ownership of sub-surface minerals vests in the State. It further held that such ownership would ‘follow the ownership of the land, unless the owner of the land is deprived of the same by some valid process.’ In India however, the rights of the adivasis to ownership over and benefits from the land and the minerals contained therein are routinely violated. The political contention that the ownership rights over the minerals vest in the State, owing to land settlement systems, such as the Ryotwari System have been argued against vehemently by the judiciary.

However, reminiscent of the Regalian Doctrine, which vested ownership of minerals in the State⁹² (depriving the traditional occupants), the innumerable forcible acquisitions of land, as seen in Jharkand, Orissa and Chattisgarh,⁹³ are a departure from the statutory requirements and judicial pronouncements. To salvage the existent

⁸⁹United Nations Declaration on the Rights of Indigenous Peoples, 2008, art. 26(1).

⁹⁰Id. art. 26(3).

⁹¹*Threesiamma Jacob v. Geologist, Dptt. of Mining and Geology and Ors*, AIR 2013 SC 3251.

⁹²John Rogers & Geoffrey Feiss, *People And The Earth: Basic Issues In The Sustainability Of Resources And Environment* 240 (1998).

⁹³Girija Shivakumar, *Jairam: forcible land acquisition by PSUs led to Naxal problem*, THE HINDU, Sept. 8, 2013.

clash between development and consent, perhaps the adivasis themselves could be engaged in mining in an attempt to also help them attain economic upliftment.⁹⁴ By engaging themselves in largely unskilled forms of employment in the mining industry, the tribals of Orissa have reaped the benefits of economic upliftment.⁹⁵

C. Violation Of The Adivasis' Right To Life

Mining itself endangers the 'right to life guaranteed by Article 21' which 'includes the right of enjoyment of pollution-free water and air for full enjoyment of life.'⁹⁶ The Supreme Court, in *MC Mehta v. Union of India* further held 'life, public health and ecology have priority over unemployment and loss of revenue.'⁹⁷

It is the adivasis, living nearby mines who have to bear the brunt of mining waste, which pollutes adjoining water bodies, rendering them incapable for use. Vast expanses of land are also left infertile and barren, due to the need for topsoil removal and the indiscriminate dumping of waste. The air pollution caused by the mineral dust from mining, further leads to several health ailments (respiratory complications, skin diseases, water-borne infections and so on) to adivasis. The tribal population of Juruguda in fact, were the victims of radioactivity due to mining of uranium, and its processing in the forest adjoining their village.⁹⁸ It is thus imperative that mining be prohibited on 'ecologically and culturally sensitive areas'⁹⁹ to not only protect the right of adivasis to a wholesome environment, but the environment at large.

⁹⁴Samatha v. State of A.P, supra note 36.

⁹⁵Skillshare International India, Status Of The Adivasis In Odisha 2014: A Human Development Analysis 23.

⁹⁶Subhash Kumar v. State of Bihar, (1991) 1 SCC 598.

⁹⁷M.C Mehta (Kanpur Territories) v. Union of India, 1992 Supp (2) SCC 637.

⁹⁸ROMESH SINGH, supra note 21.

⁹⁹Ashish Kothari & Anuprita Patel, Environment and Human Rights, NHRC (2006), <http://www.bhrc.bih.nic.in/Docs/Environment-and-Human-Rights.pdf>.

PART IV

A. *Anthropocentrism And Ecocentrism: An Introduction*

The points of diversion between the anthropocentric and ecocentric approaches are located in the differing rationales and priorities of each approach. The ‘ecological integrity’ of the environment is exalted by ecocentrism while human development lies at the heart of anthropocentrism.¹⁰⁰ The primary assertion of the ecocentric approach is the intrinsic value of the environment. It does not lend primacy to the existence of the human race, but views humans to be a constitutive element of the environment.¹⁰¹ Owing to such divergence, legal structures underscored by ecocentric values, which ascribe rights to the environment¹⁰² seem to manifest a comprehensive regime for environmental protection.¹⁰³ The interests of human beings (including the tribal people, and the non-tribals in their quest towards development) and the needs of the environment are not mutually exclusive realms, but can be, and are harmonized by ecocentric legislations.

B. *The Indian Scenario: Trends And Aspirations*

¹⁰⁰YK Choy, 28 Years into “Our Common Future”: Sustainable Development in the Post-Brundtland World, 168 WIT TRANSACTIONS ON THE BUILT ENVIRONMENT 2, 1206 (2015).

¹⁰¹Dinah Shelton, Human Rights, Environmental Rights, and the Right to Environment, 28 STANFORD INTERNATIONAL LAW JOURNAL 1,104 (1991).

¹⁰²Susan Emmenegger & Axel Tschentscher, Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law, 6 THE GEORGETOWN INT'L ENVTL. LAW REVIEW 3, 553 (1994).

¹⁰³Id. at 573.

After adopting an overwhelmingly anthropocentric approach in *MC Mehta v. Union of India*¹⁰⁴ and *Indian Council for Enviro-Legal Action v. Union of India*,¹⁰⁵ the Court has repeatedly voiced its aspirations to shift to an ecocentric approach. In *Centre for Environmental Law, World Wide Fund v. Union of India*,¹⁰⁶ the Court stressed on the importance of an effective species protection regime, while ruling that principles of sustainable development indicated an ‘anthropocentric bias’. Further, it held that the interest of mankind cannot take precedence over other species. Human beings have inherent obligations towards non-human entities as well. The Supreme Court also used the ‘species best-interest standard’ (a standard developed to place the interests of threatened species like the Asiatic lion) to articulate the right of Endangered Species to survive.¹⁰⁷ Thus, by attributing rights to non-humans and by acknowledging the right to live of endangered species, this judgment marked the beginning of the shift from an anthropocentric approach to an ecocentric approach.

Later, in the case of *T.N. Godavarman Thirumulpad v. Union of India*,¹⁰⁸ the Court stressed on the importance of an ecocentric approach to the law. The Court, while examining the phenomenon of human-wildlife conflicts, held that the route to attaining the absolutely imperative goal of environmental justice lay in engineering a shift from the anthropocentric approach to an ecocentric approach. This shift was considered necessary in order to establish a holistic framework for protection of the environment.

¹⁰⁴*M.C Mehta (Kanpur Territories) v. Union of India*, supra note 97.

¹⁰⁵*Indian Council for Enviro-Legal Action v. Union of India*, AIR 1996 SC 1446.

¹⁰⁶*Centre for Environmental Law, World Wide Fund v. Union of India*, (2013) 8 SCC 234.

¹⁰⁷*Id.*

¹⁰⁸*T.N. Godavarman Thirumulpad v. Union of India*, (2012) 3 SCC 277.

Notwithstanding the theoretical differences between the two approaches explained above, regarding them to be water-tight compartments is a misleading understanding. A manifestation of the fluidity of each approach, and the interplay between their respective realms is perceptible in the authors' subsequent attempt to the contentious issue of (the violation of) Adivasi rights.

Further, the fluidity between these approaches is discussed, by examining the legal response to illegal land acquisition - a process with heavy environmental costs. Despite being vigorously anthropocentric, the strengthening and creation of similar legal structures could translate into ecocentric results, in the form of creation of superior structures for environmental protection and the recognition of the intrinsic value of the environment.

***C. The Strengthening Of Human Rights As A Response To A
Process With Environmental Costs: From Anthropocentric To
Ecocentric Outcomes***

The externalities of land acquisition are multi-faceted, ranging from the cultural to the environmental. The social and cultural dimensions of the process are the loss of livelihoods, the erosion of various rights (when done without consent) and devaluation of religious practices. Another dimension is the environmental dimension. Unchecked land acquisition has left in its wake widespread environmental costs.¹⁰⁹ The land that was once rich in mineral has now been left barren. Mining operations undertaken on these lands have also generated a large quantum of dust, leaving the air severely contaminated.¹¹⁰

¹⁰⁹Mining Overview, CENTRE FOR SCIENCE AND ENVIRONMENT, www.cseindia.org/node/384.

¹¹⁰AMNESTY, *supra* note 50.

The law in its response to the adverse environmental impact of land acquisition, has protected human rights, rather than setting quantifiable limits, while approval/vetting of industrial projects for land acquisition. The clear environmental concerns posed by the process of land acquisition has been engaged with, by setting up consultation mechanisms (Gram Sabhas) to increase public participation in environmental decision making and strengthening the right to grant/ withhold consent, by mandating consent from the affected communities before project approval. No recognition has been attributed to the intrinsic value of the environment vis-à-vis adivasi rights and there has been no formulation of the rights of the environment as an entity. Therefore, the law, on paper has been anthropocentric.

Despite being anthropocentric in nature, the legal regime on land acquisition could translate into effective environmental protection, if seamlessly implemented. Strengthening Adivasi control over land, ties the end of environmental conservation with cultural identity and traditional practices of the local communities. The realms of environmental protection and cultural identity are interconnected by the deification of land.¹¹¹ As discussed earlier, land is central to the existence of the adivasi, as it does not merely represent a means of production, but is perceived to have ‘a deep cultural and religious meaning.’¹¹² Although the traditions and beliefs of every community differ, the symbiotic relationship with the land is a common

¹¹¹Samia Slimane, Indigenous peoples and pollution - a human rights framework, UNITED NATIONS EXPERT GROUP MEETING ON INDIGENOUS PEOPLES AND PROTECTION OF THE ENVIRONMENT (Aug. 2007), www.un.org/esa/socdev/unpfii/documents/workshop_IPPE_slimane.doc.

¹¹²Ganz B., Indigenous Peoples and Land Tenure: An Issue of Human Rights and Environmental Protection, 9 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW 1, 173-194 (1996).

feature.¹¹³ They view themselves as inseparable from the land that they inhabit.¹¹⁴ Consequentially, any threat to ownership would be a ‘threat to cultural preservation’.¹¹⁵

Strengthening the right of a stakeholder, for whom the (sacred) land is synonymous with the existence of the community itself, could translate into creating a superior mechanism for environmental protection, as the use of the land would be underscored by its perception as a spiritual entity. Consequentially, the protection of the inhabited land would be prioritised over the servicing of ecologically incompatible human needs. Environmentally detrimental activities that could be damaging to the inhabited land would never be allowed to be undertaken, as any strain on the land would be perceived to be endangering either the community or more importantly possible objects of worship.

In synergy with fortifying the rights of the adivasi communities, an active attempt must be made to diminish the involvement of large-scale corporations in acquiring the land. Rendering attempts to illegally acquire the land futile, will ensure the continued use of the land as a spiritual entity, rather than an instrument to enable production for servicing economic interests. An imperative cog in the wheel of ensuring environmental conservation through the existing legal regime, is the continued use of the land in a revered manner and not as an instrument.

¹¹³The Relationship Between Indigenous People And Forests, UNEP, <http://www.unep.org/vitalforest/Report/VFG-03-The-relationship-between-indigenous-people-and-forests.pdf>.

¹¹⁴John S. Dryzek et al., *The Oxford Handbook Of Climate Change And Society* 233 (2011).

¹¹⁵Curtis G Berkely, *Maya Land Rights In Belize And The History Of Indian Reservations* 34 (1994).

The protests of a Native American tribe, the Standing Rock in North Dakota, is an exemplification of a situation wherein protection of traditional rights over land (in that case, religious/spiritual rights), serves the end of environmental preservation goals. The dispute concerned the construction of the Dakota Access Pipeline, a project which was being undertaken for the transportation of crude oil.¹¹⁶ While climate change activists raised their concerns regarding the potential contamination of the Missouri river (also an important source of water for the tribe) owing to the pipeline, the tribe themselves were greater aggrieved by the destruction of their objects and locations of worship. After widespread protests by members of all segments of society, the State sanction for the project has been withdrawn.¹¹⁷ The protests have served as a powerful indicator of the efficacy of the rights-based approach, wherein the land and cultural rights of the indigenous communities, when upheld, has invariably protected the environment.

Apart from the tangible end of environmental conservation, an ancillary benefit of strict compliance and an additional creation of rights is legal discourse on the environment. There could possibly be a fillip to the prioritisation of conservation of the environment in law and policy-making, and even possibly the judiciary, by ensuring representation of Adivasi community members in local governance bodies that ought to be consulted before undertaking acquisition.¹¹⁸ A powerful voice should be lent to communities who would push for the

¹¹⁶Sam Levin, Dakota Access pipeline: The who, what and why of the Standing Rock protests, *THE GUARDIAN* (Nov. 3, 2016), <https://www.theguardian.com/us-news/2016/nov/03/north-dakota-access-oil-pipeline-protests-explainer>.

¹¹⁷The Standing Rock pipeline protesters and their pyrrhic victory, *THE ECONOMIST* (Dec. 10, 2016), <http://www.economist.com/news/united-states/21711340-decision-halt-construction-dakota-access-pipeline-likely-be>.

¹¹⁸Prakash Keshwan, *Studying Local Representation: A Critical Review*, RESPONSIVE FOREST GOVERNANCE INITIATIVE (2012), sdep.earth.illinois.edu/files/RFGI_Working_Papers/4Kashwan,%20Studying%20Local%20Representation.pdf.

interests of the environment (as the land they inhabit bears spiritual and religious importance to these communities), when there is a conflict with goals of development. Such communities, victims of marginalisation do not possess political or legal currency, and thus are in need of countervailing power. Ensuring the representation of such a stakeholder, would additionally help in creating the social impetus for compliance with environmental laws, by enabling representation of environmental interests.¹¹⁹

In this paradigm, even if there is no direct attribution of rights to the environment, awarding the right over the land to communities whose belief systems acknowledge the intrinsic value of the environment lends more power to such claims, thereby resounding with ecocentric logic, although the law is textually anthropocentric in nature.

This interaction between human rights and environmental protection has been conceptualised by Dinah Shelton as ‘environmental rights’.¹²⁰ Environmental rights entail the expansive interpretation of ‘existing human rights in the context of environmental protection’.¹²¹ Vital to this concept is the provision of procedural rights and guarantees such as the right to FPIC and other rights that enable the political participation of those affected.¹²²

However, there is a possible limitation to the efficacy of this approach. If the values and norms of the affected communities alter significantly, to support economic development over environmental well-being, the protection of their rights become detrimental to the

¹¹⁹UNDP Regional Centre In Bangkok, Towards Inclusive Governance 33- 115 (2007).

¹²⁰DINAH SHELTON, *supra* note 96, at 103-138.

¹²¹*Id.* at 117.

¹²²Lorenza Fontana & Jean Grugel, The Politics Of Indigenous Participation Through ‘Free Prior And Informed Consent’: Reflections From The Bolivian Case, *WORLD DEVELOPMENT* (2016), www.consultaprevia.org/files/biblioteca/fi_name_archivo.646.pdf.

protection of the environment. Therefore, an anthropocentric approach would no longer have an ecocentric outcome, if it is not informed by ecocentric logic. The critique, commonly offered against anthropocentric environmental law, that it does not create comprehensive legal protection, would stand, unless it upholds rights of those, whose belief systems are premised by values that reflect ecocentric logic.

IV. CONCLUSION

Schedule V of the Constitution, legislations such as the Forest Rights Act and the PESA Act and international instruments like the UNDRIP, developed around the core objective of protecting adivasi rights (and the environment, to an extent) are imperatives in ensuring equitable prosperity of every stakeholder in the age of development today. The State must thus engage in a balancing exercise involving complex policy formulation keeping in mind its constitutional obligation envisaged under Schedule V, that majority needs cannot always trump minority interest, and sometimes, concessions need to be made.

On paper, the legal instruments outlined in this paper have endeavoured to address the desideratum of undoing years of persecution of the adivasi community. However, the enforcement of the instruments has been far from satisfactory. The devaluation of adivasi rights by the State and the mining industry has become a common phenomenon, especially in the central Indian mineral rich states. The need for compliance with the law cannot be emphasized upon enough. Securing the rights of the adivasi is however not an end in itself. The end must be to strengthen and make dominant values and beliefs that resonate with ecocentric logic. As the degree of compliance with the anthropocentric laws is increased, the distinction between anthropocentrism and ecocentrism gradually dissipates.

Ultimately, it is the ecocentric realm, consisting of both the adivasi community as well as the environment – the forests, land, water and the air which emerge as the beneficiary of adequate compliance.

It is argued that the first step towards improving compliance with the existing rights-based legal framework, is to remedy what remains a significant lacunae in the law- the lack of effective sanction. For example, Section 7 of the Forest Rights Act imposes a meagre penalty of 1000 rupees for non-compliance with the Act. Firstly, the quantum of liability has to be significantly increased, as the non-compliant parties are usually agencies of the State or powerful non-state actors. The authorities responsible for the enforcement of the Act, must be empowered to impose penalties in proportion with the turnover of the entity involved. Secondly, apart from quantum, the sanctions can be made multi-dimensional. Some of the legislations mentioned in the paper, still do not prescribe criminal liability for contravention. Lastly, legal reform cannot be restricted to the environmental framework alone. There has to be longstanding changes made to other laws that feed into environment protection, like the Special Economic Zones Act, 2005. In practice, there must be an active attempt to ensure the State does not turn a blind eye to such non-compliance, but engages in vigorous prosecution of the concerned individuals and corporations. Only then can the adivasi community and the environment they inhabit receive the long overdue respect and protection they truly warrant.

UNDERTRIAL PRISONERS IN INDIA

*Ayushi Priyadarshini & Madhurika Durge**

Abstract

Around 2/3rd of prisoners languishing in Indian jails are undertrials. These undertrials are presumed to be innocent and majority of them remain incarcerated due to their inability to pay the bail amount, a situation which highlights the inherent economic discrimination entrenched in the system. This research paper highlights the failure of the judiciary to implement Section 436A of the Cr.P.C. and questions the same with respect to the Right to Equality enshrined in the Constitution of India under Article 14 by suggesting the inclusion of the term 'non-discrimination on economic basis' under Article 15. The paper then moves on to the legal presumption of 'innocent unless proven guilty', which seems to be denied to the undertrials. With the help of statistics, it seeks to showcase how the bail system is prejudiced towards the rich and the idea of justice rendered is unfair, because the poor are not represented adequately. The paper talks about legal aid, police torture and the degrading quality of life that undertrials lead, including

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the failure to actualize the segregation between undertrials and convicted criminals. Lastly, through various landmark judgments, the author(s) emphasise on the right to speedy justice and why it is constantly being denied, culminating in the growing number of undertrials. The author(s) thereafter give suggestions to reform the current state of undertrial prisoners. According to them there needs to be a change in the bail system, an improvement in the quality of life of undertrials and an increase in the judge-population ratio. The aim is not solely to ensure dispersal of justice but also ensure equality in the justice dispersed.

I. INTRODUCTION

Undertrials are prisoners who have not yet been convicted of the charge(s) for which they have been detained, are facing trials in the competent court, and are presumed innocent in law. They are supposed to be held in ‘judicial custody’ though they are usually held in jails.¹ The purpose of keeping undertrials in custody is to ensure fair hearing so that they are not in a position to influence the witnesses. However, it is the delay in case trials which is the core human rights issue and the main cause of the number of undertrial

¹Human Rights of Undertrial Prisoners, Chapter 6, SHODHGANGA, http://shodhganga.inflibnet.ac.in/bitstream/10603/20871/11/11_chapter-06-human-rights-undertrials.pdf.

prisoners. A preliminary examination² by the National Human Rights Commission has disclosed the appalling nature of the problem posed by the pressure of a large number of undertrial prisoners in Indian jails and the inordinate delay in the conclusion of the trial. These people end up languishing in jail for a much longer period than if they were actually convicted of the same charges. Most undertrial prisoners are poor and unaware of the rights they are granted, and the current situation of the administrative system is tainted with corruption preventing this share of the population from availing their constitutional rights. Lady Justice³ is supposed to be blindfolded, signifying divine order, objectivity and impartiality; however, there is a huge disparity in the treatment meted out to the *poorer* undertrial prisoners, who cannot afford the bail amount and are consequently deprived of their liberty.

As per NCRB's latest data⁴, there are more than 2.8 lakh undertrials in prison, constituting more than two-thirds of the prison population in India. The Supreme Court has directed⁵ the National Legal Services Authorities (NALSA) to coordinate with state authorities and the home ministry to establish *undertrial review committees*, comprising the District Judge, the District Magistrate and the Superintendent of Police in all districts of the country. The duty of the committees is to ruminate and provide recommendations on the release of undertrial prisoners entitled to the benefit of Section 436A of the Criminal Procedure Code⁶ (hereinafter referred to as Cr.P.C.). For the past two decades, there have been widespread efforts to decongest Indian prisons and reduce the undertrial population.

²National Human Right Commission of India, D.O. No. 10/19/2005-PRP&P, Dec. 2006.

³Gregory Colomb, *Designs on Truth*, PENN STATE PRESS 50 (1992).

⁴National Crime Records Bureau, *Prison Statistics India*, Ministry of Home Affairs (2015).

⁵Re - Inhuman Conditions in 1382 Prisons, AIR 2016 SC 993.

⁶Criminal Procedure Code, 1973, § 436A.

Despite initiatives such as setting up fast track courts and digitisation of court records, the number of undertrial prisoners continues to be high.

Undertrials in the Indian prisons are kept in the same jail with convicted prisoners. However, it has now been made compulsory for prison officers to provide separate accommodation for them. The *Model Prison Manual* advocates that no convicted prisoner shall be kept with undertrials, or be allowed to have contact with them.⁷ Reasons for keeping an undertrial in jail *inter alia* include,⁸ *one*, accusation of a heinous offence, *two*, apprehension that the accused will interfere with witnesses or impede the course of justice, and *three*, the anticipation that the accused might commit the same or other offences or fail to appear for the trial.

The aim of writing the paper is to question the significance of Sec. 436A of the Cr.P.C. with respect to safeguarding equality under Art. 14 of the Constitution. The authors thereby suggest the inclusion of the phrase, ‘non-discrimination on the basis of economic status’ under the purview of Article 15. Further, the issue of the detainment of undertrials in custody has been raised in the light of the principles of justice, equity and good conscience.

⁷Model Prison Manual (2003), BPR&D, New Delhi, ¶22.45.

⁸Upneet Lalli, Problem of Overcrowding in Indian Prisons – A study of undertrials as one of the factors, Institute of Correctional Administration, Chandigarh, 1 (2000).

II. STATISTICAL ANALYSIS

The Report by the Home Ministry providing statistics for Undertrial Prisoners released at the end of 2015 delivers to us the following reality⁹:

- The *total number of undertrials* were 2,82,076 (67.2% of the jail population), out of which males constituted 2,70,160 (95.8%) while females formed the rest 11,916 (4.2%).
- *Period of Detention*: Maximum number of undertrials (35.2%) were detained for up to 3 months, whereas 3,599 undertrials (1.3%) were detained in jails for more than 5 years.
- *Release and Acquittals*: The number of released undertrials is 12,92,357, out of which acquittals stand up to 82,585.
- *Literacy level*: Out of the total undertrial population, 80,528 are illiterates with 1,19,082 educated up to Class X; 58,160 having education below graduation; 16,365 graduates and 5,225 postgraduates.
- *Provision of financial assistance*: Only 416 convicts were provided with financial assistance on release; 1,286 convicts were rehabilitated and 94,673 prisoners were provided legal aid.
- *Caste and Creed*: More than 55% of the undertrial population is constituted by people belonging to the Muslim, Dalit or Tribal society.

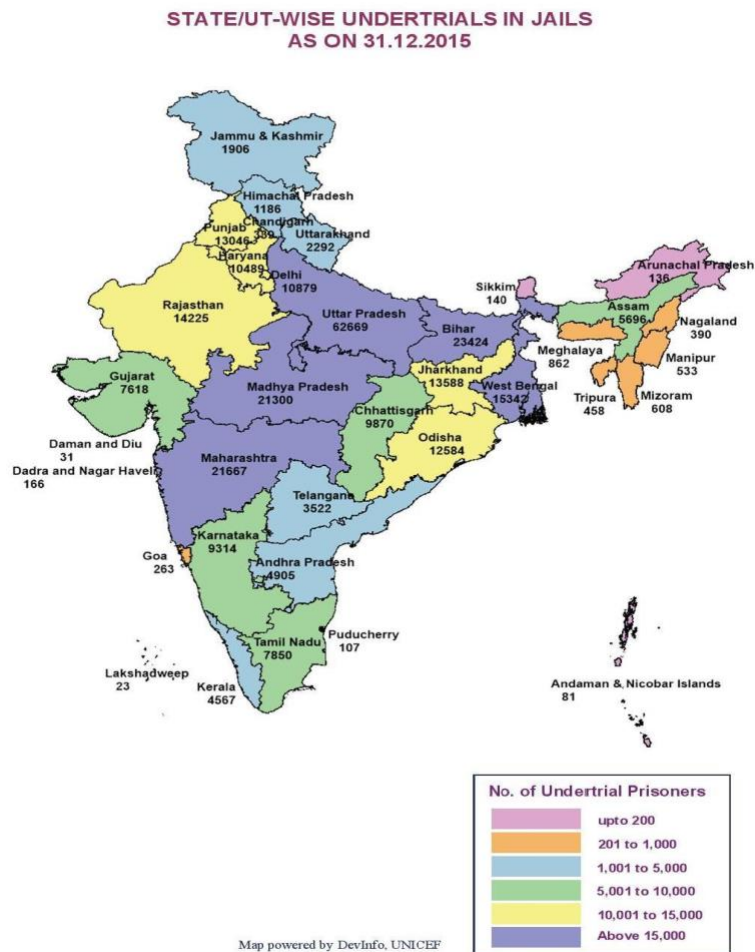
The following pictorial and graphical representations¹⁰ will help in understanding the statistics better –

- **Map 1**: State-wise distribution of undertrials in the Indian jails

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⁹Supra note 4.

¹⁰Supra note 4.



- The following table shows the percentage distribution of the types of prison inmates (**Table 1**) –

Convicts	32%
Undertrials	67.2%
Detenues	0.6%
Others	0.2%

- These are the top 10 states of maximum percentage of undertrials in the country¹¹ (**Table 2**) –

State	Percentage of undertrials constituting total prison population
Meghalaya	91.2
Manipur	88.0
Arunachal Pradesh	87.2
Bihar	85.6
Jammu and Kashmir	83.3

¹¹Supra note 4.

Nagaland	78.2
Jharkhand	77.1
Odisha	75.8
Goa	75.7
West Bengal	73.7

● Period of detention-wise undertrials (Table 3) –

Period of detention	Number of undertrials	Percentage Distribution
Up to 3 months	402201	35.2
3-6 months	59346	21.9
6-12 months	49326	17.8
1-2 years	34448	13.4
2-3 years	17210	6.3
3-5 years	9842	4.1

Above 5 years	3047	1.3
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- The following table describes the educational status of the undertrials (**Table 4**) –

Qualification	Percentage
Illiterate	28.5
Below Class X	42.2
Above X th , below Graduation	20.6
Graduate	5.8
Post-graduate	1.9
Technical degree / Diploma	1

A. *Right to Equality*

a) Financial and Economic Status

Part III of the Indian Constitution grants fundamental rights to individuals (and citizens). Article 14 endows to every person the

equality before law and the equal protection of the laws.¹² Article 15 further enlists the five grounds on which no person shall be discriminated against.¹³

Looking at the statistics above, coupled with the findings¹⁴ that “it has become the norm for the rich and powerful to get bail with ease, while others languish in prison... decisions about custody or release should not be influenced to the detriment of the person accused of an offence by factors such as gender, race, ethnicity, social status or financial conditions”, it can thus be concluded that undertrials are largely languishing in the jails due to their impoverishment, and it cannot be denied that there is a prevalent discrimination against the citizens with lesser economic security.¹⁵ The issue of the inability of even one of the undertrial to avail the provision of bail due to economic disadvantage must be addressed. This is to say, an undertrial is more likely to remain a prisoner for a longer duration if he is poor enough to not be able to ‘pay’ to get bail than a financially secure individual. It leads to the assumption that the liberty of a rich man holds more importance than that of the masses.¹⁶¹⁷ Why should financial incapacity put one in greater danger of being in the prison? The system seems strictly unfair and prejudiced. The numbers reflect a failure of the delivery of justice, but even this is unequally unjust. The disproportionate presence of members of the Scheduled Castes, Scheduled Tribes and Muslims among undertrials echoes the

¹²Indian Const. art. 14.

¹³Indian Const. art. 15.

¹⁴268th Law Commission Report, Amendments to Criminal Procedure Code, 1973 – Provisions relating to Bail (2017).

¹⁵Warren L. Miller, Bail Reform Act of 1966: Need for Reform in 1969, 19 CATH. U. L. REV. 24 (1970).

¹⁶National Human Rights Commission of India, Copy of Letter, 22 December 1999.

¹⁷Harry I. Subin, Book Review of R. Goldfarb, Ransom, “A Critique of the American Bail System”, 114(4) UNIVERSITY OF PENNSYLVANIA LAW REVIEW 630-36 (1966).

increasing vulnerability and bias against these groups, apart from a technical breakdown of the system.

The bail system is imbalanced against the poor since they would not be able to furnish bail on account of their indigence while the wealthier persons are able to secure their liberty taking note of their affordability to furnish the same.¹⁸¹⁹ This discrimination arises even if the amount of the bail fixed by the Magistrate is not high, for a majority of those who are brought before the Courts in criminal cases are so poor that they find it difficult to furnish bail even in a small amount.²⁰ Iyer J. carefully laid down that the guarantee of human dignity forms part of a constitutional culture under Articles 14, 19 and 21. “... *Dehumanise him and to violate his very personhood, using the mask of dangerousness and security... There cannot be a quasi-caste system among prisoners in the egalitarian context of Article 14*”.²¹ The decision laid to rest the discrimination between the ‘better-class undertrial’ with not so well-off by adjudicating that both be treated equally.

There is also the concept of handcuffing and police-torture prevalent in the society, even where there stands no legal notion of distinction between classes. It cannot be ascertained that a rich undertrial is any different from a poor one in matters of risk so as to handcuff the poor and not the former.²² Such an incapacitated mechanism, according to Lois Wacquant,²³ is deemed to line with the neo-liberal regime that

¹⁸Caleb Foote, The Coming Constitutional Crisis in Bail, 113 U. PA LAW REVIEW 1125, 1180 (1965).

¹⁹Bail and Its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform, 9 VAL. U. L. REV. 167 (1974).

²⁰Government of Gujarat (headed by Justice P.N. Bhagwati) Legal Aid Committee Report, 185 (1971).

²¹Prem Shankar Shukla v. Delhi Administration, 1980 AIR 1535.

²²Khatri v. State of Bihar, AIR 1981 SC 1068.

²³Wacquant L, Crafting the Neoliberal State: Workfare, Prisonfare and Social Insecurity, 25(2) SOCIOLOGICAL FORUM, 197–220 (June 2010).

promotes 'restrictive workfare' for the deserving poor and 'expansive prisonfare' for the undeserving ones, who constitute the majority of the 'urban outcasts'. With the widening of the economic gap under this organisation, prisons and custodial institutions become an instrument in the hands of the state to control the 'unruly classes' who are seemed as a threat to status quo and the social order. Currently, world prisons are increasingly being used as tools of social control, aided by disregard to and misuse of the enacted laws, with one of them being preventive detention.

b) Criminal Procedure Code – Sections 436 and 436A

The Cr.P.C. was amended in 2005 to introduce Section 436A, under which, an undertrial prisoner shall be released on own personal bond if he or she has completed half of the period of maximum possible sentence in case of conviction.²⁴ Section 436 specifies that, if an undertrial arrested in minor offences continues to languish in prison for more than a week after his bail order has been passed, he is assumed to be indigent and therefore should be released on a Personal Recognizance (herein PR) Bond (a written promise signed by the defendant promising that they will show up for future court appearances and not engage in illegal activity while out) by the trial court. Further, in offences serious in nature, if the undertrial has completed more than half of the maximum sentence awarded for the charge, he shall similarly be released on a PR Bond by the trial court.²⁵ In pursuance to that, the Supreme Court has passed orders to release as many eligible undertrial prisoners and has instructed High Courts and the NALSA to strictly monitor the situation. The amendment clarified the position on the maximum period of detention

²⁴Criminal Procedure Code, 1973, § 436A.

²⁵Vijay Raghavan, Undertrial Prisoners in India: Long Wait for Justice, 51(4) ECONOMIC & POLITICAL WEEKLY (Jan. 2016).

allowed. Though the majority of undertrials have been charged with less serious offences and are thus allowed to be released on the bond under the procedural sections; the judicial system has failed in paying adequate attention to cases under Section 436²⁶ and 436A, and hence the number of undertrial prisoners continues to increase, a situation worse than a stagnated crisis.

c) Issues

Thus three grave issues have been highlighted by the author(s) contributing to the problem of undertrial prisoners: *one*, the inability to afford legal service for defence. State governments provide free legal services to needy people due to which there is lack of quality. These lawyers have been blamed for irregular appearances in courts and lack of communication with clients. A key cause is the poor remuneration paid to the legal aid lawyers. *Two*, the failure of payment of cash bail (PR Bond) or production of surety by the accused renders him languishing in prison till the end of trial. The great economic disparity between the classes of the Indian populace makes it a better option for the poor to continue in jail than getting a bail. Thus the financial system of bail as per the Cr.P.C. sections (including the amendment) has been of little help to the people really needing it. *Three*, the abysmally poor judge-population ratio of 18 judges per million people²⁷ is a stark difference from the recommended 50.²⁸ The introduction of fast track courts has substantially reduced the pendency of cases but has been accused of focusing more on disposal of cases than ‘procedure of law’.²⁹

²⁶Criminal Procedure Code, 1973, § 436.

²⁷PTI, India Has Eighteen Judges Per Ten Lakh People: Law Ministry, INDIAN EXPRESS, Aug. 4, 2016.

²⁸121st Law Commission Report, A New Forum for Judicial Appointments (1987).

²⁹The Plight of Undertrial Prisoners in India, GENERAL KNOWLEDGE TODAY, <http://www.gktoday.in/blog/theplightofundertrialprisonersinindia/>.

B. Justice, Equity And Good Conscience

a) Locus Standi

This incessant delay in disposal of cases is a serious violation of human rights of the accused in the face of an undertrial prisoner.³⁰ It is a blatant abuse of fundamental rights granted in virtue of being a human and a citizen. A major concern is the denial of the right to bring an action in the court against the 'imprisonment' due to not being able to afford receiving legal help, and lack of knowledge and non-awareness of the existence of such remedies. If the accused are not even receiving the opportunity to satisfactorily represent themselves in the court of law, how can we say that justice has been dispensed? A culmination of these issues has led to the erosion of the faith of the common man in the legal system of the country, when he is not permitted to exercise his rightful liberty granted by law simply due to his incapacitation to pay. There has been a growth of the belief of the non-preservation of the right to equality by the very institution which exists to safeguard it. It is an established principle that delay in trial in itself constitutes denial of justice.

If it is the fear of the 'perpetuator' roaming freely in the society which culminates in keeping custody of them as undertrials, then experience has revealed that the extremely poor undertrial prisoners are less likely to abuse the discretion of the court in enlarging them on bail, as they lack in resources for such actions; and thus the very fear which leads to putting these people in detention is eliminated.³¹

b) Innocent Unless Proven Guilty

³⁰Supra note 1.

³¹State of Rajasthan v. Balchand, 1977 AIR 2447.

The Supreme Court has ordered that those undertrials who have completed half of the sentences they would have got if convicted, be released. This leads to the question, why *are* the undertrials in prison? One of the fundamental declared principles of justice is, “*everyone is to be considered innocent unless they are proved guilty*”.³² If it were truly so, they shouldn’t have been in prison altogether. This order of the apex court gives the impression that the principle practically being followed is totally contradictory, that, *accused are all guilty until proven innocent*, and releasing them after they have been confined for half their term is a protective guard, coming as a respite. The former Chief Justice of India, Justice Dattu, had declared in his judgement in the 2G case,³³ “*the courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and found guilty*”. The *Standard Minimum Rules* of the UN gives special status to the undertrials in the assumption that unconvicted prisoners are presumed to be innocent and shall be treated as such.³⁴ *Body of Principles*³⁵ has also emphasised on the treatment of undertrials and says that a detained person charged with a criminal offence shall be presumed innocent and be treated as such until proved guilty according to the law of the land.

Deducing analogically, it follows that the concept of imprisoned undertrials is wrong in itself. They are entitled to be compensated for what they have undergone, regardless of the outcome of the case. There could be certain cases where it is feared that the accused may

³²Woolmington v. DPP, (1935) UKHL 1; Golbar Husain & Ors. v. State of Assam & Anr., (2015) 11 SCC 242; Vinod Kumar v. State of Haryana, (2015) 3 SCC 138.

³³Sanjay Chandra v. CBI, AIR 2012 SC 830.

³⁴Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, Rule 84.

³⁵Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, United Nations Organization, 1988, Principle 36.

tamper with the evidence, or intimidate witnesses. Herein, confinement maybe a solution, and for such executive action(s), the reasons and the procedures thereof will have to be clearly specified, so that the option of appealing against this would always be available to the accused, and provisions for such are not taken adverse advantage of.

C. Right To Life And Personal Liberty

a) Legal Aid

Article 39A³⁶ provides for free legal aid to those who cannot afford it on their own.³⁷ Legal aid simply means that when an accused has been sentenced by a Court, tribunal or any other authority (competent to pass such a sentence) but is entitled to claim an appeal against the verdict, he can claim legal aid; and if he is indigent, the State is under an obligation to provide him with a counsel. The state government cannot avoid their constitutional obligation to provide free legal service to the poor accused by pleading financial or administrative inability.³⁸ When an accused person is too poor to afford a lawyer and therefore goes through the trial without legal assistance, the procedure cannot possibly be regarded as “reasonable, just and fair”.³⁹ The accused has the right to know about all the rights he has, how to enforce them and whom to approach when there is a denial of the grant of those rights.⁴⁰ The court has further emphasized that it is the legal obligation of the judge before whom the accused has been

³⁶INDIAN CONST. art. 39A.

³⁷DD Basu, Introduction To The Constitution Of India (20th ed. 1992).

³⁸Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1373.

³⁹Id.

⁴⁰Government of India, Ministry of Home Affairs, Malimath Committee Report on Reforms in Criminal Justice System, Vol I (Mar. 2003).

produced, to inform him of the provision of the legal aid services, in case of his inability to engage an advocate for the same.⁴¹

The scope of Art. 39A has been included in Articles 14 and 21. The reason for implementation of Art. 39A in Art. 21 is due to the ideology that law should not only be established procedurally but also be just, fair and reasonable.⁴² There cannot be any judgment passed without *audi alterem partem*, otherwise the judgment passed will not be just. In order to ensure that provisions of Art.14 (endowment of an equal opportunity of being heard) and Art. 21 (compliance with established procedure of law) are being exercised, legal aid comes under the scope of Art. 21. However, we see that prisoners are languishing in jail for years before a legal counsel is appointed.⁴³

The main concern of the author(s) with regard to Art. 39A is two-fold. The first one is the concern of the provision of the remedy to each and all, equally. The fact that majority of the population that lives in rural areas is illiterate and unaware of their rights,⁴⁴ coupled with the prevalent corruption in courts⁴⁵ renders the remedy unreachable to the masses. The second one being the issue of the quality of the advocate provided by the State under obligation. The opposing party who can afford an advocate will bring in someone of greater expertise while the State is perhaps likely to provide an advocate of lesser expertise leading to an unequal playing field. Besides, there seems to be a deep-seated fear of legal aid lawyers due to their laxity, incompetence and malpractices.⁴⁶ There are also complaints against these lawyers about irregular appearances, not informing the client about the status of the

⁴¹MP Jain, Indian Constitutional Law 1140 (7th ed. 2014).

⁴²Maneka Gandhi v. Union of India, 1978 AIR 597.

⁴³Murali Karman, & Trijeeb Nanda, Commentary on Condition of Undertrials and Problems in India, ECONOMIC AND POLITICAL WEEKLY (Mar. 2016).

⁴⁴Suk Das v. Union Territory of Arunachal Pradesh, AIR 1986 SC 991.

⁴⁵CMS India Corruption Study - Perception and Experience with Public Services & Snapshot View for 2005-17 (2017).

⁴⁶National Law University, Delhi, Death Penalty India Report, Vol I (2014).

case and poor defence put by them in the bail and trial stages.⁴⁷ The incentive provided for the State advocate is also much lesser which will probably result in the legal aid advocate not putting in all his efforts, a situation leading (again) to a biased result. This goes against the basic tenets of Articles 14 and 21, especially for undertrials who have not even yet been ‘convicted’.

b) Police Torture, Handcuffing and Prison Administration

Torture is the intentional infliction of severe physical or mental pain by a public official for a specific purpose. Torture is not merely physical but may consist of mental and psychological torture calculated to create fright to make the person submit to the demands of the police.⁴⁸ There are an approx. 150-200 deaths per year due to police torture.⁴⁹ Every undertrial person accused of a non-bailable offence punishable for more than 3 years cannot be handcuffed every time they are transported to and from the Court to the prison.⁵⁰ The worst form of prison violence was witnessed in *Khatri v. State of Bihar*⁵¹ where the police had blinded 80 suspected criminals by puncturing their eyes by needles and dousing them by acid. *Ipso facto*, in *Sunil Batra v. Delhi Administration*⁵² the court had already issued a writ directing the authorities that the prisoners shall not be subjected to physical mishandling by jail officials and should be given adequate medical and health facilities.

The law in Article 21 includes the right to live with human dignity. This means that there is an inbuilt guarantee against torture or assault

⁴⁷Vijay Raghavan, Undertrial Prisoners in India: Long Wait for Justice, 51(4) ECONOMIC & POLITICAL WEEKLY (Jan. 2016).

⁴⁸Arvinder Singh Bagga v. State of Uttar Pradesh, AIR 1995 SC 117.

⁴⁹Supra note 4.

⁵⁰Prem Shanker v. Delhi Administration, AIR 1980 SC 1535.

⁵¹AIR 1981 SC 928.

⁵²AIR 1980 SC 1579.

by the State. Thus, the State actions also go against the rule of law. No law which authorizes and no procedure prescribed by law promoting torture or any inhuman element can ever stand the test of reasonableness and non-arbitrariness and would defy Articles 14 and 21.⁵³ It will also go against Article 5 of the Universal Declaration of Human Rights⁵⁴ and Article 7 of the International Covenant on Civil and Political Rights.⁵⁵ Undertrials are not even declared to be guilty, so when they bear police torture, it goes against the expansive provisions of Articles 14, 19 and 21. The only way when handcuffing will not go against Article 21 is when there is evidence that besides handcuffing, there is no other way to exercise control. Handcuffs must be the last refuge as the notion not only goes against Article 21 but also Article 14 for being unreasonable and arbitrary. The practice of causing physical injury to the prisoners in the name of maintaining discipline is said to be violative of Article 21.⁵⁶ The Court has directed the government to set up welfare and rescue homes to take care of women and children especially those who have not been convicted of an offence. Procedural safeguards should be adhered to *and not the crime committed*, in deciding the status of solitary confinement.⁵⁷

The problem with police torture and handcuffing is that they not only defy Article 21, but also that there is neither a set classification nor a procedure for such an exercise. This again makes it arbitrary and discretionary. Police torture and handcuffing go against basic human dignity and are arbitrary and unreasonable for undertrials who are in jail *only* because they cannot afford the bail amount.

c) Quality of Life

⁵³Coralie Mullin v. Union Territory of Delhi, AIR 1981 SC 746.

⁵⁴Universal Declaration of Human Rights, art. 5, Dec. 10, 1948.

⁵⁵International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966.

⁵⁶Kumar Chadha, The Indian Jail (1983).

⁵⁷Sunil Batra I, AIR 1978 SC 1675.

Article 21 was expanded to include the scope of living a decent and civilized life. This was said to include right to food, water, decent environment, education, medical care and shelter which were said to be basic human rights.⁵⁸ It is only secured when one is assured of all facilities to develop himself and is freed from restrictions. Even though prisoners should not get all the freedoms available, they have the provisions of Articles 14, 19 and 21.⁵⁹ According to the *Standard Minimum Rules*⁶⁰ untried prisoners shall sleep singly in separate rooms. Untried prisoners may, if they so desire, have their food procured at their own expense from outside, either through the administration or through their family or friends. He shall be allowed to wear his own clothing if it is clean and suitable. If he wears prison dress, it shall be different from that supplied to convicted prisoners. An untried prisoner shall always be offered opportunity to work, but shall not be required to work. If he chooses to work, he shall be paid for it. He should also have access to books and doctors among basic necessities.

The conditions of prisons in India are ghastly as prisons meant for 650 people are being used by 2,200 inmates out of which two-thirds are undertrials.⁶¹ Pushing the prisoner into a solitary cell, denial of a necessary amenity, and (more dreadful sometimes) transfer to a distant prison where visits or society of friends or relations may be cut-off, allotment of degrading labour, assigning him to the company of hardened criminals and the like, is an infraction of liberty or life.⁶²

⁵⁸Chameli Singh v. State of Uttar Pradesh, AIR 1996 SC 1051.

⁵⁹TV Vatheeswaran v. State of Tamil Nadu, AIR 1983 SC 361.

⁶⁰Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, Rule 84.

⁶¹Bhavna Vij Aurora, The Horror of Indian Jails, INDIA TODAY (June 24, 2011), <http://indiatoday.intoday.in/story/right-to-justice-bill-jails-turn-into-nightmares-for-undertrials/1/142622.html>.

⁶²P Bharti v. Union Territory of Pondicherry, (2007) 1 MLJ 345.

There are jails where the toilets are to be cleaned by the prisoners with mud due to non-availability of water.⁶³

The basic quality of life is not guaranteed in most prisons of India, including food, water, space, sound sleep, or shelter.⁶⁴ Due to the grueling atmosphere, a petty thief might become into a hardened criminal. Article 21 is not fulfilled and most of the prisoners are subject to this being an undertrial. The most disagreeable perspective is that if the person is *actually innocent*, the implications of that can shake one's foundations of justice.

d) Speedy Trial

Deprivation of speedy trial means if the process becomes unduly long, the principles of Article 21 stand violated. The fair, just and reasonable procedure under Article 21 necessitates the right to speedy trial. It also comes within the purview of public and social interest as criminal law is *in rem*. Right to speedy trial is included in all stages, namely, investigation, inquiry, trial, appeal, revision and retrial.⁶⁵ The accused should not be subjected to incarceration before his conviction. This not only results in physical restrictions but also mental anguish.⁶⁶ The right to speedy trial does not include the time limit to be set once the trial is put into motion as it is not possible for the Court to determine that.⁶⁷

Speedy trial or a reasonably expeditious trial, is a part of Article 21. Financial constraints and priorities in expenditure will not absolve the Government of its duty to provide speedy justice.⁶⁸ Not providing speedy justice was held to be '*a crying shame on the judiciary which*

⁶³Tiruchirapalli Women's Prison, Tamil Nadu.

⁶⁴Supra note 16.

⁶⁵Abdul Rehman Antulay v. R.S. Nayak, AIR 1988 SC 1531.

⁶⁶Supra note 1.

⁶⁷Abdul Rehman Antulay v. R.S. Nayak, AIR 1988 SC 1531.

⁶⁸Hussainara v. Home Secy, Bihar (II), AIR 1979 SC 1369.

keeps men in jails for years without a trial'.⁶⁹ Whenever the right to speedy trial has not been catered to, the conviction granted in the subsequent judgment can be quashed as it is not just.

The reasons why speedy trial should be ensured besides the enforcement of Article 21 are two. *Firstly*, delaying trials are often sought as a defence tactic. This is unjust in many ways. One of the reasons is that adjournment motions are made unreasonably without genuine reasons. This causes delay which is unjust as the matter remains pending and thus causes monetary, physical and mental anguish to the undertrial. Another reason is that this defence tactic serves as a burden on the court too, as workload increases. *Secondly*, persons accused of petty offences not having much periods of detention if convicted might have to await their trials for long periods. If they are poor and helpless, they languish in jail as there is nobody to bail them out. The main reason that speedy justice is not enforced efficiently is due to pendency of cases and the abysmal judge-population ratio. Another major loophole is the presence of Sections like 309 of the Cr.P.C. which provides for adjournment of the matter on such terms as the court 'thinks fit' and for the time it considers 'reasonable'. This is entirely discretionary due to which adjournment can be sought on a wider basis which as it is, is a recurrent phenomenon.⁷⁰ Timely delivery of justice keeps the faith ingrained and establishes the sustained stability.⁷¹ Thus, speedy justice is one thing that should be ensured as justice delayed *is* justice denied.

D. Precedents and Judicial Understandings

Over the decades, the Indian Judiciary has evolved to protect the rights of the accused, and even laid the rules for speedy trials. In

⁶⁹Kadra Pahidya v. State of Bihar, AIR 1981 SC 939.

⁷⁰V Vasanthakumar v. HC Bhatia, (2016) 7 SCC 686.

⁷¹Noor Mohammed v. Jethanand, (2013) 5 SCC 202.

Maneka Gandhi v. Union of India, the Supreme Court held that the procedure established by law must be reasonable, just and fair.⁷² Thereafter in its landmark judgment in *Hussainara Khatoon v. State of Bihar*,⁷³ speedy trial was held under the purview of Article 21 of the Indian Constitution guaranteeing right to life and liberty.

The case above describes the crises of the numerous people in the prisons of Bihar whose trials had not commenced for years on end. Many of them were held for trivial offences for which they would have been sentenced to jail only for a few months but instead had spent years. It was a case of *habeas corpus* that brought in the issues of prison administration and the abysmal condition of the undertrial prisoners. The main issue was whether the rights to speedy trial and free legal aid are within the scope of Article 21. The Court herein also laid some guidelines to ensure humane prison administration. The laws applied to this case were Article 14 (Right to Equality) and Article 21 (Right to Life and Personal Liberty) along with Article 39A of the Constitution. The right to speedy trial and the right to be represented were thus held to be included in Article 21. It was understood that the bail system had major defects, wherein only the poor stayed in prison as they did not have any property as bail. There were references made as to the discretion that the judges have in release of undertrial prisoners. Procedural defects in the police system were recognised and the prison administration were given new guidelines as to the treatment of undertrials. Thus, there was a major expanse in Article 21 relating to undertrials.

In the famous *Pehadiya*⁷⁴ case, the Bench noted that the crisis of undertrials in India describes the instance of the utter callousness and indifference of the legal and judicial system towards the prisoners

⁷²(1978) 1 SCC 248.

⁷³(1980) 1 SCC 98.

⁷⁴Supra note 69.

languishing for unending years in the jails. “*It seems that once a person accused of an offence is lodged in the jail... he becomes a mere forgotten specimen of humanity alienated from the society, an unfortunate victim of a heartless system.*” In *Shabbu v. State of U.P.*⁷⁵ a full bench of the Allahabad High Court held that the purpose of Section 428 of the Cr.P.C. was to relieve the undertrials of the anguish associated with the detention by a ‘credit system’ of reduction of the time-period he has already spent in jail.

Later, certain guidelines were laid out to counter the unfair bail system in *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India*.⁷⁶ Firstly, if an undertrial prisoner was accused of an offence where the imprisonment is up to 5 years, he should be released if he has completed half the sentence. Secondly, if the undertrial was accused for an offence of more than 5 years, then a minimum of Rs. 50,000 as bail amount was to be laid out. Thirdly, if the undertrial was accused for an offence of more than 10 years, he should be released after providing Rs. 1 lakh as bail amount and serving a sentence of 5 years. However, the author(s) consider these guidelines to be inadequate as they do not seek to help out the destitute as the amount is still high. Moreover, these provisions have remained ineffective because of lack of awareness and because trial courts press for bail bonds for release.⁷⁷

The Madras High Court in *Jagannath v. The State*⁷⁸ made the rule that such undertrial prisoners would be released against whom chargesheets have not been filed within the limitation period provided in Section 468(2) of the Cr.P.C. as further detention would be

⁷⁵1982 CriL.J. 1757.

⁷⁶(1995) 4 SCC 695.

⁷⁷Utkarsh Anand, SC: Release Undertrials Who Have Served Half Their Jail Terms, INDIAN EXPRESS, Sept. 4, 2014.

⁷⁸1983 CriLJ 1748.

violative of their fundamental right under Article 21. The issue of pendency and delay in the provision of justice came up before the Supreme Court in a petition filed by an NGO. It was thus first observed in *Common Cause v. Union of India*: “It is a matter of experience that in many cases where the persons are accused of minor offences punishable for not more than three years, the proceedings are kept pending for years. If they are poor and helpless, they languish in jails for long periods either because there is no one to bail them out or because there is no one to think of them.”⁷⁹

Subsequently, the issue of disparity in the financial capacity of the undertrials was first brought to attention when the apex court bench in *Shankara and Ors v. State (Delhi Administration)*⁸⁰ categorized the undertrials into the ‘poor’ and ‘non-poor’, wherein the latter were observed to stay in jail only for a couple of hours before getting a bail. Their personal bonds of several lakhs and multiple sureties are furnished within hours whereas the former category is compelled to languish in jail for indefinite periods for not being able to furnish even one surety of minimal amount of Rs. 500-1000. “These are clear instances of depriving the undertrials of their freedom and liberty solely on the ground of poverty... suffering for years for not fulfilling the conditions which were attached to the bail orders because of their extreme poverty and ignorance. No one on their behalf has even bothered to move the courts for relaxing, reducing or waiving the conditions. The poor perhaps have no friends or relations. Consequently, they are languishing in jails for months and years... Another factor which must be taken into consideration is the huge public expense involved in keeping these under trial prisoners in custody.” The Court in its landmark verdict held that in case even after relaxation on the bail bond if any undertrial finds it difficult to furnish a surety, he is granted liberty to move to the court.

⁷⁹(1996) 4 SCC 33.

⁸⁰1996 CriLJ 43.

Finally, in February 2016, the Supreme Court in its judgment by Justice Lokur on a writ petition covered a whole lot of issues related to the conditions of the accused and undertrials, and gave guidelines for prison reform to secure their rights in *Re: Inhuman Conditions in 1382 Prisons*.⁸¹ Some of the guidelines included setting up of an Under Trial Review Committee in every district who will collaborate with the District Legal Services Authority. The primary task of the Committee would be to ensure strict implementation of Section 436 and Section 436A of the Cr.P.C. It also placed certain liabilities on police officers to ensure that living conditions of the prisoners is commensurate with human dignity.

E. Suggestions

The author(s) thus urge for a major methodical reform in the Indian prison system. Prison administration and facilities need to be brought up to the basic human standards. In order to do this, the following steps can be undertaken:

1. *Classification of prisoners*: There should be a classification as to the amount of serving time each offence carries and prisoners should be classified according to that. The provision of separate prison or custodial home for undertrials should be facilitated without further delay.
2. *Setting up of autonomous body to overview legal aid*: Additionally, the prerequisite of keeping an undertrial as a prisoner should be the engagement of a legal aid lawyer who should be reportable to an autonomous body (set up to review the administration of legal aid lawyers) to ensure accountability for the quality of work done. This will ensure

⁸¹AIR 2016 SC 993.

that certain minimum standards are ensured to counter the unequal level of expertise.

3. *Reforms in bail-related law*: The system of bail should be revised and carried out at affordable rates, *i.e.*, the introduction of the system of bail amount ‘slabs’ on the basis of the income level of the accused (*a la* the taxation laws in the nation). Further, the recognizance of personal bonds could be made for a wider ambit of offences. In order to counter the fear of absconding of the accused, the non-appearance on a personal bond can itself be made into an offence.⁸² The same would be secured only when non-discrimination on the basis of economic status is included under Art.15 of the Indian Constitution.
4. *Enforcement of Section 436 and 436A of the CrPC*: Without further adjournment, undertrial prisoners must be released under Sections 436 and 436A of the Cr.P.C.; basing on the quick and strict implementation of the apex court rule of discharging all those who have served half of the sentence if found guilty of the offence for which they are held in custody. The language of the section must be made unambiguous in communicating that the bail under this section is a matter of right, which cannot be trounced by imposing or demanding unreasonable or excessive sureties.⁸³ The sureties demanded must be in consonance with Section 440 of the Cr.P.C. according to which sureties would be prescribed with due regard to the circumstances of the case not being excessive.
5. *Provision to rehabilitate undertrials after release*: Thereafter, the State should envision a policy of getting the undertrials back on their feet on release. There should be a scheme of monetary compensation offered to those undertrials who

⁸²78th Law Commission Report, Congestion of Under Trial Prisoners in Jail (1979).

⁸³Supra note 14.

emerge to be innocent after the trial. This is similarly adopted vide the European Convention on Human Rights which enables the State to take responsibility for the wrongful arrest and hence the State pays compensation.⁸⁴ Section 358 of the CrPC also recognizes the compensation for a wrongful arrest but sets a maximum limit to rupees 1000. To make the justice system fair and for the State to admit its fault, Section 358 could be amended and a scheme of compensation for the same can be devised. The prison departments should also create a cadre of trained social workers to work with prisoners, their families and the acquitted towards promoting their legal rights and rehabilitation. All these would be supplemented by the removal of obsolete laws (*e.g.*, Section 377 IPC) to increase efficiency in trials, decriminalisation of minor offences which could be included in tortious laws (*e.g.*, pickpocketing of amount *say*, worth rupees 100), and implementation of the Probation of Offenders Act which provides for releasing the offender in less serious offences back to the community on a *bond of good behaviour* or under the supervision of a probation officer for a fixed period of time.

6. *Improving the judge-population ratio*: Last, but the most needful action is to increase the judge-population ratio to the standards advised by various committees. The problem of judicial appointment is being nationally debated currently. Barring the deadlock between the discretion of the judicial collegium and final confirmation by the government machinery, the greater problem of undertrials can be solved by appointment of more judges at the *local* level through judicial services examinations, and it thus becomes important to sensitize people of the legal profession to opt for the same.

⁸⁴European Convention on Human Rights, art. 5(5), Nov. 4, 1950.

The need of the hour in the Indian criminal judicial system is to disinfect itself by introducing reforms and bringing in people dedicated to serving the people of the nation.

F. CONCLUSION

The paramount constitutional concern with undertrial detention is that it violates the principle that there should be no punishment before the establishment of guilt by procedure of law. The concept of an incarcerated undertrial is akin to punishment before conviction, as the benefit of doubt *is* provided to him. There is an absence of segregation between undertrials and convicts as they are both lodged in the same prison, and their liabilities are similar along with the services provided, which casts a doubt on the entire system of justice. There is also a demographic similarity among undertrial ‘victims’, namely, they are destitute, uneducated, and from the backward classes. This means that there *may be* an unintentional but a most probable non-justified classification among the undertrials. Whenever there is a question of justice, the only thing that must be taken into account is the establishment of the act committed by the accused *beyond a reasonable doubt*. Invariably, it is always the poor who gets entrenched in the ‘justice system’ available for undertrial prisoners. There is a definite violation of the undertrial’s right to equality and right to life.

Before conviction, pre-trial detention must be minimal and situationally justifiable to each individual case otherwise the authorities stand in breach of their duties, violating the fundamental rights of the undertrial prisoner.⁸⁵ The familiar dicta “justice delayed

⁸⁵Supra note 14.

is justice denied” and “bail not jail” are often held out as the bulwarks of fair trial, but the profile analysis of the prison population makes it a farce.

The concept of having an undertrial as a ‘prisoner’ in itself can be questioned as our justice system relies on the principle of ‘innocent unless proven guilty’. How can somebody be punished simply on the apprehension that he has committed that offence? And if a person is declared innocent, the years that he has spent in jail are not even compensated by the government and cannot be quantified in monetary terms. However, the question of the hour is, why is there such a high proportion of undertrials in the country? Doesn’t the alarming number of undertrials shows failure of both, Section 436A of the Cr.P.C. and the criminal justice system, to successfully convict an accused in time? There is a serious breach of human rights of the undertrial prisoners. This failure remains unaddressed. Thus, there is a need for substantive reforms to the investigation and trial process in India. The ultimate aim is the restoring of the faith in the Indian justice system.

VOYEURISM: A COMPARATIVE STUDY

*Shivani Kabra**

Abstract

The recently amended Indian Penal Code provides for an independent provision, §354 C, to criminalize the act of voyeurism. Owing to its recent addition, the provision has not been interpreted or analyzed in detail. Hence, the primary focus of this paper is the interpretation of Section 354C in light of foreign jurisdictions of Canada (Criminal Code (R.S.C., 1985, c. C-46)), Australia (Crimes Act 1900 - SECT 91J), United Kingdom (Sexual Offenses Act, 2003 S. 63) and District of Columbia Code (DC Code: Omnibus Public Safety Amendment Act, 2006).

The right to privacy has not been specifically defined in the Indian legal sphere but has only been read in as a constitutional right for the purpose of Civilian- State surveillance. However, it lacks a separate recognition of an independent right not only against State supervision but also against civilian supervision. Curiously, the offence of

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voyeurism seeks to protect private acts of individuals under a legal structure that refuses to acknowledge privacy rights. Owing to such logical inconsistencies, it is pertinent to delineate on this subject and attempt to explain the same in light of recent developments.

Therefore, the main objective of the author is to characterize and interpret the current statuesque of the crime in Indian jurisdiction while verifying the utility of the clause against foreign case laws.

I. INTRODUCTION

The Criminal Amendment Act, 2013 (“the **Act**”) was enacted in response to the public fervor in wake of the ‘*Nirbhaya*’ gang rape. Subsequently the JS Verma Committee was constituted in an attempt to overhaul the criminal legal system and make it more gender neutral. The committee realized that several sexual offenses such as *voyeurism*, *eve-teasing*, and *stalking* were considered to be minor offenses even though they severely oppressed fundamental rights of the female gender. Keeping in mind the lackadaisical attitude of the Indian legislature towards sexual offenses primarily committed against females, the committee recommended, amongst other things, the creation of a provision for criminalization of voyeurism.¹

Voyeurism is predominantly defined as an activity through which the culprit (*voyeur*) derives sexual gratification from covert observations

¹JS Verma Committee, Report on Amendments to Criminal Law, <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>.

of others while they undress or engage in sexual activities. Parallely, it is also an indicator of sexual disorder and can be categorized as a form of sexual deviance. However, irrespective of either definition, it is deduced that voyeurism acts as a two-fold crime- (i) in capacity of a privacy offense and (ii) in capacity of a sexual offense. In the Indian context, the said crime has been outlawed under **§354 C of the Indian Penal Code** that explicitly illegalizes **observations, capturing and publication of any private act** of an individual in a place where the **individual has an expectation to not be observed**.²

On account of the changing legal sphere, it is necessary to characterize the offence in the current contextual scenario. This paper attempts to do the same by analyzing voyeurism in the Indian context. However, owing to its recent addition, the provision has not been structured or extensively critiqued in relation to criminal law. Therefore, it is necessary to analyze the same in context of foreign jurisdiction, specifically: *Canada, Australia, United Kingdom, and United States of America*.

Thus, this paper seeks to address the attributes that comprise the crime of voyeurism. Part II of the paper compares right to privacy across foreign jurisprudences while advocating for a right to bodily privacy for individuals under Indian laws. Similarly, Part III begins analyzing the elements of S. 345(c) with the principles laid down under foreign jurisprudences. It tries to define the nature of voyeuristic acts in India as opposed to other jurisprudences and argues for inclusion of the component of *mens rea*. Owing to the inclusion of the said element, it makes a case for diminished accountability and rehabilitative means of punishment for the voyeur. Additionally, the section questions the mutual exclusivity of consent given by the victim viz. right to expectation of privacy, and advocates

²Thus, the elements of voyeurism in India include- (i) watching, (ii) capturing, (iii) publication, (iv) private act of an individual, (v) expectation of not being observed.

for extension of this provision in the public and private sphere. In conclusion, Part IV summarizes the paper and elucidates the shortcomings faced by the Indian statute in comparison to foreign jurisprudence.

II. RIGHT TO PRIVACY

The right to privacy has not been expressly defined in the **Indian Constitution**; however through judicial pronouncements, it has been recognized as a facet of Article 21.³ The dissent in *Kharak Singh v State of Uttar Pradesh*⁴ interpreted the right to liberty to mean freedom from any restrictions imposed on a citizen's private life. Similarly, *R. Rajagopal v. State of Tamil Nadu*⁵ positively recognized this right by including it in the right to life and liberty. However, these judgments have only recognized privacy rights in connection to state surveillance. In contrast, the offense of voyeurism infringes upon a separate facet of privacy law- *bodily privacy or privacy in controlling access to one's body*.

A. *Right to Bodily Privacy*

In *Govind v. State of Maharashtra*⁶, the court held that "Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing"⁷, thus establishing privacy of home and all the activities that take place within it. Conceptually though, it solely related to state surveillance even though their reasoning subscribed to Fourteenth

³Protection of life and personal liberty.

⁴AIR 1963 SC 1295.

⁵AIR 1995 SC 264.

⁶AIR 1975 SC 1378.

⁷Id. at ¶24.

Amendment US privacy rights cases regarding bodily privacy and integrity.⁸ Consequently, the right was upheld in *T. Sareetha*⁹ where the idea of privacy comprised of body inviolability, integrity and intimacy of personal identity. Subsequently though, the case was overruled along with the Delhi High Court judgment in *Naz Foundation*¹⁰ case that had previously ascribed privacy rights to body autonomy. Thus, in this manner, the right over body autonomy has experienced varying degrees of acceptance and retractions.¹¹

B. Need for bodily Privacy

A framework to protect privacy rights for bodily autonomy seeks to criminalize intentional intrusions on private acts of an individual.¹² Thereafter, the privacy rights would not only protect an individual against illegal state surveillance, but also civilian surveillance and non-consensual access of body by another. This need for bodily autonomy primarily arises due to increasing transparency and encroachment of the public sphere in the private lives of individuals. Increased modernization has enabled newer technology to develop newer ways of invading privacy.¹³

The idea of body autonomy and privacy arises from the concern that certain bodily actions need to be hidden from others, and one should

⁸Cases like *Roe v Wade* (410 U.S. 113 (1973)): The 14th Amendment incorporated the Liberty Clause that restricted the State from depriving any individual of their life and liberty without due process of law.

⁹*T Sareetha v. T VenkataSubbaiah*, AIR 1983 AP 356.

¹⁰*Naz Foundation v. Government of NCT*, 2010 CriLJ 94- decriminalized consensual homosexual relationships.

¹¹BhairavAcharya, *The Battle for a Right to Privacy Still has a long way to go*, THE WIRE (Aug. 8, 2015), <https://thewire.in/7685/the-battle-for-a-right-to-privacy-still-has-a-long-way-to-go/>.

¹²Mark A Rothstein, *Genetic Stalking and Voyeurism: A new challenge to privacy*, 57(3) UNIVERSITY OF KANSAS LAW REVIEW 539–578 (2009).

¹³Warren and Brandeis, *The Right to Privacy*, 4 Harvard Law Review, 193 (Dec. 15, 1980).

not be watched while engaging in private acts without one's consent.¹⁴ It essentially creates the concept of an *individual sphere*, which protects personal beliefs, thoughts, and sensations.¹⁵ Therefore, it is seen that there is an imminent need to formalize bodily privacy rights and aid in creation of individual sphere in context of body autonomy. This necessity was recently reflected in a Delhi court judgment that reintroduced the right to bodily privacy by concluding the offense of voyeurism to infringe upon the said right.¹⁶

Comparably, in the Australian Jurisprudence, the right to privacy is not protected by the Australian Constitution and has only been partially recognized. The position of the right is highly unsettled as different courts have held contradicting stances on the same. In *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd*,¹⁷ the court recognized the legal cause of action on grounds of unjustified invasion of privacy, and held covert capturing of the operations at a factory in violation of the right. Extending this principle, the court in *Grosse v. Purvis*¹⁸ acknowledged the right to privacy and held the defendant guilty for the offense of stalking and harassment. However, in complete contravention to the *Grosse case*, subsequent courts rejected claims for breach of privacy on the grounds that Australian law had not been developed to recognize such a right.¹⁹

¹⁴Martha C Nussbaum, Is privacy bad for women?, THE BOSTON REVIEW (Apr./ May 2000), <http://new.bostonreview.net/BR25.2/nussbaum.html>.

¹⁵Deva Prasad, Analysing the right to privacy and dignity with respect to UID, THE CENTRE FOR INTERNET AND SOCIETY (Jan. 26, 2011), <http://cis-india.org/internet-governance/blog/privacy/privacy-uiddevaprasad>.

¹⁶Express News Service, Voyeurism violates women's right to privacy says Delhi HC, THE INDIAN EXPRESS, Apr. 9, 2016, <http://indianexpress.com/article/cities/delhi/voyeurism-violates-womens-right-to-privacy-says-delhi-court/>.

¹⁷(2002) 208 CLR 199.

¹⁸(2003) QDC 151.

¹⁹Milne v. Haynes, (2005) NSWSC 1107.

Likewise, the status of the right is uncertain in the **Canadian jurisprudence**. The Canadian Charter of Jurisdiction considers the right to privacy between an individual and the State but not of that between individuals. Nevertheless, this right has been held to be a necessary segment of liberty in a modern state²⁰ and has been given the status of a general constitutional right. Furthermore, the courts have started importing the basic principles of privacy and have guaranteed the individuals a basic right to reasonable expectation of privacy as against the state and other people.²¹

Similarly, in the **United Kingdom**, the right to privacy is not enshrined in the constitution and thus, is not constitutionally protected. However, with the enactment of the Human Rights Act, 1998, the right to privacy has been formalized. The Human Rights Act, 1998 gives effect to article 8 and article 10 of the ECHR that contain the rights of privacy and freedom of expression²² and empower the courts to interpret the legislation in consonance with Convention rights.²³ Though, it is significant to note that the English legislation has indirectly acknowledged the right to privacy and the right against intrusion by enforcing a statutory framework for protection of the same.²⁴

In contrast with the preceding jurisdictions, the **United States** formally recognizes and legally protects torts relating to invasion of privacy.²⁵ There are four distinct privacy torts that have been recognized- (i) intrusion upon seclusion,²⁶ (ii) public disclosure of public facts, (iii) publicity which places the plaintiff in a false light in

²⁰R v Dymont, 1988 2 RCS.

²¹R. v. Keough, 2011 ABQB 48; R v Mills, (1999) 3 S.C.R.

²²Human Rights Act, 1998, § 1.

²³Human Rights Act, 1998, § 2(1)(a).

²⁴The Data Protection Act, 1998; The Protection from Harassment Act, 1997; The Regulation of Investigatory Powers Act, 2000.

²⁵Griswold v Connecticut, 381 U.S. 479 (1965).

²⁶Daily Times Democrat v Graham, (1964) 276 Ala 380.

public eye, and (iv) appropriation of the plaintiff's name or likeness.²⁷ Thus, by allowing torts for intrusion in private affairs/ seclusion, the courts have accepted and acknowledged bodily privacy. Nevertheless, this right is not absolute and can be challenged using the First Amendment.²⁸

In conclusion, it is deduced that the basic principles of privacy have been used by courts, especially, for criminalizing acts that infringe upon a reasonable expectation of privacy. However, formal recognition of the same is needed since an individual has a right not to be looked at or known about, even if this right is curtailed to circumstances in which the observations cannot be reasonably expected to occur.²⁹

III. ELEMENTS OF VOYEURISM: *COMPARATIVE ANALYSIS*

The clause included under §354C details voyeurism as: “Any man who **watches, or captures** the image of a **woman engaging in a private act** in circumstances where she would usually have the **expectation of not being observed** either by the perpetrator or by any other person at the behest of the perpetrator or **disseminates such image** ... and shall also be liable to fine.”³⁰

In order to further interpretation of the provision, Part III of the paper seeks to explain the Indian law on voyeurism in context of foreign jurisprudential portrayal of the same.

²⁷William L. Prosser, Privacy, 48 CAL. L. REV. 383, 389 (1960).

²⁸Freedom of speech and expression of the Media; Florida Star v BJF, 491 U.S. 524 (1989).

²⁹Daniel O. Nathan, Just Looking: Voyeurism And The Grounds of Privacy, 4(4) Public Affairs Quarterly 365- 386 (Oct. 1990).

³⁰Indian Penal Code, 1860, § 354C.

A. *Nature Of The Offense*

Voyeurism in the Indian context requires the voyeur to (i) watch, (ii) capture, and (iii) publish the private acts of another individual. While the methods of capture and dissemination have been defined in the provision, the term ‘watch(es)’ has not been explained and thus entails a broad avenue of acts. For instance, the spectrum of watching ranges from mere glances to active and deliberate observations.

The Australian jurisdiction restraints from confining the definition of ‘observing’ to specific acts; however, it recognizes watching, staring and peeping as ways of committing voyeuristic acts.³¹ Contradictorily, the Canadian jurisdiction explicitly requires an act to be surreptitious in order for it to be voyeuristic. The term, surreptitious, was added to limit voyeuristic acts and has been construed to mean “*any act that is done in secret, or by stealth or by illicit means.*” The standard for the same has been held to be hidden or disguised acts of observations done without consent of the party being observed. Thus, the Canadian law requires the voyeur to *actively and deliberately* observe certain private acts while simultaneously criminalizing capturing of the acts and their subsequent distribution.³²

Similarly, the UK laws criminalize observation, capture and subsequent publication of private acts of individuals. They further determine ‘*observation*’ to be the deliberate watching of private acts as opposed to incidental seeing. This requirement enables the law to exclude accidental and negligent observations occurring due to careless and reckless conduct.³³ The same principle has been extended to the US jurisprudence which requires observations to be done

³¹Delaney & Carberry, (2008) FamCA 1113.

³²R. v. Lebenfish, 2014 ONCJ 130.

³³R v B, (2012) EWCA Crim 770.

secretly or in a surreptitious manner.³⁴ Moreover, the acts of ‘viewing’ and ‘observing’ have been defined as the intentional looking upon of people for a brief period of time in a manner that is not casual or cursory.³⁵ The contradictory stand of the Australian law viz. other jurisprudences show the combined efforts of the foreign jurisprudence to place more emphasis on the manner of observation than outline, specific acts to narrow its meaning. Accordingly, owing to the broad interpretations of the terms, determination of the same should be done on a case by case basis.

Significantly, Indian laws do not explicitly require the act of observation to be done in a deliberate or secret manner. Non-inclusion of such a clause creates a fallacy that allows accidental viewing of private acts to be termed as voyeuristic. For instance, circumstances involving a man passing by a washroom with an open door and accidentally glancing inside would be termed as a voyeuristic under the Indian law. In actuality, the observations in this situation were purely incidental, involuntary and due to the negligent acts of the person who left the door open. Nevertheless, due to the unclear terminology of S. 345(B), this act can be considered as voyeuristic under Indian laws.

Alternatively, due to ambiguous explanations, one is unable to determine whether the Indian jurisdiction criminalizes observation done in a casual or cursory manner contrary to acts undertaken for a specific purpose. On a plain reading of the provision, it is realized that if a man was to coincidentally look inside the bedroom of another due to their undrawn curtains, and would have chanced upon the individual engaging in a private act; the same would be considered voyeuristic under the law. Therefore, it is noted that the Indian provision utilizes a broad umbrella term that blindly criminalizes

³⁴United States of America v. Bernard Freundal, 2014 CMD 18262.

³⁵District of Columbia Code: Omnibus Public Safety Amendment Act, 2006.

every act- active participation or casual viewing; deliberate or incidental observations- irrespective of their intended purpose or impact.

Under the provision, the term ‘private acts’ of an individual has been greatly reduced to include a mandatory condition of exposure of the victim’s genitals, posterior or breasts for watching of these acts to constitute as breach of privacy.³⁶ This principle finds support in *Australian Broadcasting Corporation case*³⁷ where the court distinguished between privacy and voyeuristic offense by categorizing unauthorized capturing of private acts of people in a secret, underground factory as a privacy offense and not as a voyeuristic act. However, such an interpretation disregards scenarios of observations that blatantly invade a reasonable expectation of privacy but do not involve the exposure of genitals, posterior or breasts. For instance, situations of a voyeur observing private acts such as cooking or watching television of another inside their house, cannot be termed as voyeuristic. Any observations/ capture made in this capacity without exposure of the private parts of the victims would thus constitute as violations of privacy rights not included under the voyeurism clauses.

In comparison though, the law has prescribed and detailed adequate protection from illegal capture and publication of private acts. They have also withheld from defining the methods of ‘capturing’ or ‘publication’, thereby including a wide spectrum of conventional methods (*video, film, and camera*) as well as developing methods such as paintings. Summarily, it is contended that the Indian legislation must be widened to not only include a broadened

³⁶Explanation I of the Act requires the private acts to be done in circumstances- (1) of reasonable expectation of privacy AND where the victims genitals, posterior or breasts are exposed, or (2) victim using the lavatory, or (3) victim doing a sexual act out of the ordinary in the public.

³⁷(2002) 208 CLR 199.

interpretation of mediums for committing voyeuristic acts but to also extend the provision to include instances that infringe even the most basic circumstances of expectation of privacy.

***B. Does The Act Of Voyeurism Require An Element Of Mens Rea/
Intention Of The Voyeur?***

The Indian provision on voyeurism does not explicitly consider intention of the perpetrator; however, the same is necessary to be read in, in order to distinguish between incidental and deliberate acts of voyeurism.

The Canadian courts have upheld the necessity of testing the intention of the voyeur by including the element of *mens rea* in their concept of *surreptitious* behavior. Herein, the element of *mens rea* entails that the voyeur must actively intend to not let his victims know about his observations.³⁸ Evidently thus, actions lacking specific intent and the necessary purpose have been held to be insufficient and not within the ambit of voyeurism.³⁹ Such an inclusion has favourable impact of excluding acts committed on account of third party negligence from the ambit of voyeurism. On re-analysing the *washroom example* mentioned in the previous sub- section, it is contended that another ground for the person's actions to not constitute the offence of voyeurism is the lack of required intention. The person did not possess the requisite *mens rea* to invade bodily privacy of the occupants of the washroom and was an innocent passerby. Therefore, nature of the offence requires certain degrees of intention to commit the same. In order to distinguish deliberate acts from accidental ones such as the one committed in the preceding example, it is necessary for the man to possess an intention of committing the crime.

³⁸R v. Men, 2014 ONCA 69, ¶3.

³⁹Supra note 20.

IV. DIMINISHED ACCOUNTABILITY: A CASE FOR REHABILITATION

Voyeuristic disorders can also be described as mental conditions, categorized under paraphilic disorders by the American Psychiatric Association.⁴⁰ It has been established that voyeuristic acts involve an element of *mens rea*. However, in the current circumstances it is argued that the requisite element of *mens rea* has a mitigating effect on the voyeur's accountability. It is noted that severe psycho-sexual disorders can result in diminished accountability; however, to ascertain the same, one needs to analyze the nature, location, procedure and behavior of the offender.⁴¹

Several statutes have made provisions for rehabilitation of individuals suffering from paraphilic disorders. The German law allows suspension of sentence for exhibitionists⁴² if it is determined that the offender can cease his actions only through medical treatment.⁴³ Likewise, the UK Mental Health Bill includes sexual deviance (*sexual disorders*) as a mental disorder and provides for mitigated accountability of the same.⁴⁴ These jurisdictions have acknowledged sexual disorders to contain an element of mental illness and

⁴⁰Diagnostic and Statistical Manual of Mental Disorders (5th ed.), AMERICAN PSYCHIATRIC ASSOCIATION, <http://psychiatryonline.org/doi/book/10.1176/appi.books.9780890425596>.

⁴¹Klaus M. Beier & Kurt K. Loewit, Sexual Medicine in Clinical Practice 67-69 (2013).

⁴²Exhibitionism and voyeurism are closely related acts- Blake Morrison, Exposed: Voyeurism, Surveillance and the Camera, THE GUARDIAN (May 22, 2010), <https://www.theguardian.com/culture/2010/may/22/exposed-voyuerism-exhibition-blake-morrison>.

⁴³German Criminal Code, Criminal Code in the version promulgated on 13 November 1998.

⁴⁴Mary Ruck, Vulnerability and the law: A practitioner's perspective, BYROM STREET CHAMBERS (Sept. 17, 2008), <http://www.byromstreet.com/news/wp-content/uploads/2011/04/Vulnerability-and-the-law-public.pdf>.

accordingly have opted for rehabilitative steps. In *R v. IP*⁴⁵ the court had realized the accused to previously be of a good character. Throughout the incident, the accused had cooperated in admitting his crime and his tendencies were capable of being treated through medical therapy. Keeping in mind these external considerations, the court had taken a rehabilitative step and ordered for community service. Similarly, in *R v. Weinheimer*⁴⁶ the court had considered external factors such as good conduct, previous responsible contributions as a member of society, and guilt induced behavior of the accused to grant a rehabilitative order. Likewise, in *Public Prosecutor v. Chong Hou En*,⁴⁷ the court had opted for rehabilitation since it had considered voyeurism to be a psychiatric disorder. Though this case was subsequently overruled on the grounds that voyeurism is not a disorder, arguably this overrule is bad in law since it fails to consider extensive medical evidence that have established voyeurism as a psychiatric disorder.⁴⁸

In conclusion, it is seen that statutes and courts have acknowledged medically treatable psychiatric disorder to act as a mitigating factor. Due to the presence of an element of involuntariness, the courts have thus considered external factors in such situations and extrapolated the same to diminish accountability on a case to case basis.

⁴⁵(2005) 1 Cr. App. R. (S.) 102 (Eng. C.A.).

⁴⁶2007 ABPC 349.

⁴⁷(2015) SGHC 69.

⁴⁸Sexual Health Issues, WORLD HEALTH ORGANIZATION, http://www.who.int/reproductivehealth/topics/sexual_health/issues/en/; Supra note 35.

V. NEED FOR ‘CONSENT’ ALONGSIDE THE ELEMENT OF ‘REASONABLE EXPECTATION OF PRIVACY’

Another significant feature of the crime in India is that the observation, capture and publication of private acts of another needs to occur when the person has an expectation to not be observed. §354 (c) of the IPC lays down certain places and circumstances that give an individual a reasonable expectation of privacy, but fails to define the elements of this expectation. While the terms used in the provision are ‘expectation to not be observed’, it can be inferred that this expectation directly relates to an expectation of privacy.⁴⁹ The legislation has incorporated an objective standard of reasonability for adjudging an individual’s right to expect privacy in certain places. In absence of such a standard, a subjective reading of the provision would render the expectation of privacy dependent on the varying degrees of sensitivities of individuals rather than the intention, purpose or nature of the actions. For instance, a person sitting in a restaurant would have a subjective expectation of privacy in that place which would render every glance at him voyeuristic.⁵⁰ Therefore, in order to avoid this lacuna, it is imperative to consider an objective standard for checking expectations of privacy. However, this raises the question of whether an individual’s *reasonable expectation of privacy overwrites the need for consent?*

The Canadian courts have held reasonable expectation of privacy to be normative⁵¹ and have given importance to cognizable privacy over

⁴⁹Indian Penal Code, 1860, § 354 C Explanation 1. Further, voyeurism infringes on the right to privacy which implies that one has an inherent right to privacy (since a right can only be violated if it is possessed by an individual).

⁵⁰The Indian law excludes a specific purpose for voyeuristic acts (Part III (5) of this paper) and disregards the need for intention of the voyeur as noted in IV (2).

⁵¹R v. Tessling, (2004) 3 S.C.R. 432.

absolute privacy.⁵² Subsequently, this right has been upheld in the context of public sphere. The courts have based reasonable expectation of privacy on circumstances and extended the same to public places.⁵³ It has been realized that an expectation of privacy is not inherent in certain situations but arises due to the nature or utility of the place and should be decided on a case to case basis. For instance, a person in a closed room is supposed to have a reasonable expectation of privacy, however, this privacy ceases if the room has a multipurpose utility.⁵⁴

Similar approaches to expectation of privacy have been found in the UK and US.⁵⁵ In contrast, the Australian jurisdiction absolutely disregards an expectation of privacy and only considers consent and awareness of the victim. This approach of the Australian courts leads to a situation of mutual exclusivity of ‘consent’ and ‘expectation of privacy’. As noted earlier, the Australian jurisdiction only considers consent of the victim while the foreign jurisdictions of US and UK consider both- consent and reasonable expectation of privacy; which begs the question: is there a need for an element of consent besides that of a reasonable expectation of privacy?

The courts have recognized that absence of express consent of the victim is an essential element for a surreptitious act. Lack of an individual’s knowledge and awareness about the voyeur’s actions, thus, makes the conduct voyeuristic in nature.⁵⁶ Furthermore, it is noted that lack of a reasonable expectation of privacy does not imply consent to being observed for the purpose of sexual gratification.⁵⁷

⁵²Supra note 31.

⁵³R v. Rudiger, 2011 BCSC 1397.

⁵⁴R v Ross Hamilton, 2009 BCPC 0381; Supra note 20.

⁵⁵Supra note 33; Supra note 34; R v Hamilton, (2007) EWCA Crim 2062.

⁵⁶Supra note 20; Supra note 34.

⁵⁷R v. Kevin Bassett, (2008) EWCA Crim 1174; Supra note 52.

Considering the hypothesis of a public swimming pool, it is noted that the people using the public facilities do not have a reasonable expectation of privacy to not be watched by others using the facilities in a similar manner. However, this does not imply their consent to be watched for sexual gratification or any other purposes. Similarly, in the context of public washrooms, it is noted that individuals do not have a reasonable expectation to privacy against people using the washrooms, but this does not deride them from an expectation of privacy against people who might drill holes in walls to observe them.⁵⁸ Thus, the offense of voyeurism depends on the consent and knowledge of the person being observed since affirmation of the same makes the act legal even in circumstances of reasonable expectation of privacy. In the Indian scenario, observation and capturing of acts of an individual in places of reasonable privacy is legal if the said individual consents to the observation/capture. The provision only criminalizes publication of private acts if the individual does not consent to the said dissemination.⁵⁹ Hence, it is seen that the law, though indirectly, makes a provision for the element of consent. The element of consent is as essential as that of an expectation of privacy. Considering their lack of mutual exclusivity, logically it follows that a person can be legally observed in places of reasonable expectation of privacy if done so with their consent and knowledge.

⁵⁸See sources cited, Supra note 55.

⁵⁹Indian Penal Code, 1860, § 354 C Explanation 2: Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.

VI. THE NECESSITY TO EXTEND RIGHT OF PRIVACY IN THE PUBLIC SPHERE

Traditionally, the courts have distinguished between public and private sphere and refused to extend the right to privacy to the public sphere on the basis that the public nature of the place excludes a legitimate expectation of privacy.⁶⁰

A. *Need For Right To Privacy In the Public Sphere*

With the advent of technological influx, right to bodily privacy in a public environment has become a necessity. Modern technology has made voyeurism more accessible through zoom lenses, CCTVs, camera phones etc.⁶¹ The same was acknowledged in *Washington v. Glas*⁶² where the perpetrators were charged with voyeurism for taking pictures underneath women's skirt in public places (*Upskirt voyeurism*). However, the perpetrators were acquitted because the statute did not support extension of right to privacy to public places. The necessity for such a right was furthered in *Department of Transport v. State Employees Ins.*⁶³ where it was stated that; "*people preserve their bodily privacy by wearing clothes in public and undressing in private. Thus, it makes no sense to protect the privacy of undressing unless privacy while clothed is presumed.*"⁶⁴

In pursuance of the same, several jurisdictions have followed the US-DC laws and extrapolated the right to privacy in public places. In *R v Hamilton*⁶⁵ the accused photographed underneath the skirts of women in a supermarket and subsequently argued that privacy rights did not

⁶⁰United States v Vasquez, 31 F Supp2d 85 (D Conn 1998).

⁶¹Supra note 40.

⁶²54 P.3d 147 (Wash. 2002).

⁶³97 Wash.2d 454, 458.

⁶⁴Supra note 61.

⁶⁵(2007) EWCA Crim 2062.

extend to a supermarket due to its public nature. However, the court rejected this argument and acknowledged that lack of privacy rights creates a lacuna since it legalizes voyeuristic acts in public places. Similarly, the Californian legislation on voyeurism was amended to criminalize secret, non-consensual filming ‘under or through’ clothing in places of reasonable privacy.⁶⁶ The inclusion of ‘under or through clothing’ implies the statute’s intention to criminalize voyeurism in private and public places.⁶⁷

The need for privacy rights in public places directly correlates to the need to protect one’s body from non-consensual association at all times. It implies an individual’s decisional autonomy over their bodies, and therefore, the Indian legislation must be interpreted to extend privacy rights to public sphere. However, such an interpretation cannot be made without acknowledging the right to bodily autonomy. The phraseology of the provision requires the act to be committed in circumstances where the victim had “*an expectation to not be observed*.”⁶⁸ Currently, the private and the public denominations are getting blurred due to more inclusive technologies. Therefore, it is only reasonable to expand the expectation of privacy in the public sphere. However, the right to expect privacy at any place cannot be construed without implying the extension of an overarching right to privacy to the public sphere.

⁶⁶The California Penal Code, 1872, § 647(k) (2).

⁶⁷Lance E. Rothenberg, Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and Failure of the Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space, 49(5) AMERICAN UNIVERSITY LAW REVIEW, 1128 (June 18, 2001).

⁶⁸This expectation has been detailed in the previous section.

VII. CONCLUSION: NEED FOR A GENDER NEUTRAL PROVISION

Owing to its recent addition, the provision on voyeurism can be interpreted through a progressive outlook by comparing and scrutinizing the shortcomings and success of foreign jurisdictions. Though it is a commendable step forward in the fight for women's rights and security, the gender biased wordings paradoxically deny protection to another section of the society. The provision only criminalizes voyeuristic acts undertaken by males, and refuses to acknowledge the existence of female culprits. It only protects females against voyeuristic tendencies of males, thereby excluding the presence of male victims. Furthermore, it completely disregards the third gender to an extent that trans-genders can be the culprits or the victims of voyeurism, and still cannot be penalized or protected (*respectively*) under the act due to lacking provision. Consequently, the provision eliminates instances of voyeuristic acts against males by both- males and females, as well as, voyeuristic acts against females committed by female culprits. This deliberate attempt to exclude certain sections of societies contradicts the JS Verma report⁶⁹ that allowed for culprits to be of any gender, though the victims were still considered to be only females.⁷⁰

To surmise, the paper argues for a more complete interpretation of the provision while seeking rectifications of the shortcomings. The intention behind introduction of this provision, though commendable, lack proper analysis that makes the right to expectation of privacy and an inferred right to privacy absolute. While incorporation of a right to privacy is necessary for body autonomy, the same is fraught with several loopholes that rectifications. However, since the provision is

⁶⁹Supra note 1.

⁷⁰§ 354B: Voyeurism, The Indian Penal Code, 1860- "Whoever watches a women engaging in a private act..."

in its early stages, interpreting it in context of foreign jurisprudence can help transcend loopholes that might arise due to inadequate wordings and explanation provided in the clause.

VIII. ANNEXURE: TABULATED ANALYSIS

ELEMENTS OF VOYEURISM: COMPARATIVE JURISDICTION

	India	Australia	Canada	Washington DC	United Kingdom
What is the Nature / Means of Offense under each jurisprudence?	Watches	Watches/ Observations	Surreptitious observations - Mechanical or electronic means	Watches/ views	Observes/ Deceptively observes through concealed equipment
	Captures	No	Captures (Nudity is irrelevant)	Captures: i) person in a place of privacy ii) Intimate areas of a person	Captures
	Publication	No	Distribution	Distribution	Distribution
Does the provision provide for a right of expectation to not be observed?	Expectation of not being observed	No	No	No	No
Does the provision include and element of intention of the voyeur to commit the crime?	No	No	No	No	No
Does the provision include an element of consent?	No	No	No	No	No

Does the provision require for a specific purpose on part of the voyeur?	No	Yes. Specific purpose of sexual arousal or gratification of perpetrator	Yes. Specific purpose of Sexual gratification of perpetrator or another	Yes. Specific purpose of arousing or gratification of sexual desire of any person	Yes. Specific purpose of sexual gratification of perpetrator or another person
Is there a right of expectation of privacy	Yes	No	Yes.	Yes	Yes
Does the provision extend to public and private sphere?	Only Private Sphere. [Private acts: Sexual acts usually not done in public / Lavatories/ Exposed intimate parts or covered only by underwear.]	Only Private Sphere. [Where the person is engaged in a private act]	Private Sphere	Public and Private Sphere	Private Sphere. [Private acts: Sexual acts usually not done in public / Lavatories/ Exposed intimate parts or covered by only underwear]

COMMENTS ON A. AYYASAMY V. A. PARAMASIVAM

Siddharth Nigotia & Agnish Aditya***

Abstract

The question of arbitrability has puzzled courts across the world. Arbitrability of fraud in particular has generated a lot of discussion in India, because Courts never settled the matter conclusively. The absence of certainty in this regard enabled parties to delay arbitration proceedings by alleging fraud. The case of A. Ayyasamy v. A. Paramasivam has attempted to clarify the law in this regard.

In Ayyasamy, the Court settled the issue by holding that “mere allegations of fraud” are arbitrable, whereas “serious allegations of fraud” are not. The Court supported the well-recognized principles of arbitration embodied in the Arbitration and Conciliation Act, like minimum judicial intervention, kompetenz-kompetenz and party autonomy. However, the authors shall argue that the Court merely indulged in a pro-arbitration rhetoric and still seems to harbour apprehensions towards the arbitral process.

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In this comment, the authors will argue that although Ayyasamy attempted to clarify the law with regards to arbitrability of fraud, it failed to do so. In the first part of this comment, we look at the Supreme Court cases dealing with the issue of arbitrability of fraud, and argue that the approach in the Swiss Timings case should be adopted in this regard. In the second part, we analyse the judgment in Ayyasamy, and argue that its dicta cannot be applied uniformly. Lastly, we conclude by arguing that the remedy to this problem is the principle of negative kompetenz-kompetenz which would entail that the jurisdiction of deciding matters of arbitrability will rest with the tribunal.

I. INTRODUCTION

On 4th October, 2016, a division bench of the Supreme Court consisting of A.K. Sikri and D.Y. Chandrachud, JJ., delivered the judgment in *A. Ayyasamy v. A. Paramasivam*¹. The Court sought to clarify the long-existing confusion with regards to the arbitrability of fraud claims in domestic arbitration cases. In *Ayyasamy*, the Court considered modern authorities and well-established principles of arbitration to rule that though “mere allegations of fraud” are arbitrable, “serious allegations of fraud” are not.

¹(2016) 10 SCC 386 [hereinafter *Ayyasamy*].

While a number of comments have praised this judgment for upholding recognized principles of arbitration², not everyone has welcomed this judgment³. A close reading of the judgment would show that the distinction between “serious allegations of fraud” and “mere allegations of fraud” can never be made out uniformly, rendering the application of the dicta in the case impossible. In this comment, we will attempt to show that the Supreme Court has been following an erroneous reasoning in dealing with the issue of arbitrability of fraud, and that the solution lies in allowing the tribunal to decide upon the issue of arbitrability and making fraud arbitrable.

II. THE SUPREME COURT’S STRUGGLE WITH ARBITRABILITY OF FRAUD CLAIMS

A. *The Abdul Kadir Era*

The issue of arbitrability of fraud claims was authoritatively dealt with by the Supreme Court for the first time in the landmark case of *Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak* (“*Abdul Kadir*”).⁴ In *Abdul Kadir*, the court relied on the Chancery Division’s judgment in *Russell v. Russell*⁵ and held that in a case where fraud has been alleged, if the party charged with fraud desires so, the matter

²See Kshama Loya Modani et al., Allegations of Fraud are Arbitrable – Even in Domestic Arbitrations in India, NISHITH DESAI ASSOCIATES, http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/allegations-of-fraud-are-arbitrable-even-in-domestic-arbitrations-in-india.html?no_cache=1&cHash=c6992cb8ff2156d2fc0d9165dae50789.

³See Pranav B R and Ganesh Gopalakrishnan, Dealing with Arbitrability of Fraud in India – The Supreme Court’s Fra(e)udian Slip, KLUWER ARBITRATION BLOG, <http://kluwerarbitrationblog.com/2016/11/17/dealing-with-arbitrability-of-fraud-in-india-the-supreme-courts-fraeudian-slip/>.

⁴(1962) 3 SCR 702 [hereinafter *Abdul Kadir*].

⁵(1880) 14 Ch D 471 [hereinafter *Russell*].

shall not be referred to arbitration. According to the Court, the party charged with fraud must get an opportunity to prove himself innocent in an open court.⁶

Abdul Kadir was decided under the Arbitration Act, 1940, which gave the courts a wide discretion with regard to referring a case to arbitration. The Madras High Court also opined on the issue of arbitrability of fraud claims prior to *Abdul Kadir*, wherein Schwabe, C.J. opined that if the court finds that an arbitral tribunal cannot mete out complete justice or that there are charges of fraud, reference to arbitration may be refused.⁷ Authors have noted that this approach was based purely on an apprehension towards arbitration and that by considering *Russell*, the Supreme Court adopted a more “tempered view”.⁸ The Court, in *Abdul Kadir*, was aware of the wide discretion conferred upon it, which was the “hallmark”⁹ of the 1940 Act.

On finding the facts, however, the Court found that the allegations of fraud, which related to statements of accounts and records of stock of goods, were not “serious allegations of fraud”. These allegations were not serious enough to warrant a trial in an open court over arbitration. The Court did not clarify what it meant by “serious allegations of fraud”, nor did it lay down any parameters for determining the same. It was left to the discretion of the Courts to determine such an issue, a discretion which the 1940 Act accorded to them.

⁶Contra D. Rhidian Thomas, The judicial supervision of arbitral references involving an allegation of fraud, 9 CIVIL JUSTICE QUARTERLY 382 381-403 (Oct. 1990). The author argues that this argument does not hold water since “many a person charged with fraud would be happy to accept arbitral privacy rather than a public court.”.

⁷*Majet Subbiah & Co. v. Tetley and Whitley*, AIR 1923 Mad 693.

⁸Janhavi Sindhu, Fraud, Corruption and Bribery – Dissecting the Jurisdictional Tussle between Indian Courts and Arbitral Tribunals, 3(2) INDIAN JOURNAL OF ARBITRATION LAW 23-42.

⁹Indu Malhotra, O.P. Malhotra on The Law & Practice of Arbitration and Conciliation 427 (Thomson Reuters, 3rd ed. 2014).

B. Arbitrability of Fraud under the 1996 Act

While *Abdul Kadir* was good law for a very long time, it was necessary to reconsider it for two reasons. Firstly, because Russell, on which the Court in *Abdul Kadir* placed substantial reliance, had some glaring problems which were pointed out by the House of Lords¹⁰ as well as Indian Courts.¹¹ Secondly, because the 1996 Act curtailed the discretion of the Courts with regard to reference to arbitration under Section 8.

The Apex Court considered the issue again in *N. Radhakrishnan v. Maestro Engineers* (“*Maestro*”).¹² *Maestro* was decided by a Division Bench under Section 8. In *Maestro*, the Court found at the outset that the arbitration clause in the case covered the dispute in question. However, it proceeded to rule that the case can only be settled in court as it involved serious allegations of fraud. The court reasoned that such allegations require adducing of detailed evidence, which cannot be dealt with properly by an arbitrator.

The Apex Court relied upon a number of cases, including *Abdul Kadir*, to arrive at its conclusion. However, it failed to distinguish *Abdul Kadir* as an authority under the old Act, perhaps because there was no need to do so.¹³ *Maestro* was interpreted as a blanket ban on

¹⁰*Camilla Cotton Oil Co. v. Granadex SA & Tracom SA*, (1976) 2 Lloyd’s Rep. 10 HL. The Court pointed out that Russell acted as an authority for the party opposing the stay. Any fraud alleged by the party requesting the stay would be irrelevant.

¹¹*Meru Engineers (P) Ltd & Ors. v. The Electric Control Equipment*, (1991) 2 M.L.J. 257. The Court found that the holding in *Abdul Kadir* cannot be considered as a proposition of law. The Court held that reference can be refused if serious allegations of fraud are put forth by any party.

¹²(2010) 1 SCC 72 [hereinafter *Maestro*].

¹³See Janhavi Sindhu, *supra* note 8. The author argues that since the party charged with fraud was also opposing the reference, the Court did not feel the need to explain the ratio in *Abdul Kadir*.

referring parties to arbitration when fraud has been alleged,¹⁴ whereas the Law Commission Report recognized *Abdul Kadir* as an “authority for the proposition that a party against whom an allegation of fraud is made in a public forum, has a right to defend himself in that public forum.”

The most problematic aspect of *Maestro* is its use of the term “serious allegations of fraud”. The Court, in *Maestro*, uses this term to distinguish non-arbitrable subject matters. However, it fails to define any set parameters to assess the “seriousness” of an allegation of fraud. The judgment in *Ayyasamy* also attempted to distinguish between a mere allegation of fraud and a serious allegation of fraud; however, we shall argue in the next section that the Court failed in that regard.

C. The Year of Change: MSM Satellite and Swiss Timings

Academic works¹⁵ and even Courts often read the cases of *World Sport Group (Mauritus) Ltd. v. MSM Satellite (Singapore) (“MSM”)*¹⁶ and *Swiss Timing Ltd. v. Organising Committee, Commonwealth Games 2010*¹⁷ (“*Swiss Timing*”) as rulings on arbitrability of fraud. But neither of these cases dealt with the issue of arbitrability of fraud claims. Rather, the Apex Court in both instances dealt with the principles of *kompetenz-kompetenz* and autonomy (separability) of the arbitration agreement.

¹⁴Amendments to the Arbitration and Conciliation Act, 1996, Report No. 246, Law Commission of India (Aug. 2014), ¶50, <http://lawcommissionofindia.nic.in/reports/Report246.pdf>.

¹⁵See, e.g., Rohan V. Tigadi & Aditya Pratap Singh, Indian Premier League and XIX Commonwealth Games take arbitrability of fraud in India by storm, 31 ARBITRATION INTL. 669-678 (2015). The author notes that in *MSM*, the Court held fraud to be “an arbitrable subject-matter in case of ‘international commercial arbitration’ under the Arbitration and Conciliation Act, 1996”.

¹⁶AIR 2014 SC 968 [hereinafter *MSM*].

¹⁷(2014) 6 SCC 677 [hereinafter *Swiss Timing*].

In *MSM*, the Apex Court was seized upon to determine whether the Facilitation Deed between the appellant and the respondent was void due to allegations of fraud. The issue framed in the case was not one of arbitrability but rather of jurisdiction, i.e., who will decide the question of whether the Facilitation Deed was void? The Court relied on the House of Lords judgment in *Nafta Products Ltd. v. Fili Shipping Company*¹⁸ to decide the case on the basis of principle of separability (or autonomy of the arbitration agreement). The Court distinguished *Maestro* as a case under Section 8 and foreclosed its applicability on International Commercial Arbitration. According to the Court, “[W]here fraud in the procurement or performance of a contract is alleged, there appears to be no reason for the arbitral tribunal to decline jurisdiction.” Thus, the Court relied on the principle of separability and *kompetenz-kompetenz*, inherent in the Act,¹⁹ to hold that the tribunal shall have the jurisdiction to determine questions relating to fraud in International Commercial Arbitration.

Similarly, in *Swiss Timing*, the issue framed was not of arbitrability but again that of jurisdiction. The Court had to decide whether the contract between the parties was void on the ground of there being fraud. The Court refused to apply *Maestro* and held it to be *per incuriam* for not relying on the cases of *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums*²⁰ and *P. Anand Gajapathi Raju & Ors. v. P.V.G. Raju (Dead) & Ors.*,²¹ where the Apex Court held that Section 8 mandates a reference to arbitration according to the terms of the agreement. The Court, in *Swiss Timings*, also noted that the judgment in *Maestro* did not rely on Section 16 of the Act and thus ignored the cardinal principles of arbitration, i.e., autonomy of the

¹⁸(2007) Bus. LR 1719 [hereinafter Premium Nafta]. It was an appeal from Fiona Trust & Holding Corporation & Ors. v. Privalov & Ors., (2007) 1 CLC 144.

¹⁹Arbitration and Conciliation Act, 1996, § 16.

²⁰(2003) 6 SCC 503.

²¹(2004) 4 SCC 539.

arbitration agreement and *kompetenz-kompetenz*. The Court adopted the policy of least interference embodied in Section 5 and Section 16 to arrive at its conclusion that the Court should decline reference to arbitration only when it finds that the contract is void on a reading of the contract itself (without requiring any external evidence).

Even though none of the cases dealt with the issue of arbitrability, they are often discussed in the context of arbitrability of fraud claims. Both these cases did not consider a fraud claim as something which is not capable of settlement by arbitration. Instead, they relied on well-established principles and policies of arbitration and deferred to the statutory provisions to arrive at their conclusions. In our opinion, the approach of the Courts in this regard is the correct one. We will, however, take a different stance with regard to the extent of *kompetenz-kompetenz* endorsed by *Swiss Timings* later in our comment.

MSM was delivered in the context of International Arbitrations under Part II of the Act, whereas *Swiss Timings* was delivered under Part I. However, Courts were reluctant in considering *Swiss Timings* as an authority overruling *Maestro*.²² The judgment in *Swiss Timings* was delivered under a Section 11 petition by Nijjar J., sitting as a designate of the Chief Justice. The judgment came into question because a bench of lower strength cannot overrule a decision by a bench of higher strength. Secondly, the Supreme Court later ruled that the decision of the Chief Justice or his designate under Section 11 does not have any precedential value.²³ Thus, even though *Swiss Timings* took a progressive view it did not lay down any precedent and the issue of arbitrability of fraud was governed by the *Maestro* dicta until Ayyasamy.

²²See, for e.g., *Rrb Energy Limited v. Vestas Wind Systems*, C.S. (OS) No. 999/2014.

²³*State of West Bengal & Ors. v. Associated Contractors*, (2015) 1 SCC 32.

III. ANALYSIS OF THE JUDGMENT IN AYYASAMY

The case arose out of a dispute between brothers who entered into a partnership deed for running a hotel. The respondents filed a suit against the appellants seeking a declaration of their entitlement to participate in the administration of the hotel. The appellants filed an application under Section 8 in order to give effect to the arbitration clause in the partnership deed. The respondents resisted the application by claiming that since there were serious allegations of fraud, the case could not be referred to the arbitrator. The respondents relied on *Maestro*, whereas the appellants relied on *Swiss Timings* to oppose it.

The Trial Court as well as the High Court applied the *Maestro* dicta and refused to refer the dispute to an arbitrator. The appellants preferred an appeal to the High Court order. The issue was whether *Maestro* was applicable in the present case or not.

The Court at the very outset established that the issue was that of “arbitrability”, by noting that the Act “does not make any specific provision excluding any category of disputes terming them to be non-arbitrable”. Arbitrability in its accepted usage means that the subject-matter of a dispute is “capable of being resolved by arbitration”.²⁴ It may sometimes be used in a broader meaning, covering even the existence and validity of the arbitration agreement.²⁵ However, such usage is often criticized for creating confusion.²⁶

²⁴Fouchard Gaillard Goldman on International Commercial Arbitration 312 at ¶532 (Emmanuel Gaillard & John Savage eds., 1999).

²⁵See Laurence Shore, Defining ‘Arbitrability’ The United States vs. the rest of the world, N.Y. LAW JOURNAL (2007), <http://www.gibsondunn.com/publications/documents/shore-definingarbitrability.pdf>. The author illustrates how the U.S. Courts use the term ‘arbitrability’ in a different context and contrasts it with other jurisdictions. See also

Certain disputes are exclusively reserved for national courts due to their very nature as adjudication of such disputes may have public consequences.²⁷ This is termed as objective arbitrability.²⁸ Arbitrability has been defined as “one of the issues where the contractual and jurisdictional natures of international commercial arbitration collide head on.”²⁹ In determining arbitrability, a court should assume that the process of arbitration is effective and efficient and the consent of the parties is implied.³⁰ In our opinion, the Court’s consideration of the issue of arbitrability was bereft of any such assumption and its conclusion is a result of its apprehensions towards the process of arbitration.

In Ayyasamy, the Court held that in a Section 8 application, the Court must decide the arbitrability of the dispute. It went on to consider the existing authorities of *Abdul Kadir* and *Maestro*. The Court distinguished the dicta in both cases by holding that they are applicable when there are “serious allegations of fraud” and not when there are mere allegations of fraud. So, the Court found that “serious

Booz Allen and Hamilton v. SBI Home Finance, (2011) 5 SCC 532. The Court in Booz Allen found that arbitrability can have different meanings in different contexts.

²⁶See GAILLARD, supra note 24, at ¶532.

²⁷The Supreme Court, in Booz Allen, held that disputes relating to rights in personam were arbitrable; whereas disputes relating to rights in rem are required to be adjudicated by the court. The court, however, added a caveat to this, writing that this is not “a rigid or inflexible rule.” Commentators have pointed out the loopholes and unreliability of the Booz Allen test. See Arthad Kurlekar, A False Start – Uncertainty in the Determination of Arbitrability in India, KLUWER ARBITRATION BLOG, <http://kluwarbitrationblog.com/2016/06/16/a-false-start-uncertainty-in-the-determination-of-arbitrability-in-india>.

²⁸See GAILLARD, supra note 24, at ¶534.

²⁹Loukas A. Mistelis, Arbitrability — International and Comparative Perspectives, in ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 3 at ¶1-6 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).

³⁰Id. at ¶1-24.

allegations of fraud” are not arbitrable whereas “mere allegations of fraud” are.

The authors find the distinction between a “serious allegation” and a “mere allegation” a very vague one.³¹ If serious allegations of fraud would have meant allegations of fraud deserving a criminal trial (which the judgment contemplates to an extent), it would have been in line with the *Booz Allen test* as such fraud would affect rights in rem. But this understanding is partly correct. Whether the allegations are “serious” or not must be determined by looking at the amount and nature of the evidence which would be adduced before the tribunal to establish it.³²

This interpretation gives the court a wide amount of discretion in deciding what amounts to a serious allegation of fraud.³³ The use of vague phrases like “serious allegations” allows the Courts to find discretion when there should be none. No uniformity can be achieved through the distinction between “serious” and “mere allegations”, since it will depend upon the attitude of the Court towards arbitration. A court which is pro-arbitration might find that the arbitral tribunal is capable of dealing with a certain amount and nature of evidence, as well as civil courts can. However, a court which, is apprehensive about arbitration may decide otherwise.

The judgment in *Ayyasamy* is clearly a result of the Court’s apprehensions towards arbitration. In this regard the Law Commission suggested amendments to Section 16 which would

³¹Agnish Aditya, Takeaways from *Ayyasamy*: The Practical Impossibility of Determining “Serious Allegations of Fraud” and the Apprehension Towards Arbitration, KLUWER ARBITRATION BLOG, <http://kluwarbitrationblog.com/2017/01/20/takeaways-from-ayyasamy-the-practical-impossibility-of-determining-serious-allegations-of-fraud-and-the-apprehension-towards-arbitration/>.

³²Agnish Aditya, *supra* note 31.

³³*Id.*

affirm the tribunal's power to rule on "serious questions of law, complicated questions of fact or allegations of fraud, corruption etc."³⁴ This suggestion not only implies that fraud should be arbitrable, but also contemplates negative *kompetenz-kompetenz*, wherein the tribunal shall rule on issues of fraud. The legislature did not incorporate the suggestions in the 2015 amendment Act. In the next section, we shall suggest that the appropriate way to solve this problem will be by adopting the Law Commission's suggestions and giving due deference to the principle of *kompetenz-kompetenz*.

IV. SUGGESTIONS & CONCLUDING REMARKS

The principle of *kompetenz-kompetenz* and autonomy of the arbitration agreement are statutorily recognized in Section 16 of the Act.³⁵ *Kompetenz-kompetenz* has two effects—a positive one (positive *kompetenz-kompetenz*), which obliges the parties to refer their dispute to the tribunal in accordance with their agreement and a negative one (negative *kompetenz-kompetenz*), which bars them from approaching national courts with regards to disputes covered by the agreement.³⁶

Negative *kompetenz-kompetenz* allows the arbitrators to be first judges of their jurisdiction and limit the role of the courts to review the award.³⁷ Negative *kompetenz-kompetenz* is beneficial, since it entails that jurisdictional questions shall be decided by the arbitral tribunal itself, which would in turn save time.³⁸ It is a concept which is embodied in Section 16, but in effect it is denuded. According to

³⁴Report No. 246, supra note 14, at 50.

³⁵INDU MALHOTRA, supra note 9, at 763.

³⁶See GAILLARD, supra note 24, at ¶624.

³⁷Id. at ¶660.

³⁸Amokura Kawharu, *Arbitral Jurisdiction*, 23 N.Z. UNIV. L. REV., 243 (2008).

the Apex Court's judgment in *SBP v. Patel Engineering Ltd.*³⁹ (“*SBP*”), any ruling on jurisdiction by a Court under Section 8 or Section 11 would be binding on the arbitral tribunal.⁴⁰ In effect, if the Court decides that the issues of fraud are capable of settlement by the tribunal, the tribunal has to accept the decision and cannot arrive at a contrary conclusion.

The Act also allows vacating an arbitral award on the ground of the subject-matter not being arbitrable.⁴¹ If issues of arbitrability are decided by the Courts in the referral stage, it would only add to the opportunities that a conniving party will have to delay the process of arbitration as the party will have the opportunity to raise issues of arbitrability at the referral stage as well as the post-award stage. Thus, clearly, negative *kompetenz-kompetenz* is required in such a situation wherein issues of arbitrability will not be decided in the referral stage but only after the award has been passed.

The authors do not recommend that negative *kompetenz-kompetenz* be adopted in its complete form which would allow the tribunal to look into questions of “formal validity”⁴² of the arbitration agreement. The *Swiss Timing* case contemplated negative *kompetenz-kompetenz* by holding that the Court can only look at the contract *prima facie* to satisfy itself of its validity. Brekoulakis opposes complete negative *kompetenz-kompetenz* on theoretical, practical and policy grounds.⁴³

³⁹AIR 2006 SC 450 [hereinafter *SBP*].

⁴⁰*SBP* was severely criticized for creating an “absurdity in the law” and for exercising judicial legislation. See O.P. Malhotra, Opening the Pandora’s Box: An Analysis of the Supreme Court’s Decision in *S.B.P. v. Patel Engineering*, (2007), <http://www.manupatra.co.in/newsline/articles/Upload/30693C83-676B-4CD5-9D46-73C1810E46BC.pdf>.

⁴¹Arbitration and Conciliation Act, 1996, §§ 34(2)(b) & 48(2).

⁴²Questions regarding formation and conclusion of the arbitration agreement. See GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 581 (2nd ed. 2014).

⁴³Stavros Brekoulakis, The Negative Effect of Competence-Competence: The Verdict Has to Be Negative, AUSTRIAN ARBITRATION YEARBOOK 238-258 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1414325.

He believes that a concurrent jurisdiction of the courts and tribunals with regards to validity of the arbitration agreement strikes the right balance. In our opinion that will only be possible if *SBP* is overruled, since a concurrent jurisdiction will not be possible if the Court finds no valid agreement and thus no jurisdictional effect.

Although arguments favouring *kompetenz-kompetenz* have been made by academics⁴⁴ as well as the Law Commission, the legislature did not adopt it expressly, and the judiciary seems indifferent and confused. Allegations of fraud are common in commercial disputes, and to hold such allegations non-arbitrable would foreclose a very effective and desirable mode of dispute resolution for the parties. It is a sad state of affairs that the question of arbitrability of fraud claims is still alive and is being decided by archaic notions of arbitrability. In our opinion, adopting negative *kompetenz-kompetenz* is the way out of this quagmire.

⁴⁴Pratyush Panjwani & Harshad Pathak, Assimilating The Negative Effect of KOMPETENZ-KOMPETENZ In India: Need To Revisit The Question of Judicial Intervention?, II(2) INDIAN JOURNAL OF ARBITRATION LAW, http://www.ijal.in/sites/default/files/IJAL%20Volume%202_Issue%202_Pratyush%20Panjwani%20%26%20Harshad%20Pathak.pdf.

THE DECISION IN *SATYA PAL SINGH*: A PRESSING NEED TO RE-VISIT THE LAW RELATING TO VICTIM'S APPEAL

*Subhro Prokas Mukherjee**

Abstract

This article argues that that the Learned Division Bench of Hon'ble Apex Court erred in the case of Satya Pal Singh vs. State of Madhya Pradesh¹ where it held that a 'victim' as defined under section 2(wa) of the Code of Criminal Procedure ('the Code'), could only prefer a leave to appeal against acquittal under section 378 (3) and not prefer an appeal directly under the proviso to section 372 of the Code. It is argued that such an interpretation places an unnecessary restriction on the victim's right to appeal and has little basis to support itself. The interpretation adopted by the Hon'ble Apex Court in Satya Pal Singh is palpably at variance with the text of the Code itself, which leads to further inconsistent implications

In the case of *Satya Pal Singh*, the Hon'ble Apex Court adjudicated upon a Special Leave Petition where the appellant/aggrieved was the father of a deceased daughter who sought to challenge the order of the

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¹Criminal Appeal No. 1315 of 2015 decided on 06.10.2015.

Hon'ble High Court which upheld the order of the Learned Trial Court acquitting the accused persons of the charges under sections 498A, 304B of the Indian Penal Code 1860 and under section 4 of the Dowry Prohibition Act 1961. The Hon'ble Apex Court allowed the appeal and set aside the impugned judgement of the Hon'ble High Court for two reasons, one of which was that the Hon'ble High Court dealt with the appeal in a 'very cursory and casual manner, without advertng to the contentions and evidence on record' and 'mechanically' dismissed the appeal vide a 'cryptic' order. However, this article concerns itself with the second reason the Hon'ble Apex Court offered for upholding the appeal which is that a victim's appeal could be preferred in the High Court only with the special leave of the High Court because section 372 of the Code is necessarily conditioned and regulated by section 378 (3).²

The proviso to Section 372 which provides the victim with the right to file an appeal was inserted vide the amendments of 2009 and the section currently reads as the following:

372. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force:

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court. (*Proviso emphasized*)

²Satya Pal states: 'the right of questioning the correctness of the judgment and order of acquittal by preferring an appeal to the High Court is conferred upon the victim under proviso to Section 372, but only after obtaining the leave of the High Court as required Under Sub-section (3) to Section 378 of Code of Criminal Procedure'.

From a plain reading of section 372, it is clear that the legislature intended that a victim³ shall have the right to prefer an appeal against any order passed by a criminal court under three circumstances i.e. where the trial court has

1. Either acquitted the accused; or
2. Convicted the accused for a lesser offence; or
3. Awarded inadequate compensation to the victim.

The Hon'ble Apex Court primarily⁴ relied upon *Dwarka Prasad vs. Dwarka Das Saraf* (1976) 1 SCC 128 to hold that a proviso was a creature of the statute and ergo the proviso in section 372 of the Code which provided the right to a victim to provide an appeal, was itself subject to the main provision of section 372, and the main provision in section 372 provided that no appeal would lie 'except as provided for by this Code or by any other law for the time being in force'. Thus, it was held by the Hon'ble Apex Court that the Delhi High Court in *Ram Phal Singh vs. State*⁵ was incorrect in holding that the right of the victim to prefer an appeal was an independent legal right not subject to other provisions of the Code. The Hon'ble Apex Court found that section 372's controlling provision i.e. the provision 'provided for by this Code or any other law for the time being in force' for victim's appeal was ensconced in section 378 (3)⁶ of the Code and was not an independent right.

³Definition provided in § 2(wa) of the Code.

⁴Other cases were also cited as such CIT v. Indo Mercantile Bank Ltd, Ishverlal Thakorelal Almaula v. Motibhai Nagjibhai, Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subbash Chandra Yograj Sinha, S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591.

⁵2015 CriLJ 3220.

⁶Appeal in case of acquittal.

(1) Save as otherwise provided in sub- section (2) and subject to the provisions of sub- sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate

It is submitted, with respect, that the Hon'ble Apex Court erred in holding that the proviso to section 372 of the Code was conditioned by section 378 (3) of the Code for a number of reasons and further that the cases which were cited to hold that the proviso was controlled by the statute had no applicability in *Satya Pal*. This article argues that the proviso to section 372 i.e. the right of a victim to appeal is an independent legal remedy, not subject to section 378 of the Code.

It is trite that in serious offences where the police investigate the alleged crime, private prosecution⁷ is not allowed as a matter of policy and the victim's case is prosecuted solely by state agencies. Such a scenario, although a matter of state policy, has the effect of completely excluding the victim from the entire judicial process as she is left at the mercy of the overburdened, frustratingly slow state-led prosecution. This is ironic as even though she is the injured party as per section 44 of the Code, the victim has no meaningful say over the criminal justice process. Thus, the amendments of 2009 were enacted with a view to facilitate victim's participation in an adversarial system of adjudication.⁸ Unlike a complainant in a complaint case (under the Code), the victim has no right to conduct the prosecution herself and can only assist the state. Thus, it is only

order of acquittal passed by any Court other than a High Court² or an order of acquittal passed by the Court of Session in revision.]

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub- section (3), to the High Court from the order of acquittal.

(3) No appeal under sub- section (1) or sub- section (2) shall be entertained except with the leave of the High Court.'

⁷Refer to §§ 301 & 302 of the Code.

⁸This particular problem has been noted in the 154th Law Commission of India Report as well as the Justice Malimath Committee Report. However, it must be mentioned that the relevant Amendment Act of 2008 does not state the reasons behind the Amendment Act itself.

fair that the victim enjoys an untrammelled power to prefer an appeal in the three situations mentioned in the proviso whereas a complainant as per section 378 (4) is allowed to prefer a leave to appeal only in the limited scenario of an acquittal.

Importantly enough, it ought to be observed that there is also no textual basis to support the Hon'ble Apex Court's conclusion that the proviso to section 372 is regulated by section 378 (3). This is because section 378 (3) does not talk about victim's appeal at all and thus can't be said to be the controlling provision of the section 372. In other words, even though the proviso to section 372 provides for victim's appeal in three distinct scenarios and the proviso is subject to the main provision of section 372 which is declaratory in nature, however section 378 (3) is itself not concerned with victim's appeal. Section 378(3) cannot be said to regulate the proviso to section 372 because a bare reading of section 378(3) shows that it deals only with appeals by the Government or its instrumentalities in case of acquittals and it nowhere mentions the word 'victim'. Moreover, section 378 as a whole is limited in its applicability to only acquittals whereas the proviso to section 372 covers two more scenarios i.e. inadequate compensation or lesser sentence. Moreover, because Chapter XXIX of the Code dealing with appeals, as well as the Code in totality, do not talk about victims except for in the proviso to section 372, it must be deduced that the power vested in the proviso is untrammelled, unregulated and independent of the provisions in Chapter XXIX of the Code.

Another reason for arguing that the power under the proviso to section 372 is untrammelled is the Hon'ble Supreme Court's dicta in *S. Sundaram Pillai and Ors. v. R. Pattabiraman and Ors.* [(1985) 1 SCC 591]⁹ wherein the

⁹Cited in Satya Pal itself.

Learned Full Bench was pleased note that a proviso to an enactment served four purposes namely:

- 1) qualifying or excepting certain provisions from the main enactment;
- 2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
- 3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and
- 4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.’

In light of the fact that there are no provisions in the Code dealing with victim’s appeal except for the proviso to section 372, it can be cogently argued that the proviso to section 372 excepts and/or qualifies section 372 and becomes a substantive provision on its own legs. The Hon’ble Court ought to have followed the golden rule of statutory interpretation i.e. the literal rule which could have ably demonstrated that there are no controlling provisions to the proviso to section 372. The Hon’ble Court ought to have adopted and followed the age old adage that ‘the safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases.’¹⁰

It is unfortunate that *Satya Pal* doesn’t distinguish between complaint case and state case as in doing so the Learned Bench would have

¹⁰Barrel vs. Fordree, (1932) A.C. 676.

understood the legislative intention of requiring complainants filing a special leave application under section 378(4) and empowering victims to file appeals directly under the proviso to section 372. Having said that, one peculiar consequence of allowing the victim to prefer an appeal directly would be said the state would be compelled to file only a leave to appeal as it is explicitly (textually) bound by section 378. Ergo, it does seem possible the state might actively encourage appeals by the victims in light of the State's own compulsion in preferring only a leave to appeal.

It is a policy decision as to whether a victim ought to be given a right to directly file an appeal or only prefer a leave to appeal. However, on a plain reading of Chapter XXIX of the Code, it is amply clear that the Hon'ble Apex Court erred in holding that a victim has to prefer an appeal only after filing a special leave under section 378 and not directly under section 372. While it is conceded that allowing a victim to file an appeal directly without the safeguard of a special leave, might have the unintended consequence of equipping the 'victim' with a tool to wreak private vengeance on those already acquitted by the trial court, it must be borne in mind that it is unfair to expect the victim to prefer a leave to appeal when she has been excluded from the entire criminal justice system throughout, and further that she already has a high burden to discharge as no appellate court wants to unnecessarily interfere with the order of a court below it.

Before parting, it must be mentioned that the amendments of 2009 in the Code have led to many confusions and doubts amongst practitioners and adjudicating courts. It is unclear whether it is wise to place Satya Pal Singh within the larger context of courts trying to stymie the abuse of certain legislations¹¹ or if it is apposite to blame the decision on the clunky amendments of 2009 which were not

¹¹Example of laws often cited as prone to abuse are § 498A of the IPC, § 138 of Negotiable Instruments Act etc.

accompanied by suitable amendments in related sections. For example, there have been conflicting and varied opinions amongst different High Courts as to the period of limitation for filing a victim's appeal as well as who is qualified to qualify as a 'victim' as per section 2(wa) of the Code. Needless to state, in light of the conflicting dictas of the various High Courts,¹² it will be expedient if the Hon'ble Supreme Court settles these contentious issues of limitation and locus under section 2 (wa) by asking the legislature for clarifications. It is my humble opinion that the appellate courts themselves ought to be more vigilant when issuing notice to acquitted parties when entertaining victim's appeal instead of incorrectly linking section 378(3) with section 372 as there is little basis to support such a stance in light of the preceding averments.

¹²Refer to the Kareemul Hajazi vs. State of NCT of Delhi and Ors., 2011(1) JCC 500, Ram Phal vs. State and Ors., 2015(3) JCC 1740, Tata Steel vs. Atma Tube Products, 2013(2) RCR(Criminal)1005, Parmeshwar Mandal vs. State of Bihar and Others, MANU/BH/0654/2013.

**UNCERTAINTY IN LIMELIGHT: A CASE
COMMENT ON *SASAN POWER LTD. V. NAAC
INDIA PVT. LTD.***

Ramya Katti & Sankalp Srivastava***

Abstract

The law regarding arbitration in India has been under the scanner recently due to the implementation of the recent amendments to the Arbitration and Conciliation Act of 1996, (“the Act”) and more so because of the string of cases that arose due to the lacunae present in the law and the subsequent attempt by the judiciary to remove such creases through its interpretation. In light of this increasingly pro-arbitration stance taken by the judiciary as well as the legislature, the case of Sasan Power Ltd. v. NAAC India Pvt. Ltd. deserves a great deal of emphasis, as it raises convoluted issues that have plagued the Indian arbitration policy for a long time.

This paper seeks to examine the questions posed by this case, the first being whether two Indian parties to an arbitration agreement can derogate from Indian law and if the same is contrary to the public policy of India; and

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the second relating to the circumstances that mandate the application of Part I, Part II or both these Parts of the Act, in lieu of various Supreme Court cases that outlined many scenarios regarding the application of the same. Further, the paper analyses the Court's application of the doctrine of severability in furtherance of its decision to include the review of the arbitration agreement only under the purview of Section 45 and not the substantive contract, while also examining the effect of this judgment on the competence of the tribunal to rule on its own jurisdiction.

Through a normative analysis, this paper tries to fulfill its objective of showcasing the impact that this judgment has in arriving at a conclusive answer which untangles existing uncertainties.

I. INTRODUCTION

The Indian arbitration framework and policy has witnessed a lot of hurdles in its path of proving arbitration to be a feasible method of dispute resolution. There have been various improvements in this scheme to tackle the same, such as the recent amendment to the Act,

¹ and recent judicial pronouncements which have a pro-arbitration inclination. This has been done in an effort to make the Indian arbitration scheme less prone to judicial intervention and to make

¹The Arbitration and Conciliation (Amendment) Act, 2015.

India a better seat for arbitration in accordance with international standards.

At the outset, it would be appropriate to outline the demarcation between the two sections of the Act divided on the basis of the juridical seat of the award. While Part I provides the mechanism for interim measures, relief to be provided by court and procedure for filing objections against awards in case of arbitrations conducted in India, Part II contains the same provisions for foreign awards, that is, awards rendered outside of India, in addition to provisions that provide the procedure for enforcement of foreign awards in India.

Part I of the Act has received considerable judicial interpretation in light of the circumstances that arose in various cases in the past decade or so.

One of the most recent cases in this arena is *Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd.*² (*'Sasan Power'*), which has a massive impact on the applicability of the Act to international commercial arbitrations.

A. *Facts*

The facts of the case are as follows. On January 01, 2009, an agreement ("**Agreement-I**") was entered into between Sasan Power Limited ("**Appellant**"). and North American Coal Corporation, an American Company, incorporated in Delaware ("**NACC USA**"), as per which NACC USA would provide consultancy services and other services for a mine to be operated by the Appellant in India. Subsequently, another agreement ("**Agreement-II**") was entered into on April 04, 2011 between the Appellant, NACC USA and North American Coal Corporation India Private Limited ("**Respondent**") by

²Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd, 2016 SCC OnLine SC 855.

which NACC USA assigned all its rights and obligations to the Respondent, with the consent of the Appellant. However, the Agreement-II specifically provided for a clause that NACC USA's transfer and assignment of all its rights and obligations under the Agreement to the Respondent, would not release NACC USA, as assignor, from its obligations under the Agreement.

Section 12 of the agreement contained an arbitration clause for resolution of disputes, with the governing law of the agreement being the law of United Kingdom and the place of arbitration being London. The arbitration was to be administered by the ICC International Court of Arbitration ("ICC") and in accordance with the ICC Rules. The agreement also expressly excluded the application of Part I of the Act, saving Section 9 of the same.

Disputes arose between the parties, and the Respondent requested the same to be referred to arbitration August 8, 2014. The Appellant assailed the validity of the same as well as of the arbitration agreement before the District Court of Singrauli, Madhya Pradesh. An *ex-parte* order was passed whereby an injunction was given that prevented ICC from proceeding with the arbitration. The Respondent filed two Interlocutory Applications praying that the disputes be referred to arbitration as well as for seeking vacation of the injunction order. Both these applications were granted. Hence, the Appellant approached the High Court of Madhya Pradesh ("High Court"), which dismissed the appeal on the ground that once the parties have mutually agreed to resolve their disputes by arbitration and have chosen the seat of arbitration in a foreign country, then in view of the provisions of Section 2(2) of, Part I of the Act will not apply as this Part is applicable only when the place of arbitration is India. Once the agreement fulfils the conditions of Section 44 of the Act, then Part II will apply. Further, once the agreement is found to be not null or void or inoperative, then the bar created by Section 45 (which creates a bar on the jurisdiction of the Court from adjudicating a dispute when

there is a valid arbitration agreement) would come into play, which makes it mandatory for the Court to refer the parties to arbitration.

B. Issues

The Appellant approached the Supreme Court by way of a Special Leave Petition, wherein the primary issues which arose were, firstly, whether it was permissible under the consolidated Indian law of arbitration for two Indian Companies (each incorporated and registered in India) to agree to refer their disputes to a binding arbitration, with place of arbitration outside India, and with governing law being English law. Secondly, whether the two parties to the dispute, each of whom are companies incorporated and registered in India, could in law be said to have made an agreement referred to in Section 44 of the Act, so as to confer jurisdiction and authority on the competent Court to refer the parties to ICC arbitration in London under Section 45 of Act. Thirdly, whether the arbitration agreement contained in Section 12 of the agreement was invalid and void for being in breach of Section 28(a) of the Indian Contract Act, 1872 (“**Contract Act**”), not being saved by the exception clause, and also void because of the provisions of Section 23 of the Contract Act and hence, not referable to arbitration under Section 45 of the Act.³

II. CONFRONTING THE PITFALL

While considering the first issue, the Supreme Court battled with the nature of the contract and the parties to the arbitration agreement, as well as which Part of the Act would apply to the case at hand. For this purpose, the Court referred to previous cases that dealt with these issues.

³¶13, Sasan Power.

The Supreme Court referred to *Bhatia International Bulk Trading S.A. & Another*⁴ (“**Bhatia International**”), which considered the question of whether Part I of the Act would apply to an arbitration where the place of arbitration is outside India. It ruled that the provisions of Part I would apply to all arbitrations. It was specifically stated that when an arbitration was held in India, the provisions of Part I would completely apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I; and in cases of international commercial arbitrations held outside India, provisions of Part I would apply unless the parties by agreement, express or implied, excluded all or any of its provisions.⁵

The same position was taken further in *Venture Global Engg. v. Satyam Computer Services Ltd.*,⁶ where it was held that a foreign award would also be considered as a domestic award and the procedure for challenge provided in Section 34 of Part I of the Act would therefore apply. This led to a situation where the foreign award could be challenged in the country in which it is made; it could also be challenged under Part I of the Act in India and could be refused to be recognized and enforced under Section 48 contained in Part II of the Act.

Both these cases were overruled in *Bharat Aluminum Co. v. Kaiser Aluminum Technical Services* (“**BALCO**”).⁷ It stated that Part I of the Act would not apply to international commercial arbitrations held outside India⁸ and the same was given a prospective effect from September 06, 2012. Thus, this law will not apply to the present case as it is an arbitration agreement entered into prior to September 06,

⁴*Bhatia International v. Bulk Trading S.A. & Another*, (2002) 4 SCC 105.

⁵¶32, *Bhatia International*.

⁶*Venture Global Engg. v. Satyam Computer Services Ltd.*, (2008) 4 SCC 190.

⁷*Bharat Aluminium Co. v. Kaiser Aluminium Technical Services*, (2012) 9 SCC 552.

⁸¶194, *BALCO*.

2012 and hence, the law laid down in *Bhatia International* will hold true.

The same was re-iterated by the Supreme Court in *Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd. & Anr.*,⁹ where it was held that pre-BALCO arbitration agreements must be considered based on the principles laid down in *Bhatia International*. Also, a host of circumstances were laid down in which Part I would be excluded, which included the existence of a foreign seat, and the choice of the substantive law of a foreign country.

Further, the Supreme Court of India in *Union of India v. Reliance Industries Limited & Ors*¹⁰ held that in a pre-BALCO agreement, Part I will be impliedly excluded if either, the parties decided on a foreign seat; or if the parties agreed on a foreign law to govern the arbitration agreement.

In the present case, the question of whether Part I or Part II or both apply arose. Since the law laid down in *Bhatia International* applied, it was a question of whether the arbitration agreement was in conformity with the test laid down in *Bhatia International*.

To determine this question, three factors were considered, namely, the parties to the arbitration agreement, the venue of arbitration and whether in a foreign seated arbitration, where one of the parties is a non-Indian entity, the parties have agreed to exclude the application of Part I of the Act or not.¹¹

Here, the Court ruled that the arbitration agreement was not between two Indian parties, but rather, that it was a tripartite agreement. The Court delved into Agreement-II between the parties and held that the

⁹*Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd. & Anr.*, 2015 (3) SCALE 295.

¹⁰*Union of India v. Reliance Industries Limited & Ors*, (2015) 10 SCC 213.

¹¹¶39, *Bhatia International*.

Respondent would be liable in the same manner as NAAC USA since Agreement-II amended Agreement-I. The Court reasoned this by concluding that there was neither an assignment nor a novation of the contract.

At this stage, it is worth mentioning that an assignment is a contract whereby a party to the original contract assigns all benefits arising out of it to a third party, but not the obligations under the contract. Whereas, a novation is where the original contract is replaced, and the debt extinguished in place of a new contract. Since Agreement-II, in the instant case transferred obligations as well, and did that by way of an amendment, the court did not consider it an assignment or novation.

Thus, the Appellants' assumption that the second contract was between only two Indian parties was disregarded, since the second agreement was a tripartite contract with two Indian parties and one American company, thereby incorporating a 'foreign element', i.e., rights and obligations of the NAAC USA.¹² Thus, the stipulation regarding the governing law cannot be said to be an agreement between only two Indian companies.

Since the agreement had a non-Indian entity as a party (NAAC USA is an American company and a party to Agreement-II), it became an "international commercial arbitration" within the meaning of Section 2(f) of the Act which provides that if one of the parties to the agreement is a foreign entity, then such an agreement would be regarded as an international commercial arbitration.

Further, since the venue of the arbitration was London and Section 12 of the agreement stated that excluding Section 9, Part I of the Act would not apply, the test of exclusion as laid down in *Bhatia International* is satisfied. Therefore, only Part II of the Act applies.

¹²¶24, Sasan Power.

With respect to the second issue regarding whether the suit is maintainable or barred by Section 45 of the Act, it is pertinent to note that Section 45 of the Act permits an enquiry into the question of whether the agreement is ‘null and void, inoperative and incapable of being performed’. In the event that it meets the aforementioned criteria, the judicial authority to whom the dispute (for which the parties have made an agreement for ‘international commercial arbitration’)¹³ has been referred to, is precluded from referring the parties to arbitration. It is here that the doctrine of separability and the principle of competence-competence must be analyzed.

The doctrine of separability is a general principle of international law, accepted unilaterally by institutions and also accepted in most common law jurisdictions. For example, in England, the Arbitration Act was amended in wake of the ruling in *Harbour v. Kansa*,¹⁴ to include the application of this norm.¹⁵ In India, the adoption of Article 16(1)¹⁶ ad verbatim from the UNCITRAL Model Law on International Commercial Arbitration has made it mandatory for arbitral tribunals to rule on their own jurisdiction.

This doctrine states that the arbitration agreement is an independent or “self-contained” agreement, autonomous from the substantive contract. Thus, it is through the application of this doctrine that the competence-competence principle, i.e. the competence of a tribunal to rule on its own jurisdiction, is upheld, as opposed to a court ruling upon it. Although this principle is applicable to arbitral tribunals, the tribunal does not have absolute discretion to rule on the validity of the arbitration agreement since it is subject to other forms of statutory

¹³Arbitration and Conciliation Act, 1996, § 44.

¹⁴*Harbour Assurance Co. Ltd. v. Kansa General International Insurance Co. Ltd. et al.*, (1993) QB 701.

¹⁵Arbitration and Conciliation Act, 1996, c.2, § 7 (Eng.).

¹⁶United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006, art. 16(1), U.N. Doc. A/40/17 (2008).

review by civil courts post-award. The Supreme Court has held that the arbitral tribunal's authority under Section 16 of the Act goes to the very root of its jurisdiction.¹⁷ However, the Supreme Court has also held that the tribunal does not have the freedom to ignore any ruling of judicial authorities under Section 11(7) of the Act. The latter has been criticized as undermining the concept of *Kompetenz-Kompetenz* and being contrary to the legislative policy as laid down in Section 16 of the Act.¹⁸

In this case, the Supreme Court upheld the doctrine of separability of the arbitration agreement. Thus, the scope of enquiry was limited to legality of the arbitration agreement and not the substantive contract. This has resulted in the Court upholding the autonomy of the arbitration tribunal, as the tribunal now has the freedom to determine the validity of the contract in accordance with the conflict of law principles of United Kingdom.

It is necessary to understand the scope of review under Section 45 of the Act. The statute provides for considering whether the arbitration agreement is 'null and void, inoperative or incapable of being performed' before the dispute is referred to arbitration. Whether this shall include an extensive review on the grounds or only prima facie review has been considered by the Supreme Court previously in *Shin-Etsu v. AkshOptifibre*,¹⁹ in which the Court comprehensively examined the scope of review in other Model Law Countries and observed that not only is the Section²⁰ copied ad verbatim from the

¹⁷Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd., (2002) 2 SCC 388.

¹⁸Indu Malhotra, The Law And Practice Of Arbitration And Conciliation 773 (3rd ed., 2014).

¹⁹Shin-Etsu v. AkshOptifibre, (2005) 7 SCC 234.

²⁰Arbitration and Conciliation Act, 1996, § 45.

UNCITRAL Model Law,²¹ other model law jurisdictions including Switzerland and France provide only for a prima facie review of the arbitration agreement. Hence, the Court held that the fact that arbitration proceedings are stayed till the decision of the court is rendered in such appeals, coupled with the presence of various other factors (including determination of foreign law applicable, cost to the parties, etc.), make a final review of the contract at the pre-reference stage inconvenient. Therefore, it was held that courts should only conduct a prima facie review of the validity of the arbitration agreement, with expeditious disposition of the appeal (within 3 months). The Court held that there is provision for an extensive review provided post-award in Section 48 of the Act.

In the instant case, the court cited *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums*,²² which held that any question with respect to the applicability of the arbitration clause to the facts of the case will have to be raised before the Arbitral Tribunal concerned. The Court also applied the analogy of a civil court, which states that if a civil court is precluded from deciding the jurisdiction of the arbitration agreement, then the civil court cannot decide the validity of the substantive agreement under Section 45 of the Act as well.

With respect to the third issue that deals with whether the agreement was invalid due to being contrary to public policy, the Appellant alleged that the arbitration agreement is contrary to Section 23 of the Contract Act as it was contrary to public policy. The term public policy has been described as an ‘unruly horse’²³ due to the vast criteria under which an agreement can be assailed by applying this

²¹United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006, U.N. Doc. A/40/17 (2008).

²²*Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums*, (2003) 6 SCC 503.

²³*Gherulal Parekh v. Mahadeodas*, AIR 1959 SC 781.

restriction. Hence, it should be used in rare cases by the courts to outlaw that which would affect public interest.²⁴

As aforementioned, the court refused to consider whether the substantive contract violates public policy for the mere reason that it is the validity of the arbitration agreement which is under review in Section 45 of the Act and not the validity of the substantive contract.

III. EFFECT OF THE SASAN DECISION

While the Supreme Court held that the legality and validity of the substantive contract is not to be questioned in a case under Section 45 of the Act in a pro-arbitration spirit, there is yet another question that remains unanswered in this judgment. The most important issue put forward by the Appellant in this case was whether two Indian parties can agree to refer their commercial disputes to a binding arbitration, with place of arbitration outside India, and with governing law being a foreign law. The Supreme Court did not deal with this issue at all and merely applied the test as laid down in *Bhatia International* as it concluded that the tripartite agreement included a foreign party. It simply upheld the ruling of the High Court regarding the same arbitration agreement.

The effect of derogation from Indian law by two Indian parties is still uncertain. The issue lacks a conclusive judgment on the same. While it is argued that the choice of the parties as to which law must apply is paramount in arbitration, others argue that contracting out of Indian law would violate public policy.

Ironically, while the High Court ruling stated that two Indian parties can opt out of domestic law in the context of arbitration (with a

²⁴*Ratanchand Hirachand v. Askar Nawaz Jung*, AIR 1976 AP 112.

foreign seat and with a foreign substantive law) and that the resultant award would be a ‘foreign award’ as envisaged under Part II of the Act, the Supreme Court ruling did not touch upon this issue at all, and instead chose to recognize the existence of a foreign element in Agreement-II and concluded that the arbitration can be under foreign law.

There have been other observations made in different cases. In *TDM Infrastructure Pvt. Ltd. v. UE Development India Ltd.*²⁵ (“**TDM Infrastructure**”) before the Supreme Court, which was relied upon by the *Bombay High Court in Adhar Mercantile Pvt. Ltd. v Shree Jagdamb*,²⁶ (“**Adhar**”) later, the Courts relied on Section 28 of the Arbitration and Conciliation Act of 1996 and stated that two Indian parties cannot opt for a foreign law to govern their contract as it would violate Section 23 of the Contract Act and result in being contrary to public policy. Section 23 of the Contract Act states that agreements that have considerations that are unlawful shall be void. The category of violating ‘public policy’ falls within the category of unlawful considerations.

The question of whether two Indian parties can opt for a foreign seat or a foreign law governing the arbitration agreement has not been explicitly dealt with and remains unanswered; although, based on the judgments in *TDM Infrastructure* and *Adhar*, it is possible to reason that two Indian parties can do so as neither of the two judgments make any reference to a situation which entails a foreign seat of arbitration or a foreign law governing the arbitration. Thus, Indian parties are free to choose a foreign seat of arbitration or a foreign law governing the arbitration agreement. Such an interpretation is consistent with *BALCO’s* interpretation of Section 28 of the Act

²⁵*TDM Infrastructure Pvt. Ltd. v. UE Development India Ltd.*, (2008) 14 SCC 271.

²⁶*Adhar Mercantile Pvt. Ltd. v Shree Jagdamb*, Arbitration Application No 197 of 2014, along with Arbitration Petition No. 910 of 2013, (Bombay HC, 12/06/2015).

wherein it had only read substantive law under Section 28 (not a foreign seat of arbitration or a foreign law governing the arbitration) with an intention to ensure that two or more Indian parties do not circumvent to substantive Indian law by resorting to arbitration.

The High Court in its analysis held that two Indian parties can choose a foreign seat and held the findings concluded in *TDM Infrastructure* and *Adhar* to be obiter dicta as they dealt with issues with respect to jurisdiction under Section 11 of the Act concerning the appointment of an arbitrator. These cases never dealt with the question of whether two Indian parties can contract out of Indian law or whether a contract can be governed by a foreign law. The High Court also considered *Atlas Exports Industries v. Kotak & Company*,²⁷ which supported party autonomy and held that an award passed by a foreign seated tribunal was not unenforceable or contrary to public policy with respect to Section 28 of the Act and Section 23 of the Contract Act. Thus, the High Court judgment allowed parties to choose a foreign seat and indirectly adopted a position taken by the Supreme Court in *Reliance Industries Ltd. v. Union of India*,²⁸ in which a challenge to an award arising from a foreign seated arbitration between two Indian parties was dismissed.

Although the Supreme Court has remained completely silent on this issue, the answer can be inferred by the implied recognition of autonomy of parties to choose a foreign seat, as was upheld by the High Court judgment. Further, it must be noted that due to the law set forth in *BALCO*, Section 28 of the Act deserves no consideration in foreign seated arbitrations since the jurisdiction of Indian Courts under Part I of the Act is impliedly excluded and further under the

²⁷*Atlas Exports Industries v. Kotak & Company*, (1997) 7 SCC 61.

²⁸*Reliance Industries Ltd. v. Union of India*, (2014) 7 SCC 603.

Bhatia International regime, if the arbitration agreement provides for a foreign-seated arbitration.²⁹

Thus, *Sasan Power* has thrown light on the convoluted issue of whether two Indian parties can choose a foreign seat or a foreign law to govern their arbitration agreement and has had a significant impact in paving the path of solving this dilemma, but failed on the account of not giving any explicit and authoritative answer. Hence, uncertainty still looms around this issue and one can only await another precedent to guide parties towards a more hassle free arbitration experience.

²⁹Supra note 10.