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MESSAGE

I applaud the upcoming publication of the eighth volume of the NLIU Law Review. Since beginning, the NLIU have encouraged legal scholarship and research of the highest quality. The NLIU Law Review provides a platform for active dialogue on legal issues that concern both national and international community.

Volume VIII Issue 1 revolves around interesting aspects of law ranging from more popularly discussed topics such as Intellectual Property Rights and Cyber Crime to more niche areas like Islamic Banking and Cross Border Cattle Smuggling. This diversified legal entrée has a little something for everyone and will surely kindle reader's interest.

I commend the Editorial Board and the student members for their hard work and dedication. I sincerely hope that students, academicians, lawyers and judges and all other readers find this publication stimulating and beneficial

(S. K. Seth)
Chief Justice

MESSAGE FROM THE PATRON

NATIONAL LAW INSTITUTE UNIVERSITY

Ref. No. 101/NLIUB

Prof. (Dr.) V. Vijayakumar
M.A., M.L., M.Phil., Ph.D.
Vice Chancellor

Date : 30-05-19

Message from the Patron

I am pleased to present Volume VIII Issue I of the NLIU Law Review to our readers. Much in the vein of its predecessors, this Issue presents several articles and papers that will undoubtedly pique the interest of all legal professionals, students, academicians and others. Topics such as cybersecurity, electoral bonds, geographical indications and global trade mechanisms, among others, are dealt with in great detail by various authors contributing to this Issue. It is expected that the readers find themselves enriched by these pieces.

The NLIU Law Review is the flagship publication of National Law Institute University, Bhopal and is a platform for academicians, lawyers and students alike, to contribute to legal discourse. The journal encourages legal research and critical thinking by rigorously evaluating the submissions on grounds such as contribution to knowledge and contemporary relevance.

Of course, any discussion about this Issue would be remiss without mentioning the efforts of those who made this endeavour possible. To the Patron-in-Chief of the Law Review, Hon'ble Shri Justice Sanjay Kumar Seth, Chief Justice, High Court of Madhya Pradesh, I express my immense gratitude for his guidance and support. I extend my congratulations to Prof. (Dr.) Ghayur Alam for successfully supervising the publication of this Issue through constant inputs to the student editors. I further commend the Editorial Team for their meticulous work and hope that their enthusiasm only grows with each upcoming issue. We at NLIU look forward to the feedback from the renders on the contents of this Issue and the Law Review's scholarship over the years. It is my hope that with your feedback we will further refine our Journal.

(V. Vijayakumar)

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MESSAGE FROM THE FACULTY ADVISOR

The VIII Volume of the NLIU Law Review presents the readers with a new corpus of legal research which explores a variety of issues, both of international and domestic relevance. It includes in-depth analysis of contemporary legal concerns and various attempts to provide realistic solutions. I sincerely hope that the articles, case comments and book reviews included in this Issue will prove useful to the readers.

The article titled 'Invoking Equity Jurisdiction of the Indian Supreme Court: Scope and Limits' expounds the equity jurisdiction of the Supreme Court. It discusses how these provisions are used to provide equitable remedies and discusses the limitations within which this jurisdiction can be invoked.

'The Developing Dilemma: WTO's Prudish Outlook to the Price Support Mechanism' attempts to uncover the rationales behind the domestic price support measures related to agricultural products in developing nations and tests the justifications given for adopting them. On the other hand, 'Busting Cartels: The Indian Leniency Regime' analyses the leniency regime conceived by Indian competition law. It considers applications for leniency in disputes decided upon by the Competition Commission of India to highlight the concerns in the Indian regime. Foreign leniency regimes are then analysed to recommend solutions for the regime in India.

In 'BCCI v. Union of India', the author strongly disagrees with the Apex Court's decision by which Star India is obligated to share feeds of live cricketing events with Prasar Bharti and no other DTH or cable service provider. This view is buttressed by licensing guidelines, government notifications and the fact that the majority of cricket viewers have a cable connection or a DTH service provider.

In 'Private Ordering: A Progressive Outlook on Automobile Cybersecurity in the United States', the author establishes how private ordering is the most productive way of setting up cybersecurity benchmarks for the automotive industry. In 'Electoral Bonds and Funding to Political Parties in India: A Critique', the author has

highlighted the salient features of the recent electoral bonds policy and provides a multidimensional criticism of the same.

This issue also includes a book review of Sugata Bag's 'Economic Analysis of Contract Law' which discusses the various illustrations and models in the book. It also brings to light the importance of his work in bringing intelligent and thought-provoking arguments to classroom discussion, thereby going a long way in bridging the gap between economics and law.

'The Constitutional Case of the Missing Cattle: Curbing Cross-Border Smuggling and the Prevention of Cruelty' analyses the constitutional issues plaguing the Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules 2017. It examines the competence of the Central Government to enact the Rules and provides solutions to the problem of cross-border smuggling of cattle.

'Why the Protection of Geographical Indications in India Needs an Overhaul' examines the concept of geographical indications ('GIs'). The paper takes the reader through the evolution of GIs, the problems that riddle the Indian GI framework before finally discussing solutions that could help overcome the obstacles in the path of successful GI implementation in India.

'Financial Exclusion of Minorities: Islamic Banking to the Rescue?' evaluates the RBI's decision to prohibit the incorporation of Islamic banking in India and the constitutional validity of such a form of banking. It anticipates the short-term and long-term challenges to such a system and makes recommendations for its effective implementation.

It would be amiss not to commend the student body of the Journal for demonstrating remarkable dedication and integrity in evaluating and screening the papers. This Issue is the outcome of their proactive involvement at every stage of the endeavour.

I would like to take this opportunity to thank the Patron-in-Chief of the Journal and Chief Justice of the Madhya Pradesh High Court, Hon'ble Justice S.K. Seth for his continuous encouragement and guidance and our Patron, Prof. (Dr.) V. Vijayakumar, the Vice Chancellor of National Law Institute University, Bhopal for his

constant support. I would also like to extend our gratitude to all the contributors to this issue who have made this publication endeavor a success.

We wholeheartedly invite and appreciate comments, suggestions or criticism on the articles published herein and the issue as a whole. The aim of the NLIU Law Review is to always strive towards bettering itself and any comment will be a step in this direction.

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

EDITORIAL NOTE

The VIII volume of the NLIU Law Review presents the readers with a new corpus of legal research which explores a variety of issues, both of international and domestic relevance. It includes in-depth analysis of contemporary legal concerns and various attempts to provide realistic solutions.

In Developing Dilemma: WTO's Prudish Outlook to the Price Support Mechanism, the authors discuss the possible rationales for continuing with domestic price support measures related to agricultural products in developing nations. The paper analyzes the problems faced in compliance with the WTO rules and assesses the corresponding effects of inflation on their ability to maintain their support levels. The paper evaluates the recourses adopted by affected countries to tackle the market volatilities.

'Why the Protection of Geographical Indications in India Needs an Overhaul' examines the concept of geographical indications ('GIs'). The paper takes the reader through the evolution of GIs, the problems that riddle the Indian GI framework before finally discussing solutions that could help overcome the obstacles in the path of successful GI implementation in India.

'Busting Cartels: The Indian Leniency Regime' analyzes the leniency regime conceived by Indian competition law. It considers applications for leniency in disputes decided by the Competition Commission of India in order to highlight the concerns in the Indian regime. The paper finally examines the leniency regimes in the United States of America and the European Union to recommend solutions to the leniency regime in India.

In 'Private Ordering: A Progressive Outlook on Automobile Cybersecurity in the United States', the author evaluates the current legislations in the United States of America with regards to car hacking and their drawbacks. The paper establishes how private

ordering is the most productive way of setting up cybersecurity benchmarks for the automotive industry. It concludes in favour of the status quo with regards to the legislative framework in the United States.

'Invoking Equity Jurisdiction of the Indian Supreme Court: Scope and Limit' expounds the equity jurisdiction of the Supreme Court. The article discusses how these provisions are used to provide equitable remedies and evolve equitable procedure. It also discusses the limitations within which this jurisdiction can be invoked by the Supreme Court.

'Financial Exclusion of Minorities: Islamic Banking to the Rescue?' evaluates the RBI's decision to prohibit the incorporation of Islamic banking in India. The paper analyses the constitutional validity of such a form of banking and anticipates the short-term and long-term challenges to such a system. It makes recommendations for an effective implementation of the system.

'Electoral Bonds and Funding to Political Parties in India: A Critique' highlights the salient features of the recent electoral bonds policy and provides a multidimensional criticism. It suggests measures which can aid in bringing transparency and contribute in reducing the menace of black money in the electoral system. The paper makes an analysis of electoral finance reforms and laws in other countries to evaluate whether they can be beneficial in India's electoral financing and diminish corrupt practices in the political parties.

'The Constitutional Case of the Missing Cattle: Curbing Cross-Border Smuggling and the Prevention of Cruelty' analyzes the constitutional issues plaguing the Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules 2017. It examines the competence of the Central Government to enact the Rules and provides solutions to the problem of cross-border smuggling of cattle.

This issue also includes a book review of Economic Analysis of Contract Law by Sugata Bag which discusses the various illustrations and models in the book. It also brings to light the importance of his work in bringing intelligent and thought-provoking arguments to classroom discussion, thereby going a long way in bridging the gap between economics and law.

The Law Review Team hopes that the present volume proves to be an insightful read for all its readers and marks another step forward in the Law Review's pursuit of excellence in legal scholarship. We would like to thank the authors for their contributions and, as always, welcome any feedback to improve the quality of our journal.

Editorial Board

THE DEVELOPING DILEMMA: WTO'S PRUDISH OUTLOOK TO THE PRICE SUPPORT MECHANISM

Miss Priya[*]

Abstract

The majority of the developing countries including India have repeatedly been challenged for their domestic price support measures related to agricultural products. Today, as the World Trade Organization and the Developed Members gear up for a long drawn dispute about the breach of support related commitments by the food insecure countries, the authors attempts to uncover the layers of possible rationales of the developing nations to continue with such support practices. The paper will discuss whether these commitments need to be reviewed, in light of the efforts made by the developing countries to provide food security for its people. The authors attempt to test the justification given by the developing nations for reconsideration of the WTO rules. This paper goes in depth to analyze the problems faced in their compliance and assess the corresponding effects of inflation on their ability to maintain their support levels. The authors further evaluate the recourses adopted by affected countries to tackle the market volatilities by usage of the instrument of Art-

[*]Priya is a third-year student at National Law University, Delhi. The author may be reached at priya16@nludelhi.ac.in.

18.4 of the Agreement on Agriculture. The focus of this article is upon the question of why all these possible measures need to be catered to uphold the core values of WTO, with the authors concluding by suggesting the scope for resolution of these contentious issues to ensure free and fair global trade.

Keywords: Developing Countries, Price Support, Agriculture, WTO, Inflation

With the demand for food expected to rise by 60 per cent by the end of 2050,[1] the global challenge that nations face today is to ensure food security to their people. The Food and Agriculture Organization ("**FAO**") of the United Nations states that: "*Food security exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food.*"[2] Thus, governments principally focus on agricultural policies, focused towards achieving national food security goals.

I. DOMESTIC SUPPORT REGIME OF THE WTO:

INTRODUCTION

The most fundamental ways in which the World Trade Organization ("**WTO**") seeks to contribute to global trade, is by ensuring a system of non-distorting and efficient trade practices. The key goal of the WTO has been to discipline and reduce domestic support, while

[1]Keith Breen, *Food Security and Why it Matters*, *World Economic Forum*, WE FORUM (Jan 18, 2016), https://www.weforum.org/agenda/2016/01/food-security-and-why-it-matters/.
[2]United Nations Food Agriculture Organization, *Towards a Food Insecurity Multidimensional Index (FIMI)*, FOOD AGRICULTURE ORGANIZATION (Nov. 1974), http://www.fao.org/fileadmin/templates/ERP/uni/FIMI.pdf.

simultaneously leaving sufficient scope for governments to design domestic agricultural policies,[3] in accordance with the specific conditions prevailing in these individual countries. However, considering their welfare-driven domestic interests, developing countries in the absence of sufficient resources often end up providing domestic price support beyond their entitlements.[4]

This is done to create a safety net for their farmer population to ensure that if their stocks remain unsold in the markets due to cheaper prices in the world market, then the government would buy this domestic produce at reasonable support rates from the farmers agricultural trade practices. The WTO facilitates this process through its balancing role by evening out the fluctuations in the supply of agricultural trade and thus containing the volatility that exists in the market prices of agricultural goods.[5] The WTO conducts a multilateral Ministerial Conference for all its Members every two years to discuss such contemporary issues. Through the multilateral agricultural rules negotiated at the Uruguay Multilateral Conference Round, the WTO Members concluded a set of binding rules and regulations relating to the subsidies on domestic agricultural trade.[6]

Additionally, a majority of the developing nations suffer from high levels of inadequacy of resources and unaffordable prices adversely affecting its population. This can be resolved by the price support mechanism that seeks to incentivize the farmer to produce more crops

[3]World Trade Organization, *Understanding the WTO: The Agreements, The Agriculture Agreement: new rules and commitments*, WORLD TRADE ORGANISATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm.

[4]Panos Konandreas & George Mermigkas, WTO Domestic Support Disciplines: Options for Alleviating Constraints to Stockholding in Developing Countries in the Follow-up to Bali, FAO 18 (hereinafter WTO Domestic Support Disciplines).

[5]INTERNATIONAL TRADE AND FOOD SECURITY: EXPLORING COLLECTIVE FOOD SECURITY IN INDIA 15-27 (Michael Ewing Chow & Melanie Vilarasau Slade ed. Edward Elgar 2016) (hereinafter Trade and Food Security).

[6]Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 410 (hereinafter AoA).

so as to ensure food security of its population. The government procures the food crops from the farmers and then utilizes it for welfare purposes by distributing among its impoverished population at subsidized prices.[7] These measures have highly protectionist implications since they provide insulation to the domestic farmers, thus creating an imbalance in the international trade regime and a distortionist impact on other nation states.[8]

Such price support insulates the domestic farmers against the international market forces of demand and supply, and also creates a disincentive for them to trade with other countries,[9] thus acquiring the nature of Other Trade Distorting Domestic Support ("**OTDS**").[10] This stimulates them to change their original trade patterns and rather sell their produce directly to the government, thus eliminating the possibility to tread into the world markets. This is when the WTO steps in as a regulatory body to formalize the international trade regime. The regulations related to Domestic Support were negotiated in the Uruguay Round Reform Programme and included commitments for reductions in subsidies and protection, as well as imposing other disciplines on the trade.[11]

[7]Food Corporation of India, Procurement: Policy and System http://fci.gov.in/procurements.php?view=86.

[8]Kirsten Urban et al., Evaluating the Effect of Domestic Support on International Trade: A Mercantilist Trade Restrictiveness Approach, Annual Conference on Global Economic Analysis (Jun. 2015, Melbourne, Australia).

[9]Lars Brink, The Evolution of Trade-Distorting Domestic Support, Tackling Agriculture in the Post-Bali Context ICTSD (Ricardo Meléndez-Ortiz et al., October 2014).

[10]*In agriculture, OTDS refers to Amber Box + de minimis + Blue Box support*, WORLD TRADE ORGANIZATION, GLOSSARY TERMS, https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm.

[11]World Trade Organization, *Trade Topics, Agriculture: Explanation, Domestic Support*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm. (hereinafter "Domestic Support").

These have been laid down in the Agreement, to which all the Members of the WTO are signatories. The Agreement seeks to establish a fair and market-oriented agricultural trading system[12] and hence imposes specific curtailments on the autonomy of a Member to make use of its price support criteria. It further creates a classification under two sub-categories:

i) Countries providing Domestic Support during the base level period of 1986-88, and thus having specified reduction commitments to meet.

ii) Countries that did not provide any level of support during the base period and thus having no reduction commitments.

Among the existing 164 Members of the WTO, no other country apart from 14 WTO Members provided any kind of Domestic Support[13] and thus resultantly the WTO specifies that other countries are not required to reduce their levels of support.[14] They merely have to ensure that the price support provided by their government does not exceed the specified levels as specified in the Schedule of each Member.[15] In this paper the authors seek to analyze the regulatory measures adopted by the WTO and the reasons behind the inability of the majority of developing Members to abide by these commitments.

II. VIOLATING OBLIGATIONS, ENSURING FOOD SECURITY

The Agreement of Agriculture lays down a *de-minimis* threshold specifying the eligibility granted to different countries based on their level of development. These values have been set at 10 per cent of the

[12]AoA, *supra* note 6, at Preamble.
[13]Joseph Mcmahon, The WTO Agreement on Agriculture, A Commentary (Oxford Commentary on The GATT/WTO Agreements, 2007).
[14]Domestic Support, *supra* note 11.
[15]AoA, *supra* note 6, at art.7.

total value of production for the developing countries.[16] According to this, a Member is not required to reduce such trade-distorting domestic support in any year in which the aggregate value of the product-specific support does not exceed 10 per cent limit. This effectively means that the domestic support provided by the government to its producers should not exceed the 10 per cent threshold. However, today a majority of the developing nations are facing difficulties in meeting these standards because of the reasons mentioned below:

- Non- uniformity in Calculation Mechanism
- Stringent limits set as Commitment Levels
- High levels of Inflation prevailing in the countries.[17]

This issue came to the forefront in 2011 when USA initiated discussions on this issue with the major claim being that the majority of developing countries were providing Domestic Support to their farmers in violation of their WTO commitments.[18] The basis of their claim was that though the developed nations had substantially reduced their levels of support in the recent years, there had been a major increase in subsidization in the developing countries. However, a closer look provides justification for such non- compliance.

A. Non- Uniformity in the Calculation Mechanism

Within the domain of International Trade, domestic price support (known as Aggregate Measurement of Support)[19] exists in two forms: either through administered prices (involving transfers from consumers) or through certain types of direct payments from

[16]AoA, *supra* note 6, at art.6.
[17]Alan Matthews, *Food Security and WTO Domestic Support Disciplines post- Bali*, ICTSD PROGRAMME ON AGRICULTURAL TRADE AND SUSTAINABLE DEVELOPMENT, ISSUE PAPER No. 53 (2014).
[18]WTO Domestic Support Disciplines, *supra* note 4.
[19]Domestic Support, *supra* note 11.

governments. Calculation of the Domestic Market support requires following this certain methodology.[20]

MPS for a Product = (Administered Price - Fixed External Reference Price) x Production Amount

Here, the price support is generally measured by multiplying the gap between the government administered price and a specified fixed external reference price or "world market price" by the quantity of production eligible to receive the administered price.[21] Though the methodology appears to be fairly simple, this has been the bone of contention. Since different countries appear to follow different approaches in the way they calculate their Market Price Support ("**MPS**"), the WTO suggests that this formula requires usage of the Total Value of Production for finding the MPS. The latter formula, using the Total Production value methodology also derives support from the Appellate Body ruling in the *Korea- Beef*[22] case which laid down that except in special specific circumstances, all production, and not just the amount of product procured by government, should be used in the calculation of the MPS. The WTO argues that the Production levels to be used should be the actual total quantity which is "fit or entitled to be purchased" and not merely the quantum receiving the administered price.[23]

However, the developing countries have been arguing that such usage leads to over estimation of the Total Market Price Support. When the total value of production is used, a country seems to have exceeded its *de-minimis* threshold though the support remains within limits when

[20]AoA, *supra* note 6, at Annexes 3- 4.
[21]*Id*.
[22]APPELLATE BODY REPORT, KOREA – MEASURES AFFECTING IMPORTS OF FRESH, CHILLED AND FROZEN BEEF, WT/ DS161/AB/R and WT/DS169/AB/R (Jan. 10 2001) (hereinafter Korea– Various Measures on Beef).
[23]WTO Domestic Support Disciplines, *supra* note 4.

instead the Actual Quantity procured is used for such calculations.[24] For instance, even India is in breach of its commitments in rice even when its notification is made in USD, when total production is used in the calculation of MPS.[25] However, considering the 2014 levels, when the actually procured quantity is used in the calculation of MPS, in that case with a MPS of USD 1,880 million against a *de minimis* of USD 3,318 million,[26] India still has some unused policy space.

Similar trends are also seen in case of wheat crop of Turkey wherein it is in clear-cut violation of its commitment levels of 10 per cent if the total wheat production is to be used in the MPS calculation. However, when actual procured production is to be used, its calculated wheat MPS is within Turkey's *de-minimis* commitment.[27] A similar trend is also seen in the case of Pakistan wheat and Philippines rice. In the latter case, if Philippines uses its actually procured production for calculation of domestic support, then its rice MPS is within its *de minimis* commitment. However, under the assumption of using procured quantities and not total production, the Philippines easily manages to have a large policy space to increase procured rice supplies and to increase its administered price without breaching its *de minimis* threshold.[28]

Both the methodologies depict highly differing results, which in turn substantially affects the capacity of the developing countries to meet their commitments.[29] This is because the calculations reflect inflated

[24]AGRICULTURE, DEVELOPMENT, AND THE GLOBAL TRADING SYSTEM 285- 324 (Antoine Bouet et al eds., 2017) (hereinafter Agriculture Development).
[25]WTO Domestic Support Disciplines, *supra* note 4, at 12.
[26]WTO Domestic Support Disciplines, *supra* note 4, at 13.
[27]USDA Foreign Agricultural Service, *Turkey Grain and Feed Annual* (2013) https://gain.fas.usda.gov/Recent%20GAIN%20Publications/Grain%20and%20Feed%20Annual_Ankara_Turkey_4-4-2013.pdf.
[28]C. B. Cororaton, *WTO Disciplines on Agricultural Support Update: Philippine WTO Domestic Support Notification*, VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY, WORKING PAPER (2013).
[29]Agriculture Development, *supra* note 24, at 284-324.

degrees of support when effectively the government is not supporting to that extent. Thus, the authors, in line with the opinion of the WTO Appellate Body,[30] proposes that the formula should instead incorporate the usage of production that was actually purchased.

B. Stringent Limits for meeting commitment levels

Developing countries have also expressed their grievance regarding the existing domestic support provisions under the WTO, and how they are highly unbalanced and favorable to the developed countries.[31] Contrary to the intent of the AoA, USA and nations in the European Union have managed to retain and rather increase their annual level of farm related subsidies by around 70-80 million tons[32] by classifying them under different exemptions including Blue Box, Green Box, etc. Where on the one hand the developing and the Least Developed Countries were forced to lower their tariffs and at times dismantle their tariff walls to be in consonance with the WTO Rules, the developed countries managed to escape unaffected.[33]

Though there should have been a reduction in the overall support being provided, the developed countries have instead witnessed an exacerbation in the already persisting problem of overproduction.[34] While the developing countries have attempted to ensure compliance with all possible liberalization measures by not invoking any kind of Special Safeguards,[35] developed countries managed to retain their

[30]Korea– Various Measures on Beef, *supra* note 22.
[31]Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals (Ricardo Meléndez-Ortiz, Christophe Bellmann, & Jonathan Hepburn eds., 2009).
[32]*Ten Years of the WTO Agreement on Agriculture: Problems and Prospects*, IGTN- ASIA, WTO ANNUAL PUBLIC SYMPOSIUM (2005) (hereinafter Agriculture: Problems and Prospects).
[33]Prema Chandra Athurokala, Asian Developing Countries and the Global Trading System for Agriculture: Uruguay Round Achievements and Post- Uruguay Round Issues, in TRADE AND AGRICULTURE: NEGOTIATING A NEW AGREEMENT? 121- 142 (Cameron May, 2008).
[34]Agriculture: Problems and Prospects, *supra* note 32, at 2.
[35]*Id*.

protectionist walls by setting tariffs at a very high level from the base year of implementation.

The effect was that they were required to ensure only a negligible tariff reduction, having distorting effects on the market access for the exports of developing and least developed countries. It was the developing who had to bear the brunt since the WTO rules[36] have failed to ensure that these Members are provided with sufficient policy space to perform the required public interventions in the crop market. Agriculture in developing countries often may be carried out by resource deficient farmers working on a small scale.[37] Since such agro- based activities are performed not only with the sole objective of commercial operation, such policies created a barrier for them to ensure availability of food for their populations.

Also, the threat faced by the pool of developing countries was because of the systemic weaknesses of the WTO provisions as under the Agreement of Agriculture. The calculation methodology does not take into consideration the government's actual spending on Domestic Support but rather determines it on the basis of an out-dated external reference price which was set way back in 1986-88.[38] There have been no attempts to revise or amend these rates, often leading to distorted results.

C. Inability to account for inflationary aspects

The inability to comply with these standards is also due to steep increase in world food market prices accompanied by the increased volatility in these prices. Majority of developing Member states have seen high levels of inflation in their price indexes with corresponding

[36]AoA, *supra* note 6, at art.6.
[37]Aileen Kwa, *Agricuture in Developing Countries: Which way forward?, in* TRADE RELATED AGENDA, DEVELOPMENT AND EQUITY (UNDP, June 2001).
[38]AOA, *supra* note 6, at Annex 3.

fall in their currency rates and overall weakening of their currency.[39] As such on-paper findings continue to depict highly distorted figures, these countries argue that their commitments relating Aggregate Measurement of Support have been eroded,[40] and thus propose that the adverse implications of inflationary should be built into their commitment requirements.

For instance, the first major case dealing with inflation affecting domestic support was of Turkey, which experienced inflation rates between 88 and 55 per cent between 1995 and 1999.[41] Similarly, it was seen that India would be in breach of its commitments in rice if the notification was to be made in INR and not in US$.[42] This is the result of the inflationary trend in currency rates, which leads to distortions with respect to the current product- specific AMS levels, as elaborated in Section IV of this paper.

Moreover, such uncertain market forces have a unidirectional effect and do not affect the developed countries because of their comparatively larger capacity to insulate their markets. It is usually the developing countries who have had to bear the brunt with their trust on the world food market having seriously shaken. In such a scenario where the trade regulatory measures are failing to ensure fair market practices and take into consideration the legitimate interests of the majority chunk of developing Member states, the WTO along with the Member states realized the need to relook these policy considerations.

[39]David Orden, Exchange Rate Effects on Agricultural Trade and Trade Relations, UNIVERSITY OF GUELPH 5-24 (2000).
[40]World Trade Organization, *Trade Topics: Agriculture Negotiations, Domestic Support*, WORLD TRADE ORGANISATION https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd14_ph2domest_e.htm.
[41]Aykut Kibritcioglu, *A Short Review of the Long History of Turkish High Inflation*, UNIVERSITY LIBRARY OF MUNICH, GERMANY (2004).
[42]WTO Domestic Support Disciplines, *supra* note 4, at 12.

III. THE GLOBAL POSITION AGAINST THE DEVELOPING WORLD'S APPEALS

The abovementioned discussions about the non- compliance with the commitments by the developing countries coincide with historically high levels of market prices for major food commodities. These breaches were witnessed especially post 2008, the period when there was high volatility in the world prices.[43] This eventually led to uncertainties relating to attaining the due share of access to the world markets, causing apprehensions among, and criticism by, these developing nations about the unbalanced nature of the WTO Agreement of Agriculture and especially the Uruguay Round provisions.[44]

A. Proposals of the G-33 nations

These concerns were put forward by a group of 33 nations who came forward seeking to amend the Agreement of Agriculture to make it more accommodative to the needs and requirements of the developing countries.[45] To tackle the problem of stringent commitments set by the WTO, this group of Members initially suggested raising the *de-minimis* threshold level as one of the solutions[46] to ease the pressure faced by developing countries regarding the breaching of their commitments.

[43]Alan Matthews, *Policy Space to Pursue Food Security in WTO Agreement on Agriculture*, THE STATE OF AGRICULTURAL COMMODITY MARKETS, FOOD AND AGRICULTURE ORGANIZATION (2015-16).
[44]K Elliott, *Food security in developing countries: is there a role for the WTO?*, WASHINGTON, DC, CENTER FOR GLOBAL DEVELOPMENT (2015); B Chatterjee & S Murphy, *Trade and food security*, GENEVA, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (2014).
[45]Bellmann, Christophe et al., *G-33 proposal: early agreement on elements of the draft Doha accord to address food security*, ICTSD PROGRAMME ON AGRICULTURAL TRADE AND SUSTAINABLE DEVELOPMENT (2013) [hereinafter G-33 Proposal].
[46]*Id*.

It was thus suggested that the *de minimis* threshold be increased from 10per cent to 15per cent for developing countries.[47] Further in the fall of 2012, the G-33 Members proposed an amendment to Annex 2 of the Agreement for widening the scope of the Green Box category in terms of the support provided.[48] They made specific suggestions that any acquisition of stocks of foodstuffs by developing country Members, if given effect mainly to fulfill the objective of supporting low-income or resource-poor producers, then that shall not be required to be accounted for in the Aggregate Measurement Support calculations.[49]

Also, to tackle the problem of the outdated external reference price against which all the support levels are calculated, this group recommended a change in the proposed definition of the external reference price. Rather than the stagnant levels of 1986-89, for the purposes of calculations, these levels should be set on a three-year average period,[50] mainly based on the preceding five-year period to account for the latest changes in their patterns. Alternatively, they proposed the base reference price to be set according to the previous year's average producer price in the largest suppliers of foodstuff in the respective countries.[51]

This group of developing Member states also proposed the reintroduction of a Peace Clause as a measure of Special and Differential Treatment for the developing countries. All these recommendations were put forward at various Ministerial

[47]Merlinda D. Ingco & John D. Nash, Agriculture and the WTO: Creating a Trading System for Development 280-285 (2004).
[48]Committee on Agriculture, G-33 Proposal for Early Agreement to address Food Security issues, Job/AG/22 (Nov. 30, 2012).
[49]*Id*.
[50]WTO: Ag Talks Chair Seeks to Reconcile Conflicting Visions for Bali, 15(17) BRIDGES WEEKLY TRADE NEWS DIGEST (2013).
[51]Diaz-Bonilla E., *On Food Security Stocks, Peace Clauses, and Permanent Solutions After Bali*, IFPRI WORKING PAPER (Jun. 2014); WTO Domestic Support Disciplines, *supra* note 4.

Conferences of the WTO, and though the other recommendations still remain undecided due to inability of the Members to reach any consensus, the Peace Clause came to be adopted at the Bali Ministerial Conference in 2013.[52]

B. Insufficiency of the peace clause

The rationale behind the Public Stockholding Programme,[53] also known as the Peace Clause was to provide a temporary solution wherein the developed nations cannot challenge any breach in prescribed ceiling by a developing nation. The existing WTO AoA rules under the Green Box[54] permit the governments to incur expenses for accumulation and holding of food stocks without any monetary limitation. The specific issue that came under consideration at the Bali Meeting concerned such situations in developing countries when public stockholding programmes intersected with Market price support policies.[55]

However, this was only supposed to be an interim protection to be applicable only in cases where the domestic support is exceeded for food security purposes. The idea was that the developing countries that are exceeding these support levels for providing domestic food aid or to ensure the availability of resources for sustenance to tackle the adverse agrarian crisis should be provided an exemption.[56] However, the beneficiary developing Members under the Bali

[52]Agricultural Negotiations Factsheet, *The Bali decision on stockholding for food security in developing countries*, WORLD TRADE ORGANIZATION (Nov. 2014), https://www.wto.org/english/tratop_e/agric_e/factsheet_agng_e.htm.
[53]World Trade Organization, Ministerial Declaration of 11 December 2013, WT/MIN (13)/38/DEC ¶ 1 [hereinafter Bali Decision on Public Stockholding].
[54]*Id*. at para 3.
[55]Trade and Food Security, *supra* note 5, at 24.
[56]World Trade Organization, *Trade Topics, Agricultural Negotiations, The Bali decision on stockholding for food security in developing countries*, https://www.wto.org/english/tratop_e/agric_e/factsheet_agng_e.htm#whatwasagreedinbali.

Decision were subject to certain monitoring and consultation requirements.[57] There is a pre- requisite for the fulfillment of certain transparency obligations and safeguard provisions in order to limit any scope of abuse and reduce the possibility of negative effects to the food security of other Members.

As per the decision,[58] this was laid down as a mere temporary solution with the aim of reaching an agreement on the permanent solution in four years, at the 11th Ministerial Conference that was held last year at Buenos Aires in December 2017. However, in the recently concluded Ministerial Conference, the Members failed to reach any consensus on the future of this Peace Clause[59] and hence in the absence of any agreement having been concluded, the ambiguity continues to threaten the interests of the developing Members.

IV. TACKLING THE VOLATILITY OF INFLATION

This decision sought to provide an extension of the protection mechanism for the developing and Least Developing but failed to provide a solution against the suffering from the inflationary conditions. Resultantly, developing countries like India, Brazil, and Philippines have become less willing to provide greater access to their market and have also started reconsidering their own production and support systems to fend-off externally generated volatility.[60]

Under the WTO regime, the rules related to the calculation of the Domestic Support provided by the government is measured against

[57]Agriculture in the WTO Bali ministerial Agreement, CRS REPORT, UNIVERSITY OF NORTH TEXAS (2014).
[58]World Trade Organization, Trade Topics, Ministerial Conference 9: WT/L/913, http://wto.org/english/thewto_e/minist_e/mc9_e/desci38_e.htm.
[59]Noor Mohammad, *WTO Meet Likely to Be a Washout as India and US Clash Over Food Security,* THE WIRE (Dec. 13, 2017), https://thewire.in/business/wto-meet-likely-washout-india-us-clash-food-security.
[60]WTO Domestic Support Disciplines, *supra* note 4.

the base reference price fixed in 1986, which has remained the same since then. The mechanism for such calculation as laid in the Agreement of Agriculture,[61] provides certain constituent and data methodology standards for bringing in uniformity in such measurements. The Agreement requires that a country is supposed to use the same methodology in which the base standards were set in 1986.[62] Accordingly, it requires that the countries should use the same currency in which they provided their data about support levels.

This is where the issue of inflationary aspect creeps in. A majority of developing countries used their domestic currencies for the making of their original schedules back in 1986, however now they have prefer the usage of US Dollars for all such representations.[63] When calculations are made using national currencies, they appear inflated despite the annual support levels having remained constant. The domestic support is measured against the original external reference price set in USD in the year 1986-88.

Supposing the support level is set at 10USD for a country. If the exchange rate is set at 12/USD, then it would mean that120INR worth of support could be provided. If the value were to drop to 65/USD, then the support would be of 650INR. Here, though the amount supported remains constant with no change, yet because of inflation it seems as if it has been exceeded multi-fold times. This situation arises because the reference level still remains fixed at 120INR. Hence, in countries hit by inflation, usage of USD brings in uniformity. According to the authors' analysis, when the calculations are made in USD, their support manages to remain within the bound limits, but when these representations are made in their Domestic currencies, the support provided seems to have inflated enormously.

[61]AoA, *supra* note 6, at Annex 3.
[62]AoA, *supra* note 6, at art 1(h) (ii).
[63]WTO Domestic Support Disciplines, *supra* note 4, at 21.

A. Inflation killing development: Due consideration needed

These concerns are being faced by various developing nations including India, Pakistan, Turkey, Egypt, affecting their price support measures. India's support patterns for Rice, Pakistan's and Turkey's support in case of wheat, etc. are facing challenge before the WTO forum but these countries claim defenses because of their fluctuating and unstable economic conditions. India has on an average seen an inflation of 7-8per cent since 1986 with the currency value of India Rupee against US Dollars having depreciated enormously from Rs.12.2/USD in 1986 to around Rs.65/ USD in 2018.[64]

Now, every country is supposed to provide two types of notifications: a] An annual notification detailing the support structure being provided, and b] Special notification in case of any modifications in the measures. When a notification by India for it is in INR, India would be in breach of its commitments if the de minimis level is of 10per cent.[65] However, when its notification is made in USD with the actually procured quantity being used in the calculation of Market Price Support, then with an MPS of 1,880 million USD against a de minimis of 3,318 million USD, India still has some unused policy space.[66] Similar issues are also being faced by other Member States like Pakistan, Turkey, etc.

If Pakistan's disputed support measures for rice were to be considered, it also similarly stands affected because of the volatility in its currency. The Pakistani Rupee has witnessed a depreciation from 15.9/USD in 1986 to around 110/USD in 2018 witnessing high

[64]*Treasury Reporting Rates Of Exchange*, DEPARTMENT OF TREASURY (March 1986) https://www.gpo.gov/fdsys/pkg/GOVPUB-T63_100-dd1437db9d97161a1d6cd2945151dd6c/pdf/GOVPUB-T63_100-dd1437db9d97161a1d6cd2945151dd6c.pdf (hereinafter Dept. of Treasury).
[65]AoA, *supra* note 6, at art 18.
[66]Sudha Narayanan, *The National Food Security Act vis-à-vis the WTO Agreement on Agriculture*, ECONOMIC AND POLITICAL WEEKLY, 40, 42 (2014) (hereinafter Narayan).

currency fluctuation throughout this 30 year period.[67] Such trends have also been noticed in other countries like Turkey with their economy suffering from an average of 35per cent inflation from the 1970's, reaching an all-time high of 138.71per cent in May of 1980's and currently witnessing over 12per cent of inflation in 2018.[68]

All these developing countries have addressed this problem by reporting both Base Aggregate Market Support and current Price Support in USD. They derive support from Art-18.4 of the AoA,[69] which requires WTO Members to "*give due consideration to the influence of excessive rates of inflation on the ability of any Member to abide by its domestic support commitments*". Art. 18.4 of AoA uses the phrase "*due consideration*" highlighting that in cases of inflationary situations, the calculation methodology be amended if it does not lead to any manipulation.

In authors' opinion, this signifies that the Members should preferably take a currency which nullifies the effect of inflation while representing the domestic support, accommodating any Member's ability to abide with its commitments. This immediate interpretation of the provision is supported because other inflationary adjusting mechanisms involve time- consuming technicalities putting the interests of the developing nations at stake. For instance, the adoption of any automatic adjustment tool for inflation under the "due consideration" clause, would involve only a decision by the Committee of Agriculture in interpreting Art-18.4. In contrast, the option to introduce a new base year for the external reference price is more difficult as it would necessitate an amendment in the AoA itself.[70]

[67]Dept. of Treasury, *supra* note 64.
[68]Chusnul Ch Manan, *Turkey Inflation Rate*, TRADING ECONOMICS, https://tradingeconomics.com/turkey/inflation-cpi.
[69]WTO Domestic Support Disciplines, *supra* note 4, at 22.
[70]Narayanan, *supra* note 67.

B. WTO's insight into the usage of Article-18.4

Usage of Art-18.4 of the Agreement of Agriculture is disregarded by the other developed and highly developing Member states who reason it out by distinguishing between the countries having reduction commitments and those only having to comply with the *de-minimis* threshold. It is stated that for developing countries with price support upper cap of 10 per cent, since the values of production and the *de minimis* limits increase *pari-passu* with inflation, they accommodate inflation-related increases in nominal expenditures and payments.[71] Countries with a Bound Total AMS i.e., pre-specified level of support that can be extended, on the other hand, may be tempted to use Article 18.4 as conferring the right to reduce the amount of calculated support from its nominal level to a lower level by deflating it, as has been seen in cases of Ukraine and Jordan.[72]

With the fall in the currency rate, the eligible amount for providing *de- minimis* support also increases.[73] Supposing, in 1986, India was providing support on 100 tons of rice. With currency rate at 12/USD, this was equivalent to 1200INR of support, within its eligible limits. Now, the production remaining constant, when the currency value falls, the eligibility also increases accordingly. The country with 65/USD, can provide 6500INR of support, which would still be within its limits.

Also, Art-18.4 comes into play only when there are excessive rates of inflation in a country and includes the phrase "due consideration."[74] This cannot be necessarily interpreted to mean the change in the methodology of calculation by changing the currency usage.

[71]Lars Brink, Support to Agriculture in India in 1995-2013 and the Rules of the WTO, IATRC WORKING PAPER1 NO.14 (2014).
[72]WTO Domestic Support Disciplines, *supra* note 4, at 22.
[73]WTO DISCIPLINES ON AGRICULTURAL SUPPORT: SEEKING A FAIR BASIS FOR TRADE (David Orden, Tim Josling & David Blandford eds., Cambridge University Press, 2011).
[74]AoA, *supra* note 6, at art-18.4.

Measures like usage of the Total Purchasing Power Parity Index or Inflation Adjusting Mechanism like adjustment of the reference price, etc. can be used. Since, original calculations of 1986-89 were made in the domestic currency; the authors suggest that the same methodology should be followed in all the present transactions, as that would ensure fair representation and uniformity in the calculation.[75]

To tackle such conflicting stands taken by various groups of Member states, the G33 has submitted a proposal on how to deal with excessive inflation rates,[76] which entailed a comparison of the actual rate of inflation in a country with a comparator "normal level" of inflation and adjust administrative prices based on the gap between actual and normal levels of inflation. There has also been a proposal for an increase to 15 per cent *de minimis* threshold from the existing 10 per cent cap. However, this could not materialize into an amended provision.[77]

V. CONCLUSION

The authors in this concluding remark recommend that the developing countries need to be given greater leverage to account for their prevailing agrarian and economic crises. The stringent commitment standards of the Agreement of Agriculture need to be relaxed in lieu of the inflationary circumstances, so as to cater to the food security needs of the world population. Additionally, the members should be allowed to preferably take a currency which nullifies the effect of inflation while representing the domestic support. Though this may result into jeopardizing the compliance with WTO law, yet this is needed for accommodating any Member's ability to abide with its commitments.

[75]AoA, *supra* note 6, at art-1(h)(ii).
[76]*Supra* note 48.
[77]*Supra* note 52.

Also, efforts need to be made to facilitate the Members to reach a consensus regarding the non- uniform Calculation Mechanism by allowing the change of currency to USD for ensuring fair representation. Along with this, the phraseology "due consideration" as under the Agreement needs to be given wider interpretation to address the excessive volatility in the currency exchange rates. In this strive to uphold the core values of WTO, the Members should consider and aim to ensure compliance with these possible measures for ensuring free and fair trade in the world.

WHY THE PROTECTION OF GEOGRAPHICAL INDICATIONS IN INDIA NEEDS AN OVERHAUL

Gautami Govindrajan[*] *& Madhav Kapoor*[**]

Abstract

In a land as rich in cultural arts and traditional knowledge as India, Geographical Indications (GIs) are an extremely important intellectual property right. The Geographical Indications of Goods (Registration and Protection) Act was passed accordingly, to protect the interests of the producers, and to bring economic prosperity. However, despite the passing of the Act in 1999, there have been several issues with GI protection in India. Low awareness among producers, rampant violations, and lack of proper marketing and promotion are but some of the problems that plague Indian GIs. These problems have eclipsed the multifarious benefits that GI protection offers to both producers and consumers; causing severe hardship to the local vendors whose livelihood is dependent on these products and frustrating the very purpose of the Act. This paper begins by examining the concept of GIs, along with

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history of GI protection in India, which examines how this intellectual property right evolved. It further goes on to explore the special importance of GIs in the Indian context, with a focus on how producers, rural communities and consumers stand to benefit from GI protection. The paper then discusses the various problems that riddle the Indian GI framework. While analysing the post-registration issues that arise with Indian GIs, the authors draw a comparison with thoroughly marketed goods such as Parma Ham, to highlight what lessons can be learnt from the branding and marketing thereof. Lastly, the authors discuss solutions that could help overcome the obstacles in the path of successful GI implementation in India.

I. INTRODUCTION

Every culture is characterised by products which are created and developed as a result of the region the people reside in, and which are carried forward through the generations. These products are unique to their region of origin; they derive quality and other attributes therefrom. They are a goldmine of commercial potential; something other States and jurisdictions have realised and tapped into for decades now. India, being a home to many such products, needs to accord adequate significance and protection to these products too. This paper seeks to explore the problems with the current legal framework for the protection of Geographical Indications, and the implementation thereof. In *Part I*, the authors discuss the concept of Geographical Indications, how they evolved in India, and what the procedure is to obtain registration of them. In *Part II*, the authors

explain the importance of Geographical Indications in the Indian context. The authors delve into a discussion of the problems plaguing the Indian Geographical Indications framework in *Part III*, and analyse solutions for these issues in *Part IV* of the paper, along with concluding thoughts.

II. AN INTRODUCTION TO GEOGRAPHICAL INDICATIONS

A Geographical Indication ("**GI**") is an indication which identifies a good in the territory of a country or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin.

India has a very strong cultural identity, with a rich history of indigenous goods having special characteristics. By providing GIs, the law attempts to safeguard a number of products which are locally produced from being marketed by manufacturers who are not from that geographical area. In furtherance of this objective, The Geographical Indications of Goods (Registration and Protection) Act, 1999 (the "**Act**") was passed. The statement of objects of the Act states that the legislation was passed to protect the interests of producers of goods, bring economic prosperity to them, promote goods bearing Indian geographical indications in the export market and lastly, protect consumers from deception.[1] Another reason to pass the Act can be seen on examination of obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights

[1]Statement of Objects and Reasons, The Geographical Indications of Goods (Registration and Protection) Act, 1993, No. 48 of 1999, Acts of Parliament (India).

("**TRIPS Agreement**").[2] Unless a geographical indication is protected in the country of its origin, there is no obligation for other countries to extend reciprocal protection under the TRIPS Agreement.[3] It has been more than 14 years since the legislation came into force and most of these objectives are far from being achieved.

A. The Origin and Evolution of Geographical Indications in India

Till the enactment of the Act, there was no separate law in India offering specific protection to GIs.[4] They were protected using common law principles.[5] However, there were three alternative ways in which the then-existing legal system of the country could have been utilized for preventing misuse of GI.[6] The first way was in the field of consumer protection through Section 2(1)(r) of the Consumer Protection Act, 1986 and Sections 36A to 36E of the Monopolies and Restrictive Trade Practices Act, 1969.[7] As per these provisions, unfair trade practices had to be proved to obtain relief. The second way was through *'passing off'* action in courts.[8] Under this, the plaintiff had to establish that there is goodwill attached to the goods supplied by him on which the GI is regularly used; and that the defendant misinterprets to the public that the goods offered by him originate from the plaintiff.[9] Therefore, to prevent the unauthorized use of a GI, a successful action for passing off had to be shown.[10] The last alternative to protect GI before the Act was in the form of

[2]Agreement on Trade-Related Aspects of Intellectual Property, Jan. 1, 1995, 1869 U.N.T.S. 299.
[3]Agreement on Trade-Related Aspects of Intellectual Property, art. 24.9, Jan. 1, 1995, 1869 U.N.T.S. 299.
[4]Singh, *supra* note 2, at 197.
[5]S.C. Srivastava, *Geographical Indications and Legal Framework in India*, 38 ECON. & POL. WKLY. 4022–33 (2003) (hereinafter Srivastava, GI Framework).
[6]Kasturi Das, International Protection of India's GI with Special Reference to "Darjeeling Tea", 9(5) J. WORLD INTELL. PROP. 459, 465 (2006).
[7]Singh, *supra* note 2, at 198.
[8]*Id.* at 199.
[9]*Id.*
[10]*Id.*

Certification Trade Mark ("**CTM**") protection.[11] Under Section 2(e) of the Trade Marks Act 1999, CTM could be adapted to serve the functions of the modern GI and the CTM system was capable of being used for the protection of names of geographical repute.[12] The most common geographical name protected under the CTM system, prior to the Act, was "Darjeeling tea."[13]

With the TRIPS Agreement coming into force in the year 1995, India was faced with an accompanying obligation to give formal protection to GIs.[14] These obligations arose as a result of the negotiations prior to the signing of the TRIPS Agreement, which brought this particular species of intellectual property to the fore. This was mostly due to the negotiating power of the EU, where GIs had already been accorded considerable significance.[15] Thus, there was a gradual discontinuation of previous methods of protection with the passing of the Act in 1996.

B. The process of obtaining a GI in India

The process to get GI registered in India first involves filing an application before Geographical Indications Registry which has been established by the Central Government, with all–India jurisdiction, at Chennai.[16] The party filing it must necessarily represent the interest of the producers; and should mention the special characteristics of the

[11]*Id.* at 201.
[12]Shyamkrishna Balganesh, Systems of Protection for Geographical Indications of Origin: A Review of the Indian Regulatory Framework, 6(1) J. WORLD INTELL. PROP. 199 (2003).
[13]Jane Pettigrew, *Darjeeling Tea's New Certificate of origin*, 172(6) TEA & COFFEE TRADE J. (2018).
[14]Srivastava, GI Framework, *supra* note 9.
[15]*See* The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations 116-117 (Jayashree Watal & Antony Taubam ed., 2015).
[16]Dr. Sudhir Ravindran & Arya Mathew, *The Protection of Geographical Indication in India – Case Study on Darjeeling Tea*, INTERNATIONAL PROPERTY RIGHTS INDEX: 2009 REPORT, https://www.altacit.com/wp-content/uploads/2015/03/The-Protection-of-Geographical-Indication-in-India-Case-Study-on-Darjeeling-Tea.pdf.

product in the application, along with other particulars.[17] The Examiner will then examine and scrutinise the application. Any deficiencies can be remedied by the applicant within a month. Further, if the Registrar has any objections to the application, a show-cause notice will be served and the matter will be heard and decided accordingly. Once the application is accepted, it will be published in the GI Journal. Any person objecting to the same can file a notice of opposition within 3 months of the publication. The applicant can respond to this within 2 months; and if he fails to do so, he will be deemed to have abandoned his application. The parties will then lead their respective evidences, and the matter will be adjudicated. When a GI is finally accepted, it will be registered.

III. THE ROLE AND IMPORTANCE OF GIS IN THE INDIAN CONTEXT

We need only to reflect upon our daily conversations to see the sheer importance of GIs in India. References to "Kolhapuri Chappals", "Mysore Sandal soap", or "Darjeeling Tea" are liberally peppered in our day-to-day conversations,[18] and we often fail to notice that all of these are actually GIs. In fact, almost everything that we grow, make or produce in India is linked to a particular region.[19] Each region has developed art and traditional products specifically moulded to suit their specific clime and topography; particularly due to the strong link shared between the people and their land. What this signifies is that each region creates products that are intrinsically linked to their

[17]*The Registration Process*, IP INDIA, http://www.ipindia.nic.in/the-registration-process-gi.htm.
[18]Prabha Sridevan, *Will the Veena Gently Weep?*, THE HINDU (Jun. 9, 2015), https://www.thehindu.com/opinion/lead/will-the-veena-gently-weep-prabha-sridevan-on-geographical-indication/article7295304.ece?homepage=true (hereinafter Sridevan).
[19]*Id.*

geographical origin; or, in other words, each region creates goods capable of being recognised as GIs.

The fundamental economic rationale behind the protection of GIs lies in the fact that place of origin can be used as a marker of the quality of goods. The resources of a region can be beneficially utilised in the origin-labelled product, as quality attributes.[20] Studies have shown that globally, consumers are increasingly placing value on products which are associated with a certain place or means of production.[21] GIs become significant in this regard, by providing recognition and legitimacy to producers making and marketing goods linked to their geographical origin; thus "institutionalising the reputation"[22] of goods being protected. GIs also give indigenous producers the opportunity to operate in a niche market of specialised goods based on differentiation of products[23] to earn higher profits, and use the geographical origin of the goods as a means to sell them better. This helps to revitalise lagging markets of traditional goods and save such industries from dying out in a country like India. Further, GIs are an effective marketing tool, as they are brands in themselves. Therefore, any product with the label of a GI assures a high quality to its

[20]Alessandro Pacciani, et al, The Role of Typical Products in Fostering Rural Development and the Effects of Regulation (EEC) 2081/92, 73RD SEMINAR OF THE EUROPEAN ASSOCIATION OF AGRICULTURAL ECONOMISTS (2001).

[21]Brian Ilbery & Moya Kneafsey, Product and Place: Promoting Quality Products and Services in the Lagging Rural Regions of the European Union, 5(4) EUR. URB. & REGIONAL STUD. 329-341 (1998).

[22]Giovanni Beletti, *Origin Labelled Products, Reputation and Heterogeneity of Firms*, *in* The Socio-Economics of Origin Labelled Products in Agro-Food Supply Chains: Spatial, Institutional and Co-Ordination Aspects, (B. Sylvander *et al* eds. 2000).

[23]Cerkia Bramley et al, The Economics Of Geographical Indications: Towards A Conceptual Framework For Geographical Indication Research In Developing Countries, WIPO, http://www.wipo.int/edocs/pubdocs/en/wipo_pub_1012-chapter4.pdf.

consumer; and this is sufficient to attract customers willing to pay for the same.

The West has long been fascinated by Indian goods, with trade for silk, spices, ivory and other goods from India flourishing since ancient times.[24] Traders flocked to Indian shores for the rich products they offered. India can tap into this ready market for traditional goods. Adequate protection under GIs could help boost exports, consequentially hiking foreign exchange earnings; whilst simultaneously protecting the exclusiveness, heritage and traditional skills of those making such products.[25]

GIs, being collective rights, are best suited to protect the interests of communities which have developed unique goods. These rights protect these goods from being hijacked by corporations; and reward the true owners and creators of such products. They also promote the evolution of tradition and culture.[26] Small local producers can use them to enhance their reputations, and compete more effectively against large corporations.[27]

GIs can also act as effective tools of rural development. Many, if not most, of the goods which are eligible for GI protection originate from villages. Unique and typical products are often developed in these villages and rural communities based on their culture and circumstances, as a result of the interaction of local knowledge and

[24]Klaus K. Klostermaier, A Survey of Hinduism 456 (3 ed.).
[25]Anil K. Kanungo, *Geographical Indications Have the Potential to be India's Growth Engine*, FINANCIAL EXPRESS (Apr. 11, 2016), https://www.financialexpress.com/opinion/geographical-indications-have-the-potential-to-be-indias-growth-engine/234813/.
[26]Felix Addor & Alexander Grazioli, Geographical Indications Beyond Wine and Spirits - A Roadmap for Better Protection of G.I. in the WTO TRIPS Agreement, 5(3) J. WORLD INTELL. PROP. 893-895 (2005).
[27]W. Moran, *Rural Space as Intellectual Property*, 12 (3) POL. GEOGRAPHY 263, 264 (1993).

environmental conditions.[28] As stated above, GIs can be used to give small local producers a way to compete against corporations. They can also publicise the region that GIs use for the names.[29] GIs further help to protect indigenous knowledge, by keeping it in the public domain, and granting rights to the producers in perpetuity;[30] which helps to not only protect the traditional knowledge but also make sure it is not lost over time. An effective GI mechanism can not only empower a single producer, but also entire communities which produce goods unique to a geographical region.[31] GIs foster local production and generate employment in these areas. Further, they may even build up ancillary industries like tourism, which can help in the socio-economic development of the area; by generating sufficient interest in the product and the region it is linked to.[32]

GIs can also be of a huge benefit to the consumer. Sellers often dupe consumers into buying inauthentic goods by misrepresenting that the goods come from a particular region. These "piggyback riders"[33] have a dual detrimental effect- firstly, that of cheating innocent consumers; and secondly, by devaluing the authentic product by *passing off* fake goods of poorer quality as the real ones.[34] GI protection to the goods will ensure that only producers who belong to the geographic region

[28]World Trade Organization, 'Promoting Agricultural Competitiveness through Local Know-How' Workshop on Geographical Indications for Middle Eastern and Northern African Agri-Food Products, WORLD BANK REPORT (June 2004).
[29]*Id.* at 266.
[30]See Dwijen Rangnekar, The Socio-Economics of Geographical Indications: A Review of Empirical Evidence from Europe, UNCTAD-ICTSD PROJECT ON IPRS & SUSTAINABLE DEV. (2004).
[31]Aparajitha Lath, *Who is Going to be the G.I. Joe That Will Save the Vanishing Indian GIs?*, SPICYIP (Jun. 17, 2015), https://spicyip.com/2015/06/who-is-going-to-be-the-g-i-joe-that-will-save-the-vanishing-indian-gis.html.
[32]Latha R. Nair, *Making India GI Brand Conscious*, THE HINDU (Mar. 17, 2016), http://www.thehindu.com/opinion/op-ed/comment-article-by-latha-r-nair-making-india-geographical-indications-gi-brand-conscious/article14158353.ece.
[33]Sridevan, *supra* note 22.
[34]*Id.*

from where the unique good originates can use the particular name to sell the goods; thus protecting consumers from being cheated by unscrupulous sellers. This would also ensure that the value of the original good is not damaged.

Thus, it can be seen that an effective GI mechanism serves multifarious goals; producer protection, fair competition, foreign trade, rural development, and consumer protection, to name a few. All of these are goals are of especial importance in a developing country like India.

IV. THE PROBLEMS PLAGUING THE GI FRAMEWORK IN INDIA

As can be seen from the above discussion, GIs have emerged as an important instrument of protecting the market for "quality, reputation and other character of goods essentially attributable to their geographical origin."[35] While the TRIPS Agreement and the GI Act have tried to fulfil this objective, there exist several problems which have limited their success, and have thus failed to effectuate their purpose.

A. Problems with Foreign Registration

For an Indian GI to be protected in another country, it needs to go through the full legal process of that particular country, since recognition under the GI Act does not provide worldwide protection.[36] Therefore, every technical and legal obligation in each country needs to be studied and complied with before applying for GI recognition there. The task of acquiring legal armour in various

[35]Singh, *supra* note 2, at 338.
[36]The Geographical Indications of Goods (Registration and Protection) Act, 1993, § 1(2), No. 48 of 1999, Acts of Parliament (India).

countries as per their respective legal and technical frameworks is an extremely daunting one. This is even more so because of the significant divergences in modes of protection of GIs from country to country.[37]

Further, the difficulty with protecting GIs in a foreign country does not stop with completion of local registration. Once the GI is registered in a foreign country, exorbitant expenses are involved in appointing a monitoring agency in each country to get information on misappropriation.[38] Additionally, huge financial resources are needed for fighting legal battles in foreign lands.[39] In such a situation, the TRIPS Agreement does not help much as it leaves it up to the member countries to determine the appropriate method of implementing the provisions of the Agreement within their own legal framework.[40] As a result, the process to register and protect an Indian GI in a foreign country is a very long, technical and formidable process involving huge expenses.

B. Lack of Awareness

While India has no dearth of goods eligible for GI protection; the number of goods actually registered is startlingly low. Knowledge of the very existence of GIs has not penetrated the various rural areas where the producers of these goods reside and function; making applications of registrations from these producers a moot point. Chinnaraja G. Naidu, the Assistant Registrar of Trade Marks & GI Registry, has voiced concerns about the lack of registrations due to

[37]Kasturi Das, *Prospects and Challenges of Geographical Indications in India*, 13 J. WORLD INTELL. PROP. 148, 160 (2010) (hereinafter Das (2010).
[38]Singh, *supra* note 2.
[39]*Id.*
[40]Das (2010), *supra* note 41.

lack of awareness among local producers of the benefit of GIs.[41] Due to this, there is an abysmally low number of registered GIs in Punjab: while the area is teeming with products capable of receiving GI protection, the number of registered GIs is just one.[42] Another instance is of goods such as Chilika curd, which is a traditional dairy product made in Odisha that has all the requirements to qualify for GI protection,[43] but has not been registered due to lack of awareness among the producers. This phenomenon is leading to inefficiencies in the GI system in India: for GIs to succeed, producers need to be aware of the protections they can avail.

C. Excessive Reliance on Documentary Proof for Registration

The law as it exists leans heavily on documentary evidence to grant GIs: the process to obtain and register a GI requires the submission of a large amount of documentary proof.[44] This is primarily to discourage frivolous applications. While well-intentioned, the excessive reliance on documentary proof for registration of a GI can lead to hurdles in practical application. Documentary proof is not always easy to obtain, especially in areas where history is transferred from generation to generation by word of mouth.[45] One such example is of Judima wine in Assam. The Dima tribe which has been making it

[41]Press Trust of India, *Lack of Awareness About GI Spelling Doom for Many Products*, THE BUSINESS STANDARD (Dec. 18, 2013), https://www.business-standard.com/article/pti-stories/lack-of-awareness-about-gi-spelling-doom-for-many-products-113121800166_1.html.

[42]Vijay C. Roy, *Punjab, Haryana Unable to Reap Benefits of GI*, THE TRIBUNE (Mar. 21, 2018), http://www.tribuneindia.com/news/business/punjab-haryana-unable-to-reap-benefits-of-gi/566323.html.

[43]Dhiraj Kumar Nanda et al, Indian Chilika Curd – A Potential Dairy Product for Geographical Indication Registration, 12 INDIAN J. TRADITIONAL KNOWLEDGE 707-713 (2013).

[44]Section 03.08.01, Manual of Geographical Indications Practice and Procedure, http://www.ipindia.nic.in/writereaddata/Portal/IPOGuidelinesManuals/1_31_1_manual-of-geographical-indications-practice-and-procedure.pdf.

[45]Jupi Gogoi, *Locked Out, Without a GI Tag*, THE HINDU (Nov. 27, 2017), http://www.thehindu.com/opinion/op-ed/locked-out-without-a-gi-tag/article20944930.ece.

over generations has no documentary proof to support its claims, and has therefore been refused a GI tag.[46] Another example is the refusal to grant GI protection to a variety of Hyderabadi Biriyani due to lack of documentary evidence.[47] Thus the stringency in requirement of documentary evidence becomes a problem, especially in several tribal societies, and in cases of passing of traditional knowledge, where written history or documentary evidence is nearly impossible to find. This needs to change to allow adequate protection over such goods. The authors will, in a later section of this paper, analyse potential ways to resolve this problem.

D. The 'nationalisation' of GIs

A large percentage of applications for GIs can be seen to be filed by the State or Central governments through various authorities. 64% of the first 100 registered GIs were filed and registered by various government bodies.[48] Agricultural & Processed Food Products Export Development Authority ("**APEDA**") is the holder of the GI for Basmati rice, and even Universities have been granted GI rights, as in case of 'Wayanad Jeerakasala Rice', and 'Tangaliya Shawl.'[49]

[46]*Id*.
[47]U. Sudhakar Reddy, *Origin Not Proved, So No Geographical Indication Tag for Hyderabadi Biryani*, DECCAN CHRONICLE (Mar. 9, 2017), https://www.deccanchronicle.com/nation/in-other-news/090317/origin-not-proved-so-no-gi-tag-for-hyderabadi-biryani.html; Manish Raj, *Hyderabad Biryani Fails to Get Geographical Indication Tag*, THE TIMES OF INDIA (Mar. 9, 2017), https://timesofindia.indiatimes.com/city/chennai/hyderabad-biryani-fails-to-get-geographical-indication-tag/articleshow/57548184.cms.
[48]Prashant Reddy, *More on the Nationalization of GIs – Sarkar Raj – Power Cannot be Given – It Has to be Taken*, SPICYIP (Feb. 17, 2012), https://spicyip.com/2012/02/more-on-nationalization-of-gis-sarkar.html.
[49]Prashant Reddy, *The 'Nationalization' of Geographical Indications in India*, SPICYIP (Feb. 12, 2012), https://spicyip.com/2012/02/nationalization-of-geographical.html.

The Act is silent as to whether a government can be the registered GI-holder. All the Act mandates is that there must be an "association of persons or producers or any organization or authority established by or under any law"; which represents the interests of the producers.[50] This does not give clarity as to whether a government body is indeed allowed to hold a GI right.

The next question that arises is whether a government body is an appropriate body to hold a GI right. The justification of the governments in this regard is also untenable. While the government may claim that it represents the interests of all producers, this does not always hold true; especially in cases where the government is involved in the process of production and marketing.[51] There is a likelihood of prejudice against producers who are not linked with the government. Further, the involvement of the bureaucracy brings with it the problems that plague the system: the corruption in the Indian system is no secret. Such a situation would defeat the very purpose for which the GI is granted; i.e., the benefit of the producer. The government may claim that it will protect the interest of every producer; whether that promise will be kept cannot be said for certain.

E. Lack of benefit to Local Vendors

One of the primary purposes for which GIs have been created is for the protection of local vendors. Though GIs have been implemented to protect and benefit the local vendors, this purpose has not been achieved in reality: while rights have been granted, the benefits have not always been enjoyed by the local vendors. This could be due to a plethora of reasons: piggyback riders in the market who sell inauthentic goods to consumers, thus robbing the authentic sellers of their consumer base; lack of organisation and awareness in these local producers; lack of proper implementation of the GIs, etc. The position

[50]The Geographical Indications of Goods (Registration and Protection) Act, 1993, § 11(1), No. 48 of 1999, Acts of Parliament (India).
[51]Vinayan, *supra* note 4.

of the local vendor is further weakened due to the problems that plague any collective right: in case of lack of unity in the group, the entire group suffers. Further, firms with a better bargaining power may end up making a disproportionate amount of benefit from the GI protection; leaving the smaller producers high and dry.[52] A field study conducted by The Energy and Resources Institute ("**TERI**") showed that in cases of several GI protected products, such as Malabar Pepper and Vazhakulam Pineapple, the farmers were not reaping benefits of the GI tag.[53]

This lack of benefit to local vendors runs contrary to one of the primary reasons for which GIs exist in the first place.

F. Enforcement in India and Abroad: Violations of GI

Violations of GI run rampant, both within and outside the boundaries of India. The famous Banarasi silk is being copied by weavers in Surat, who use power-looms to make cheaper imitations of the traditional silk.[54] Traders also import Chinese silk, and sell it as Banarasi silk in Indian markets.[55] This has proved ruinous for the weavers of the original Banaras silk, forcing them to search for new jobs. This has also occurred in the case of Pashmina shawls as well, with power-loom made substitutes driving the producers of the

[52]Dwijen Rangnekar, *The Socio-Economics of Geographical Indications*, 8 BRIDGES BETWEEN TRADE & SUSTAINABLE DEV., 20-21 (2004).
[53]Nitya Nanda *et al*, *The Protection of Geographical Indications in India: Issues and Challenges*, TERI POST-TRIPS IPR REGIME IN INDIA PROJECT (2013), http://yucita.org/uploads/yayinlar/diger/makale/8-The_Protection_of_Geographical_Indications_india.pdf.
[54]Rajiv Dikshit, *Narendra Modi's Dilemma: Surat vs Banarasi Saris*, TIMES OF INDIA (Mar. 27, 2014), http://timesofindia.indiatimes.com/news/Narendra-Modis-dilemma-Surat-vs-Banarasi-saris/articleshow/32742485.cms.
[55]Shefalee Vasudev, *Ground Report, The Banaras Bind*, LIVEMINT (Nov. 23, 2013), www.livemint.com/Leisure/5h1lnyORjhtn9Pr0Z4wiXL/Ground-Report–The-Banaras-bind.html.

authentic Pashmina out of business.[56] In both the above examples, the registered GI holders, which are private entities, have done nothing to enforce their rights. In fact, even in instances where the Government is the registered GI holder, no active measure towards enforcement has been taken. This can be seen in the case of Muga silk; where there has been a steady stream of products which are not pure Muga but which are passed off as the same.[57] These are but a few instances of blatant violation of GI within India, with sellers luring consumers in with the name of the geographical area but selling them inauthentic and cheap products. Thus, there arises a crucial need for all registered GI holders, government and private alike, to actively enforce their GIs; as not doing so would frustrate the very purpose of registering a GI.

Protecting GIs in foreign jurisdictions is an even tougher task due to the vast expense it entails. Violations can be seen abroad as well. Producers in Bangladesh have been producing Banarasi silk in gross violation of the Indian GI tag, which has compounded the struggles of the weavers of the authentic silk.[58] Even though the Government has taken several initiatives towards protecting "Darjeeling" Tea India and abroad; the statistics show that violations are still taking place: around 40 million kg of tea per annum are being sold globally as ''Darjeeling tea'', whereas the actual production of authentic Darjeeling tea is around 9 million kg only.[59] Another prominent case of violation occurred when America granted a broad basmati patent right to Ricetec, an American company.[60] This was followed by a

[56]Das (2010), *supra* note 41; *Kashmiri Pashmina shawl industry facing challenge to survive*, DNA (Jan. 11, 2009), https://www.dnaindia.com/lifestyle/report-kashmiri-pashmina-shawl-industry-facing-challenge-to-survive-1220633.
[57]Sridevan, *supra* note 22.
[58]Nishant Shekhar, *Bangladesh Manufacturing Banarasi Saree in Gross Violation of Geographical Indication Law*, THE INDIAN EXPRESS, (Apr. 5, 2018) http://indianexpress.com/article/india/bangladesh-manufacturing-banarasi-saree-in-gross-violation-of-geographical-indication-law/.
[59]Das (2010), *supra* note 41.
[60]Suman Sahai, *Of Basmati and Champagne*, 31 ECON. & POL. WKLY. 513 (1996).

protest; as America was infringing upon the rights of Basmati, which vested in India. This grant of patent right was condemned as bio-piracy and as being grossly violative of India's rights.[61] Eventually, the dispute was resolved with a narrower right being given to Ricetec.[62] All these instances prove that violations of GIs are a common phenomenon. However, all hope is not lost and effective steps can help curb these violations; as was done in the Basmati case.

G. Need for a Post Registration Mechanism: Branding, Inspection and Promotion

A major problem with the Indian GI scenario as it exists today is the government attitude towards GIs. The government merely seeks to register GIs, thus promoting a system of "Vanity GIs";[63] since there exists no proper post-registration system in place. While there have been efforts to promote registration of GIs, little is being done afterward to enforce the GI and then promote the goods. The problem with this is that if the follow-up mechanism to GI registration is weak, it renders the protection offered to producers and consumers ineffective.[64]

There are 330 registered GIs in India, belonging to a number of categories such as agriculture, handicraft, foodstuff and

[61]Dr. Vandana Shiva, *Basmati Biopiracy: Ricetec Must Withdraw All Patent Claims for Basmati Seeds and Plants*, THE HINDUSTAN TIMES (Nov. 20, 2000), http://www.vshiva.net/Articles/Basmati%20Biopiracy.htm.
[62]Saritha Rai, India-*U.S. Fight on Basmati Rice Is Mostly Settled*, THE NEW YORK TIMES (Aug. 25, 2001), https://www.nytimes.com/2001/08/25/business/india-us-fight-on-basmati-rice-is-mostly-settled.html.
[63]Yogesh Pai & Tania Singla, *'Vanity GIs': India's Legislation on Geographical Indications and the Missing Regulatory Framework*, *in* GEOGRAPHICAL INDICATIONS AT THE CROSSROADS OF TRADE, DEVELOPMENT, AND CULTURE (Cambridge University Press, 2017).
[64]Arun S., *GI Protection in India: A Time to Introspect*, FINANCIAL EXPRESS (Sep. 1, 2008), https://www.financialexpress.com/archive/gi-protection-in-india-a-time-to-introspect/355400/.

manufactured. [65] Out of these, there are only a handful of GIs which are famous and well-known to people, while other lesser-known GIs fail to benefit from the tag and silently suffer. Well-recognised GIs tend to have a ready market and high demand. In contrast, lesser known GIs suffer due to insufficient demand for these products, because of various reasons such as lack of promotion, marketing, and awareness. This can be seen by contrasting celebrated GIs in India such as Darjeeling Tea and Basmati Rice, which India has managed to successfully protect internationally with lesser known ones such as Tulaipanji Rice (West Bengal) or Guledgudd Khana (Karnataka), which are not known domestically, let alone abroad. Some of the popular GIs, such as Malabar Pepper and Mysore Silk, were well-known even historically, having gained recognition since colonial times. This high demand further increases the economic value of such products as it is more profitable for a person to market and sell them. On the flip side, GIs such as Warangal Dhurries are in desperate need of the same amount of popularity. There emerges, therefore, a need for an effective post- registration mechanism to popularise the GIs which are still hidden in the shadows of obscurity.

Quality is an important consideration for GI goods, as consumers expect these goods to conform to a high level of quality. In fact, it is the quality of the good that contributes to its reputation.[66] However, the problem in the Indian context is that for most GI protected goods, there is no proper mechanism for quality control.[67] There is no monitoring or supervisory body to ensure that the GI registered goods actually adhere to the quality consumers expect to receive. Further, the enabling Rules of the Act also give little emphasis on an inspection structure for GI. Rule 32(6)(g) asks for an applicant to list

[65]For a list of registered GIs in India as of January 2019, see, *Registration Details of Geographical Indications*, IP INDIA, http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/registered_GI_list.pdf.
[66]K.D. Raju & Shivangi Tiwari, The Management of Geographical Indications: Post Registration Challenges and Opportunities, 42 DECISION 293 (2015).
[67]Vinayan, *supra* note 4.

particulars of the inspection structure, "if any", to regulate the use of the GI. This makes it clear that it is not even mandatory for the inspection structure to exist. It is impossible to maintain the supply chain integrity of the product and consequently its quality, without a proper inspection system.[68]

Marketing, branding and promotion are vital tools to sell any product in the market. One of the major reasons behind the registration of a good as a GI is to promote sales of that good due to the preference of consumers for GI-branded products. A good branding system will help producers to make good on the commercial potential of their products; and help them differentiate their products. An important step in this regard would be developing a common logo for GI protected goods in India; as has been done by the EU.[69] This would reassure consumers as to the authenticity of a product. In sharp contrast with the aggressive marketing strategies employed by various countries to promote their GIs, however, there is little being done in India to market our GIs; thus leading to an enormous waste in potential.

H. Lessons from Parma Ham

India can take a cue on how to market GIs successfully from the marketing of Parma Ham. Parma Ham was awarded the Protected Designation of Origin (**"PDO"**) status in 1996, and was one of the first meats so receive this protection.[70] The *Consorzio del Prosciutto di Parma*, a Consortium of producers of Parma Ham which was set up in 1963, has been the body in charge with branding and promoting the

[68]Latha R. Nair, *First in Time, First in Right*, FINANCIAL EXPRESS (Aug. 31, 2008), https://www.financialexpress.com/archive/First-in-time-first-in-right/355407/.
[69]*EU Quality Logos*, EUROPEAN COMMISSION, https://ec.europa.eu/agriculture/quality/schemes_en.
[70]*Protected Designation Origin*, PROSCIUTTO DI PARMA, https://www.prosciuttodiparma.com/en_UK/prosciutto/pdo.

PDO.[71] The Consortium oversees the management of quality, protecting of the PDO status, promotion of the brand, and also provides support to associated companies.[72] Further, there are stringent quality requirements which the ham needs to meet, starting from the very breed of pig which is used for the meat; to guidelines on production and inspection; and quality checks.[73] Whether the various stages of quality checks have been met or not is easily traceable; the passing of each stage is visible through seals, brands and tattoos marked on the skin of the pig.[74] The final marker of quality is the branding of the Ducal crown, which is stamped under strict control of inspectors, and is conclusive guarantee of the quality of the meat.[75] The Consortium has also worked with Brand Dialogue, a marketing and design agency, to market Parma Ham in the UK.[76]

Moreover, the Consortium has also worked to protect the Parma brand from infringements, and ended up winning a legal battle against Asda Stores, which sold ham boned, but not sliced, by a producer belonging to the Consortium.[77] The European Court of Justice decided in favour of the Consortium, holding that in this case, slicing and packaging of the ham were important considerations for its quality; and thus the slicing and packaging of ham outside the protected region would run contrary to its PDO.[78]

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[71]*Consortium*, PROSCIUTTO DI PARMA, https://www.prosciuttodiparma.com/en_UK/consortium.
[72]*Tasks and Functions*, PROSCIUTTO DI PARMA, https://www.prosciuttodiparma.com/en_UK/consortium/tasks-functions.
[73]*Specifications*, PROSCIUTTO DI PARMA, https://www.prosciuttodiparma.com/pdf/en_UK/specifications.pdf.
[74]*Guarantees*, PROSCIUTTO DI PARMA, https://www.prosciuttodiparma.com/en_UK/prosciutto/guarantees.
[75]*Id.*
[76]*Clients-Prosciutto di Parma*, DIALOGUE AGENCY, http://dialogueagency.com/clients/consorzio-del-prosciutto-di-parma/.
[77]Consorzio del Prosciutto di Parma and Salumificio S. Rita v. Asda Stores Ltd and Hygrade Foods Ltd., EUECJ C-108/01 [2003] ECLI:EU:C:2003:296, ¶93, 97, operative part ¶2.
[78]*Id.*

The Consortium has also taken great efforts to ensure consumers can have information about Parma Ham at their fingertips. Its official website provides easily accessible information as to the quality checks and marks for Prosciutto di Parma; and also has information as to region-specific producers and distributors of Parma Ham.[79] Another great initiative to attract customers and stimulate interest in Parma Ham is the Festival del Prosciutto de Parma, which is held annually in and around the Parma region, and involves several events which visitors can enjoy.[80] The twentieth edition of the Festival was held in September, 2017.

All of these are initiatives which India can learn from in marketing of our GI products. Stringent quality checks, uniform logos, engaging and informative websites and events to stimulate consumer interest can go a long way in promoting GIs and establishing a brand name for them. These strategies have certainly worked in the case of Parma Ham, with valuable lessons to be learned from the enormous global reach by a handful of small producers in rural Italy.[81]

V. FILLING THE GAPS: WHAT CAN BE DONE TO SOLVE THE PROBLEMS

It is important to remember that the Act in India is still at a very nascent stage. There are bound to be issues and hurdles in the

[79]PROSCIUTTO DI PARMA, https://www.prosciuttodiparma.com/en_UK/home.
[80]FESTIVAL DE PROSCIUTTO DI PARMA, http://www.festivaldelprosciuttodiparma.com/en/.
[81]Janice Hopper, *Lessons from Parma- A Taste of Success*, THE SCOTTISH FARMER (Mar. 30, 2017), http://www.thescottishfarmer.co.uk/lifestyle/cls_features/15192529.Lessons_from_Parma___a_taste_of_succe,%20ss/.

implementation. However, steps can be taken to overcome these problems.

Awareness needs to be increased in the grass root level, and the need for this cannot be overstated. The Government has been conducting awareness camps in areas where goods which can be protected by GIs are produced.[82] The reach of these camps needs to be broadened, and should permeate rural areas where there is no knowledge of GIs. As it is important for local producers to understand the significance of GIs, vernacular language should be used to facilitate more effective communication. Further, producers should be made aware not only of the protections that GI registration offers; but also how to go about maintaining the GI protection and protecting themselves from infringements.

Finding an immediate solution to the nationalisation of GIs is difficult. While it is true that the increasing number of GI registrations in the name of the government could pose problems, the truth remains that in the current scenario, it is difficult to do away with it altogether. However, steps can be taken to mitigate the potential negative effects of this necessary evil. First, greater clarity needs to be brought in the provisions of the Act in terms of who can be an appropriate GI holder, especially with regard to the position of government bodies. This could arise as a result of judicial decisions, or an amendment in the legislation. Second, absolute transparency should be maintained in the operation of such government GI holders to ensure that no corruption or malpractice takes place. Transparency in decision-making and operation would also mitigate the issue of preferential treatment by the government and ensure that the ultimate benefit of GI registration accrues to the actual producers. There is no easy solution to the

[82]Kartik Chawla, *Geographical Protections in India and Beyond*, SPICYIP (Aug. 10, 2015), https://spicyip.com/2015/08/guest-post-geographical-indications-in-india-and-beyond.html; Vrunda Kulkarni & Viren Konde, *Pre- and Post- Geographical Indications Registration Measures for Handicrafts in India*, 16 J. INTELL. PROP. RTS. 463, 467 (2011).

problems surrounding the foreign registration of GIs, either. While it is true that the present framework is cumbersome and painstaking, there exist no feasible alternatives for Indian GI holders. India not being a contracting party to the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration,[83] the reciprocal protection that arises between the Contracting Parties of the same cannot be availed by Indian GI holders. Thus, each holder must individually work to register their own GIs in other countries.

As for the problem of excessive reliance on documentary evidence; a solution would be to consider testimonial proof that a particular GI has existed over generations while granting a GI. Testimonies of three successive generations can be recorded and verified to prove that the custom has indeed existed over time. Further, common knowledge of the tradition can be used to test the veracity of claims raised. This is something that needs to be decided from case to case; with adequate examination of the legitimacy of claims.

While emphasis should certainly be given to increasing registrations for GIs, sufficient attention must also be paid to post-registration mechanisms. Sufficient quality checks must exist for GI goods, especially ones which are being exported. These inspection measures and quality checking mechanisms should be envisaged at the pre-registration stage itself, so that each GI, once registered, has adequate mechanisms to ensure quality is not compromised. This can be done by associations of producers, as has been done in the case of Parma Ham. Darjeeling Tea is an important example in this regard; as the Tea Board has a well-established quality checking and certification

[83]Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, Oct. 31, 1958, 923 U.N.T.S. 205, www.wipo.int/treaties/en/text.jsp?file_id=285856/.

mechanism in place.[84] Similarly, producers can, with the assistance of the government if necessary, develop such measures.

Organisation among the producers is imperative to ensure that there is a smooth mechanism in place to inspect and promote the goods. As GIs are collective rights, it is extremely important for producers to cooperate with each other. A strong organisation of producers of a certain GI protected good could go a long way in protecting and promoting the GI, and helping the local vendors flourish. Adequate marketing strategy must be developed. Some GIs have developed logos for themselves, to ensure product differentiation. Muga silk,[85] Darjeeling Tea,[86] Odisha Pattachitra,[87] and Kota Doria,[88] are some of the GI protected goods which have developed their own logos. Other producers of GI goods should also develop unique and distinctive logos for the product and get them registered. These logos should be prominently displayed on the goods as well. This would help them differentiate authentic goods more easily and help combat the spurious goods that are being sold. With e-commerce gaining more importance in modern business, it is important for producers to make authentic GI products available online as well, as has been done in the case of Chanderi Silks.[89] This will broaden the reach and consumer base that the goods enjoy.

Another strategy which can be adopted is to use the stories, myths and legends of an area to market products. There is no lack of folklore and

[84]*Darjeeling Tea*, TEA BOARD INDIA, http://www.teaboard.gov.in/TEABOARDCSM/NQ== (hereinafter Darjeeling Tea).
[85]*Finally, Muga Gets GI Logo*, THE TELEGRAPH (Apr. 28, 2014), https://www.telegraphindia.com/1140428/jsp/northeast/story_18284649.jsp.
[86]Darjeeling Tea, *supra* note 88.
[87]Odisha Patachitra Set for Global Recognition with Launch of GI Logo, ODISHAN (Mar. 20, 2013), http://odishan.com/3764.
[88]Dr. Ruppal Sharma & Shraddha Kulhari, *Marketing of GI Products: Unlocking their Commercial Potential*, CENTRE FOR WTO STUDIES, IIFT, http://wtocentre.iift.ac.in/Papers/Marketing%20of%20GI%20Products%20Unlocking%20their%20Commercial%20Potential.pdf.
[89]CHANDERIYAAN, https://www.chanderiyaan.net/about-us.

mythology that can be used to better market these goods. Promotional events can also be organised to capture consumer interest and give them a view of the hard work that goes into producing these products. One such instance was the Raghurajpur International Arts and Crafts Exchange in 2012, which invited artists from the world over to the small village which is the home for the GI protected Odisha Pattachitra paintings.[90] These events can boost earnings through tourism, and promote GI goods as well.

In fact, the government can take measures to integrate GIs with tourism. India is a tapestry of rich cultural heritage, and attracts millions of tourists every year. These tourists are fascinated by local handlooms, arts and crafts. Incorporating GIs into the advertisements of a tourist destination would attract the attention of tourists to these products; thus firstly, increasing sales, and secondly, raising awareness and interest in them. By integrating GIs and tourism; both industries would become symbiotic: each would benefit the other. Tourists can partake of the GI protected products; and these regions would flourish due to the influx of tourists. This would further help to popularise lesser-known GIs.

Steps must also be taken to check infringements and violations of GI rights. Producer associations can do this by closely monitoring markets inauthentic products. They can also hire- third party watchdog agencies to perform this function.[91] Swift legal action should be taken against any instances of passing off of goods. We

[90]*Raghurajpur International Arts and Crafts Exchange*, TRAVEL LINK, https://travellink-india.com/odisha-orissa-cultural-events/raghurajpur-international-art-crafts-exchange-2012/.

[91]Darjeeling Tea has done the same by hiring CompuMark to monitor violations in India and abroad, *see* S.C. Srivastava, *Protecting the Geographical Indication for Darjeeling Tea*, WTO CASE STUDIES, https://www.wto.org/english/res_e/booksp_e/casestudies_e/case16_e.htm.

must take cues from the fierce guarding of the Champagne brand, and of Scottish Whisky,[92] in this regard.

Another concern that needs to be addressed is that all of these initiatives require funding. The government can provide financial assistance to registered GI holders in the form of subsidised loans, financial aid schemes, etc. While it is expensive to market, inspect and promote a GI, doing so will help producers reap profits and establish a brand name for themselves. Government assistance in doing this would be invaluable for producers.

VI. CONCLUSION

While the problems Indian GIs face are many, all is not gloom and doom. GIs in India are still at a developing stage, and the goods to be protected are quite numerous. The issues faced are remediable: what is needed is for producers and the government to step up and take action to fix them. There is a lot the government can do to in this regard: awareness programmes, providing financial assistance to producers through loans and subsidies, promoting and marketing GIs, ensuring proper enforcement of GIs both in India and abroad; to name a few. Producers, too, must organise themselves into effective groups which can work towards protecting, enforcing and promoting their GIs. The costs that will be incurred in doing so will be quite considerable. However, stakeholders stand to lose a lot more if they fail to protect their rights- every day, producers lose a staggering amount of sales and profit thanks to violations of GIs. The costs are justified and even necessary to help the producers harness the economic potential in their products, and profit from them. India

[92]There have been several cases where the Scotch Whisky Association has taken legal action against GI violations. For the cases in India alone, *see* Scotch Whisky Association v. Golden Bottling Limited, (2006) 129 DLT 423; Khoday Distilleries Ltd. v. Scotch Whisky Assn. & Ors., (2008) 10 SCC 723.

needs to wake up and realise the importance of a proper enforcement mechanism for GIs. It is high time that effective steps are taken to fill in the gaps in the system.

BUSTING CARTELS: THE INDIAN LENIENCY REGIME

Aaditya Ranbir Sehgal[*]

Abstract

Cartelization affects the overall competitive nature of a market, acting to the detriment of the consumers and competitors outside of the cartel. It has been noted as a serious form of antitrust violation and is dealt with strictly, all around the world. However, cartels are often hard to detect, and in some instances harder to prove to exist. This is owing to measures taken specifically to avoid the existence of a cartel, as has been noted by the Competition Commission of India. One of the most effective means of cartel enforcement around the world is introducing leniency programs. However, leniency programs for cartels have become one of the most effective means in cartel-enforcement, around the world. This, however, cannot be conclusively said for the Indian leniency regime. This paper seeks to analyze the Indian leniency regime, the problems faced by it and the manners in which it can be improved. In order to do so, firstly, all 14 applications for leniency adjudicated upon in 4 cartelization matters by the Competition Commission of India have been analyzed.

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Secondly, reference has been made to the leniency regime in the United States of America and an analysis of the leniency regime in the European Union has been carried out. Both these jurisdictions have two of the most effective competition regulation regimes in the world. This has been done to see what lessons the Competition Commission of India can learn to effectively employ a tool recognized as one of the most effective means of busting cartels.

I. INTRODUCTION

Cartels can be best understood as "any anticompetitive concerted practice(or arrangement), by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce."

Such arrangements act to the detriment of the consumers and other competitors in the market and are presumed to have an appreciable effect on competition. Consequently, they are prohibited as under the Competition Act, 2002 (the "**Act**").[1] The factors which shall be taken into consideration while determining whether such adverse effect exists have been set out in Section 19(3) of the Act. However, one of the fundamental problems concerning curtailing of cartelization is detecting cartels and conclusively proving their existence. Since, the prohibition on participating in anti-competitive agreements and the penalties such offenders may incur are well known, it is typical that such activities are conducted in a clandestine manner, meetings are

[1]The Competition Act, 2002, §3, No. 12 of 2003 [hereinafter The Competition Act, 2002].

held in secret and the associated documentation reduced to a minimum.[2]

Consequently, competition regulators the world over have introduced leniency programs to aid cartel enforcement, wherein, members of such cartels are given incentives to approach the competition authority and aid them by providing information. In jurisdictions with advanced competition regulation regimes such as USA and EU, such leniency programs have become the most important tool for detecting cartels and are also purported to deter such infringements from occurring.[3] In the United States, from 1996 to 2010, of the fines collected from companies for antitrust violations, 90% came from investigations assisted by leniency applicants.[4] Of the approximately 50 international cartel investigations ongoing at any time in the USA, more than half of these investigations are initiated, or are being advanced, on the basis of information procured from leniency applicants.[5] In the European Union, out of 57 cartels investigated and established to exist, 53 were done so by means of the leniency notice i.e. almost 93%. Furthermore, of the 352 corporations involved in these, 166 filed for leniency, i.e., 47.16%.[6] Thus, the importance of an effective leniency regime as a motivator for cartel members to cooperate with competition regulators cannot be denied.

In India, the Competition Commission of India ("**CCI**") can grant leniency to any cartel member who approaches it and aids the CCI,[7]

[2]Builders Association of India v. Cement Manufacturers Association & Ors., 2016 CompLR983 (CCI), ¶ 183 (hereinafter Builders Association of India).
[3]ARON BEATON WELLS AND CHRISTOPHER TRAN, ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION 140 (2015).
[4]Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, ADDRESS BEFORE THE 24TH ANNUAL NATIONAL INSTITUTE ON WHITE COLLAR CRIME (Feb. 25, 2010),
https://www.justice.gov/atr/file/518241/download (hereinafter Hammond).
[5]*Id.*
[6]O Dominte, D Serban & AM Dima, *Cartels in EU: Study on the effectiveness of leniency policy*, 8 MANAGEMENT & MARKETING 529 (2013).
[7]Competition Act, 2002, *supra* note 2, at § 46.

possibly to the extent of 100%[8] of the penalty liable to be imposed, subject to certain conditions. However, the leniency program in India did not have a smooth start. This is primarily because of concerns such as confidentiality, etc., relating to the leniency regulations, further coupled with the uncertainty over the CCI's attitude towards leniency, which persisted owing to a lack of cases where leniency was sought. After the amendment to the relevant regulations i.e. the Competition Commission of India (Lesser Penalty) Regulations, 2009, in 2017, ambiguities with respect to confidentiality were cleared out,[9] the scope of applicants was clarified to include persons and not just corporations,[10] and the scope of number of parties to be granted a reduction in penalty was increased with the removal of limitation on the number of applicants.[11] The next section of this article examines the requirements for the relevant declarations to be made and the extent to which leniency may be granted to an applicant.

II. COMPETITION COMMISSION OF INDIA (LESSER PENALTY) REGULATIONS, 2009

The Competition Commission of India (Lesser Penalty) Regulations, 2009 (the "**Regulations**") detail the grant of lesser penalty, the conditions and the procedure subject to which such lesser penalty may be granted, as under Section 46 of the Act. An applicant seeking the grant of lesser penalty must:

I. cease any participation in the activities of the cartel from the date of its admissions unless otherwise directed by the CCI,

[8]Competition Commission of India (Lesser Penalty) Regulations, 2009, Regulation 4(a), No. 4 of 2009 (hereinafter Lesser Penalty Regulations).
[9]*Id.* at Regulation 6.
[10]Lesser Penalty Regulations, *supra* note 9, Regulation 2(1)(b).
[11]Competition Act, 2002, *supra* note 2, at § 4(b).

II. provide vital disclosures in respect of violations under the Act,

III. provide all relevant information, documents and evidence as may be required by the CCI,

IV. fully co-operate throughout the investigation and proceedings before the CCI,

V. not conceal, destroy or remove relevant documents in any manner, that may contribute to the establishment of the cartel.[12]

Where the applicant is an enterprise, it must also provide the names of individuals who have been involved with the cartel on its behalf and for whom lesser penalty is sought. Furthermore, the CCI may subject the applicant to any further restrictions or conditions after examining the facts of the case, if it deems fit.[13]

Reductions in penalty can be understood to be on a first come first serve basis. The cartel member who first makes a vital disclosure by submitting evidence can be granted a reduction in penalty up to or equal to 100% of the penalty liable to be imposed in the event that such evidence helps establish a prima facie opinion regarding the existence of a cartel and initiate an investigation or establish the existence of a cartel.[14]

Applicants subsequent to the first applicant may also be granted a reduction in penalty if they are able to provide any evidence which may provide 'significant added value' to the evidence already in possession of the CCI or Director General, regarding the existence of a cartel. 'Added value' has been explained in the Regulations to mean

[12]Lesser Penalty Regulations, *supra* note 9, at Regulation 3(1).
[13]Lesser Penalty Regulations, *supra* note 9, at Regulation 3(3).
[14]Lesser Penalty Regulations, *supra* note 9, at Regulation 4(a).

the extent to which the ability of the CCI or Director General is enhanced to establish the existence of a cartel.[15]

A second applicant in a chronological order may be granted a reduction in penalty up to or equal to 50% of the penalty liable to be imposed,[16] and any subsequent applicant may be granted a reduction in penalty up to or equal to 30% of the penalty liable to be imposed.[17]

An applicant seeking to avail such lesser penalty must make an application containing the following information regarding cartel activities:[18]

- information regarding the cartel such as the arrangement of the alleged cartel, its aims and objectives and activities carried out in furtherance of thereof;
- the goods or services involved;
- the geographic market covered;
- the commencement and duration of the cartel;
- the estimated volume of business affected by the cartel in India;
- details of any other Competition Authorities approached, if any, or intended to be approached;
- Information regarding the persons who knew of and were involved in the cartel, their addresses.

Amongst certain other information required for procedural purposes.

The Regulations have been amended over time with the limitation on the number of applicants being removed, the scope of applicants

[15]*Supra* note 12.
[16]Lesser Penalty Regulations, *supra* note 9, at Regulation 4(c)(i).
[17]Lesser Penalty Regulations, *supra* note 9, at Regulation 4(c)(ii).
[18]Lesser Penalty Regulations, *supra* note 9, at The Schedule.

being expanded and provisions for confidentiality relating to identity of the applicant, information and evidence being introduced. These can only be considered as attempts to further disclosures relating to the existence of cartels by persons or entities associated with the cartels.

III. LENIENCY APPLICATIONS MADE BEFORE THE CCI

As of May 2018, 4 applications seeking lesser penalty in matters have been adjudicated upon. All 14 applications filed in the 4 matters have been discussed below with reference to the stage at which the application was filed, the information provided by the applicant as evidence, the CCI's opinion on the evidence and the consequent adjudication of such applications by the CCI. This has been done in an attempt to analyse the approach of the CCI, whether uniform or not.

S. No.	Details	Percentage of penalty relaxed (In the order of filing of application)
1.	*In Re Brushless DC Fans*[19] (Collusive Tenders) Number of Applicants: 1 Status before Application:	75%

[19]*In Re*: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, Competition Commission of India, Suo Moto Case No. 03 of 2014, Order dated 18.01.2017.

	Investigation of the matter was in process and report of the Director General was pending. Information Provided: The sole Applicant explained the functioning of the cartel and the role of the various parties operating the cartel, the design and *modus operandi* of the cartel, duration of the cartel, incentives for formulating the cartel, mode and manner for deciding the pricing of the products to be quoted in tenders and mode of deciding about the name of the winner in the tenders. CCI's Observations: The CCI took note that such information provided by the Applicant enabled the Director General to identify the collusion over pricing, and that such information provided was relied upon to establish the existence of the cartel. However, the CCI also took note of the stage at which the applicant provided such information whilst deciding the percentage of penalty to be relaxed. It was noted that a *prima facie* opinion had already been formulated before the Applicant made disclosures.	
2.	*In Re Zinc Carbon Dry Cell Batteries*[20] (Price Fixing) Number of Applicants: 3	OP3: 100% OP1: 30%

[20]*In Re*: Cartelisation in respect of zinc carbon dry cell batteries market in India, 2018 CompLR467 (CCI).

	Status before 1st Application: Investigations started after Opposing Party-3 ("**OP3"**), acting as an informant, admitted to having been part of the cartel and sought lesser penalties under Section 46 of the Act. • 1st Applicant: OP3 Information Provided: The application of OP3 detailed the circumstances that led to the formation of the cartel, the *modus operandi* of the cartel and the steps taken to ensure that the detection of violations, as well as a price war amongst the cartel members, does not take place. Information regarding the use of a trade organization (OP4 in the proceedings) to facilitate information exchanges and consequent collusion was also provided. CCI's Observations: The CCI observed that the information and evidence provided by OP3 was crucial in assessing the domestic market structure of the zinc-carbon dry cell batteries, the nature and extent of information exchanges amongst OPs with regard to the cartel. Furthermore, it proved useful identifying the names, locations and email accounts of key persons of OPs actively involved in the cartel activities. The information and cooperation received from OP3 enabled the Director General to conduct dawn raids at the premises of the other OPs and seize quality evidence in the form of emails, handwritten notes and various other	OP2: 20%

	documents. • 2nd and 3rd Applicant – OP1 and OP2, respectively: Information Provided: OP1: Disclosures regarding product involved, commencement/ duration of cartel, *modus operandi* of the cartel, evidence of role of AIDCM – the trade association involved (and OP4 in the proceedings) and involvement of certain individuals were made by OP1. OP2: (Not detailed in the final order) CCI's Observations: The CCI noted that OP1 and OP2 had not made any value addition to the investigation by means of evidence submitted as the evidence collected from OP3 and consequent investigations had been sufficient to establish that a cartel existed. It, however, took note of their cooperation throughout the course of the investigation.	
3.	*In Re Fortified Security Solutions*[21] (Collusive Tenders) Number of Applicants: 6 Status before 1st Application: Director General had already gathered some evidence which indicated violations	OP6: 50% OP5: 40% OP4: 50%

[21]Nagrik Chetna Manch v. Fortified Security Solutions & Ors., 2018 CompLR425 (CCI).

	under the Act had taken place. • 1st Applicant – OP6: Information Provided: OP6 made a critical disclosure regarding the *modus operandi* of the cartel. OP6 disclosed not only the roles of the persons involved in the cartel but also provided evidence such as emails, bank statements in furtherance of the same. CCI's Observations: The CCI opined that this made for significant added value to the ongoing investigation by providing a better, clearer picture of the operations of the cartel while also substantiating the investigations of the Director General and completing the chain of events. However, it took note of the fact that the application was filed only after the Director General had come into possession of evidence • 2nd Applicant – OP5: Information Provided: OP5 made disclosures regarding *modus operandi,* role of persons involved and provided emails to substantiate the same. The CCI was of the view that this made for good value addition and aided the investigation by revealing the modalities of operation of the cartel. Further, statements made before the DG helped in establishment of the cartel. CCI's Observations:	OP2: 25% OP7: Nil OP1: Nil

	The CCI, however, took note of the stage at which the application was made and the fact that the *modus operandi* had already been made known by OP6. The CCI also took note of the continuous full cooperation on part of the applicant. • 3rd Applicant – OP4: Information Provided: The *modus operandi* of the cartel in respect of another set of tenders was made known by OP4. OP4 also disclosed that it was agreed to make proxy bids, providing copies of emails to prove the same. OP4 also provided additional information regarding the functioning of the cartel and how bids were placed on its behalf. CCI's Observations: The CCI was satisfied that value addition had been made to the evidence in possession regarding the tenders in question. It took note that as the tenders involved were different from the ones in respect of which OP6 had filed an application. It would be treated as the first applicant for the tenders which OP4 was involved with, and penalty was decided accordingly, keeping in mind the overall belated stage at which the application was made. • 4th Applicant – OP2: Information Provided: OP2 admitted to having orchestrated the cartel in all tenders. Disclosures regarding	

	the modus operandi were made, thus confirming the disclosures made by the previous three applicants. OP2 admitted to arranging for proxy bidders and provided documents to prove the same. CCI's Observations: The CCI noted that by the time OP2 had made the application, a lot of evidence had already been collected and almost all of the information provided by OP2 was already available with the CCI. The CCI noted that the only value addition by OP2 was regarding procurement of the digital key for uploading the documents on behalf of other bidders from the computer of OP2, and thus the value addition by OP2 was minimal. • 5th Applicant – OP7: Information Provided: Admissions concerning assistance to the cartel were made. Although admissions concerning the existence of, and assistance provided to, the cartel were made, participation in the cartel was denied. CCI's Observations: The CCI took note of all the disclosures that had already been made before it and was of the view that there was no value addition. • 6th Applicant – OP1: Information Provided: Admissions regarding orchestrating the cartel and propping up proxy bidders to	

	ensure that the tenders were awarded to OP2 were made. OP1 furnished documents and evidence, however, the CCI was already in possession of the documents. CCI's Observations: The CCI noted that OP1 had also been cooperative but had made no value addition to the investigation by the evidence provided.	
4.	*In Re: Cartelization in Tenders No. 21 and 28*[22] (Collusive Tenders) Number of Applicants: 4 Status before 1st Application: This case originated from information received by the CCI in the above case, to rig Tender Nos. 21 and 28 of 2013 floated by the Pune Municipal Corporation, which were not investigated as a part of the above case. 3 of the 4 parties were also OPs in the above case. The 1st Application was filed subsequent to the initiation of investigations. • 1st Applicant – OP1: Information Provided: The CCI noted that when OP1 approached it and admitted to being a part of the cartel, the DG had already gathered evidence	OP1: 50% OP2: Nil OP4: Nil OP3: Nil

[22]*In re:* Cartelization in Tender Nos. 21 and 28 of 2013 of Pune Municipal Corporation for Solid Waste Processing, Competition Commission of India, *Suo Motu* No. 3 of 2016, Order dated 31.05.2018.

	which indicated bid rigging/ collusion amongst OPs. However, OP1 made critical disclosures regarding how it was approached to be a part of the cartel, requests to provide documents of OP1 to place proxy bid and collection of documents for such purposes. CCI's Observations: The CCI found that the information provided by OP1 made for 'reasonable value addition' and helped to better understand the operation of the cartel. The evidence provided helped substantiate the evidence already in the possession of the DG, helped complete the chain of events and was relied upon to establish the existence of the cartel. • 2nd Applicant – OP2: Information Provided: A Director of OP2 admitted to having orchestrated the cartel, disclosing the *modus operandi* of the cartel. It was admitted that cover/ proxy bidders were brought in so it was assured that there were at least three eligible bidders in first round of bidding itself and tender would ultimately be awarded to OP-2. It was acknowledged that relevant documents for the tenders were provided by OP1 in furtherance of the collusive bidding. CCI's Observations: The CCI observed that almost all evidence provided by OP2 was already in its possession; it had been made aware of the	

	modus operandi by OP1 already and the only value addition which was made by disclosure of OP-2, was with respect to purchase/ procurement of digital keys for uploading the documents on website of PMC on behalf of other bidders from the computer of OP2. Therefore, in the CCI's opinion, the value addition was minimal. Furthermore, keeping in mind the stage at which the application was filed by OP2, no reduction in penalty was granted. • 3rd Applicant – OP4: Information Provided: It was disclosed that in order to help OP2 participate in the said tenders, authorization certificates were issued to OP2, as the latter itself was not engaged in manufacturing of composting machines, a prerequisite for being eligible to place a bid. Furthermore, in its application, the existence of a cartel was admitted but the applicant denied being a part of the cartel. CCI's Observations: The CCI was of the view that OP4 was not able to provide any added value to the establishing the existence of the cartel and thus deserved no reduction in penalty. • 4th Applicant – OP3: Information Provided: The proprietor of OP3, being the same as the abovementioned Director of OP2, admitted to orchestrating the cartel and disclosed the *modus operandi* of the cartel.	

	It furnished documents and evidence. However, the material provided by OP3 was already in the possession of the CCI. CCI's Observations: The CCI noted that although OP3 cooperated during the investigation and provided evidence, it was unable to make any value addition and thus did not deem any reduction in penalty.	

A. Analysis of the orders

As of May, 2018, 14 lesser penalty applications have been filed and adjudicated upon by the CCI. The CCI has granted a 100% waiver of penalty in only 1 instance, wherein, one of the cartel members in Zinc Battery Manufacturers informed the CCI that a cartel existed even before there existed any evidence to form a *prima facie* opinion that the cartel existed. The CCI granted a 75% penalty waiver in *Brushless DC Fans* to the first informant and a 50% penalty waiver to the first informant in *Fortified Security Solutions*. The difference may be attributed to the evidence supplied by the parties and the extent to which such evidence helped in establishing existence of a cartel. In *Brushless DC Fans*, the first informant provided details about the functioning of the cartel and evidence which helped the Director General to establish collusion over pricing. In the *Fortified Security Solutions* case, however, the evidence provided by the first applicant helped to complete the chain of events surrounding the contraventions and supplemented the evidence already in the possession of the Director General.

The CCI's approach towards waiver of penalty in applications made after the first lesser penalty application has been made, has not been uniform. In *Fortified Security Solutions*, the CCI granted a partial

waiver of penalty to only parties whose evidence, according to the CCI, helped add value to the investigation and helped establish the existence of a cartel. With respect to 2 applications in the said case, the CCI didn't grant any waiver of penalty, in spite of cooperation on the part of the parties, as the evidence supplied by them didn't add significant value and enough evidence already existed to establish the existence of a cartel in accordance with the Regulations. However, in *Zinc Battery Manufacturers*, the CCI noted "With respect to the Lesser Penalty Applications of OP-1 and OP-2, the Commission notes that incriminating documents (both hard and soft copies) recovered and seized from the premises of the Manufacturers during the search and seizure operations on 23 August 2016 were independently sufficient to establish the contravention of Section 3 of the Act by OPs. Therefore, information/evidence on cartel including the period of cartel, submitted by OP-1 and OP-2 did not result in 'significant value addition'."[23] Yet it granted waivers of 30% and 20% of penalty to the two applicants because the CCI was satisfied with the co-operation rendered, seemingly in divergence with Regulation 4 of the Regulations.

Furthermore, the standard of 'significant added value' has caused more uncertainty. In *Fortified Security Solutions*, the CCI adjudicated upon 6 lesser penalty applications. On an analysis of the order, it can be seen that the CCI has provided no rationale for the reduction in penalty i.e. how the evidence submitted made for value addition to the evidence already in possession, whilst according a lesser penalty for disclosures relating to the same issue such as *modus operandi* or role of persons involved, etc. The CCI further stretched the concept to include 'reasonable value addition' in *Cartelization in re: Tenders No. 21 and 28.* While the argument may be made that this is within the discretionary power of the CCI, the language of the Regulations

[23] *Supra* note 21, at ¶ 10.3.

gives another impression, defining 'added value' but still requiring that for a reduction in penalties, the added value must be significant.

Such an approach is not conducive towards furthering the leniency regime in India. There is a huge degree of uncertainty not only due to the small number of applications adjudicated upon but more so due to the inconsistent approach of the CCI. Furthermore, what has been described as the 'carrot and stick approach'[24] seems to be followed in advanced foreign jurisdictions, wherein the parties may actually get the carrot in the form of immunity or lesser penalties, as huge fines are imposed in cartel matters (the EC imposed a fine of € 2.93 Billion on a truck manufacturers cartel)[25] but full immunity is granted to corporations which have provided conclusive evidence establishing the existence of a cartel even after the investigations have begun. Therefore, even if a party is a part of a cartel, it is in its best interests to make clear its role as great monetary penalties may be otherwise placed upon them. The CCI, in *Brushless DC Fans*, missed out on the opportunity to send a message to Indian entities that they too may be granted full immunity even if they provide evidence after the commencement of investigations, so long as it helps in conclusively establishing the existence of a cartel.

IV. LESSER PENALTIES UNDER EU ANTITRUST LAW: A COMPARISON

Europe and USA have the most developed competition regulation regimes in the world.[26] Therefore, in order to help ascertain the steps

[24]Hammond, *supra* note 5.
[25]Case AT.39824 Trucks, European Commission (Commission Decision of Sept. 27, 2017).
[26]William E. Kovacic, Competition Policy in the European Union and the United States: Convergence or Divergence?, presented at BATES WHITE FIFTH ANNUAL ANTITRUST CONFERENCE,

the CCI may take towards furthering the Indian leniency regime, the next section of this article analyses some instances of adjudication of leniency applications filed in Europe to analyse the approach of the European Commission, a forum which has helped foster a highly successful leniency regime. While the leniency regime in the USA has been highly effective as mentioned above, and despite having the first ever case of full immunity granted in a cartelization case, it hasn't been discussed in detail in this article owing to 2 fundamental differences between the competition regulatory mechanism in the USA and most other jurisdictions:

i. cartelization is a criminal offence in USA,[27] as opposed to it being a civil offence in India and many other jurisdictions, where culpable individuals are held accountable in the form of prison sentences and active enforcement of the same,

ii. leniency is only granted to the first applicant providing evidence which helps to conclusively establish the existence of a cartel.[28]

Neither of these 2 features exist in the Indian leniency program. Moreover, the leniency regulations of the EU and India are similar and, therefore, a comparative analysis of the EU regulations shall be helpful.

The European Commission ("**EC**") has provided a lenient approach towards cartel members who have either filed leniency applications enabling the EC to initiate investigations and conclude the existence

https://www.ftc.gov/sites/default/files/documents/public_statements/competition-policy-european-union-and-united-states-convergence-or-divergence/080602bateswhite.pdf.

[27]Sherman Antitrust Act, 1890, § 1, 26 Stat. 209, 15 U.S.C (U.S.).

[28]*Part A, Part B, Corporate Leniency Policy*, THE UNITED STATES DEPARTMENT OF JUSTICE, https://www.justice.gov/atr/file/810281/download;
Q. 4, Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters, THE UNITED STATES DEPARTMENT OF JUSTICE, 5, https://www.justice.gov/atr/page/file/926521/download.

of a cartel, or in cases where the informant have provided sufficient information to establish the existence of a cartel when the EC had sufficient information to initiate an investigation,[29] as seen in the *Methylglucamine*,[30] *Fine Art Auction Houses*,[31] and *Methacrylates*.[32] It may be noted that the CCI has also partially adopted a similar approach, granting a full waiver to the first applicant in *Zinc Battery Manufacturers* who had filed the lesser penalty application before there existed sufficient evidence to initiate investigations.

The EC may grant a reduction in penalty to cartel members who don't fulfil either of the 2 conditions mentioned previously, if they are able to provide 'significant added value' by means of evidence submitted ('Part III Applications').[33] The interpretation of 'added value' in Indian & EU Antitrust law is similar in theory, with the EC's 'Commission Notice on Immunity from fines and reduction of fines in cartel cases' further detailing the manner in which evidence submitted is to be given importance.[34] The first undertaking to provide such significant added value may be granted 30-50% waiver of the total penalty liable to be imposed, while the second undertaking may be granted a waiver of 20-30% and on any subsequent undertaking, a waiver of upto 20% of the total penalty liable to imposed.[35] The EC shall also take into consideration the stage at which the application may be granted to more than one party i.e. a party that provides sufficient evidence to initiate investigations and also a party that that

[29]European Commission, *Commission Notice on Immunity from fines and reduction of fines in cartel cases*, (2006/C 298/11) at Part II, Section A, 8 (hereinafter Commission Notice).
[30]Case COMP/E2/37.978: Methylglucamine, European Commission (Commission Decision of Nov. 27, 2002).
[31]Case COMP/E2/37.784/Fine Art Auction Houses, European Commission (Commission Decision of Oct. 30, 2002).
[32]Case COMP/F/38.645 – Methacrylates, European Commission (Commission Decision of May 31, 2006).
[33]Commission Notice, *supra* note 30, at Part III, Section A, 23.
[34]*Id.* at Part III, Section A, 25.
[35]Commission Notice, *supra* note 30, at Part III, Section A, 26.

provides evidence to help conclusively establish the existence of a cartel.[36] It has been argued in India that post the 2016 amendment to the Regulations, the same approach exists in India,[37] owing to the deletion of a proviso which clearly stated that such full immunity shall only be granted to one party. However, the language of the amended regulations doesn't support the same view as the Regulations still read that a partial reduction in penalties may be granted to "applicants who are subsequent to the first applicant",[38]creating further confusion.

In *Methacrylates*, one of the cartel members provided evidence which enabled the EC to adopt a decision to carry out an investigation, prior to which the EC did not have sufficient evidence to adopt a decision to conduct such an investigation. Consequently, a full immunity from imposition of penalties was granted. Subsequently, a Part III Application was also filed wherein the EC was of the view that although the timing of the application was relatively early in the proceedings, in the month following the inspections, it was only after receipt of subsequent submissions that the EC concluded that the member qualified for leniency. This was in view of the nature and level of detail of these submissions, which strengthened the EC's ability to prove the facts in question. More importantly, even if the member had provided significant added value with its first submission and the time factor had been more in its favour, the extent to which the member had added value to the EC's case has remained limited throughout the proceedings. Furthermore, the extent to which the member cooperated represented added value has remained limited. However, in spite of this, the EC granted a waiver of 40% of penalty imposed. A 2nd Part III Application was also filed, wherein, the

[36]*Supra* note 20.
[37]Trilegal, *CCI Amends Lesser Penalty Regulations*, MONDAQ (Aug. 31, 2017), http://www.mondaq.com/india/x/625190/Cartels+Monopolies/CCI+Amends+Lesser+Penalty+Regulations.
[38]Lesser Penalty Regulations, *supra* note 9, at Regulation 4(b).

evidence submitted by the applicant helped the EC to extend the period of the cartel by about 18 and a half months. The EC ruled that the additional 18 and a half months would not be taken into consideration while determining the quantum of the penalty to be imposed on the second applicant under Part III. The said second applicant was also granted a waiver of 30% of penalty imposed on account of significant value added by its evidence and cooperation rendered.

The question of determining 'significant added value' has caused some understandable consternation and led to further disputes, owing to its subjective nature in practice. However, attempts have been made to curtail this subjectivity. It has been held that "for the purposes of applying the bands of reduction provided for in point 23(b) of the Leniency Notice, the Commission (EC) must establish the time at which the undertaking actually provided it with evidence representing significant added value with respect to the evidence already in its possession".[39] Therefore, this helps in setting in place a structure that helps ascertain whether there actually exists added value in the evidence submitted in cases where there are multiple corporations seeking leniency.

The CCI, in all the 3 above mentioned orders passed by it has not specifically provided any rationale regarding the quantum of penalties reduced, as was given in *Methacrylates* and most other EC decisions. While it is understandable that the CCI has to act in a manner that furthers the leniency regime in India and that not granting reductions in penalties would not help its cause, the CCI has acted rather arbitrarily, if not randomly, in terms of what constitutes value addition and the percentage of penalty to be reduced. This approach certainly doesn't help the cause and the state of the leniency regime shall not change unless the CCI adopts a more structured approach.

[39]Solvay v Commission (hydrogen peroxide and perborate), Case T-186/06 [2011] 5 CMLR 428.

While the CCI has imposed substantial fines in cartelization cases to deter cartelization, it needs to alter its approach towards incentivizing cartel members to provide them with evidence in order to bust cartels more effectively.

V. CONCLUSION

Cartels need to be dealt with effectively and it has been shown that this can be done with the use of effective leniency programs. However, the Indian leniency regime has a long way to go. In order for such programs to succeed, cartel members need to feel assured that it is in their best interest to provide information regarding cartel activities and that the consequences may be rather severe otherwise. This has been achieved in the EU and the USA, with cartel members who act either as informants or cooperate in investigations once they have begun being rewarded in the form of reduced penalties and often full immunity. The CCI has imposed huge fines on cartels (the Cement cartel was fined over Rs 6,700 Crores i.e. $1 Billion). However, first, and foremost, it needs to adopt a more uniform mechanism of dealing with the leniency applications in order to create some degree off predictability necessary for convincing cartel members to cooperate with the competition regulator. Secondly, the CCI needs to define 'significant added value' and limit the number of parties to which it grants leniency in a matter. This would give motivation to act as informants or file leniency applications providing all evidence an entity can, instead of waiting to see the course the investigation takes with the assurance that a certain degree of leniency would anyhow be granted. This would have the added advantage of a reduction in the resources an investigation may require, resources that can be utilized elsewhere.

The CCI has often looked at jurisprudence from the EU, taking cognizance of internationally recognized standards and practices in

order to arrive at a just and fair resolution by taking into consideration relevant evidence, etc. For example, the CCI took note of the approach in the EU regarding information exchanges in the Cement Cartel case while adjudicating upon the matter.[40] It would be in the best interests of the CCI to ensure a uniform approach is adopted by it, one which would help further its own cause. It should not shy away from relying on the past efforts at regulation to determine the effectiveness of the measures employed.

[40]Builders Association of India, *supra* note 3, at ¶ 198.

PRIVATE ORDERING: A PROGRESSIVE OUTLOOK ON AUTOMOBILE CYBERSECURITY IN THE UNITED STATES

Sudipto Koner[*]

Abstract

For several years now, cybersecurity hacks have usually been restricted to attacks on our privacy and on cashless modes of payment like credit and debit cards. Nowadays, even car security infringements take place quite often. This essay focuses on the United States of America and begins by providing a concise history of numerous research endeavours to determine the probable risks of car security infringements in Part I. Part II evaluates the current legislations with regards to car hacking and their drawbacks. Part III deals with how laws at present can be relevant to car hacking and establishes how private ordering is the most productive way of setting up cybersecurity benchmarks for the automotive industry. It concludes by stating that no new legislations are required, they are just a burden on the already complicated legislative framework in the United States.

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I. INTRODUCTION

For a long time, our privacy was breached in multifarious ways with every cyber hack that occurred; by making illegitimate transactions on our credit cards,[1] reading our confidential documents and emails,[2] and revealing the darkest phases of our otherwise private lives.[3] As we become more dependent on the internet with every passing day,[4] the issue of cybersecurity becomes much more prominent. It becomes more significant when cyberattacks are targeted at automobiles. In this essay, the focus is on automobile cybersecurity in the United States and viable options for the progress of the same.

In the month of July 2015, a reporter named Andy Greenberg was cruising down a St. Louis highway in a Jeep Cherokee.[5] Researchers (or hackers, based on the reader's perspective) Miller and Valasek gained remote access to the Jeep, taking control of the vehicular controls while working at home several miles away.[6] They first disabled the brakes of the vehicle, causing it to fall into a trench.[7] They were also able to trace specific GPS coordinates, find out the speed, and track routes.[8] What appeared like an unlikely concern

[1]Robin Sidel, *Home Depot's 56 Million Card Breach Bigger Than Target's*, THE WALLSTREET JOURNAL (Sept. 19, 2014), https://www.wsj.com/articles/home-depot-breach-bigger-than-targets-1411073571.
[2]Andrea Peterson, *The Sony Pictures hack, Explained*, WASHINGTON POST (Dec. 18, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/12/18/the-sony-pictures-hack-explained.
[3]Dan Goodin, *Ashley Madison Hack is not only real, it's worse than we thought*, ARS TECHNICA (Aug. 19, 2015), https://arstechnica.com/information-technology/2015/08/ashley-madison-hack-is-not-only-real-its-worse-than-we-thought/.
[4]Bill Wasik Gear, *In the Programmable World, All Our Objects Will Act as One*, WIRED (May 14, 2013), https://www.wired.com/2013/05/internet-of-things-2/.
[5]Andy Greenberg, *Hackers Remotely Kill a Jeep on the Highway—With Me in It*, WIRED (Jul. 21, 2015), https://www.wired.com/ 2015/07/hackers-remotely-kill-jeep-highway/ (hereinafter Greenberg).
[6]*Id.*
[7]*Id.*
[8]*Id.*

some years ago has now turned out to be a disconcerting reality. These hackers confirmed that cyber-security is no longer restricted to infringements of privacy; hackers can now take charge over the vehicular controls and exploit it to the fullest, mostly resulting in physical harm to the victim.

To this day in the United States (US), many legislations have been incorporated pertaining to cybersecurity measures, with a special focus on car hacking. In July 2015, Senators Edward J. Markey (District Court, Massachusetts) and Richard Blumenthal (District Court, Connecticut) introduced the Security and Privacy in Your Car (SPY Car) Act.[9] This Act was again reintroduced in 2017. In November 2015, Joe Wilson, now Chairman of the House Armed Services Subcommittee on Readiness, and Ted Lieu (CA-33) introduced the SPY Car Study Act[10] (again reintroduced in January 2017), which was preceded by a discussion draft prepared by the House Committee on Energy and Commerce.[11] Critics as well as cybersecurity experts were sceptic about the efficacy of these types of measures,[12] more so because they were cautious about governmental schemes in private businesses.[13] On the contrary, advocates of consumer safety believe that legislation was required to care for unwary motorists.[14]

[9]Security and Privacy in Your Car Act, S. 1806, 114th Cong. (2015) (U.S.).
[10]Security and Privacy in Your Car Study Act of 2015, H.R. 3994, 114th Cong. (2015) (U.S.).
[11]*Id*.
[12]Tim Starks, *Car-hacking feud revs up on the Hill*, POLITICO (Aug. 29, 2015), https://www.politico.com/story/2015/08/pro-cyber-carhacking-starks-213124 (hereinafter Starks).
[13]Eli Dourado & Andrea Castillo, *Why the Cybersecurity Framework Will Make Us Less Secure*, MERCAT. CENT. (2014), https://www.mercatus.org/system/files/Dourado_CybersecurityFramework_v2.pdf (hereinafter Dourado and Castillo).
[14]*See* Starks, *supra* note 12, at 2.

This essay maintains that any new law bringing about new guidelines regarding safety is pointless, and will eventually give rise to more problems. To begin with, there are manifold recognised laws in the US that already mandate what some of these recommend, or tackle the concerns related to hacking of cars. Also, with the constant progress in vehicular technology, new ways and means will be on hand to repair the flaws present in their systems. Finally, the ineffectiveness of the government and its failure to avert its own cyberattacks[15] renders any type of federal directives mandating minimal safety protocols an inconvenient option. Therefore, this essay maintains that private ordering, the act of apportioning regulatory power with private partners,[16] will come in handy when it comes to carrying out of productive security measures.

While driverless cars are close to becoming a reality, such technology evokes several legal issues that is beyond the scope of this essay. Hence, this essay will emphasise on vehicular electronics as they are easily obtainable on the existing market.

II. INSTANCES OF CAR HACKING IN THE PAST

In February 2010, cars of the customers of the Texas Auto Center refused to start or started honking nonstop.[17] Omar Ramos-Lopez, once a used car dealer, took advantage of a system called Webtech Plus, a remote immobilization system used as an alternative measure

[15]Andrea Peterson & Lisa Rein, *What you need to know about the hack of government background investigations*, WASHINGTON POST (Jul. 9, 2015), https://www.washingtonpost.com/news/federal-eye/wp/2015/07/09/what-you-need-to-know-about-the-hack-of-government-background-investigations/ (hereinafter Peterson and Rein).

[16]Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 320 (2002) (hereinafter Schwarcz).

[17]Kevin Poulsen, *Hacker Disables More Than 100 Cars Remotely*, WIRED (Mar. 17, 2010), https://www.wired.com/2010/03/hacker-bricks-cars/.

against repossessing vehicles for which payments were due.[18] By this system, car dealers mounted a miniature black box under car dashboards that would respond to inputs sent via a central website, and transmit them through a wireless pager network.[19] A dealer was able to switch off the ignition or remotely trigger the horn as an intimation to owners for making payment.[20] Omar infiltrated the system through another employer's account, made a database of all the customers whose cars had been fitted with a black box, and immobilised their cars.[21] Even though it was not fatal from a security breach perspective, this was proof to the fact that any device with an internet connection can be used as an access point.

In the same year, a team of researchers from the University of Washington and the University of California, San Diego tried to find out how much resistance a normal car could have against a virtual attack targeted at its internal machinery.[22] The researchers conducted tests on two cars of the same brand and model in a simulated environment and in actual road tests.[23] The findings of the study revealed that the cars had minimal resistance against cyberattacks.[24] Nonetheless, the study laid emphasis on the question of whether a hacker could infect a car's internal machinery, and not on the manner in which a hacker might do so.[25] The researchers detected several vulnerabilities within the cars and they also established that for each

[18]*Id.*
[19]*Id.*
[20]*Id.*
[21]*Id.*
[22]Karl Koscher et al., *Experimental Security Analysis of a Modern Automobile*, 2010 IEEE SYMPOSIUM ON SECURITY AND PRIVACY (2010), http://feihu.eng.ua.edu/NSF_CPS/year1/w9_1.pdf.
[23]*Id.*
[24]*Id.*
[25]*Id.* at 14.

vulnerability, one could get full command over the vehicular machinery.[26]

It was imminent that Miller and Valasek would come to know about this research and subsequently devoted two years of their time in their pursuit for finding ways to remotely hack a vehicle.[27] They infiltrated the Jeep's internal machinery via a feature called Uconnect—Chrysler's network system that manages the vehicle's entertainment and navigation functions, receives phone calls, and offers a WiFi hotspot.[28] This vulnerability, named as zero-day vulnerability,[29] enabled them to transmit code via the Jeep's entertainment systems to the steering, brake pedals, transmission and dashboard related functions.[30] Besides performing considerably harmless functions like switching on the windshield wipers or toying with the air conditioner, the hackers were capable of completely inactivating the engine at lesser speeds and trigger or disable the brakes at any time.[31] As if their capability to gain access to vehicular controls was not scary enough, they could also trace specific GPS coordinates, and track the route of a particular vehicle.[32] Both of them issued a prior notice to Fiat Chrysler to inform them about their intentions to make their findings public. Thereafter, Fiat Chrysler recalled 1.4 million vehicles

[26]Stephen Checkoway et al., *Comprehensive Experimental Analyses of Automotive Attack Surfaces*, USENIX SECURITY SYMPOSIUM (2011), http://static.usenix.org/events/sec11/tech/full_papers/Checkoway.pdf.
[27]Andy Greenberg, *Hackers Reveal Nasty New Car Attacks—With Me Behind The Wheel (Video)*, FORBES (Jul. 24, 2013), https://www.forbes.com/sites/andygreenberg/2013/07/24/hackers-reveal-nasty-new-car-attacks-with-me-behind-the-wheel-video/.
[28]Greenberg, *supra* note 5.
[29]*See* Kim Zetter, *Hacker Lexicon: What Is a Zero Day?*, WIRED (Nov. 11, 2014), https://www.wired.com/2014/11/what-is-a-zero-day/ (hereinafter Zetter).
[30]*Id.*
[31]Greenberg, *supra* note 5.
[32]*Id.*

and implemented network grade security systems on the Sprint mobile network that operates in its vehicles.[33]

Another duo of researchers, Marc Rogers and Kevin Mahaffey, discovered after several years of research work that they were able to electronically 'hotwire' a Tesla Model S after connecting a laptop via a network cable into the car's driver-side dashboard.[34] They also found out that they could insert a Trojan virus by remote-access in the car's network when they had physical access to it, and afterwards use it to remotely inactivate the engine after disconnecting.[35] The car's infotainment system was operating on an obsolete browser which had an Apple WebKit vulnerability that could make the system accessible to any hacker.[36] They discovered six vulnerabilities in total in the Model S and this was communicated to Tesla thereafter. Tesla worked with the researchers to fix those vulnerabilities.[37] However, contrary to Fiat Chrysler, which had to recall around 1.4 million vehicles, Tesla was able to issue software updates remotely for its vehicles.[38]

These studies were taken into consideration by Senator Edward J. Markey in 2013.[39] Senator Markey dispatched a letter to twenty large

[33]Aaron M. Kessler, *Fiat Chrysler Issues Recall Over Hacking*, N.Y. TIMES (Jul. 24, 2015), https://www.nytimes.com/2015/07/25/business/fiat-chrysler-recalls-1-4-million-vehicles-to-fix-hacking-issue.html (hereinafter Kessler).
[34]Kim Zetter, *Researchers Hacked a Model S, But Tesla's Already Released a Patch*, WIRED (Aug. 6, 2015), https://www.wired.com/2015/08/ researchers-hacked-model-s-teslas-already/ (hereinafter Zetter, Tesla).
[35]*Id.*
[36]*Id.*
[37]*Id.*
[38]*Id.*
[39]Ed Markey, *As Wireless Technology Becomes Standard, Markey Queries Car Companies About Security, Privacy*, PRESS RELEASE OF THE U.S. SENATOR FOR MASS. (Dec. 23, 2013), https://www. markey.senate.gov/news/press-releases/as-wireless-technology-becomes-standard-markey-queries-car-companies-about-security-privacy.

automobile companies in the United States to know about security measures that were previously implemented.[40] The letter comprised questions on the way companies identify probable vulnerabilities from third party devices, whether vehicles had the technology required to identify unusual behaviour, and what kind of data regarding driving history could be acquired from technologies present in the vehicle.[41] In 2015, Senator Markey showed the report reviewing the responses and came to a conclusion that security measures were grossly inadequate for protecting drivers, especially against hackers who intend to take over a vehicle or tap confidential information.[42] According to the report, the responses given were proof of the fact that privacy and security measures were worryingly inadequate and erratic, and directed the National Highway Traffic Safety Administration ("**NHTSA**") to introduce new norms to protect recent drivers.[43]

What the above establishes, therefore, is that cybersecurity is now an integral part of our lives. As hackers find out more intricate methods to infringe a car's machinery, more laws are likely to be introduced.

III. EXISTING LAWS WITH REGARDS TO CAR HACKING

This section of the essay examines the legislations introduced to solve the issues related to car hacking and the flaws that are associated with them.

[40]*Id.*
[41]*Id.*
[42]Staff of Senator Edward J. Markey, *Tracking & Hacking: Security & privacy gaps put American drivers at risk 1* (2015), https://www.markey.senate.gov/imo/media/doc/2015-02-06_MarkeyReport-TrackingHackingCarSecurity%202.pdf.
[43]*Id.*

A. Schemes of Legislation

There are three legislations dealing with car hacking, namely (i) SPY Car Study Act of 2017, (ii) Spy Car Act of 2017, and (iii) House Discussion Draft. However, the problems lie with the NHTSA because this is mandatory for promulgating ordinances. Later, this part will discuss the problems within the government and cybersecurity at large.

a) Spy Car Study Act of 2017

In January 2017, Congressmen Joe Wilson and Ted Lieu introduced the SPY Car Study Act of 2017.[44] The bill would have mandated the NHTSA to carry out a study with several organizations such as the Secretary of Defense, Federal Trade Commission ("**FTC**"), SAE International, automobile companies and important academic establishments.[45] Initial findings of the study would be submitted within one year of the enactment of this bill to several agencies in the House and Senate, with a concluding report before six months after that submission.[46]

Nonetheless, a few years previously in 2012, Congress ratified the Moving Ahead for Progress in the 21st Century Act (MAP-21).[47] It provided for a new council under the NHTSA committed to automobile electronics mandating the NHTSA to carry out a study pertaining to safety measures in electronic systems in passenger

[44]security And Privacy in Your Car Study Act Of 2017, H.R. Doc No. 701, at 1 (2017) (U.S.).
[45]*Id.* at § 2(a).
[46]*Id.* at § 2(b).
[47]Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405 (2012) (U.S.) (hereinafter MAP-21 Act).

automobiles.[48] Thus, the requirements of the SPY Car Study Act were already enforced by the MAP-21 Act.

b) Spy Car Act of 2017

By applying a wider perspective on this issue, Senator Edward J. Markey and Richard Blumenthal introduced the SPY Car Act in March 2017.[49] This bill is divided into three primary categories: (i) Cybersecurity Standards in Motor Vehicles (ii) Cyber Dashboard and (iii) Privacy Standards in Motor Vehicles.[50]

If enforced, the first section would mandate every points of access to the electronic systems in automobiles to have satisfactory standards in place to prevent cyberattacks, and the crucial software systems to be segregated.[51] On top of that, the information acquired by these systems shall have adequate protection to foil infiltration during the time of accumulation and storage of that information.[52] Finally, all points of access shall have the technology to identify, inform and prevent interception of information or infiltration on a vehicle.[53]

The next section, the Cyber Dashboard, would made it compulsory for a sticker to be attached to every automobile manufactured two years after the enforcement of the bill.[54] The function of the sticker would be to apprise customers regarding the protections provided by a particular vehicle for cybersecurity and privacy in a way that is simple and graphic-intensive.[55]

[48] *Id.* at § 31401-02.
[49] Security and Privacy in Your Car Act of 2017, S. 680, 115th Congress (2017) (U.S.) (hereinafter Spy Car Act, 2017).
[50] *Id.*
[51] Spy Car Act, 2017, *supra* note 49, at § 30129(a)(1)-(2).
[52] Spy Car Act, 2017, *supra* note 49, at § 30129(a)(3).
[53] Spy Car Act, 2017, *supra* note 49, at § 30129(a)(4).
[54] Spy Car Act, 2017, *supra* note 49, at § 30129(3)(a)(1).
[55] Spy Car Act, 2017, *supra* note 49, at § 30129(3)(a)(2).

The third section of the bill would ensure privacy measures which are unambiguous and under customer control.[56] Vehicles would be mandated to give a proper notice regarding the accumulation and usage of driving information acquired by the vehicle.[57] Moreover, customers could refuse such accumulation of information without getting deprived of the navigation feature.[58] On top of that, the SPY Car Act would delegate the framing of rules and final regulations to the NHTSA to be enforced before three years after the enforcement of the bill.[59] As will be assessed in Part III, this may probably be in conflict with the Cybersecurity Information Sharing Act which was enforced in 2015. The government should be cautious with regard to permitting customers to pull out of such an information accumulation scheme as it is unknown what kind of information surveillance is required for car companies and other surveillance companies to correctly identify probable dangers. Keeping in mind the fact that researchers have already established the variety of ways a hacker could bypass a car's security system, the fact that customers would be permitted to pull out of the accumulation of driving information citing privacy reasons could possibly impair the ability of the company to evaluate security risks.

c) House Discussion Draft

In 2015, The House Committee on Energy and Commerce also issued a discussion draft pertaining to cybersecurity in passenger vehicles. Cybersecurity, Privacy and Hacking Prohibition (Title III) would mandate car companies to devise and enforce a privacy scheme for conveying the company's assimilation, handling and distribution of

[56]Spy Car Act, 2017, *supra* note 49, at § 30129(4)(b)-(c).
[57]Spy Car Act, 2017, *supra* note 49, at § 30129(4)(b).
[58]Spy Car Act, 2017, *supra* note 49, at § 30129(4)(c)(2).
[59]Spy Car Act, 2017, *supra* note 49, at § 30129(b)(1)-(2).

specific information related to customers.[60] A company which is unable to devise such a scheme would be subjected to a fine to the limit of $5000 a day and would not surpass $1,000,000 for a single company.[61] The draft also includes a special provision, which states that companies whose privacy schemes conform to the provisions will be exempted from section five of the Federal Trade Commission Act pertaining to fraudulent practices with regards to privacy.[62]

Further, the draft makes it clear that it shall be illegal for anyone to retrieve, without permission, an electronic control unit or a crucial unit of a vehicle, or other units having driving information for that vehicle, either remotely or via a wired connection.[63] Each time a person is found in contravention of this provision, he/she would be subject to a fine to a limit of $100,000.[64] Also, the draft mandates the NHTSA to set up the 'Automotive Cybersecurity Advisory Council' to formulate superlative practices for companies, with a directive for major companies to elect a delegate for their service on the Council.[65]

Though it was never approved, this draft had its share of problems. First of all, the language was vague and did not mention who could give the approval. Harley Geiger, a former Advocacy Director of the Center for Democracy and Technology, asserted that after a customer buys a car, he normally possesses the physical parts of the car, while the software present in the car is just registered by the car company to the buyer.[66] Also, illegitimate access permitted researchers to identify the vulnerabilities of a car and afterwards work with companies to

[60]Discussion Draft Title III, H.R. 3994, 114th Cong. (2015) (U.S.).
[61]*Id.*
[62]*Id. See also* 15 U.S.C § 45(a)(1).
[63]Discussion Draft Title III, H.R. 3994, 114th Cong. (2015) (U.S.).
[64]*Id.*
[65]*Id.*
[66]Harley Geiger, *Draft Car Safety Bill Goes In The Wrong Direction*, CENTER FOR DEMOCRACY & TECH. (Oct. 20, 2015), https://cdt.org/blog/draft-car-safety-bill-goes-in-the-wrong-direction/.

repair those vulnerabilities, similar to the work Mahaffey and Rogers did for Tesla.

Vulnerabilities prevalent in systems which dealers are unaware of but hackers tend to misuse are known as zero-day vulnerabilities.[67] Usually, a zero-day vulnerability is not bad in itself, similar to the way Miller and Valasek misused the system, although their motivations were beneficial. Permitting other researchers to identify ways in which these vulnerabilities can be misused has resulted in the recall of 1.4 million vehicles by Fiat Chrysler[68] and a security patch sent to owners of Tesla cars.[69] By causing this kind of research to be illegal, customers will have to suffer undesirable consequences thereafter. Car companies could accept or reject approval from researchers for a variety of reasons, be it suspicious or genuine. Still, other third parties investigating vulnerabilities of connected vehicles will only lead to a bigger system of counterbalancing influences between experts and car companies.

IV. SHORTCOMINGS IN LEGISLATION SCHEMES

Presently, all the schemes depend on the NHTSA to promote regulations. Owing to the sluggishness of administrative agencies and the NHTSA's problems of late, ideally the NHTSA is not a good option. Also, experts believe that the government is indulging in cybersecurity control as a result of several breakdowns in its own security.

[67]*See* Zetter, *supra* note 29.
[68]*See* Kessler, *supra* note 33.
[69]*See* Zetter, Tesla, *supra* note 34.

A. The NHTSA Controversy

Every scheme mentioned above delegates wholly or partly its power for framing of rules to the NHTSA. For instance, the SPY Car Act delegates exclusive framing of rules to the NHTSA,[70] with the NHTSA Superintendent putting out a Notice of Proposed Rulemaking schemes before eighteen months of enforcement, and final regulations to be brought out within a limit of three years after the enforcement of the bill.[71] By issuing this public notice, the SPY Car Act renders the enactment of cybersecurity norms to the will of the procedure of rulemaking.

It is important to mention that the Administrative Procedure Act[72] oversees the Notice of Proposed Rulemaking. Any individual whose legal right is infringed, or suffers harmful consequences due to the acts of a company within the ambit of the pertinent law, can proceed for judicial review.[73] In this case, the court of review can take a random and impulsive stance with regards to company actions.[74] In *Motor Vehicle Manufacturers Association v State Farm Mutual*,[75] the Supreme Court examined whether the NHTSA acted randomly and impulsively when it annulled the mandate that all vehicles manufactured after 1982 would have some subdued restrictions.[76] The Court viewed that the random and impulsive standard is limited and a court cannot substitute its judgment for the purpose of the company. The Company must provide a reasonable justification for its acts.[77]

[70]*See* Vlasic & Ruiz, *infra* note 81.
[71]Security and Privacy in Your Car (SPY Car) Act of 2015, S. 1806, 114th Cong. § 30129(b) (2015) (U.S.).
[72]5 U.S.C § 553 (2015).
[73]5 U.S.C. § 702 (2015).
[74]5 U.S.C. § 706(2)(a).
[75]Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 2867, 77 L. Ed. 2d 443 (1983) (U.S.).
[76]*Id.* at 44.
[77]*Id.* at 42.

The Court came to a conclusion that the NHTSA was unable to provide a reasonable justification for annulling the safety norms.[78]

In this situation, should a car company or a business association,[79] feel that they have suffered harmful consequences owing to the NHTSA action, they can go for judicial review wherein the NHTSA must provide a reasonable justification for its acts. The court of review would afterwards employ the same impulsive standard to decide whether the NHTSA provided reasonable justifications or not. As is evident with the hacks conducted by researchers recently, car companies respond to vulnerabilities at once.[80] In a rapidly evolving field such as cybersecurity, even after certain standards qualify for the judicial review, they could still get outdated before the procedure of review gets over.

Amidst the likely indolence of being governed by administrative laws, the NHTSA has been embroiled in some controversies.[81] In 2015, reports were circulated which examined the function the NHTSA performed in General Motors' recalls with regards to flaws in the ignition switch which resulted in the death of at least hundred people.[82] Based on insider inputs, the NHTSA confessed to a failure to spot warning signs that could have notified the agency regarding General Motors' flaw and its reluctance to discharge its full power in punishing them,[83] for which General Motors' cars operated without repairs for several years.[84] This resulted in a restructuring of the

[78]*Id.* at 48.
[79]5 U.S.C. § 551 (2015).
[80]*See* Zetter, Tesla, *supra* note 34.
[81]*See* Bill Vlasic & Rebecca R. Ruiz, *Safety Agency Admits Missing Clues to G.M. Ignition Defects,* N.Y. TIMES (Jun. 5, 2015), https://www.nytimes.com/2015/06/06/business/nhtsa-admits-missing-clues-to-gm-ignition-defects.html (hereinafter Vlasic & Ruiz).
[82]*Id.*
[83]*Id.*
[84]*Id.*

NHTSA, which comprised of a supervisory team of specialists to assist in implementation of those reforms.[85]

Understandably, the NHTSA is the agency for enacting regulations for automobiles. Despite this, car hacking is a cybersecurity concern which calls for an effective approach which can promptly retaliate to technological changes. The NHTSA is not the most reliable agency for enacting regulations with regards to the concern of car hacking, primarily due to the probable deferrals in the rulemaking scheme.

B. Contribution of the Government in the field of Cybersecurity

Another concern with all of the three schemes is entrusting the government with the task of devising cybersecurity regulations for vehicles. The current as well as the previous government's cybersecurity schemes have drawn criticism for quite some time.

The Cybersecurity Framework is one such scheme. The Director of the National Institute of Standards and Technology was to spearhead the growth of this framework in order to minimise cyberattacks to crucial infrastructure, according to Executive order numbered 13636.[86] It comprises guidelines, policies, courses of action and ways to deal with cybersecurity risks with the help of a flexible, merit-based and economical strategy to support owners and administrators of crucial infrastructure in tackling cybersecurity threats.[87] If any of the crucial infrastructure systems (systems and resources, either physical or virtual) in a country (in this case, the US) are adversely affected, it would have a disastrous outcome on matters related to security, financial security and public health security.[88]

[85] *Id.*
[86] Exec. Order No. 13,636, 78 Fed. Reg. 33, at 11, 740-71 (Feb. 19, 2013).
[87] *Id.*
[88] *Id.* at 11739.

The Cybersecurity Framework is divided into three parts: (i) the Framework Core (ii) the Framework Implementation Tiers and (iii) the Framework Profile.[89] The Framework Core contains top-notch methods for every class of crucial infrastructure, which is in turn classified into functions and then subcategories.[90] The Framework Implementation Tiers ensures that every function and category incorporated in the Framework Core are compatible with each other.[91] An organization is scored by the Framework profile with regards to its conformity with the Framework's proposed cybersecurity measures.[92]

The Cybersecurity Framework received responses which were ambivalent at best. Some people believe that the framework was a suitable course of action,[93] while others viewed the Cybersecurity Framework as a bad idea, substituting a dynamic approach of devising cybersecurity norms with a mandate with regards to conformity with prescribed federal norms.[94]

Andrea Castillo and Eli Dourado, both research fellows at the Mercatus Center at George Mason University, viewed that the Internet did not have a cohesive cybersecurity scheme for a long time owing to the associations amongst networks.[95] The Internet devised a policy for itself, such as promptly banning networks that permitted criminals to utilise their resources.[96] Cybersecurity teams were

[89]*See* Dourado and Castillo, *supra* note 13.
[90]*Id.* at 10.
[91]*Id.*
[92]*Id.*
[93]Joab Jackson, *How the NIST cybersecurity framework can help secure the enterprise,* PCWORLD (Feb. 14, 2014), https://www.pcworld.com/article/2098320/how-the-nist-cybersecurity-framework-can-help-secure-the-enterprise.html.
[94]*See* Dourado and Castillo, *supra* note 13.
[95]*Id.* at 6.
[96]*Id.* at 7.

created to keep a check on traffic for malicious activities and notify users of possible security risks.[97] Plausible tactics with regards to botnet activity were created from shared information among organizations.[98] Therefore, private companies had already devised necessary measures to improve cybersecurity standards.[99] However, critics view that the Framework replaces those independent tactics with the impetus to improve the score of their Framework Profile.[100]

A major disapproval of the current as well as the previous government's efforts to enact cybersecurity regulations arises because of the government's own susceptibility to being hacked and otherwise bad reputation regarding cybersecurity. In 2014, the US Department of Justice confirmed around 3600 cases of data infringements, which was followed by malicious software being downloaded onto computers of various companies roughly around 180 times.[101] The very next year, the United States Office of Personnel Management was targeted by hackers, resulting in the breach of confidential information of 21.5 million people.[102] Recently, the emails of around 350 blue-chip clients of accountancy giant Deloitte were targeted by hackers.[103] These 350 clients comprise of four US government departments, the United Nations and a few of the world's biggest corporations like FIFA and three airline companies amongst others. Insider inputs believe that the breach occurred only in the US, and the hackers got access to the IP addresses, usernames, passwords,

[97]*Id.* at 8.
[98]*Id.* at 9.
[99]*Id.* at 6.
[100]*Id.* at 15.
[101]Eli Dourado & Andrea Castillo, "*Information Sharing": No Panacea for American Cybersecurity Challenges*, MERCAT. CENT. (2015), https://www.mercatus.org/system/files/Dourado-Information-Sharing-Cybersecurity-MOP.pdf.
[102]*See* Peterson and Rein, *supra* note 15.
[103]Nick Hopkins, *Deloitte hack hot server containing emails from across US government*, THE GUARDIAN (Oct. 10, 2017), https://www.theguardian.com/business/2017/oct/10/deloitte-hack-hit-server-containing-emails-from-across-us-government.

architectural models for businesses and healthcare, and secret security and design data of those blue-chip clients.[104] Therefore, a situation may arise wherein the NHTSA enacts regulations that would drive companies to make an effort towards conforming to federally prescribed regulations rather than devising suitable standards for technological changes.

C. Addressing the Legislative Inadequacies with regards to Car Hacking

As is the case with any security risk, car hacking has led to a rift amongst business insiders, supervisors, and consumer activists. There should be two primary objectives to be achieved. First, car companies have to create a blueprint for proceeding with appropriate conventions that protect their vehicles against imminent cyberattacks. Second, customers have to be safeguarded. Consumer activist groups along with Senators Markey and Blumenthal contend that the most appropriate way to accomplish these objectives is to enact laws that exclusively tackles car hacking, like the SPY Car Act.[105] Nevertheless, car companies believe that the new conventions will only hamper development of appropriate security standards and were reluctant to be held accountable for the acts of hackers when they have acted with sincere intentions.[106] Also, the automobile industry has encouraged information-sharing schemes, like the Cybersecurity Information Sharing Act ("**CISA**"), with General Motors advising the Senate to enforce the CISA.[107]

Even though the discussed proposals are introduced with good faith, they are ultimately unnecessary. Many subsisting legislations contain

[104] *Id.*
[105] *See* Starks, *supra* note 12.
[106] *Id.*
[107] *Id.*

most of the issues concerned with car hacking, rendering new legislations as surplusage. To address the concern in a more convenient way, private ordering should be used as a tool to facilitate the automobile industry to implement its own standards with the purpose of keeping up with the technological changes more effectively.

a) Current Legislations associated with car hacking

Most of the concerns related to car hacking are already dealt with by current laws such as automotive safety norms, cybersecurity regulations and accountability of car companies. For instance, the NHTSA has been enacting motor vehicle safety regulations under confederate order[108] from the year 1967.[109] The function of these regulations is to minimise traffic mishaps and death by performing requisite research in the field of safety and development.[110] Product accountability and other tort-based litigations have dictated the culpability of automobile companies for several years. On top of that, MAP-21 issues an additional mandate to the NHTSA to explore safety issues with regards to connected vehicles.[111]

Undoubtedly, car hacking is within the ambit of the Computer Fraud and Abuse Act (CFAA).[112] The law includes acts like deliberately inducing harm to a secured computer by means of a transfer of a codified program,[113] deliberately infiltrating a secured computer by bypassing authentication and impulsively bringing about damage and loss.[114] A secured computer refers to a computer which is used in the

[108]Motor Vehicle Safety, 49 U.S.C. § 30101 (2016) (U.S.).
[109]*See* Federal Motor Vehicle Safety Standards And Regulations, U.S. DEPT. OF TRANSP. (1998) (U.S.).
[110]*Supra* note 108.
[111]MAP-21 Act, *supra* note, at § 31401-02.
[112]18 U.S.C. § 1030 (2015).
[113]*Id.* at § 1030(a)(5)(A).
[114]*Id.* at § 1030(a)(5)(C).

process of carrying out regional or overseas trade.[115] The CFAA states that the word 'computer' also includes an information storage or transmissions service functioning directly or in combination with that service.[116] As a result, this is definitely a way to penalise hackers who illegitimately access a vehicle.

In spite of this, the CFAA has also drawn criticism for quite some time. Few people contend that this Act is abused by prosecutors to torment and threaten security scientists by using the 'unauthorised access' phrase.[117] Others contend that the phrase 'unauthorised access' is very wide and ambiguous and should therefore be made unconstitutional.[118] It is thus not difficult to comprehend that the analogous usage of 'without authorization' phrase by the House Discussion Draft is complicated while making efforts to penalise prospective hackers.

Moreover, the Federal Trade Commission ("**FTC**") may well have the power to control automobile cybersecurity referred to under the 'unfair acts' section of the FTC Act.[119] In the case of *FTC v Wyndham Worldwide Corporation*,[120] the Third Circuit decided that the FTC has the power to initiate proceedings against a company for its recurring inability to protect itself against cyberattacks in a small period of time.[121] Here, in between the year 2008 and 2009, Wyndham was targeted by hackers thrice, all of them happening in a similar manner,

[115]*Id.* at § 1030(e)(2)(B).
[116]*Id.* at § 1030(e)(1).
[117]Sam Gustin, *U.S. "Hacker" Crackdown Sparks Debate over Computer-Fraud Law*, TIME (Mar. 19, 2013), http://business.time.com/2013/03/19/u-s-hacker-crackdown-sparks-debate-over-computer-fraud-law/.
[118]Tim Wu, *Fixing the Worst Law in Technology*, NEW YORKER (Mar. 18, 2013), https://www.newyorker.com/news/news-desk/fixing-the-worst-law-in-technology.
[119]15 U.S.C. § 45(a) (2015).
[120]F.T.C. v. Wyndham Worldwide Corp., 799 F.3d 236, 259 (3d Cir. 2015) (U.S.) (hereinafter F.T.C. v. Wyndham).
[121]*Id.* at 241–42.

by gaining access to an administrator account.[122] The FTC suspected that Wyndham was involved in fraudulent cybersecurity practices that were unjust and pointless, such as exposing consumers' confidential information to illegitimate access and theft and also suspected that Wyndham was unsuccessful in employing firewalls or taking suitable steps to identify and thwart illegitimate access.[123] The court dismissed these claims stating that the absence of a firewall and a third attack in a like manner would put Wyndham on a warning that it failed to comply with the norm of the cost benefit analysis[124] stated in a different section of the Act.[125] While this was an interim appeal, and therefore no conclusion was arrived at with regards to its merits,[126] it unofficially made companies aware of the fact that the FTC has the authority to initiate legal proceedings against those it believes lack adequate cybersecurity measures.

Furthermore, CISA[127] was enacted as an addition to an omnibus budget bill.[128] CISA permits private parties[129] to inspect their own data system for cybersecurity reasons.[130] It also safeguards legal responsibility as against private parties for inspecting a data system under section 104(a).[131]

This Act also provides for companies to give out information related to cybersecurity risks with the government[132] and grants extra

[122]*Id.*
[123]*See Id.* at 240–41.
[124]15 U.S.C. § 45(n) (2015).
[125]F.T.C. v. Wyndham, *supra* note 120, at 256.
[126]*Id.* at 240.
[127]Cybersecurity Information Sharing Act of 2015, Pub. L. No. 114-113, 161 Stat. 1729 (2015) (U.S.).
[128]Andy Greenberg, *Congress Slips CISA into a Budget Bill That's Sure to Pass*, WIRED (Dec. 16, 2015), https://www.wired.com/2015/12/congress-slips-cisa-into-omnibus-bill-thats-sure-to-pass/.
[129]Consolidated Appropriations Act, P.L. No. 114-113, § 102(4), 129 Stat. 2242 (2016) (U.S.).
[130]*Id.* at § 104(a)(1)(A).
[131]*Id.* at § 106(a).
[132]*Id.* at § 105.

protection of legal responsibility from litigations arising due to this sharing of information.[133] For future laws that may mandate sharing of information, CISA's protection makes it certain that car companies will be more likely to inspect their data systems and share information with the government to get the best possible protection given by law. For any legislation that is introduced, like the SPY Car Act of 2015, that permits customers to refuse this collection of information, car manufacturers may draw attention to CISA, arguing that they are permitted to inspect the data systems of their automobiles. Excluding car hacking from other cybersecurity legislations will result in conflicting policies.

It is evident that there are plenty of legislative schemes available to legislators to create safety regulations for car companies, initiate legal proceedings against those they believe are falling short of providing reasonable protection to customers, and penalise malicious hackers in future. Enacting more laws governing this field of law will only create more problems in an already congested legislative scenario.

b) Private Ordering is the answer

Private ordering will permit automobile companies to implement their own cybersecurity regulations. A good example of a private ordering system is the Internet Corporation for Assigned Names and Numbers (ICANN) which manages the Internet domain structure.[134] Moreover, Moody's Investors Service and Standard & Poor's Ratings Service had the authority to hand out credit ratings, in addition to other duties.[135] The credit card sector is a case in point with regards to private ordering in the industrial sector which addresses its own cybersecurity concerns.

[133]*Id.* at § 106(b).
[134]*See* Schwarcz, *supra* note 16, at 319, 320.
[135]*See Id.* at 326.

D. The role of private ordering in the Credit Card Industry

Private ordering has been in operation in the credit card industry to help devise the Payment Card Industry Data Security Standards ("**PCI DSS**").[136] Private ordering is concerned with different methods for regulating behaviour and addressing disputes which are distinct from legislations brought forward by the government and implemented by the judiciary.[137] In the year 2004, five big card brands joined hands to issue the first renewal of the PCI DSS, which provided for an organised methodology to increase productivity with the help of 'shared security knowledge.'[138] The PCI Data Security Council ("**PCI DSC**") enforces regulations that must be adhered to by the various levels of the whole industrial sector.[139] Professors Vasant Raval and Edward Morse view that expertise pertaining to industry security regulations is presently shared by the means of the PCI SSC.[140] By sharing the expertise with the help of this private ordering scheme, the knowledge that is shared amongst the regulated industry and those who have the intention of regulating it come in conflict with each other.[141] This gives rise to major concerns regarding efforts at regulatory intervention by the government.

Professors Raval and Morse found out that the private schemes of regulation in the payment card industry were created because it was necessary to gain the trust of customers and traders regarding the usage of this mode of payment.[142] A chain of trust relationships exists which are integral to this industry.[143] To enhance the trust of

[136]Edward A. Morse & Vasant Raval, *Private Ordering in Light of the Law: Achieving Consumer Protection through Payment Card Security Measures*, 10 DEPAUL BUS. & COM. L.J. 213, 216 (2012) (hereinafter Morse & Vasant Raval).
[137]*Id.* at 214.
[138]*Id.* at 229.
[139]*Id.* at 230.
[140]*Id.* at 235.
[141]*Id.*
[142]*Id.* at 221.
[143]*Id.*

customers, customers are safeguarded from illegal transactions performed on the network of any card issuer by not acquiring any accountability from such transactions.[144] Although there are a few laws which mandate customers to accept liability to the limit of 50 dollars, companies are focusing on their own self-interest by giving more protection than the minimal requirement.[145] By reducing, or completely eradicating customers' apprehensions regarding illegal transactions, payment card companies have amassed a great fortune.[146]

Likewise, in the automobile industry, customers should be able to rely on the cars they own that they will be safe for regular use and car companies should have faith that their product will not be used for creating harm in any manner. Car companies will also be operating in their own self-regard by enforcing safety regulations. If customers are unable to bestow their faith on a specific company's vehicles, they will shift to a company which they find more reliable.

Back in 2012, governmental interventions in the payment card sector had no significant impact.[147] One such intervention was the Fair and Accurate Credit Transaction Act of 2003 ("**FACTA**"), which contained a provision mandating only the final five digits and the complete abolition of expiration dates on every computer generated bill.[148] It turned out to be under-inclusive as well as over-inclusive in a few ways.[149] A criminal hypothetically would choose insecure electronic information over paper receipts, which FACTA does not focus on. An infringement of the FACTA provision could result from revealing the first and the last card numbers and hiding the numbers

[144]*Id.* at 223.
[145]*Id.* at 223–24.
[146]*Id.*
[147]*Id.* at 253.
[148]*See* Morse & Vasant Raval, *supra* note 136, at 253-54.
[149]*Id.* at 254–55.

in the middle, thus generating billions of permutations to determine the exact number of the card.[150] This kind of infringement is not much of a concern, minus other information.[151] Ultimately it leads to higher litigation expenses, owing to the large number of class action lawsuits brought under the realm of FACTA, thereby causing inconvenience to customers.[152]

Reviews of the PCI DSS suggest that the trader community mostly does not conform to its regulations.[153] This concern is possibly not prevalent in the automobile industry sector since the companies themselves will most likely be liable for enforcing the safety regulations in the end. The payment card industry is a case in point regarding private ordering, and the inadvertent outcomes of controlling an industry that has the impetus for self-regulation. Permitting the automobile industry to self-regulate with the assistance of cybersecurity specialists will tackle inadvertent undesirable consequences on customers.

E. The importance of private ordering with respect to car manufacturers

Just like in the credit card industry, car companies will implement safety regulations owing to market pressure, which includes ensuring the safety of customers. By now, car companies have started to devise private ordering systems. One of the most prominent groups in the US within the automobile sector is the Auto Alliance.[154] The Auto Alliance instituted the Automotive Information Sharing and Analysis Center ("**Auto-ISAC**") in order to make progress on collective

[150]*Id.* at 255.
[151]*Id.*
[152]*Id.* at 255–56.
[153]*Id.* at 238.
[154]There are twenty members of the Auto Alliance, which include Mercedes-Benz USA LLC, Volkswagen Group of America, General Motors, Volvo Car USA, and other major players. *See* Participating Members, AUTO ALLIANCE, https://autoalliance.org/connected-cars/automotive-privacy/participating-members/.

efforts.[155] The Auto-ISAC is a public body for conveying important security information to the automobile industry. It collects and circulates information about cybersecurity threats faced by interconnected vehicles across the globe. Information is obtained from its own members, administrative agencies, scholarly articles, open-source and other reliable sources. After a detailed examination by cybersecurity experts, the information is compiled into intelligence reports and shared through its secure Auto-ISAC Portal. With these stats, the automobile industry is better equipped to react to security threats, vulnerabilities and other similar events so that members of the interconnected vehicular network can best deal with their business risks.

Other initiatives undertaken by the automobile sector include founding the Vehicle Electrical System Security Committee, which was set up by the Society of Automotive Engineers (SAE).[156] It was set up to issue regulations and convenient practices and to target cybersecurity measures in sectors like medicine and aviation. Such initiatives are proof of the fact that the automobile industry is conscious about security risks and is striving towards enhancing the standards of security for their vehicles. By formally passing on the duty of implementation of cybersecurity standards to the car companies, the government will be in favour of the initiatives already undertaken by the automobile sector.

[155]Press Release, *Auto-ISAC Announces Board of Directors*, GLOBAL AUTOMAKERS (Oct. 21, 2015), https://www.globalautomakers.org/posts/press-release/auto-isac-announces-board-directors/.

[156]Alliance of Automobile Manufacturers, *Auto Cyber-Security: Continual Testing, Checks and Balances*, AUTO ALLIANCE (Jul. 10, 2014), https://www.autoalliance.org/auto-innovation/cyber-security/.

V. CONCLUSION

As the world becomes more interlinked, the risk of car hacking turns out to be more prominent than ever. Hacks of vehicular machinery amongst other things serve as a reminder to people that even if they have physical control over their car, it is just moments away from being infiltrated by a resourceful hacker who then gains complete control over the vehicle. It is not just about mere breaches of privacy, it can put to risk innocent lives as well.

The anticipated legislation exclusive to car hacking is not required in the present legal scenario of the US. Current laws already deal with the kind of offences regarding car hacking, and making more regulations will just create more problems in an already congested legislative scenario. Parting with the NHTSA or any other organization to enforce norms through the course of regulation disregards the way technology progresses and evolves steadily. Instead of switching to confederate regulations, legislators should take into consideration the significance of private ordering schemes like the PCI DSS. A private ordering system will permit car companies to enforce norms with the aid of specialist researchers for the purpose of keeping pace with evolving technology.

INVOKING EQUITY JURISDICTION OF THE INDIAN SUPREME COURT: SCOPE AND LIMIT

Dushyant Thakur[*]

Abstract

The Supreme Court of India does an incredible task by enforcing the lengthiest Constitution of the world in the most populous democracy. For performing this task, the makers of the Constitution of India have vested some extraordinary powers in the Supreme Court in the form of Articles 32, 136 and 142 of the Constitution of India. The Supreme Court uses these provisions to invoke its Equity Jurisdiction. The purpose of this article is to expound and do a systematic study of Equity Jurisdiction of the Supreme Court, a distinctive head of jurisdiction under which the Supreme Court can exercise its power. The article discusses how these provisions are used to provide equitable remedies and, in some cases, evolve equitable procedure. This is done on the basis of principles of equity. It will be observed through a discussion on various provisions of the Constitution of India that the provisions, which act as the source of Equity Jurisdiction of the Supreme Court, are

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plenary in nature, with virtually no limits according to their text. However, to protect its misuse, the Supreme Court has imposed a boundary upon itself within which this jurisdiction can be invoked. These boundaries are imposed either by evolving principles or by using various maxims of equity. These limitations, within which the Equity Jurisdiction can be invoked by the Supreme Court, will also be discussed. However, such limits can be bypassed if the situation so demands, in the interest of justice.

I. INTRODUCTION

The Supreme Court of India was established as the apex court of the judicial system for the Union of India on January 26, 1950. This establishment led to the strengthening of the foundation of the rule of law in the freshly independent State of "India". The importance of the Supreme Court in India can be demonstrated by its function to construe and enforce the lengthiest and the most intricate Constitution in the world's most populous democracy. All these years since its establishment, the Supreme Court has played a major role in maintaining the integrity of democratic institutions and rule of law. Through its interpretations and power of judicial review, it has not only preserved but also enhanced judicial independence and protected fundamental rights.

Article 124(1) of the Constitution of India establishes the Supreme Court of India.[1] The Supreme Court is a multi-jurisdictional court[2]

[1]INDIA CONST. art. 124, cl. 1. The Article states:
"124. Establishment and Constitution of Supreme Court.

with remarkably wide and varied jurisdiction.[3] Jurisdiction of the Supreme Court is dealt from Article 131 to Article 143 of the Constitution of India. As per the Constitution, the jurisdiction conferred upon the Supreme Court can be divided under the heads of Original Jurisdiction (Article 131), Appellate Jurisdiction (Articles 132 – 134), Advisory Jurisdiction (Article 143), Special Jurisdiction for enforcement of fundamental rights (Article 32) and a discretionary residuary jurisdiction of an omnibus character to grant special leave to appeal (Article 136).[4] The purpose of this paper is to expound on equity jurisdiction of the Supreme Court and understand the extent and limit of the same, in other words, to systematize equity jurisdiction of the Supreme Court. Equity jurisdiction is the jurisdiction which is exercised by the Supreme Court as a court of equity and decisions are taken by following the principles of equity. This will be dealt with in the subsequent sections of the paper.

After introducing the topic in Part I of this article, Part II deals with the concept behind equity, equitable and equity jurisdiction. In this Part, the author has also attempted to define the terms and in what sense these terms have been used in this article. Part III of the article aims to explore the scope of equity jurisdiction of the Supreme Court. In the opening of this Part, provisions of the Constitution of India under which equity jurisdiction can be invoked are enlisted. The Part has been further divided into three Sections, namely, A, B and C, under which the scope of equity jurisdiction under Articles 32, 136 and 142, respectively, have been discussed using various Supreme

There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges."

[2]1 M.P. JAIN, INDIAN CONSTITUTIONAL LAW 658 (6th ed. 2010) (hereinafter 1 Jain).

[3]Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476, 478 (2003).

[4]M. Ramaswamy, *The Supreme Court of India*, 2 U.W. AUSTL. ANN. L. REV. 215, 219 (1953).

Court cases. Part IV has been divided into five sections, which are separate heads of various limits on invocation of equity jurisdiction by the Supreme Court. The Part also covers the need to limit power of the Supreme Court to invoke equity jurisdiction. With Part V, the author has concluded this article with his view on when such limits can be bypassed.

II. CONCEPT BEHIND EQUITY AND EQUITY JURISDICTION

In general terms, *equity* is a notion of fairness, impartiality and even-handed dealing. *Osborne* considered equity as fairness and related it with natural justice.[5] For *Aristotle*, equity is a correction of the law, where the law is defective owing to its universality.[6] The term "Equity" comes from the Roman term "*aequitas*", which goes back to Sanskrit "*aika*" (that is "one"), and *aikatuan* (unit, likeliness), suggesting the idea of equality, equilibrium, and proportion.[7]

Equity as a system of justice was developed, parallel to the system of Common Law, by the High Court of Chancery in England. The court exercised its extraordinary jurisdiction in order to adjudge a dispute on the basis of principles of equity.[8] In the words of *Snell* who emphasized on the technical sense of the concept of equity, "equity may be defined as a portion of natural justice which, although of a nature more suitable for judicial enforcement, was for historical reasons not enforced by the Common Law Courts, an omission which was supplied by the Court of Chancery."[9] Equity can also be defined

[5]Osborne, Dictionary of English Law 724 (Roger Bird ed., 7th ed. 1990).
[6]Aristotle, The Nicomachean Ethics V Ch. 10 (Ross's trans., 1925).
[7]María José Falcón y Tella, Equity and Law 23 (1st ed. 2008).
[8]Geo. Tucker Bispham, The Principles of Equity: A Treatise on the System of Justice Administered in Courts of Chancery 1-2 (11th ed. 1931).
[9]R.E. Megarry, Snell's Principles of Equity 1-2 (23rd ed. 1947).

as the system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law.[10]

Thus, it can be comprehended from the above definitions that equity originated in the Court of Chancery upon the principles of natural justice and the idea of equality. It rose to provide for remedies which, for some reasons, could not be provided for by the Common Law Courts. However, it can also be perceived that equity has been defined above in terms of its origin. Conceptually, equity can be delineated as that branch of common law in which the existing procedures and remedies could not provide for relief in a particular case and calls for the exercise of justice and fairness by the judge.[11] In India, while deliberating upon the term "*equity*", it was observed by a High Court that, among its usage in various senses, the most practical one is equivalent to natural justice. However, limiting its practical ambit in the court of law, the court further observed that jurisdiction for administration of equity should not be supposed as that wide and extensive which would result from carrying into operation of all the principles of natural justice because natural justice cannot be practically enforced in its widest sense and is left to the conscience of each individual.[12] Thus, equity can be defined in numerous ways. However, for the purpose of this article, the term *equity* has been used for the remedies provided by a judge of the Supreme Court on the basis of his discretion, which is to be exercised to provide an equitable remedy, keeping principles of equity in mind. Furthering this point, the focus of this article is not on the substantive rule of laws which were traditionally equitable (e.g. trust, specific relief etc.).

[10]Bryan A. Garner, Black's Law Dictionary 619 (9th ed. 2009) (hereinafter Black's Law Dictionary).
[11]2 Craig Ducat, Constitutional Interpretation G3 (1st ed. 2009).
[12]Bharatha Charyulu v. R.B. Alivalu Manga Thayaru, A.I.R. 238 (AP: 1996).

Equity has undergone a process of transformation into a "sociological understanding". From the basic principle that equity acts *in personam*, lately, it has offered relief to society at large.

Equitable as a general expression is something which is marked by a due consideration of what is fair, unbiased or impartial; according to natural justice, untrammelled by technical niceties of the law.[13] It exists in equity which is available or sustained by an action in equity or under the rules and principles of equity.[14] Equitable is something fair and reasonable which is recognized, regulated and enforced by the court of equity in accordance with the principles of equity.[15]

Further, the right to decide a matter in equity comes within the *equity jurisdiction* of a court. The equity jurisdiction does not suggest that the jurisdiction conferred on a court by the sovereign over specified subject matters and parties rather it refer to the merits of the case.[16] *The Black's Law Dictionary* defines equity jurisdiction as the power in a common law judicial system to hear certain civil actions according to the procedure of the Court of Chancery and to resolve them according to equitable rules.[17] To clarify, it should not be assumed that equity jurisdiction is an exercise of judicial discretion. When such discretion is exercised on the basis of principle of equity, then only it will be considered to be done under equity jurisdiction. Under equity jurisdiction, on the basis of the principles of equity, decisions are passed as justice demands. As per modern practice in India, the Supreme Court exercises both equity and legal jurisdiction and hence is capable of granting equitable and legal remedies, as the situation demands.

[13]P. Ramanatha Aiyar, Advanced Law Lexicon 489 (3rd ed. 2007).
[14]Black's Law Dictionary, *supra* note 10, at 617.
[15]Walker D.M., The Oxford Companion to Law 423 (1st ed. 1980).
[16]William Q. de Funiak, Handbook of Modern Equity 38 (2nd ed.1956).
[17]Black's Law Dictionary, *supra* note 10, at 929.

III. EQUITY JURISDICTION OF THE SUPREME COURT

In England, equity jurisdiction is exercised by the court of equity. This is not the case in India where the courts exercise jurisdiction over equity as well as law and no such system of exclusive jurisdiction is present.[18] Therefore, the Supreme Court is not only a court of law but a court of equity as well.[19] The Supreme Court as a court of equity should act to prevent legal fraud and to do justice by the promotion of good faith.[20]

The Constitution of India nowhere mentions directly that the Supreme Court will be a court of equity or will exercise equity jurisdiction. However, the Supreme Court exercises equity jurisdiction, *implicitly*, under Article 32, Article 136 and Article 142 of the Constitution of India. Under Article 32, the Supreme Court can be approached for one's violation of fundamental rights. Supreme Court has power to grant special leave against any decree, order or judgment by any court in India under Article 136 and to pass any order or decree for doing complete justice under Article 142 in a pending matter. Even the Supreme Court has held that Articles 32, 136 and 142 of the Constitution of India confer equity jurisdiction upon the Supreme Court.[21] These provisions provide discretionary power to the Supreme Court in order to do complete justice. Discretion lies in the heart of the equity jurisdiction.[22] This discretion has intrinsic equitable powers

[18]Shiv Kumar Sharma v. Santosh Kumari, 8 SCC 600 (2007) (hereinafter Shiv Kumar Sharma).
[19]Chandra Bansi Singh v. State of Bihar, 4 SCC 316 (1984) (hereinafter Chandra Bansi Singh).
[20]AP State Financial Corp v. M/S GAR Re-Rolling Mills and Anr., 2 SCC 647 (1994).
[21]G.M., O.N.G.C. Ltd. v. Sendhabhai Vastram Patel and Ors., Supp 2 SCR 448 (2005).
[22]Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 533 (1982).

to mould decision as per facts of a particular case through interpretation of laws and certainty for these newly framed principles is achieved through the doctrine of *stare decisis*. In India, this is achieved by virtue of Article 141. Such equity jurisdiction should be exercised so that justice is done in respect to both parties.[23]

In the discussion which will follow in the article, it will be observed that Equity Jurisdiction of the Supreme Court is wide and unrestrained, providing it with plenary powers. Such wide power has been conferred upon the Supreme Court for the proper and effective administration of justice so that exceptional situations in larger public interest can be dealt with in order to build confidence in the rule of law and strengthen democracy.[24]

A. Scope of equity Jurisdiction under Article 32

Remedy to the violation of fundamental rights is provided in Article 32 of the Constitution of India. It is Article 32 that ensures that one can approach the Supreme Court for the enforcement of Fundamental Rights under Part III of the Constitution. The Supreme Court can issue orders, directions or writs such as *certiorari, habeas corpus, mandamus, prohibition, quo warranto* in order to enforce these Fundamental Rights guaranteed by the Constitution.[25] No act of the Parliament can abrogate or take away the jurisdiction conferred on the

[23]T.N. Electricity Board v. Sumathi, 4 SCC 543 (2000).
[24]Manohar Lal Sharma v. Principal Secy & Ors., 2 SCC 532 (2014).
[25]INDIA CONST. art. 32. The Article states:
"32. Remedies for enforcement of rights conferred by this Part.
The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."

Supreme Court by Article 32 as it is an integral part of the Constitution.[26]

Nature of the power vested in the Supreme Court by Article 32 is plenary and cannot be shackled by any legal constraint. It must be noted that power of the Supreme Court is not limited to issuing writs of *habeas corpus, mandamus, prohibition, quo warranto* or *certiorari* or what can be termed as "prerogative writs". The jurisdiction of the Supreme Court has been enlarged by use of the expression "in the nature of" in the provision.[27] Therefore, the Supreme Court is empowered under Article 32 to make any order, as it may appear to be necessary to give proper relief to the aggrieved.[28] The court can mould its direction to provide a relief which is appropriate for a given situation. An application under Article 32 cannot be refused merely on the ground that a Common Law writ has to be modified in order to give proper relief to the applicant.[29] This is where the Supreme Court gets the power to invoke equity jurisdiction for granting equitable remedies. Such is the extent of this power that even if the petition is not found to be maintainable, appropriate orders based on the facts of a particular case can be given to do complete justice between parties.[30] Further, for awarding equitable remedy, the court has discretion to evolve a procedure appropriate for a given situation. The court can adopt such procedure as it thinks fit in the exercise of its new jurisdiction created for the purpose of enforcing fundamental

[26]3 D.D. Basu, Commentary on the Constitution of India 3709 (8th ed. 2014) (hereinafter 3 Basu).
[27]Chiranjit Lal Chawdhuri v. Union of India, AIR 41 (1951); Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1 (1967) (hereinafter Naresh Shridhar case); Bandhu Mukti Morcha v. Union of India, 3 SCC 161 (1984) (hereinafter Bandhu case).
[28]Kochunni v. State of Madras, AIRSC 725 (1959).
[29]P.T.I. v. Union of India, 4 SCC 63 (1974).
[30]Saihba Ali v. State of Maharashtra, 7 SCC 250 (2003).

rights.[31] Therefore, for protecting fundamental rights, an appropriate equitable remedy can be provided and for the same equitable procedure can be evolved as per the circumstances and fact of a case. Acharya Dr. D.D. Basu went to the extent to say that:

> *"Article 32 lays down a constitutional obligation on the Supreme Court to protect the fundamental rights of the people and for that purpose, it has all incidental and ancillary powers including power to forge new remedies and fashion new strategies designed to enforce the fundamental rights, particularly in the case of poor and the disadvantaged who are denied their basic human rights and to whom freedom and liberty has no meaning."*[32]

In the recent times, new dimensions of Article 32 have been evolved.[33] Two among them includes making a liberal use of "directions" under Article 32 and public interest litigation under Article 32. Through these two new dimensions, Article 32 has seen the sociological understanding of the term "equity" whereby, invoking equity jurisdiction under Article 32, directions are being issued for greater public interest or public good including enforcement of Fundamental Rights.

a) Frame guidelines and give direction:

Exercising the ample power conferred to the Supreme Court, necessary directions can be issued under Article 32 read with Article 142 to fill the vacuum until such time the legislature steps in to cover the gap or the executive discharges its role.[34] In exercise of this power, various directions and guidelines have been issued by the

[31]Bandhu case, *supra* note 27.
[32]3 Basu, *supra* note 26, at 3720.
[33]3 Basu, *supra* note 26, at 3783.
[34]Vineet Narain v. Union of India, 1 SCC 226 (1998).

Supreme Court such as: guidelines relating to emigration act, guidelines for adoption of minor child by foreigners, guidelines and norms for the appointment and transfer of Judges, guidelines which should be followed in the case of arrest and detention of a Judicial Officer.[35] One of the most famous examples of the exercise of such power is the framing of *Vishakha* guidelines for observance in workplaces relating to sexual harassment of working women.[36] In this case, Fundamental Rights were enforced under Article 32 if the Constitution of India in absence of any legislation by exercising power under Article 142. Most recent example of such exercise of power is the issuance of guidelines for the protection of Good Samaritans[37] in which the Court held that:

> *"This Court can issue such directions under Article 32 read with Article 142 to implement and enforce the guidelines, which are necessary for protection of rights under Article 21 read with Article 14 of the Constitution of India so as to provide immediate help to the victims of the accident and at the same time to provide protection to Good Samaritans. The guidelines will have the force of law under Article 141. By virtue of Article 144, it is the duty of all authorities-judicial and civil-in the territory of*

[35]Erach Sain Kanga Etc. v. Union of India and Anr., Writ Petition No. 2632 of 1978 (Guidelines relating to Emigration Act); Lakshmi Kant Pandey v. Union of India, 2 SCR 795 (1984) (Guidelines for adoption of minor child by foreigners); Supreme Court Advocates-on-Record Association and Others v. Union of India (II Judges case), AIR SC 268(1994) (Guidelines and Norms for the appointment and transfer of Judges); Delhi Judicial Service Association v. State of Gujarat, 4 SCC 406 (1991) (Guidelines which should be followed in the case of arrest and detention of a Judicial Officer).

[36] Vishakha and Ors. v. State of Rajasthan and Ors., AIR SC 3011 (1997).

[37]Savelife Foundation and Ors. v. Union of India (UOI) and Ors., 7 SCC 194 (2016).

India to act in aid of this Court by implementing them."[38]

It can be observed that equitable remedy in the form of guidelines or directions is not *in personam.* However, this understanding of granting equitable remedy is traditional and has undergone a transformation in recent times. Now, though equitable remedies, relief is provided to society at large. Therefore, this invocation of equity jurisdiction is a part of the evolved concept to provide remedy to society at large. Further, it is imperative to point out here that such directions and guidelines, as per equitable principles, can always be requested from the Supreme Court. It further follows that guidelines have always been requested from the Supreme Court and has never been claimed as a right.

b) Public Interest Litigation:

The foundation stone of Public Interest Litigation ("**PIL**") in India was laid down in S.P. Gupta case by Justice Bhagwati who held that, 'any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision.'[39] The Supreme Court in a later case recognized that a person seeking relief in the public interest by filing PIL approaches a court of equity.[40] *Public interest* has been defined as a matter of public or general interest in which a class of the community has a pecuniary interest by which their legal rights and

[38]*Id.*

[39]S.P. Gupta v. President of India and Ors., AIR SC 149 (1982).

[40]Narmada Bachao Andolan v. State of Madhya Pradesh and Anr. and State of Madhya Pradesh v Narmada Bachao Andolan and Anr. and Narmada Hydro-Development Corporation v Narmada Bachao Andolan and Ors., AIR SC 1989 (2011).

liabilities are affected.[41] Therefore, it has been recognized that equity jurisdiction of the Supreme Court can be invoked for the matters concerning public interest. This public interest can stem from Fundamental Rights guaranteed under the Constitution of India or any other statutory right.

B. Scope of Equity Jurisdiction under Article 136(1)

Apart from the Constitutional provisions regarding Appellate Jurisdiction described under Article 132 to Article 134 of the Constitution of India, the Supreme Court has been empowered with discretionary power to grant special appeal from any judgment, decree, determination, sentence or order in any case of any court or tribunal within the territory of India under Article 136 (1).[42]

Article 136 does not confer ordinary power to grant appeal as compared to the one given under Section 96 and Section 100 of the Code of Civil Procedure ("**CPC**").[43] It is important to note here that it is not a right vested in the individuals but a discretion vested in the Supreme Court. Also, since the jurisdiction of the Supreme Court under this provision is discretionary in nature, relief or more appropriately "equitable relief" lies at the discretion of the court and this relief can be moulded as per circumstances and situation to advance interest of the justice.[44] The Supreme Court exercises equity jurisdiction under Article 136 as it is empowered to apply equitable

[41]3 Daniel Greenberg, Stroud's Judicial Dictionary of Words and Phrase 2024-2025 (7th ed. 2010).
[42]INDIA CONST. art. 136, cl. 1. The Article states:
"136. Special leave to appeal by the Supreme Court.
Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India."
[43]N. Suriyakala v. A. Mohandoss & Ors., 9 SCC 196 (2007).
[44]Orissa Cement v. State of Orissa, AIR SC 1676 (1991).

rules and principles if the situation demands for deciding upon cases and granting equitable remedies. Further, this power of the Supreme Court signifies discretion while exercising equity jurisdiction under this provision. This scope of jurisdiction depends upon the power of the Supreme Court to apply equitable principles and grant equitable remedies. Since this power is drawn from Article 136, the scope of the same can be used to determine the scope of equity jurisdiction under Article 136.

The start of the Article with a non-obstante clause itself expresses its overriding effect and indicates the intention of the framers of the Constitution of India to provide a residuary power unfettered by any statute or other provisions of the Constitution.[45] The power has extraordinary amplitude and cannot be taken away, expressly or impliedly, by any legislation. Special nature of the power under Article 136 shifts it beyond the purview of ordinary law in cases where the need of justice demands interference by the Supreme Court.[46] It has been held by the Supreme Court that the power is discretionary and equitable in nature and the Court intervenes when justice, equity and good conscience require such intervention.[47] Further, relief asked for under Article 136 cannot be denied if the party is entitled to it purely on the basis of equitable considerations though not under law.[48] Such special leave can be granted when the question which arises for consideration is more of equity and fair play than law.[49] The jurisdiction under Article 136 is plenary and residuary and is basically one of conscience.[50] Such extraordinary jurisdiction has been conferred upon the Supreme Court by the Constitution with

[45]A.V. Papayya Sastry v. Government of Andhra Pradesh, 4 SCC 221 (2007) (hereinafter A.v. Papayya Sastry).
[46]Union Carbide Corporation v. Union of India, 4 SCC 584 (1991).
[47]A.V. Papayya Sastry, *supra* note 45.
[48]Chandra Bansi Singh, *supra* note 19.
[49]Nirmal Chandra Bhattacharjee and Ors. v. Union of India and Ors., 2 SCC 363 (1991).
[50]Union of India v. Ashok Kumar Aggarwal, 16 SCC 147 (2013).

an implicit trust and faith and must be exercised with extraordinary care and caution.[51]

In a nutshell, it can be said that by virtue of equity jurisdiction of the Supreme Court under Article 136, it has discretionary power to grant special leave. This power, although is of extraordinary amplitude, but must be exercised on the basis of conscience and must be invoked only when it is required by justice, equity and good conscience. This jurisdiction being of equitable nature, the discretion is to be exercised in an equitable way and by following principles of equity. Reliefs, purely based on equitable considerations, can be awarded under Article 136 by the Supreme Court since it is an exercise of equity jurisdiction.

The Supreme Court has held that power under Article 136 forms part of the basic structure of the Constitution,[52] thus, making it unfettered even by a constitutional amendment. The scope of equity jurisdiction of the Supreme Court under this provision is malleable. Further, the provision itself does not contain any qualifying word. Therefore, the Supreme Court by exercising its equity jurisdiction under Article 136 may pass any equitable order considering facts of the case.

C. Scope of Equity Jurisdiction under Article 142(1)

The Supreme Court has been vested with extraordinary power under Article 142(1) of the Constitution of India to make any such order or pass a decree which is necessary to do complete justice in a case or matter pending before it.[53]

[51]Tirupati Balaji Developers Pvt. Ltd. v. State of Bihar, AIR SC 2351 (2004).
[52]Delhi J.S.A. v. State of Gujarat, AIR SC 2179 (1991); Kunhayammed v. State of Kerala, AIR SC 2587 (2000); Supra note 46; Durga Shankar Mehta v. Raghuraj Singh, AIR SC 520 (1954).
[53]INDIA CONST. art. 142. The Article states:

The use of the expression "complete justice" instead of "justice" should be specially noted which indicates that the provision strives for imparting justice to all parties of the case instead of any one party. The provision does not contain any limitation regarding the causes or the circumstances in which the power can be exercised nor does it lays down any condition to be satisfied before such power is exercised and exercise of such power has been left completely to the discretion of the Supreme Court.[54] This is the reason why the power of Supreme Court under Article 142(1) is extraordinary and discretionary in nature. The nature of power further indicates that there is no static formula for the exercise of this power being plenary in nature. This power is invoked to redress injustice and in doing so the Supreme Court acts in its equity jurisdiction to balance the conflicting interests of the parties and advance the cause of administration of even-handed justice.[55] Further, the rationale behind the power being justice-oriented, is guided by equitable principles.[56] It can also be said that nature of the power under Article 142(1) is residuary and is based on equitable principles.[57] If there is no provision in law or the situation arisen cannot be effectively dealt under the existing laws, that will not deter the Supreme Court to

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

The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

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

[54]E.S.P. Rajaram and Ors. v. Union of India and Ors., 2 SCC 196 (2001) (hereinafter E.S.P. Rajaram).

[55]Lalaram v. Jaipur Development Authority, 11 SCC 31 (2016).

[56]*Id.*

[57]Laxmidas Morarji v. Behrose Darab Madan, 10 SCC 425 (2009).

proceed under Article 142 to do complete justice between the parties.[58] In such cases, the Supreme Court is not required to have recourse to any provisions of the CPC or any other principle deductible therefrom.[59]

It can be stated in simple terms that Supreme Court while exercising discretion under Article 142 is guided by equitable principles. Further, power to do complete justice forms part of one of the three general classes of the division of Equity Jurisdiction and power to do complete justice can be effected by granting equitable remedies. Therefore, the Supreme Court by invoking equity jurisdiction does complete justice by granting equitable remedies guided by equitable principles. This can be substantiated by Supreme Court's verdict that equitable considerations must be looked into while passing orders under Article 142 and the Court should strive to "evolve an appropriate remedy, in facts and circumstances of a given case, so as to further the cause of justice, within available range and forging new tools for the said purpose, if necessary, to chisel hard edges of the law."[60] The Supreme Court, by invoking equity jurisdiction, has evolved various equitable remedies and recognized new equitable rights "to chisel hard edges of the law" which are discussed below.

a) Stay of execution of sentences:

Stay of execution of sentences is an equitable remedy. This is because when a stay is granted, "the state is enjoined from implementing" the imposed sentence and the claims of the petitioner are allowed to be heard.[61] The Supreme Court, while exercising its equity jurisdiction

[58]Delhi Development Authority v. Skipper Construction Co. (P) Ltd., 4 SCC 622 (1996).
[59]Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai, 3 SCC 214 (2004).
[60]C. Chenga Reddy v. State of A.P., 10 SCC 193 (1996).
[61]Hill v. McDonough, 547 U.S. 573, 584 (2006).

under Article 142, may pass an order to stay the execution of sentence and to grant bail pending the disposal of an application for the special leave to appeal under Article 136.[62]

b) Frame guidelines and give directions:

This has been dealt with under Section A of this Part of the Article. The Supreme Court has the power to frame guidelines and give directions under Article 32 read with Article 142 of the Constitution of India by invoking equity jurisdiction.

c) Curative petition:

The power conferred upon the Supreme Court under Article 142 is curative in nature.[63] Using the same and Article 129[64] of the Constitution of India, the Supreme Court evolved the concept of curative petition in the case of *Rupa Ashok Hurra v. Ashok Hurra and Anr*. ("***Rupa Ashok Hurra***").[65] Under curative petition, the Supreme Court may reconsider its judgments in the exercise of its inherent power in order to prevent abuse of its process and to cure a gross miscarriage of justice.[66]

Although in the opinion of the majority, it was not possible to enumerate all grounds on which the petition may be entertained, the Court laid down the *ex debito justitiae* obligation and enlisted two grounds.[67] These grounds are basically the situations where there is violation of principles of natural justice.

[62]K.M. Nanavati v. State of Bombay, AIR SC 112 (1961).
[63]Supreme Court Bar Association v. Union of India, 4 SCC 409 (1998).
[64]INDIA CONST. art. 129. The Article states:
"129. Supreme Court to be a Court of Record.
The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself."
[65]Rupa Ashok Hurra v. Ashok Hurra and Anr., 4 SCC 388 (2002).
[66]*Id.*
[67]*Id.*

- The first is the situation where the person filing the curative petition was not party to the dispute but the judgment was given which adversely affected him or when he was party to the dispute but no notice of the proceedings was served upon him and the matter proceeded as though notice had been served.
- The second ground arises in the situations where scope of apprehension of biasness arises when the judge presiding over the dispute fails to disclose his connection with the parties and the judgment is passed, adversely affecting the person filing the curative petition.

The Supreme Court laid down a separate procedure, where other than these grounds, the curative petition can be accepted. According to the *Rupa Ashok Hurra* case, a second review is not permissible and the Court distinguished the same from the curative petition.[68] Being the highest court of the land, the Supreme Court possesses powers to correct a judgment in curative petition if the parameters laid down in *Rupa Ashok Hurra* case are satisfied.[69] This was incorporated in the Supreme Court Rules 2013, under Order XLVIII. By invoking equity jurisdiction, the Supreme Court evolved the extraordinary remedy of curative petition and also laid down the grounds and procedure for acceptance of this petition (equitable procedure). This was termed as creation of *curative jurisdiction* of the Supreme Court. If so, curative jurisdiction forms part or is a subset of equity jurisdiction of the Supreme Court.

d) Social Justice Bench:

The year 2014 marked a new beginning in Indian legal system for direct admission of Social Justice when the Supreme Court

[68]Yakub Abdul Razak Memon v. State of Maharashtra, 9 SCC 552 (2015).
[69]State of Tamil Nadu v. State of Kerala, 12 SCC 696 (2014).

established a Social Justice Bench to deal with the problem of the society and its members. Though the Bench got scrapped under the regime of Justice T.S. Thakur, it has now been reconstituted and will hear PILs and other related matters including environmental matters.

The system of equity has made constant efforts to bring justice and fairness. As per *Aristotle*, equity and justice 'coincide'.[70] For administration of Justice, the system recognizes natural law or rights and provides means to protect them. Principles of equity have provided means to bring Social Justice. Social justice can be understood as a species of genus 'justice' and given the wide scope of equity; it essentially comes under the concept of equity.[71] Hence Social Justice Bench have been constituted by invoking equity jurisdiction of the Supreme Court have remedies, which will be provided will be equitable.

It is within the overreaching power of the Supreme Court to do complete justice with a matter under Article 142(1) of the Constitution to come up with such bench. Therefore, it can be said that the Social Justice Bench is constituted under Article 142(1) read with Article 145[72] of the Constitution of India. The Supreme Court is the custodian of the Constitution in India. Justice is an amalgamation of social, economic and political justice as per the Preamble and the Constitution of India has maintained securing Social Justice as its ideal since the time of its inception.

In essence, it can be said that Supreme Court exercises power vested to it by Article 142 under equity jurisdiction. This is because the exercise of this power is guided by equitable principles, as the main aim of this provision is to do complete justice, which can be effected by granting equitable remedies. The Supreme Court, because of the

[70]C. Douzinas, The End of Human Rights 42 (1st ed. 2000); A. Hudson, Equity and Trusts 10 (8th ed. 2015).
[71]Air India Statuary Corporation v. United Labour Union, AIR SC 645 (1997).
[72]INDIA CONST. art. 145.

presence of this provision, is not stopped to do complete justice in the cases where the existing provisions are insufficient. By using the power under this provision, the stay can be granted in execution of sentence. Further, exercising its power under this Article, the Supreme Court may frame directions and guidelines where there is a lacuna in the law on a particular subject matter. Even under the Social Justice Bench, justice will be provided through Article 142. Also, by invoking this Equity Jurisdiction, the Supreme Court evolved extraordinary equitable remedy of curative petition. Therefore, the provision which confers extraordinary discretionary power upon the Supreme Court to make any order to do complete justice between the parties, which can be realised by awarding equitable remedies, is guided by equitable principles.

IV. LIMITS OF EQUITY JURISDICTION OF THE SUPREME COURT

It has been observed from the above part that wide discretionary power has been vested with the Supreme Court. Although, this discretionary power strengthens judiciary in a long way, however, it comes with its own disadvantages. This power can be misused either by the litigants or the judges themselves. When there are no floodgates for invoking equity jurisdiction of the Supreme Court, it may be abused by the litigants. Litigants may start approaching the court for trivial matters and to ask for something unreasonable. This will lead to increase of cost per case and increase in the burden of cases on the apex court of the country.

Also, when such wide discretion is given to a court by the Constitution itself, which is essentially plenary, irrespective of how high the moral code is maintained by the court, element of

arbitrariness seeps in. This arbitrariness will go against delivery of justice which is the ultimate aim of the equity jurisdiction. Further, by invoking this jurisdiction, the judge may surpass the law, hence functioning as a legislator. Therefore, to prevent these *susceptible* abuses of equity jurisdiction, some limits have been set by the Supreme Court itself.

These limits, which have been discussed below, may overlap at some point. However, it has been tried to keep them separate as far as possible. These limits have been divided into four sections. In Section A, limit over the exercise of discretion for invoking discretion has been discussed which is principled discretion and must be used judicially. In Section B, Maxims of Restraint and Maxims of Defense have been discussed as to how these maxims act as friction over the invocation of Equity Jurisdiction of the Supreme Court. In Section C, Section D and Section E, limits over invocation of Equity Jurisdiction by the Supreme Court under Article 32, Article 136(1) and Article 142(1) respectively along with the discussion that these limits are self-imposed and may be overridden by the Supreme Court, whenever necessity is felt. Although these limits have not been sharply defined and are not mandatory upon the Supreme Court, these limits are expected to be followed and respected in order to preserve the functioning of democracy and demarcating the line between respective organs of the State.

V. LIMIT OVER EXERCISE OF DISCRETION

Equity jurisdiction can be exercised only when some discretionary power has been entrusted with the Court. It is only by employing this discretionary power, equity jurisdiction is exercised. However, it is pertinent to note here that such discretion is not the personal discretion of the judge. Further, equitable relief is not to be granted on the unconstrained and intemperate discretion of what judge feels the

best. Discretion, in the context of exercising equitable jurisdiction, refers to *principled discretion* which is guiding light for any judge to grant equitable relief.[73] This discretion, which is *judicial discretion*, is limited. Judicial discretion is the discretion which is exercised on the basis of what is fair in the given circumstances is guided by the rules and principles of law.[74] While exercising judicial discretion, principles of equity are followed contrary to personal discretion. In the words of Benjamin Cardozo, the exercise of judicial discretion should be inspired by the established principles informed by earlier practices and based on logic in order to do what is just and fair.[75] Lord Mansfield in his famous *dictum* said that judicial discretion should be the one based on law governed by rule and one which is not arbitrary and vague.[76]

This is particularly true in the Indian scenario too, where such discretion in the case of equity jurisdiction is exercised in accordance with justice, equity, good conscience and fairness to both the parties.[77] It has been held by the Supreme Court that discretion is not to be exercised in derogation of established principles of law and

[73]Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 614 (1996-1997) (hereinafter Kennedy).
[74]Black's Law Dictionary, *supra* note 10, at 534.
[75]BENJAMIN CARDOZO, THE NATURE OF JUDICIAL PROCESS 141 (1921) (The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains.).
[76]Rex v. Wilkes (1770, K. B.) 4 Burr. 2527, 2539 (Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule not by humour; it must not be arbitrary, vague and fanciful, but legal and regular.).
[77]Kanshi Ram v. Om Prakash Jawal, 4 SCC 593 (1996).

cannot be "arbitrary, fanciful and vague."[78] Further, while exercising discretion, facts and circumstances of a particular case must always be taken into consideration. Even conduct of the parties is also looked at while exercising judicial discretion.[79] Also, while exercising discretion under Article 136, equitable considerations must be noticed, otherwise, the Supreme Court will be failing in its duty.[80] Discretion must be exercised in terms of the existing statute and the same cannot go against any statutory provision.[81] If the exercise of discretion *inter alia* will be against the public policy, such discretion may be denied.

Equity jurisdiction inherently forms a limit over a court's exercise of judicial discretion. This is because while exercising the discretion under equity jurisdiction, principles of equity are to be followed. These, principles of equity, over so many years of application of the doctrine of *stare decisis* have become rigid and fixed. Thus, while invoking equity jurisdiction, the Supreme Court is required to keep itself within the bounds of the established principles of equity. This, in a way, forms a limit on the exercise of discretion by the Supreme Court, which in turn becomes a limit over its Equity Jurisdiction. Since discretion forms basis for the exercise of the equity jurisdiction by the Supreme Court, this limit on exercise of discretion will also act as a limit on the exercise of equity jurisdiction under Article 32, Article 136 and Article 142 of the Constitution of India.

A. Maxims of Restraint and Defense

A number of substantive maxims have been formed by the court of equity. Few among such maxims restrain the use of equity. These maxims can be called as *Maxims of Restraint*. One such maxim is

[78]Jai Prakash Singh v. State of Bihar and Anr, 4 SCC 379 (2012).
[79]M.P. Mathur v. DTC, 13 SCC 706 (2006).
[80]Shivanand Gaurishankar Baswanti v. Laxmi Vishnu Textile Mills, 13 SCC 323 (2008).
[81]Shiv Kumar Sharma, *supra* note 18.

"equity follows the law". This maxim forms significant limit over equity jurisdiction, as the court sitting in equity cannot depart from substantial rule of law.[82] However, in England, in the case of conflict between equity and law, equity will prevail. Thus, equity follows the law but not slavishly nor always.[83] Conversely, in India, equity must act strictly within the strict bounds of the substantive rule of law. If the exercise of equity jurisdiction violates any express provision of law, the same cannot be done and equity jurisdiction can be exercised only when no law operates in the field.[84]

In addition, there are *Maxims of Defense*, which can be used by the defendants to show why the case of the plaintiff seeking equitable remedy should not be accepted. Hence, they constrain and limit judicial discretion and in the process, acts as limits. Some of the recognized Maxims of Defense are "delay defeats equity" and "he who comes to equity must come with clean hands". Although these are at the discretion of the Judge to accept, however, may be used to create some friction against abuse of equity jurisdiction, thus limiting its scope. Example can be taken of a case in which the Supreme Court refused to grant any relief under Article 136 on the basis of clean hands doctrine.[85]

B. Limits over invocation of Equity Jurisdiction under Article 32

Article 32 has been considered as the most important provision in the Constitution of India. The Supreme Court has considered it to be part of the basic structure of the Constitution of India. The Supreme Court itself has considered the need to limit the plenary power vested in it under Article 32. The jurisdiction (or equity jurisdiction) under this

[82]Kennedy, *supra* note 73, at 617.
[83]Graf v. Hope Bldg. Corpn., 254 NY 1.
[84]Shiv Kumar Sharma, *supra* note 18.
[85]Anil Bansal v. Ashok Kumar Bansal & Ors., 9 SCC 368 (2005).

Article can be invoked only for enforcement of the Fundamental Rights guaranteed by the Constitution of India and not any other legal right.[86] It has been held by the Supreme Court in several of its decisions that in a proceeding under Article 32, no question other than relating to Fundamental Rights can be raised.[87] Further, purely executive power cannot be interfered with in absence of violation of constitutional limitation circumscribing such power.[88] Article 32 cannot be used as a means to interfere in the implementation of a policy in absence of a direct and casual violation of a fundamental right guaranteed by the Constitution of India.[89] Though delay, acquiescence and the like do not take away the jurisdiction of the Supreme Court under Article 32, the court may refuse to grant relief in the exercise of its jurisdiction where delay affects the merits of the petitioner's claim.[90] Thus, in this case, the maxim "delay defeats equity" acts as a limit over the invocation of equity jurisdiction under Article 32. The Supreme Court cannot give directions to amend Rules or Acts. Furthering the point, no direction can be given which would be contrary to rules or the Act.

Coming on to the limits over the use of PIL, it should be kept in mind that where a right or liability is created by a statute, which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.[91] If an action is covered under a self-contained code, the jurisdiction of the Supreme Court could not be invoked in matters relating to its provisions.[92] Also, PIL can only be

[86]3 Basu, *supra* note 26, at 3735.
[87]Gopal Das v. Union of India, AIR 1955 SC 1; Esmail v. Competent Officer, AIR 1967 SC 1244; Muneeb v. Government of J&K, 4 SCC 24 (1984); Amar Singhji v. State of Rajasthan, AIR 1955 SC 504; Star Sugar Mills v. Union of India, 4 SCC 299 (1983).
[88]Gupta v. Union of India, SCC Supp 87 (1981).
[89]English M.S.P.A. v. State of Karnataka, 1 SCC 550 (1994) (hereinafter English M.S.P.A.).
[90]Tilokchank v. Munshi, 1 SCC 110 (1969).
[91]Titaghur Paper Mills Co. Ltd. v. State of Orissa, AIR SC 603 (1983).
[92]G.Veerappa Pillai v. Raman and Raman Ltd., AIRSC 192 (1952).

used to seek a remedy against any grievance when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it.[93] Writ Petitions are also not meant to adjudge upon disputed question of facts.[94] The Supreme Court itself has prepared a guideline for PILs for the better administration of justice through the system.[95]

Necessary directions or orders pertaining to the issue arising in the PIL can be given to fill the existing vacuum or void which is preventing the aggrieved party from getting a suitable remedy till a suitable law is enacted.[96] However, no directions can be given for amending an Act or the Rules.[97] The Judiciary, through PILs, strives to safeguards only fundamental rights[98] guaranteed by the Constitution of India but it cannot be used as a mean to interfere in the implementation of a policy.[99]

C. Limits over invocation of Equity Jurisdiction under Article 136(1)

Power to the Supreme Court under Article 136(1) is extraordinary in nature. Its limit, while chasing injustice, is the sky.[100] This extraordinary power should be used by the Supreme Court with extraordinary care and caution. In the Constitutional Assembly Debates, Pandit Thakur Das Bhargava while expressing his opinion said that the Supreme Court, while exercising power under this

[93]Union of India v. Association for Democratic Republic, 5 SCC 294 (2002).
[94]Rourkela Shramik Sangh v. Steel Authority of India Ltd. and Anr., 4 SCC 317 (2003).
[95]State of Uttranchal v. Balwant Singh Chaufal, AIRSC 1029 (2010).
[96]*Supra* note 93.
[97]*Id*.
[98]3 Basu, *supra* note 26, at 3720.
[99]English M.S.P.A., *supra* note 89.
[100]A.V. Papayya Sastry, *supra* note 45.

provision, should not be restricted "by any canon or provision of law". The makers of the Constitution of India also expected that the Supreme Court should not accept special leave unless it finds that a case involves a serious breach of some principle in the administration of justice or breach of certain principles which strike at the very root of administration of justice.[101] The intention of the legislators regarding power under this Article was for the Supreme Court to exercise it by keeping in mind the settled judicial precedents.[102] Therefore, interference should not be permitted unless substantial and grave injustice has been done by disregarding the forms of legal process or some violation of the principles of natural justice or otherwise.[103]

Although the power has plenary in nature, the Court has imposed certain restrictions upon itself while exercising this power. In exercise of this extraordinary power, the Supreme Court will not assume a jurisdiction which is not warranted by the provisions of the Constitution nor offer to provide relief which has been omitted in the Constitution, for that will be tantamount to making legislation which is never the function of the court.[104] All remedies available to the aggrieved party under any law before the lower appellate authority must be exhausted. Although, Article 136 does not contain any period of limitation, the appeal must be filed without undue delay.[105] Delay is not condoned in the case of unusual and unexplained delay and laches[106] or where the petitioner has not come up with clean hand or where dilatory tactics have been adopted.[107] It can be observed that

[101]8 Constitutional Assembly Debates: Official Report 638-639 (photo. reprint 2003).
[102]Ramakant Rai v. Madab Rai, 12 SCC 395 (2003).
[103]Sanwat Singh v. State of Rajasthan, AIRSC 715 (1961).
[104]Dhakeshwari Cotton Mills Ltd. v. CIT, AIR SC 65 (1955); Om Prakash Sood v. Union of India, 7 SCC 473 (2003).
[105]1 Jain, *supra* note 2, at 789.
[106]G.C. Gupta v. N.K. Pandey, 1 SCC 316 (1986); CCE v. Mathew Kurien, 9 SCC 23 (1999); State of U.P. v. Manisha Dwivedi, 6 SCC 763 (2001).
[107]N. Balakrihnan v. M. Krishnamoorthy, 7 SCC 123 (1998).

the Supreme Court recognized principles of equity to act as a limit over invocation of equity jurisdiction. These principles are "delay defeats equity" and "he who comes to equity must come with clean hands". However, the provision itself does not provide for any limit on itself, making it plenary. Thus, at last everything lies at the discretion of the judge and the only limit upon the exercise of Equity Jurisdiction under Article 136 is the "wisdom and good sense of the Judges" of the court.[108]

D. Limits over invocation of Equity Jurisdiction under Article 142(1)

The power granted to the Supreme Court under Article 142 is a step ahead to the power conferred upon it under Article 136. The power is of wide amplitude. However, self-imposed restrictions exist while exercising equity jurisdiction under Article 142. The power was held to be of ancillary in nature which can only be exercised when not in express conflict with the substantive provisions of law.[109] Equity jurisdiction under Article 142 cannot be invoked to override any express provision.[110] Though there is no limit on the use of power in the provision, it cannot be used to supplant the substantive provisions as the power is supplementary in nature.[111] Power under Article 142 is curative in nature. It cannot be used to supplant any existing substantive law which is applicable over the situation in question.[112] Further, this power is extended to make guidelines for an issue but only in those cases where the laws are not adequate to deal with an issue or there exists a lacuna in the law. Such guidelines cannot be framed or directions cannot be given where existing laws are

[108]Balakrishna Iyer v. Ramaswamy Iyer, AIR SC 195 (1965).
[109]Naresh Shridhar case, *supra* note 27.
[110]E.S.P. Rajaram, *supra* note 54.
[111]State of Punjab v. Rafiq Masih (White Washer), 8 SCC 883 (2014).
[112]*Supra* note 63.

sufficient. Curative petitions are also accepted only in exceptional and extraordinary cases. Invocation of equity jurisdiction for the purpose of acceptance of curative petition has been limited by the grounds laid down in *Rupa Ashok Hurra* case. Also, it should be kept in mind that once Judgment or Order is passed in the Review Petition, the curative petition must be filed within a reasonable time.[113] Thus, the maxim of "*delay defeats equity*" also operates as a limit for the curative petition.

To summarize, it can be said that provisions *prima facie* do not contain any limitation upon the exercise of equity jurisdiction. However, while exercising the equity jurisdiction, discretion is an indispensable element, over which some limits are imposed. Over and above these limits, there are self-imposed limits over the provisions under which the Supreme Court can invoke equity jurisdiction. Furthermore, in India, in the case of conflict between equity and law, law will prevail and will act as a limit on equity jurisdiction of the Supreme Court.

VI. CONCLUSION

Blackstone wrote, "*a court of equity and a court of law, as contrasted to each other, are apt to confound and mislead us: as if the one judged without equity, and the other was not bound by any law.*"[114] However, in India, no such distinction in the jurisdiction of courts persists and the Supreme Court act as both, the court of law as well as the court of equity. Hence, confusion as to what extent equity jurisdiction can be invoked for the purpose of delivering justice and where the limit to such invocation arises gets increased.

[113]Supreme court Rules, 2013, rule 3, order XLVIII.
[114]William Blackstone, Commentaries on the Laws of England: A Facsimile of the First Edition of 1765—1769 (1979).

In India, provisions of the Constitution of India under which equity jurisdiction can be invoked implicitly give extraordinarily wide and discretionary power to the Supreme Court. The provisions, *per se*, do not impose any restriction or limit upon such use of power. Therefore, the Supreme Court, through various cases, has created a periphery for itself within which, such power can be exercised. Examining the language of the provisions signifies that it was the intention of the makers of the Constitution to provide the Supreme Court with open-ended and elastic power which can be exercised in extraordinary circumstances in order to preserve democratic system of this country. The self-imposed restrictions are also in line with intentions of framers of the Constitution of India. These restrictions should be followed and respected as far as the circumstances permit.

There is an alternate view which can be taken as a reason as to why the makers of the Constitution did not impose any limit on the provisions. It can be said that makers of the Constitution did not intend to limit the powers conferred upon the Supreme Court under the provisions because, there might be times when circumstances demand bypassing the restrictions and expansion of the boundary within which equity jurisdiction can be invoked. Absence of Constitutional Assembly Debates on Article 142 further strengthens this view. However, in such cases, equitable principles should be taken into consideration and principled discretion should be exercised to invoke equity jurisdiction for delivery of justice, in the form of equitable remedies, in greater public benefit with an aim of strengthening democracy and rule of law.

FINANCIAL EXCLUSION OF MINORITIES: ISLAMIC BANKING TO THE RESCUE?

Akshata Kumta[*] *and Shaalini Agarwal*[**]

Abstract

After many years of extensive debates, reports and declarations, the RBI in November of 2017 declared that it would not allow for the incorporation of Islamic banking in India. It based its decision on the ground that there were sufficient pre-existing schemes in place for financial inclusion of all sections of society, including the Muslims. Research indicates that certain pre-existing schemes for financial inclusion were not as effective as the Government portrayed them to be. This puts the Indian demographic, especially minorities, at severe risk of exclusion from conventional banking methods. Therefore, Islamic banking could be a potential solution to deal with this problem of exclusion of minorities. This paper seeks to analyze whether this decision of the RBI was truly right and beneficial for the wide Indian demographic.

This paper also seeks to answer the following questions, in corollary to the main premise: would such a non-conventional form of

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banking be constitutionally valid? If it were to be introduced in India, then who would administrate it? What would the short term and long term challenges be, if it were in fact introduced in India? Furthermore, how must it be implemented to effectively deal with all these challenges?

I. AN INTRODUCTION TO INDIA'S SHAKY HISTORY IN RELATION WITH ISLAMIC BANKING

Islamic banking can be most succinctly described as a non-conventional, interest-free banking system which exclusively follows Shariah principles. Due to its non-conventional nature, the questions of its validity, application and implementation within the country have been extensively debated. To understand the scope of the implementation of Islamic banking in India, the Reserve Bank of India ("**RBI**") in 2005, appointed the Anand Sinha Committee to study Islamic Financial Products that could be introduced in India for the purpose of economic inclusion of Muslims.[1] The Committee recommended against Islamic banking as the current regulations governing banking companies in India do not allow Islamic banking. The introduction of Islamic banking would mean amending to the Banking Regulation Act, 1949 along with separate regulations and rules governing interest-free banking.[2] Moreover, the Committee

[1]Shariq Nisar, *Islamic Banking in India: The Flip-Flop*, INDIAN CENTRE FOR ISLAMIC FINANCE (Jan. 2, 2017, 12:00 pm), http://icif.in/icif-news-event.php?event=ei&id=278.

[2]Press Trust of India, *'Islamic window' in banks would attract huge Gulf money: ICIF*, THE ECONOMIC TIMES (Nov. 28, 2016, 8:50 pm), https://economictimes.indiatimes.com/news/economy/policy/islamic-window-in-banks-would-attract-huge-gulf-money-icif/articleshow/55670680.cms.

opined that the tax laws would also have to be amended to allow for interest-free banking provision.

In sharp contrast to this, the Raghuram Rajan Committee in 2008 suggested the inclusion of interest-free banking as a part of financial sector reforms.[3] The Committee recommended that certain appropriate legislative and executive measures should be taken to permit the delivery of low-interest finance for the purpose of financial inclusion and creation of a solid framework for financial products.[4]

Almost as if in compliance with the aforesaid report, various government bodies attempted to introduce principles of Shariah banking into the banking sector of India. For example, in 2016, the RBI proposed Islamic windows to be opened in conventional banks. At the same time, it highlighted the complexities of Islamic finance, various regulatory and supervisory challenges, and the lack of experience of Indian banks in this field.[5]

However, the inaction of the RBI for more than a year following its declaration forced the Press Trust of India ("**PTI**") to file a petition under the Right to Information Act, 2005 to inquire about the status of the window. In response, the RBI revealed that after reconsideration, it had reneged its proposal on the grounds of making "wider and equal opportunities available to all citizens to access banking and financial services".[6] This development was met with bouts of criticism,

[3]Government of India, *Report of the committee on Financial Sector Reforms*, A HUNDRED SMALL STEPS, 8 (2008), http://planningcommission.nic.in/reports/genrep/rep_fr/cfsr_all.pdf.
[4]*Id.*
[5]Ashwini Shrivastava, *Sharia banking: RBI proposes 'Islamic window' in banks,* PRESS TRUST OF INDIA (Nov. 20, 2016, 1:19 PM), http://www.ptinews.com/news/8097951_Sharia-banking--RBI-proposes--Islamic-window--in-banks.html [hereafter Shrivastava].
[6]Ashwini Shrivastava, *Not to pursue Islamic banking in India, says RBI*, PRESS TRUST OF INDIA (Nov. 12, 2017, 11:31 AM), http://www.ptinews.com/news/9228772_Not-to-pursue-Islamic-banking-in-India--says-RBI.html.

especially from the Muslim community in India. As a result Public Interest Litigation ("**PIL**") was initiated in the High Court of Jammu and Kashmir to issue a notice to the Government of India and the RBI to enable the Jammu and Kashmir Bank to open up Islamic banking services for the public.[7]

The RBI's shaky stand on Islamic banking coupled with the PIL opened a Pandora's box of opinions on Islamic banking. This was the authors' primary motivation for research on this subject. This paper seeks to analyze the constitutional and practical questions regarding the viability of Islamic banking in India. This paper has four primary parts. Part I explains the principles of Shariah related to banking; Part II tests the viability of Islamic banking against the Constitution of India; Part III recommends a regulatory framework for Islamic banking in India after analyzing the structure for Islamic finance in the United Kingdom and Malaysia; finally, Part IV identifies an additional set of problems that may arise in India in relation to Islamic banking, and suggests potential solutions.

II. PRINCIPLES OF SHARIAH

Shariah law has directives to regulate all the aspects of a person's life, whether secular or religious.[8] The Quran commands that finance be regulated by the principles of Shariah envisaged in it and

[7]Indian Centre for Islamic Finance, *Islamic Banking In J&K: HC Gives Finance Ministry, RBI Two More Weeks To Respond*, ICIF (Mar. 20, 2018), http://www.icif.in/icif-news-event.php?event=ei&id=339; Ishfaq Tantry, *Islamic banking: HC notices to RBI, state*, THE TRIBUNE (Mar. 20, 2018, 12:32 AM), https://www.tribuneindia.com/news/jammu-kashmir/islamic-banking-hc-notices-to-rbi-state/560338.html.

[8]Delwin A. Roy, *Islamic Banking*, 27 MIDDLE EAST. STUD. 427, 427 (1991); Ahmad Hidayat Buang, *Islamic Contracts in a Secular Court Setting? Lessons from Malaysia*, 21 A.L.Q. 317, 317-318 (2007).

implemented by the Sunnah.[9] Shariah lays emphasis on economic development with economic justice at all stages.[10] It insists on sharing of wealth amongst human beings and discourages its concentration amongst a few.[11] It allows individuals wide freedom of contract, which in turn makes room for all transactions but those which are *haram, i.e.* expressly prohibited.[12] Transactions based on ownership and sale, that is, participation in trade and gaining profit, are approved by the Shariah.[13] Islamic law envisages two main forms of prohibition, *Riba* and *Gharar,* the philosophical basis of which is to avoid unjust enrichment.[14]

A. Riba

The word '*riba*' is derived from the Arabic word "raba-wa", which means 'to increase' or 'excess'.[15] Prohibition on riba addresses all transactions where the profit earned by the trader exceeds the efforts put by him.[16] For example, in the Pre-Islamic Arab society, riba consisted of doubling and redoubling of debt on non-repayment of the amount within the stipulated period.[17] Modern forms of riba would even include commitment commissions charged by banks and exorbitant penalties imposed on the customer for late payment.[18] However, prohibition against riba is most closely associated with the

[9]Beximco Pharmaceuticals v. Shamil Bank of Bahrain, EC [2004] APP.L.R. 01/28.
[10]Zamir Iqbal & Abbas Mirakhor, *Progress and Challenges of Islamic Banking,* 41 T.I.B.R. 381, 386 (1999) [hereinafter Iqbal & Mirakhor].
[11]Madiha Khan, *Islamic Banking Practices: Islamic Law and Prohibition of Ribā,* 50, ISLAM. STUD. 413, 413-414 (2011) [hereinafter Khan].
[12]Iqbal & Mirakhor, *supra* note 10, at 386.
[13]Nicholas H. D. Foster, *Islamic Finance Law as Emergent Legal System*, 21 A.L.Q. 170, 172 (2007).
[14]CHARLES PROCTOR, THE LAW AND PRACTICE OF INTERNATIONAL BANKING 769 (1st ed. 2010) [hereinafter PROCTOR].
[15]*Id*.
[16]*Id*.
[17]Mohammad Omar Farooq, Stipulation of Excess in Understanding and Misunderstanding Riba: The Al-Jassas Link, 21 A.L.Q. 285, 287 (2007).
[18]Proctor, *supra* note 14, at 771.

prohibition against fixed interest on debt. It is based on the idea that money, having no intrinsic value, cannot be exchanged as a commodity. It therefore cannot be used to produce more money without sharing the risk.[19] Another reason for the prohibition on riba is that the fixed and predetermined nature of the interest gives the lender a wrongful advantage over the borrower, as the interest is certain but the profit of the borrower is not.[20] Islamic law thus hits the foundation of the conventional banking system. However, this does not mean that Islamic law prohibits trading. Islamic law has its own set of banking products and schemes which are Shariah-compliant. An example of such a product is called *mudaraba*, akin to equity, wherein although the profit-sharing ratio is fixed, the return itself is not.[21] It is a profit-sharing contractual arrangement between the investor *(Rab-ul-maal)* and the bank *(mudareb)*.[22] Under this Shariah-compliant scheme, the bank collects funds from the investor and invests in the business of the borrower, who manages the enterprise. The investor takes risk on its investment, and at the end of the stipulated period of time, the capital is returned to it, along with his share of profit as per the profit sharing agreement. The investor does not have a guaranteed return on his investment, and takes part in losses up to the amount of capital invested by him. The entrepreneur is not liable to incur losses unless they can be attributed to his own negligence.[23]

[19]Ashraf U. Kazi & Abdel K. Halabi, The Influence of Quran and Islamic Financial Transactions and Banking, 20 A.L.Q. 321, 323 (2006).
[20]Khan, *supra* note 11, at 415.
[21]Khaled Qasaymeh, Islamic banking in South Africa: between the accumulation of wealth and the promotion of social prosperity, 44 C.I.L.S.A. 275, at 282-283 (2011).
[22]Nasser M. Suleiman, *Corporate Governance in Islamic Banks*, 22 Society and Economy in Central and Eastern Europe, 98, at 101-102 (2000).
[23]PROCTOR, *supra* note 14, at 782, 785.

B. Gharar

The word '*Gharar'* means 'uncertainty'.[24] Islamic law prohibits transactions which involve unnecessary uncertainty in their outcome, to prevent the unjust enrichment of one party against the other.[25] Gharar invalidates a contract if the risk is significant and it affects the principal outcome of the contract.[26] It is a general term and encompasses other transactions, such as maisir (gambling).[27] An example of gharar would be sale of a commodity when the buyer touches it without seeing it.[28] Gharar also raises issues related to modern-day forward contracts. Forward contracts are contracts for sale of a commodity at a pre-determined price and quantity on a future date.[29] In general, Islamic law does not allow forward contracts as the seller contracts for the goods he does not possess, which results in uncertainty.[30] It only allows those forward contracts, known as *Salam* contracts,[31] where one counter-value exists at the time of the execution of the contract.[32] In other words, Shariah allows for forward contracts in which payment of money is done at the time of execution of contract. This is directly in contrast with modern forward contracts in which payment is made at the time of actual delivery of goods. Moreover, the goods to be sold must either exist or be fungible, and the quantity, quality and other characteristics must be clearly

[24]Frank E. Vogel & Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk, and Return* 88 (Springer, 1998).
[25]Nicholas C. Dau-Schmidt, F*orward Contracts—Prohibitions on Risk and Speculation Under Islamic Law*, 19 Ind. J. Global Legal Stud. 533, 534 (2012) [hereinafter Dau-Schmidt].
[26]PROCTOR, *supra* note 14, at 771, 772.
[27]Sherin Kunhibava & Balachandran Shanmugam, *Sharī'ah and Conventional Law Objections to Derivatives: A Comparison*, 24 A.L.Q. 319, 324 (2010) [hereinafter Kunhibava & Shanmugam].
[28]*Id*.
[29]Dau-Schmidt, *supra* note 25.
[30]Id.
[31]*Id.* at 542.
[32]Kunhibava & Shanmugam, *supra* note 27, at 327.

described.[33] Islamic law also allows another type of forward contract known as *Istisna.*[34] This is a contract in which one party agrees to manufacture a product for the other party at an agreed price. The payment to the manufacturer is made by the buyer only after the product is ready.[35] The contract is immune from revocation once the product is ready.[36]

To sum up, the principles of Shariah-compliant banking are based on principles of fair dealing. It is pertinent to note that the actual scope and purview of Shariah-compliant banking is unfamiliar to many people in India. As a result, the question of its viability in a secular country such as India has arisen time and again. The following section seeks to assess whether this form of banking is constitutionally permissible in India.

III. DOES INDIA TRULY NEED ISLAMIC BANKING AND IS IT CONSTITUTIONALLY VALID?

In 2018, the RBI decided not to pursue Islamic banking in India on the grounds of making "wider and equal opportunities available to all citizens to access banking and financial services".[37] In other words, the RBI meant that there were sufficient schemes in place for the financial inclusion of all the sections of the society - for example, the Pradhan Mantri Jan Dhan Yojana ("**PMJDY**"), which was floated to ensure that all persons have access to bank accounts. While the opinion of the RBI appears tenable at face value, the reality is starkly different. The RBI's reasoning is questionable in light of the World

[33]Dau-Schmidt, *supra* note 25, at 544.
[34]Noor Mohammed, *Principles of Islamic contract law*, 6 J.L. & RELIG. 115, 124 (1988) [hereinafter Mohammed].
[35]Dau-Schmidt, *supra* note 25, at 545.
[36]Mohammed, *supra* note 34.
[37]Shrivastava, *supra* note 6.

Bank Global Findex database, 2017 which reported that almost half of the Indian bank account holders in the year 2017 had inactive accounts.[38] Specifically in the context of PMJDY, the latest data (as on August 1, 2018) on the official website shows that a total of 32.235 crore accounts have been opened and Rs. 80,674.62 crore has been deposited under the scheme, since its inception. This means that the average deposit amount is around a mere Rs. 2600.[39] The RBI in 2015, based on an empirical study, went to the extent of reporting that a significant number of Muslims are voluntarily excluded from short term formal finance because it is not Shariah-complaint.[40] These statistics point not only to the RBI's vacillating stand but also to the fact that there is a clear lack of financial inclusion of Muslims. Islamic windows can be utilized by the RBI to bring the Muslim minority at par with the majority to facilitate financial inclusion. This is in consonance with the idea of social justice, envisaged under Article 14 of the Constitution, which requires equitable distribution of resources and abolition of inequalities of income and opportunity.[41] If the State finds a minority community which is not placed equally with majority community, it is empowered by the Constitution to take positive actions to bring them at par.[42]

The consideration now is whether the practice of Islamic banking is violative of secularism. This question came before the Hon'ble High Court of Kerala in *Dr. Subrahmaniam Swamy v. State of Kerala*[43] in

[38]LEORA CLAPPER ET AL., THE GLOBAL FINDEX DATABASE 2017: MEASURING FINANCIAL INCLUSION AND THE FINTECH REVOLUTION 65 (Apr. 19, 2018, World Bank).
[39]Progress Report, Pradhan Mantri Jan Dhan Yojana (Aug. 01, 2018), https://pmjdy.gov.in/account.
[40]RESERVE BANK OF INDIA, REPORT OF THE COMMITTEE ON MEDIUM-TERM PATH ON FINANCIAL INCLUSION, 42-43 (2015).
[41]Article 14 reads as "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. See Vijay Harishchandra Patel v. Union of India, (2009) 3 GLR 2153, ¶¶ 8-9.
[42]Id.
[43]Dr. Subrahmaniam Swamy v. State of Kerala, (2011) 1 KHC 584, ¶ 10.

which the decision of the Government of Kerala to contribute to the share capital of a Shariah-compliant trading institute was challenged. The main contention of the Petitioner was that the action of the Government was against secularism and specifically violated Article 27 of the Constitution. This was rejected by the Court, which held that the Government of Kerala can contribute to the share capital of the institute to carry on business in a Shariah-compliant manner as the purpose of the transaction is to attain commercial benefits.[44] Merely because the trade has a basis in some religion does not mean that the State violates the ideals of secularism.[45] It further held that State may spend public money on such a contribution as it is not for the purpose of promoting a religion.[46]

The jurisprudence in India and the interpretation of this case is limited to the constitutional validity of the State participating in trade in a Shariah-compliant manner. However, this is just one aspect of a larger, unexplored realm of law. The question still remains as to whether the position taken by the Court will hold good for full-fledged State-run Islamic banks or Islamic windows in State-run banks. In other words, is the State venturing into the prohibited territory of 'promoting religion' or 'violating secularism' by actually setting up Islamic banks?

Secularism essentially entails neutrality of the state towards religion and equal treatment of different religions by the State,[47] which is reflected in Articles 25 to 28 of the Constitution of India. This in turn is based on the idea that religion is a personal affair and should be

[44] i*d.* at ¶ 36.
[45] *id.* at ¶ 52.
[46] *id.* at ¶ 54.
[47] The political ideology of Secular state was born as a result of a series of religious wars in seventeenth century Europe that led to massive destruction of human life and property. It was established by the Peace of Westphalia (1648) which took away the sovereignty of rulers over religious affairs.

kept outside the public sphere.[48] The State is prohibited from identifying with any religion or according preferential treatment to any religion.[49] However, this is not to suggest that there is a complete ban on the Indian State's association with religion.[50] The State may associate itself with an activity that has some basis in a religion, provided that the State's association does not result in the direct promotion and propagation of the religion.[51] The test to ascertain whether the State is promoting a religion is to examine the purpose of the State's activity.[52] For example, introduction of Sanskrit as an elective by the Central Board of Secondary Education was not held to be violative of secularism, as the purpose of such introduction was to better the understanding of Indian culture and not to propagate any religion.[53] Also, the affiliation of an educational institution imparting optional religious instruction apart from secular education was held not derogatory to the secular character of the state as the purpose was the protection of minorities and promotion of education.[54] Similarly, expenditure to facilitate Haj pilgrimage,[55] contribution to ensure proper administration of religious trusts and institutions,[56] provisions for academic research on the life of Guru Nanak in relation to its impact on Indian civilization and culture[57] were held not to be hit by

[48]Kevin Y. L. Tan, *Secularism and the Constitution: Striking the Right Balance*, STATE AND SECULARISM: PERSPECTIVE FROM ASIA 137, 139 (Michael Heng Siam-Heng & Ten Chin Liew ed., 2010).
[49]S.R. Bommai v. Union of India, (1994) 3 SCC 1, ¶ 146.
[50]Kidangazhi Manakkal Narayanan Nambudiripad v. State of Madras, AIR (1954) Mad 385, ¶ 6.
[51]Dr. Subrahmaniam Swamy v. State of Kerala, (2011) 1 KHC 584, ¶ 52.
[52] *id.* ¶ 43.
[53]Santosh Kumar v. Ministry of Human Resources, AIR (1995) SC 293, ¶ 19.
[54]The Ahmedabad St. Xavier's College Society v. State of Gujarat and Ors, AIR (1974) SC 1389, ¶ 139.
[55]Mahanagar Ghaziabad Chetna Munch v. The State of Uttar Pradesh, (2007) 1 ADJ 77, ¶¶ 54-56.
[56]Mahant Sri Jaganath Ramanuj Das v. The State of Orissa, AIR (1954) SC 400, ¶¶ 9-10.
[57]DAV College v. State of Punjab, AIR (1971) SC 1737, ¶¶ 25-29.

the Constitutional limitation as their purpose and direct effect is not to promote religion.

To test the idea of Islamic banking against secularism, we need to look at the purpose of introducing Islamic banking in India. It has a two-fold purpose: the financial inclusion of Muslim minorities on the one hand and promotion of trade and flow of capital on the other.[58] It is not to promote and propagate the teachings of Islam. For that same reason, public money can be spent on it without violating Article 27 of the Constitution.[59] Moreover, secularism is related to equality of religions and bringing the minority communities at par with the majority communities.[60] The Government, however, must observe complete religious neutrality. It must make sure that the Islamic banking institutions only focus on financial inclusion of the Muslims and do not get involved into advancement of religion itself.[61] Therefore, introducing Islamic banking within the purview of the Indian scenario is to facilitate secularism rather than impede it.

IV. RECOMMENDATIONS FOR ADMINISTRATIVE FRAMEWORK FOR ISLAMIC WINDOWS IN INDIA: A CASE STUDY OF UNITED KINGDOM AND MALAYSIA

The next question that arises in relation to Shariah finance is how to make space for it in India. For this the authors have looked into the practice and regulatory regime specific to Islamic banks in the United Kingdom ("**UK**") for the reason that it is also a secular country which

[58]Shrivastava, *supra* note 5.
[59]Article 27 read as "No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination".
[60]Vijay Harishchandra Patel v. Union of India, 2009 3 GLR 2153, ¶¶ 9-10.
[61]*Id.* at ¶ 13.

was once dominated exclusively by conventional banks, similar to India. However, owing to various pitfalls that the system in UK suffers from, the authors have also looked at the practice in Malaysia, which has a well-developed system and thriving Islamic finance to suit its Muslim-majority population. In this section, the authors analyze the historical and administrative set-up of Islamic windows and banks in both of these countries in order to select the most suitable features for India. By this, a suitable model is sought to be recommended for Islamic banking in India.

A. Case Study: United Kingdom

Islamic Banking was introduced in the United Kingdom in the 1980s with the establishment of the Al-Baraka Bank, which operated with a license. Although this bank was shut down in 1993 due to certain complications, it paved the way for the concretization of Islamic finance in the UK.

The British banking system was regulated by the Financial Services and Markets Authority Act, 2000 ("**FSMA**").[62] This Act mandated a regulatory authority for banking and financial services, named the Financial Services Authority ("**FSA**"). The FSA was the body that authorized the conduct of a 'regulated activity' with regard to banking. It must be noted at the outset that while the term 'banking' itself is not defined as a 'regulated activity' in the FSMA Act, 2000, the act of 'accepting deposits' is generally accepted as a sufficient threshold to allow 'banking' to fall within the scope of the Act.[63] The violation of the principles enshrined in the Financial Services and Markets Authority Act, 2000 (FSMA) amounted to a criminal offence.

The FSA regulated the conduct of conventional and non-conventional modes of banking. As a result, it has authorized and supervised the

[62]Financial Services and Markets Act, 2000, Part II, §2, 2012 c.21 (Eng.).
[63]Financial Services and Markets Act, 2000, Part II, §5, 2012 c.21 (Eng.).

establishment and growth of Islamic windows in banks and full-fledged Islamic banks in the UK. The first fully-fledged Islamic bank authorized by the FSA was the Islamic Bank of Britain. Following this, the UK has seen major development in the Islamic banking scenario, making it the largest Islamic banking hub in the western world.

The FSA operated on a non-discriminatory basis, whereby it would grant a bank or financial institution with permission to carry on a regulated activity.[64] In matters of authorizing institutions to conduct their activities, the FSA ensured that all institutions, whether they abide by religious principles or conventional banking principles, are subject to the same standards.[65] Therefore, the threshold for allowing any regulated activity to be authorized is set at uniformly high for all institutions, irrespective of their religious affiliation.[66]

The original text of the FSMA was in operation till 19 December 2012. On this date, the Parliament substantially amended the FSMA by the Financial Services Act, 2012 to ensure better regulation of the banking system. It is pertinent to note that this amendment was effective when the United Kingdom was still a member of the European Union. As a result of the amendment, from the 1 April 2013, the FSA was abolished and replaced by two statutory bodies - the Financial Conduct Authority and the Prudential Regulatory Authority.[67]

The Financial Conduct Authority ("**FCA**") is a quasi-judicial authority, similar to its predecessor. The FCA is a company limited by guarantee. Its primary duty is to ensure that banks conduct their

[64]Financial Services and Markets Act, 2000, Part II, §19, 2012 c.21 (Eng.).
[65]Financial Services and Markets Act, 2000, Part IV, §40, 2012 c. 21(Eng.).
[66]Howard Davies, Conference on Islamic Banking and Finance Bahrain, Islamic Finance and the UK Financial Services Authority, (March 2, 2003), http://www.fsa.gov.uk/Pages/Library/Communication/Speeches/2003/SP118.shtml.
[67]Financial Services Act, 2012, Part 2, Chapter 1, 2012 c.21 (Eng.).

daily affairs with customers on a fair basis, to implement healthy competition between banks, and to identify any potential risks associated with the banking sector.[68]

The Prudential Regulatory Authority ("**PRA**") is a limited company which is wholly owned by the Bank of England. Its primary duty is to promote the safety and security of the entities that it regulates, to supervise all the entities and to set appropriate standards for the entities.[69] The banking authorities have unendingly ensured that the new structure also maintains a level playing field for all banks and institutions, like its predecessor. This new structure purports to achieve two objectives. First, to ensure the smooth supervision of banks and financial institutions in a more systematic manner and second, to ensure compliance with certain basic European Union norms of banking, such as the Capital Requirements Regulations, 2013[70] on prudential requirements for credit institutions and investment firms and Capital Requirements Directive (IV), 2013[71] on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firm, *inter alia*. The implications of the United Kingdom's exit from the European Union may potentially alter this present system, however, the dame is yet to be seen.

a) Problems with Islamic banking in the UK

While in theory, the FCA operates on a system of fixed standards for all institutions and non-discriminatory treatment of all customers, it is plainly evident that certain shortcomings exist in the present model.

[68]Financial Services Act, 2012, Part 2, Chapter 1, §1A, 2012 c.21 (Eng.).
[69]Financial Services Act, 2012, Part 2, Chapter 1, §1B, 2012 c.21 (Eng.).
[70]Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on Prudential Requirements For Credit Institutions And Investment Firms 648/2012/EEA, 2013 O.J. (L 176).
[71]Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on Access to the Activity of Credit Institutions and the Prudential Supervision of Credit Institutions and Investment Firms 2002/87/EC, 2013 O.J. (L 176) 1, 338.

The first is the stark absence of any definitional or regulatory clauses on Islamic finance contained in any English legislation which is applicable to banks and financial institutions. This leads to a system of confusion, since it opens a window for discriminatory treatment of customers of the bank and fraudulent transactions.[72] Furthermore, due to the lack of a definitional standard regarding the applicability of Shariah principles to a commercial contract, Courts have time and again held that Shariah law cannot be the governing law of a financial transaction despite the fact that the contract itself makes a reference to the application of Shariah law. This imbalance in the threshold for the application of Shariah principles to govern a contract and be regulated by fixed standards can lead to the exacerbation of disputes.[73]

A second practical issue that arises is with respect to the absence of any governing authority or authorizing agency of each institution on the principles of Shariah law and the rules which shall govern the particular authority.

The third issue is the absence of a proposed body to aid the Courts with the adjudication of a potential dispute involving Shariah interpretation, which may arise between the parties to the transaction. English Courts have on occasion faced difficulty in interpreting the principles of Shariah law in relation to commercial transactions. The Court in *Investment Company of The Gulf (Bahamas) Limited v. Symphony Gems N.V. and Ors.*[74] went to the extent of seeking expert views from Shariah scholars on the validity of mudarabah agreements in commercial contracts, which it later chose to ignore in favour of a literal interpretation of the contract. This issue is further fueled by the

[72]Zulkifli Hasan et al., An analysis of the Courts' decisions on Islamic finance disputes, 3 (2) ISRA International Journal of Islamic Finance 57, at 41-71 (2011).
[73]Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd (No.1), (2004) 2 All E.R. (Comm) 312; Investment Company of The Gulf (Bahamas) Limited v. Symphony Gems N.V. and Ors., (2014) EWHC 3777.
[74]Investment Company of The Gulf (Bah.) Limited v. Symphony Gems N.V. and Ors., (2014) EWHC 3777 (Comm) (2014).

fact that there is also an absence of any special procedural regulations which shall be applicable to resolve such a dispute, should it arise.[75]

B. Case Study: Malaysia

Pitfalls in the system of UK call for a look at the more developed model of Islamic Finance in Malaysia. Malaysia operates on a dual banking basis: a conventional banking system and an Islamic banking system, which offers a wide range of services to residents and non-residents. Islamic banking in Malaysia was introduced in 1983. Since then, it has offered an alternative option to conventional banking. The statutes governing the two systems are the Financial Services Act, 2013 and the Islamic Financial Services Act, 2013, respectively. Banks are regulated by the central bank called Bank Negara Malaysia ("**BNM**") which is to supervise and control all the banks in Malaysia.[76] BNM was established under the Central Bank of Malaysia Act, 2009 and is administered by it.[77] For Islamic banks, Malaysia has a Shariah Advisory Council ("**SAC**") of BNM, which issues rulings or advice to the BNM on the interpretation of Islamic law related to financial business.[78] The SAC will give such rulings/advice when the BNM makes a reference under the Central Bank of Malaysia Act, 2009.[79] The published rulings of SAC are also taken into account by courts or arbitrators dealing with any Shariah-related matter.[80] The courts or arbitrators shall also make reference to the SAC for its ruling where any question pertaining to Shariah arises.[81] Any ruling given by the SAC to the BNM, courts or arbitrators are final and

[75]Scott Morrison, B*rexit: bane or boon for Islamic finance and banking?*, 32(7) J. Intl. Banking Law &Regulation 293, at 291-298 (2017).
[76]Islamic Financial Services Act, 2013, § 6, No. 759 of 2013 (Malay.).
[77]Central Bank of Malaysia Act, 2009, § 3, No. 701 of 2009 (Malay.).
[78]Central Bank of Malaysia Act, 2009, § 51, No. 701 of 2009 (Malay.).
[79]Central Bank of Malaysia Act, 2009, § 52, No. 701of 2009 (Malay.).
[80]Central Bank of Malaysia Act, 2009, § 56(1), No. 701, Laws of Malaysia, 2009 (Malay.).
[81]Id.

binding.[82]To ensure the quality of rulings, members of SAC are appointed after consultation from BNM from amongst persons who have knowledge or experience in Shariah as well as banking and finance.[83]

In addition to the SAC, each bank is to establish a Shariah committee.[84] This committee provides advice to the bank and its subsidiaries on Shariah matters to make sure that the bank complies with Shariah principles at all times.[85] Moreover, where there are differences in rulings between the Shariah Committee of an Islamic bank and SAC, the ruling of the SAC would prevail.[86] In matters that cannot be resolved by the Shariah committee, banks can directly seek ruling or advice from the SAC through its Secretariat.[87]

The difference between the English and the Malaysian model is that the FCA in the former case does not have a board of Shariah scholars who are appointed to interpret and review the Islamic banking principles and instruments of Islamic banking. In this regard, UK tends to treat conventional banking and Islamic banking at par with each other; however, it does on occasion attempt to incorporate the developed standards of Shariah which are set by certain Islamic organizations, for example, the Islamic Financial Services Board ("**IFSB**") and the Accounting and Auditing Organization for Islamic Financial Institutions ("**AAOIFI**").

[82]Central Bank of Malaysia Act, 2009, § 57, No. 701, Laws of Malaysia, 2009 (Malay.).
[83]Central Bank of Malaysia Act, 2009, § 53(1), No. 701, Laws of Malaysia, 2009 (Malay.).
[84]Islamic Financial Services Act, 2013, § 30, No. 759, Laws of Malaysia, 2013 (Malay.).
[85]Islamic Financial Services Act, 2013, § 30, No. 759, Laws of Malaysia, 2013 (Malay.).
[86]Islamic Financial Services Act, 2013, § 58, No. 759, Laws of Malaysia, 2013 (Malay.).
[87]Central Bank of Malaysia Act, 2009, § 55, No. 701, Laws of Malaysia, 2009 (Malay.).

C. Recommendations for Islamic Banking in India

Owing to the presence of a sizeable Muslim community in India and how it has been historically disadvantaged, the authors suggest that Islamic windows must be introduced as an alternative to conventional banking. It could be started as a window, since it is a fairly novel concept to India. Gradually, based on the success of the Islamic windows, the Government could consider setting up full-fledged Islamic banks and eventually allow private Islamic banks to enter the market. The reason behind starting with only State-run banks would be to provide increased accessibility to the people and ensure accountability of the Government for greater protection to customers and investors. Meanwhile, State-run Islamic windows could be regularly monitored for their progress.

To allow for Islamic windows in India, the Banking Regulation Act, 1949 has to be appropriately amended, a task in which the Ministry of Finance will play a major role. The Ministry could move an amendment bill in the Parliament. The aid of Shariah scholars could be taken in the drafting of the amendment bill. Considering that the lack of definitional and regulatory clauses in the English legislation posed a significant roadblock in the implement of smooth Islamic finance in England, the authors propose that to avoid such a problem in India, the Indian Parliament could consider including important definitions and broad standards through the amendment. This would usher in uniformity and alleviate confusion with regard to Islamic finance in India. The Parliament could also consider making suitable changes to the Reserve Bank of India, 1934 and the Banking Regulation Act, 1949 to make way for a Shariah Advisory Committee as a recommendatory body of the RBI. This concept is taken from the Malaysian model[88]. Members of Shariah Advisory Committee must

[88]Central Bank of Malaysia Act, 2009, § 51, No. 701, Laws of Malaysia, 2009 (Malay.).

be qualified in Shariah and have expertise in banking and finance. However, the authors' recommendation differs on the point of the binding value of the Shariah Advisory Committee's advice. This committee could have a two-fold purpose: *first*, to interpret financial standards based on Shariah in banking, keeping in mind Indian demographics; *second*, to ensure that the Islamic windows in banks are compliant with Shariah principles. The Monetary Policy Committee of RBI should adhere to the aid and advice of Shariah Advisory Committee while making monetary policies for Islamic windows. Further, the authors would not suggest that each bank have its own set of scholars to define Shariah standards, as it may lead to inconsistent interpretation of Shariah principles across banks in the country. It may also potentially result in Fatwa shopping. This entails the cherry-picking of scholars who are inclined to grant a fatwa in favour of a certain activity, rather than picking those scholars that shall evaluate the accuracy of the principle on a holistic basis.

Furthermore, the authors have observed that the United Kingdom does not have a proper channel for Courts to seek the aide of Shariah scholars to interpret Shariah law in banking disputes. To tackle this problem, it is recommended that disputing parties resort to the same methods of dispute resolution as in a conventional banking dispute in India. In case the adjudicating authority (whether it be the Courts, arbitrators of the parties' choice, Debt Recovery Tribunal, etc.), has any doubts regarding the interpretation of Shariah law, it may take the aid of the Shariah Advisory Committee to interpret the same. An example of such a doubt could be whether the adjudicating authority must award interest (on account of delay in the proceedings) to the aggrieved party, since interest is prohibited by Shariah. This is based on the Malaysian model of dispute resolution in Islamic financial disputes.[89] However, unlike the Malaysian model, the authors suggest that the role of Shariah Advisory Committee may be merely

[89]Central Bank of Malaysia Act, 2009, § 57, No. 701 (Malay.).

recommendatory in this regard. It is preferred that the adjudicating authority, in its discretion, thoroughly evaluates the advice of the Shariah Advisory Committee. This method will ensure that the award or decree ultimately rendered is accurate as per Shariah standards. The final award or decree of the adjudicating authority can be allowed to challenge on parameters such as correctness of the award, arbitrariness, inequality, etc, however it cannot be allowed to be challenged merely on the ground that the award or decree is not in compliance with the interpretation given by the Shariah Advisory Committee.

Finally, banks must be legally obligated by statute to take proactive steps to create awareness of interest-free products amongst the depositors, especially in the semi-urban and rural areas, to ensure financial inclusion. The Depositor Education and Awareness Fund established by the RBI[90] could be utilized for this purpose.

V. PRACTICAL PROBLEMS ASSOCIATED WITH THE IMPLEMENTATION AND ESTABLISHMENT OF ISLAMIC BANKING

The previous section of the paper sets a recommendatory tone for the establishment of Islamic-windows in India. However, upon examining various jurisdictions that have incorporated Islamic banking, the authors realize that many similar issues may arise upon the establishment of Islamic windows in India. This section of the paper seeks to delve into the intricacies of the problems, both short term (such as taxation issues, money laundering and terrorism) and long term (inequality), that may potentially crop up during or after the

[90]Banking Regulation Act, 1949, § 26A, No. 10.

implementation of Islamic banking, and it seeks to provide a solution to the same.

A. Taxation

An immediate issue that could potentially arise is the irregular and confusing tax treatment meted out by State-run Islamic banks in India. The reasoning for this is that the tax treatment of instruments of Islamic banking varies vastly from that of conventional banking, a lesson that can be taken from the experience in countries that have implemented Islamic banking.[91]

In England, prior to the enactment of the Finance Act of 2003 and its subsequent amendments, Islamic banks and Islamic windows of private banks in England had a relatively high rate of taxation for customers of a bank. This was due to the absence of a steady legislation or tax policy governing their operations.[92] The Finance Act 2003 brought in significant changes in this regard; for example, it eliminated the double real estate transfer tax on Islamic mortgages.[93] Prior to this, it was once taxed when a bank purchased property and again taxed when the customer repurchased the property from the bank.[94] Similarly, the Finance Act 2007 dealt with the absence of a

[91]FAYAZ AHMAD LONE, ISLAMIC BANKS AND FINANCIAL INSTITUTIONS: A STUDY OF THEIR OBJECTIVES AND ACHIEVEMENTS 4-6 (1st ed. 2016); Nayamath Basha, *The Hundred Differences between Islamic and Conventional Banking Systems*, 5(9) International Journal of Scientific Research and Management 7102, at 7093-7106 (2017).

[92]Yusuf Karbhari et al., P*roblems and Challenges Facing the Islamic Banking System in the West: The Case of the UK*, 46(5) Thunderbird International Business Review 525, 521-543 (2004).

[93]In Murabaha, the bank purchases a commodity that the client is selling and the client agrees to a payment schedule for repurchasing the good at an amount which is equal to cost and profit.

[94]Mohammed Amin, Taxation of conventional and Shariah compliant mortgages: A review of the United Kingdom's taxation rules regarding the granting and securitisation of residential and commercial mortgages, covering both conventional

provision for deductibility of profit distributed to the Sukuk holders (which made it an expensive instrument of finance),[95] by mandating the taxation of Sukuk at par with the taxation of a conventional bond.

To equalize the tax treatment between conventional and Islamic banks, the authors examine the tax treatment of Shariah-compliant products and conventional banking in Pakistan, a country whose legal system possesses adequate safeguards in this regard. The Federal Board of Revenue of the Government of Pakistan introduced the Seventh Schedule to the Finance Act, 2007 to deal with tax payable on profits and gains from a banking company and the tax treatment of the same.[96] The purpose of Regulation 3 of this Schedule was to eliminate tax-based discrimination. Regulation 3(1) of this Schedule provides that merely because a bank offers 'Shariah-compliant' instruments of banking does not mean that it shall be accorded any special treatment in terms of additions and reductions to income.[97] Furthermore, Regulation 3(2) states that Shariah-compliant banks are not to be treated specially in terms of tax liability, subject to fulfillment of filing requirements, certified by the auditors. More importantly, the Government frequently issues clarifications on non-discriminatory tax treatment of Shariah compliant products.[98]

To avoid any confusion and irrationality, the authors recommend that India follow this model, whereby the Income Tax Act, 1961 must specifically state that the tax treatment for all banking companies shall be uniform, without any prejudice as to whether they are conventional or non-conventional banking companies.

and Shariah compliant transactions, PRICE WATER HOUSE COOPERS LLC, 24 (2008), http://www.pwc.blogs.com/files/taxation_rules_for_mortgages.pdf.

[95]Finance Act, 2007, §53, 2007 c.11 (Eng.).

[96]Finance Act, 2007, Sch. VII, No. 4 (Pak.).

[97]Finance Act, 2007, Sch. VII, Reg. 3(1), No. 4 (Pak.).

[98]Federal Board of Revenue, Explanation Regarding Certain Provisions of the Income Tax Ordinance (2017).

B. Money laundering and terrorism

In addition to the aforementioned issue, the accountability of Islamic banks must also be adequately regulated. The consequence of unregulated operations of Islamic banks could range anywhere from money laundering and stretch as far as to terrorism. Due to the wide demographic of people, many opportunities arise for criminal activities such as money laundering and fraudulent investments, in the name of the establishment of an Islamic bank.[99]

A prime example of such an incident of money-laundering occurred in Delhi where hundreds of people were left cheated of their life savings, in the name of 'Islamic investment.' During the short period during which the Government of India had allowed Islamic NBFCs, a Delhi-based investment group named 'Al-Fahad' ran a scheme on the principle of participation of profits. The group collected money from Muslim investors under the garb of savings for their annual 'Hajj'. Eventually, all the savings were laundered by the high ranking officials of the group and no returns were made to these investors.[100] A suitable way to regulate this is to ensure that no bank, financial institution or investment group is exempted from complying with KYC Norms, to ensure strict accountability. Further, proper background checks must be made strictly enforceable to ensure that there is no attempt made by one to abscond with the savings of another.

Terrorism, however, could be one of the most extreme cases of unchecked and under-regulated operations of Islamic banks and Islamic windows in banks. French political scientist Gilles Kepel goes

[99]Humayon A. Dar et al., *Lack of Profit Loss Sharing in Islamic Banking: Management and Control Imbalances*, 2(2) International Journal of Islamic Financial Services 5-16, 3-18 (2002).
[100]THE MILLI GAZETTE, http://www.milligazette.com/Archives/01-7-2000/Art13.htm.

so far as to contend that certain Islamic-terror groups (for example, the Muslim Brotherhood), helped in the establishment of specific Islamic banks only with the ulterior motive that such banks could then eventually finance Islamic militant operations.[101] Even the Security Council of the United Nations has reported that terrorist groups such as the al-Qaeda abuse the tools that constitute the basis of Islamic banking and religious donations.[102]

An example of this was seen in *Jesner v. Arab Bank*, where the appellant sued the Jordan-based Arab Bank on the ground that the bank had helped finance over 50 terrorist attacks on American civilians in the Middle East.[103] In a controversial turn, the US Supreme Court in a 5:4 decision held that the suit was not maintainable on the ground that liability under the Alien Tort Statute, 1789 could not be extended to foreign corporations. However, the minority went to the extent of opining that the case be remanded back to the district court on the ground of a strong possibility of a terrorism link to the bank.[104]

In addition to this, it appears that terrorist groups have also reportedly branched out into money-laundering operations in order to avoid attracting the attention of their domestic and international regulatory authorities.[105] In corollary to using this *hawala* (method of money transfers), al-Qaeda is notorious for having set up various charitable institutions as a front to conduct seemingly legitimate (however, illegal) transactions through Islamic banks.[106]

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[101]GILLES KEPEL, JIHAD: THE TRAIL OF POLITICAL ISLAM 51 (Harvard University Press, 2002).
[102]Jean-Charles Brisard, *Terrorism Financing: Roots and trends of Saudi terrorism financing*, JCB CONSULTING, Dec. 19, 2003, at 21.
[103]Jesner v. Arab Bank, 584 U.S.__, 138 S. Ct. 1386 (2018).
[104]*id.* ¶2. (Sotomayor, J. dissenting).
[105]NIKOS PASSAS, *Terrorism Financing Mechanisms and Policy Dilemmas*, TERRORISM FINANCING AND STATE RESPONSES 34-35 (2nd ed., 2007).
[106]PHIL WILLIAMS, WARNING INDICATORS AND TERRORIST FINANCES, TERRORISM FINANCING AND STATE RESPONSES 85-86 (2nd ed., 2007);

In order to tackle this empirically proved abuse, Malaysia has enacted the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act, 2001 to limit such activities by strictly punishing their perpetrators.[107] This is done by ensuring that any 'person' who is either engaged in some unlawful activity of terrorism[108] or money laundering[109] is sufficiently punished for the same by methods such as freezing the offenders' assets, seizure of the offenders' property and confiscation of any proceeds of money-laundering. The recent enforcement of the Fugitive Economic Offenders Act, 2018 in India will aid the already prevailing Indian legislation, such as the Prevention of Money Laundering Act, 2002 and its subsequent amendments, in tackling such offences.

The authors recommend that to ensure that there is no abuse of funds by any banking company or Islamic window in India for either money laundering or terrorism, these illegal activities (specific to banking and financial services) should be specifically included in relevant Indian legislation.

VICTOR COMRAS, AL-QAEDA FINANCES AND FUNDING TO AFFILIATED GROUPS, TERRORISM FINANCING AND STATE RESPONSES 123-124 (2nd ed., 2007).

[107]Suppression of Terrorism Financing Offences and Freezing, Seizure and Forfeiture of Terrorist, Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act, 2001, No. 613, Laws of Malaysia, 2001 (Malaysia).

[108]Suppression of Terrorism Financing Offences and Freezing, Seizure and Forfeiture Of Terrorist, Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act, 2001, Part VIA, §66A-66F, No. 613, Laws of Malaysia, 2001 (Malaysia).

[109]Suppression of Terrorism Financing Offences and Freezing, Seizure and Forfeiture Of Terrorist, Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act, 2001, Part II, §4, No. 613, Laws of Malaysia, 2001 (Malaysia).

C. Inequality

After Islamic banks are established in India, a pertinent problem that may arise is that of inequality. On a practical scale, this problem could exist between Islamic men and women.

First, the authors examine the situation of inequality between Islamic men and Islamic women, especially in male-dominated territories. For this particular problem, the authors have primarily analysed available data from the Middle East and North Africa, since these areas are Muslim-dominated and subscribe primarily to Shariah principles of banking. It has been widely reported by the World Bank that in the Middle East and North Africa, the facilitation of certain Shariah principles has resulted in misuse of the same by the Islamic banks.[110]

For example, a survey conducted by the Center of Arab Women for Training and Research, in five countries, namely UAE, Bahrain, Tunisia, Lebanon and Jordan, reported that out of 1228 women entrepreneurs who wanted to grow their business, a vast majority were unsuccessful in receiving financial aid from their respective Islamic banks.[111] Furthermore, it has been noted that there are high gender barriers to a woman's access to mere finance due to the abuse of personal and labour laws by such financial institutions.[112] The appalling ratio on access to financial institutions for men and women was recorded in a report by the World Bank. This report was on 14

[110]World Bank. [WB], *Women, Business and the Law: Removing Barriers to Economic Inclusion*, 10, (September, 2012), http://pubdocs.worldbank.org/en/107821519930717245/Women-Business-and-the-Law-2012.pdf.

[111]International Finance Corporation. [IFC], *Strengthening Access to Finance for Women-Owned SMEs in Developing Countries*, 14-15, (October, 2011), https://www.ifc.org/wps/wcm/connect/a4774a004a3f66539f0f9f8969adcc27/G20_Women_Report.pdf?MOD=AJPERES.

[112]World Bank. [WB], *The Status & Progress of Women in the Middle East & North Africa*, 29, (June 2009), http://siteresources.worldbank.org/INTMENA/Resources/MENA_Gender_Compendium-2009-1.pdf.

Middle-East and North African economies which revealed that 17 men have access to financial institutions, for one woman that has such access.[113]

The RBI committee on Medium-Term Path on Financial Inclusion provided a useful suggestion to the problem of exclusion of women. It recommends that in this regard, State-run banks have to undertake "special efforts" to ensure that they open accounts for women, especially those from a below-poverty-line background.[114]

The second aspect of inequality appears to stretch to the inclusion of women in key managerial, administrative or employee roles in State-run Islamic financial institutions. There exists a high level of under-employment of women in Islamic financial institutions.[115] Even in a country such as Malaysia, which has a prominent Islamic-banking structure and boasts of a relatively large number of women CEOs of Islamic banks, it is noted that the total number of women employed in this sector is significantly less than the number of men employed.[116]

It is the authors' recommendation that State-run Islamic windows abide by Article 15 of the Constitution of India while employing workers, and ensure equal employment opportunities for both men and women.

VI. CONCLUSION

Islamic banking is a new and unexplored concept in India. Through research, the authors have found that *first*, many Muslims are

[113]World Bank [WB], *supra* note 110.
[114]Reserve Bank of India, *supra* note 40, at 8.
[115]Mushtaq Parker, *Misogyny still rules in finance*, NEWS STRAIT TIMES (Dec. 28, 2016, 11:02 am), https://www.nst.com.my/news/2016/12/199966/misogyny-still-rules-finance.
[116]Id.

voluntarily excluded from participating in financial activities since they have no access to Shariah-compliant methods of banking. The RBI itself has reported that some of them appear to access only long-term methods of conventional banking because of the slight similarity between long-term methods and Shariah-compliant methods; *second*, on examination of the constitutional scheme, the RBI can in principle set up Islamic banks; *and third*, the Government must take adequate safeguards to ensure that the aforesaid practical problems which may arise are mitigated to the fullest extent possible.

While the RBI's decision to not participate in Islamic windows is understandable, the RBI could have at least tested the need and viability of the concept in India before dismissing it at face value. The RBI must however ensure that it acts within the Constitutional boundaries while implementing Islamic banking. Additionally, it could learn from the experiences of numerous other countries (some of which have been mentioned above) that have incorporated the Shariah principles in their banking law.

THE CONSTITUTIONAL CASE OF THE MISSING CATTLE: CURBING CROSS-BORDER SMUGGLING AND THE PREVENTION OF CRUELTY

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Abstract

On March 5, 2015, the State of Maharashtra imposed a ban on the slaughter of all cattle, and prohibited the transport of cattle out of the state, leading to devastating effects. It began with an immediate loss of livelihood for persons crucially dependent on this trade, such as butchers, slaughter-house owners, and leather-workers. This was followed by the destruction of the production cycle of cattle, which led to a loss of livelihood for farmers, who often depend on this trade to sustain them. In the present day, the ban has resulted in the distress sale of cattle, for prices far lower than that required by farmers to replace old, unusable cattle with new animals, thereby resulting in farmers and cattle owners finding themselves in a desperate situation - incurring

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losses they cannot bear, for animals which provide little to no economic value. Despite the entry of markets and fairs in the state list, the Central Government recently attempted to regulate the trade of cattle under the garb of prevention of cruelty to animals. The Ministry of Environment notified the Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules 2017 with twin objectives of preventing cruelty and curbing illicit cattle trading at the the country's border. Owing to the widespread criticism due to the indirect ban on cattle slaughter, the government replaced these rules with a draft regulation titled 'Prevention of Cruelty to Animals in Animal Markets Rules 2018'. This draft regulation specifically aims at tackling the issues of cruel practices in animal markets and also addresses the problem of cattle smuggling. The paper aims to analyze the constitutional issues plaguing the 2017 Rules and whether these issues have been addressed in the draft Rules and their effectiveness. Part I examines the competence of the Central Government to enact the Rules. Part II analyzes whether the Rules fall foul of the Right to Equality contained in Article 14 of the Constitution, while Part III examines them from the perspective of violation under Article 19(1)(g). Part IV considers whether the Rules violate Article 21 of the Constitution by breaching the rights to privacy, personal autonomy, and livelihood. Part V analyses the

Rules in light of Right to Property specified in Article 300A. Part VI addresses these issues vis-à-vis the draft Rules. Finally, Part VII concludes the paper and attempts to provide solutions to the problem of cross-border smuggling of cattle.

I. INTRODUCTION

Beginning with a polarized Constituent Assembly at the time of independence, the legality of trade in cattle has had a long and tumultuous history in India. At that time, there had been a push to enact a law on prohibition on cow slaughter as a fundamental right. A compromise allowed it to be retained as a Directive Principle of State Policy, with the caveat that it would not be enforced by coercion. The inclusion of cattle slaughter as a state subject in Entry 15 of List II of the Seventh Schedule to the Constitution allowed this issue to be legislated upon exclusively by the states each of which have their own policies to regulate the slaughter of cattle; some permit slaughter upon the receipt of a 'fit-for-slaughter' certificate, while there are others that completely prohibit the slaughter of cattle. A few, including Kerala, West Bengal, Sikkim, and Meghalaya, among others, impose no restrictions on slaughter.[1] This exclusive power given to the state governments to frame appropriate legislation on subject-matters contained in List II has widely been recognized as the touchstone of the federal nature of the Indian polity.

[1]*The States Where Cow Slaughter is Legal in India*, THE INDIAN EXPRESS (Oct. 8, 2015, 9:00 AM), http://indianexpress.com/article/explained/explained-no-beef-nation/.

An attempt to circumvent this was made by the Central Government in 2017 with the enactment of the Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules 2017, under the umbrella of the Prevention of Cruelty to Animals Act, 1960. Ostensibly, the aim of these Rules is to prevent the cruelty caused to cattle during transport and slaughter, to regulate animal markets in order to ensure that only healthy cattle are traded, and to curb trans-border cattle smuggling as per the directions of the Supreme Court in the case of *Gauri Maulekhi v. Union of India*.[2] The underlying issue in the case rested on the ineffective nature of the mechanisms used against the proliferation of cattle smuggling at the border. On an overview of the provisions, it is correct that the Rules do not impose a ban on cattle slaughter in the country. However, by prohibiting the sale of cattle for slaughter from animal markets, the indirect effect of these Rules has been a ban on the slaughter of all types of cattle.

By framing laws on cattle slaughter, these Rules go beyond the scope of their parent legislation, which carves out an exception for slaughter of animals for the purpose of providing food, thereby damaging the federal nature of the Indian Constitution. Apart from this, however, it is imperative that we draw conclusions on the catastrophic effects that will result from such a ban from the effects that have been observed in the aftermath of the ban on cattle slaughter in the State of Maharashtra, as noted above.[3] The Rules will lead to massive losses to a booming livestock industry. Farmers, already in the grips of an agrarian crisis and their increasing dependence upon their cattle to sustain their livelihoods, would be forced to shoulder the cost of unproductive cattle and be deprived of a traditional source of

[2]Manuraj Shunmugasundaram, *Banning Cow Slaughter by Stealth*, THE HINDU CENTRE FOR POLITICS AND PUBLIC POLICY (June 29, 2017, 6:58 PM), http://www.thehinducentre.com/the-arena/current-issues/article9739770.ece.

[3]Sagari R. Ramdas, *The Beef Ban Effect: Stray Cattle, Broken Markets and Boom Time for Buffaloes*, THE WIRE (Apr. 6, 2017, 6:00 PM), https://thewire.in/121728/beef-ban-cattle-market/.

income.[4] The leather industry, providing employment to nearly 2.5 million people, most belonging to Scheduled Castes or minority communities, will be brought to a halt due to a shortfall in raw material.[5] The negative consequences of such a move will also be felt in allied industries like meat, pharmaceuticals and transport, which provide employment to millions and entail revenue of millions of rupees.[6]

It is on the basis of several such considerations that the Supreme Court, supporting the order of the Madras High Court, stayed these Rules, halting the Government's attempt to ban the slaughter of cattle.[7] Consequently, the Central Government withdrew the rules and notified a draft set of rules titled 'Prevention of Cruelty to Animals in Animal Markets Rules 2018'.

II. OVERREACH BY THE CENTRAL GOVERNMENT

The first criticism of the 2017 Rules arises from the lack of the Central Government's competence to enact such legislation. This argument has two prongs. First, the Rules are within the exclusive

[4] TV Jayan, *Cow Slaughter Ban can Cost India Dearly*, THE HINDU BUSINESS LINE (Jan. 11, 2018), https://www.thehindubusinessline.com/economy/agri-business/cow-slaughter-ban-can-cost-india-dearly/article9756523.ece.

[5]Brinda Karat, *The Economics of Cow Slaughter*, THE HINDU (Sept. 6, 2016, 1:22 PM), http://www.thehindu.com/opinion/op-ed/the-economics-of-cow-slaughter/article7880807.ece.

[6]Rahul Wadke, *New Cattle Trade Rules May Slaughter a Rs. 2000-cr Industry*, THE HINDU BUSINESS LINE (June 1, 2017), http://www.thehindubusinessline.com/economy/policy/new-cattle-trade-rules-may-slaughter-a-2000cr-industry/article9717921.ece; AeshaDatta, *Trade in Cattle for Slaughter Axed*, THE HINDU BUSINESS LINE (May 26, 2017), http://www.thehindubusinessline.com/economy/agri-business/sale-purchase-of-cattle-from-animal-markets-for-slaughter-banned/article9713472.ece.

[7] All India Jamiatul Quresh Action Committee v. Union of India, W.P. (Civil) No. 422 of 2017 (July 11, 2017).

legislative competence of the State Governments, rather than that of the Union Government. Second, the Rules amount to a transgression of the Central Government's jurisdiction, and are in the nature of colourable legislation.[8]

Article 246 of the Constitution states that Parliament has exclusive legislative competence with regard to subject matters contained in the Union List of the Seventh Schedule. Further, it also has the power to enact legislation on matters contained in the Concurrent List. However, the competence to make laws on matters contained in the State List is within the exclusive jurisdiction of the individual State Governments.[9] The 2017 Rules, like its parent Act - the Prevention of Cruelty to Animals Act, 1860 - have purportedly been made in pursuance of the Central Government's power to legislate on the prevention of cruelty to animals, contained in the Concurrent List.[10] Entries 15 and 28 of the State List, however, give State Governments exclusive jurisdiction to legislate on the subject matters of 'protection and preservation of livestock' and 'markets and fairs'.[11]

The doctrine of pith and substance is one among many maxims applied by the judiciary in order to ensure that the elements of a federal system between the Union and states, enshrined in the Constitution, are preserved. The doctrine is applied to settle conflicts between the legislative competence of the Central and state Governments.[12] The doctrine calls for a determination of the validity of a legislation on the basis of legislative competence through an ascertainment, on the whole, of its true character. This, in turn, is accomplished by examining the object, scope, and effect of the

[8] Suhrith Parthasarathy, *Modi Government's Cattle Slaughter Ban is Brazenly Unconstitutional*, THE WIRE (June 5, 2011), https://thewire.in/politics/modi-cattle-slaughter-ban-unconstitutional.
[9] INDIA CONST. art. 246.
[10] INDIA CONST. Sch VII, List III, Entry 17.
[11] INDIA CONST. Sch VII, List II, Entry 15, 28.
[12] Union of India v. Shah Goverdhan L. Kabra Teachers' College, (2002) 8 SCC 228.

legislation.[13] In case of the 2017 Rules, although their outward objective is to prevent cruelty to cattle, their effect has been to regulate animal markets and legislate on cattle slaughter, both of which are subjects which falls squarely within the state governments' exclusive competence. For instance, Rule 22(e) imposes a positive obligation on animal markets to ensure that cattle brought to the market are not sold for the purposes of slaughter.[14] Such a law, by transgressing on the competence of the states, clearly violates the separation of powers between Centre and states, espoused in the Seventh Schedule.

Here, an argument may be made that the Central Government has not actually transgressed its powers; rather, the encroachment into the state legislatures' allotted field is only incidental in nature. Such the doctrine of incidental and ancillary encroachment cannot be resorted to in order to extend the competence of a legislature to a subject-matter already provided for in an entry relating to that specific subject.[15] As noted above, the subject-matters which this piece of legislation deals with have already been provided for in Entries 15 and 28 of List II. Hence, the doctrine of incidental and ancillary encroachment has no application in the present case. On an examination of the 2017 Rules on the touchstone of the doctrines of pith and substance and incidental and ancillary encroachment, it is clear that the Union Government has transgressed its legislative competence by legislating on matters within the exclusive jurisdiction of the State Governments.

[13]*Id.*; *See also* Durga Das Basu, Commentary on the Constitution of India 8698 (8th ed. 2011).
[14]Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 22(e) (May 26, 2017) [hereinafter *Regulation of Livestock Markets*].
[15]State of Uttar Pradesh v. Bar Council of Uttar Pradesh, AIR 1971 All. 187, ¶11. *See also* 8 DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 8659 (8th ed. 2011).

The second prong of argument is based on the doctrine of colourable legislation. This doctrine applies when one legislature, under the pretence of exercising its own powers, has transgressed, in substance, upon the exclusive powers of another legislature, attempting to do indirectly what it cannot do directly.[16] The 2017 Rules have been framed under the guise of preventing cruelty to animals, which is a subject over which the Central Government has legislative competence. In doing so, however, the government has clearly transgressed into the states' exclusive jurisdiction. It is important to note that the motive of the legislature is irrelevant in determining whether a particular legislation is colourable in nature.[17] Therefore, any contentions that the Central Government's motives in enacting such legislation were bona fide are entirely irrelevant. The 2017 Rules, being colourable legislation, are invalid, and as such, should not be allowed to stand.

III. A QUESTION OF EQUALITY: REASONABLE CLASSIFICATION AND ARBITRARINESS

Right to Equality is one of the notable cornerstones of the Constitution of India. The right does not function on the concept of absolute equality but in fact, allows for differentiation when founded upon reasonable grounds for classification.[18] The reasonability is assessed based on a two pronged test–intelligible differentia and reasonable nexus with the object to be achieved.[19]

The 2017 Rules are in compliance with the first prong of the test of reasonable classification—intelligible differentia, differentiation

[16]K.C. Gajapati Narayan Deo v. State of Orissa, AIR 1953 SC 375, ¶9.
[17]Dharam Dutt v. Union of India, (2004) 1 SCC 712, ¶16.
[18]National Council for Teacher Education v. Shri Shyam Shiksha Prashikshan Sansthan, (2011) 3 SCC 238, ¶22.
[19]In Re: The Special Courts Bill, 1978, (1979) 1 SCC 380, ¶72.

which is capable of being understood.[20]It has been recognized by the Apex Court that cattle and other animals such as sheep or goats are capable of being differentiated into separate groups based on their usefulness to society.[21] Therefore, notifying rules especially for cattle creates an intelligible differentiation between them and other animals, satisfying the first part of the test. However, the reasonable classification test requires a cumulative satisfaction of both prongs.[22]

The second prong requires an assessment of the objective of the Rules. The source of these Rules is § 38(1) of the 1960 Act.[23] The section delegates the power of making rules to the Central Government only to "carry out the purposes of the Act".[24] The purposes of the Act has been expressed in the Preamble as prevention of unnecessary pain or suffering to animals from cruel practices.[25] Section 11 of the Act lists activities which are covered under the ambit of cruel practices. It specifically excludes the "destruction of any animal as food for mankind" from the definition of cruelty.[26] Thus, the object of the Rules, which is founded in the Act, does not extend to prevention of slaughter for food. The provisions of the rules traverse the objective by disallowing sale of cattle for slaughter. Furthermore, the Act contains a specific restriction on interference for killing of an animal for religious purposes.[27] This restriction is also flouted by the Rules when it prohibits sacrificing of an animal for any

[20]2 DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 1427 (8th ed. 2011). *See also* State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75, ¶55.
[21]Mohd. Hanif Qureshi v. State of Bihar, AIR 1958 SC 731, ¶72.
[22]In Re: The Special Courts Bill, 1978, (1979) 1 SCC 380, ¶72.
[23]Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Preamble.
[24]Prevention of Cruelty to Animals Act, 1960, § 38(1), No. 59 of 1960.
[25]Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Preamble.
[26]Prevention of Cruelty to Animals Act, 1960, § 11(3)(e), No. 59 of 1960.
[27]Prevention of Cruelty to Animals Act, 1960, § 28, No. 59 of 1960.

religious purpose.[28] The 2017 Rules fail the second prong as differentiation of cattle from other animals does not have a rational nexus with the object of prevention of cruelty to animals. Therefore, the 2017 Rules violate Article 14 of the Constitution as per the test of reasonable classification.

Further, in 1974, the Supreme Court of India evolved a new test for equality on the grounds of non-arbitrariness.[29] The Court took a positivist view to hold that "equality is antithetic to arbitrariness", which was subsequently rejected in the *McDowell*[30] case. However, Nariman J., in the recent *Triple Talaq*[31] judgment, re-examined the tests for Article 14. He, with the support of Lalit J. and Joseph J.– qualifying for a 3:2 majority, outlined how arbitrariness is a valid ground and is hence, relevant in an Article 14 analysis. Thus, as the law stands today, a law will be held to be in violation of Article 14 if it fails to satisfy either of the two tests of reasonable classification and non-arbitrariness.

The newer doctrine does not require any form of classification. A state action will be held as non-arbitrary when applicable alike to those who are similarly situated.[32] In the context of delegated legislation, it has been held that an action will be arbitrary when done in an "unreasonable manner", "capriciously without any adequate determining principles".[33] The Ministry of Environment and Forest released a notification stating the intent and purpose of the Rules. It was specified that the Rules were made in light of the order of the Supreme Court pursuant to the case of *Gauri Maulekhi.*[34] The case and the subsequent order dealt with necessity of action by the

[28]Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 22(d).
[29]E.Y. Royappa v. State of Tamil Nadu, (1994) 4 SCC 3, ¶ 85.
[30]Mc Dowell & Company Limited v. The Commercial Tax Officer, 1986 AIR 649.
[31]Shayara Bano v. Union of India, AIR 2017 SC 4609.
[32]Smt. Maneka Gandhi v. Union of India, (1978) 1 SCC 248, ¶16.
[33]Sharma Transport v. Government of Andhra Pradesh, (2002) 2 SCC 188.
[34]Gauri Maulkehi v. Union of India, W.P. (Civil) No. 881 of 2014.

government to prevent illegal smuggling of the cattle at the border. The 2017 Rules are notified for the entire geographical stretch of India, including states which are neither border states nor adjoining them. This state action of preventing slaughter in all areas is resulting in alike treatment of states that are not similarly situated as border states. Illegal sale of cattle at the border is not an adequate determining principle to ban such sale across states which are not even remotely connected to the border states. Furthermore, the Rules permit purchase only by 'agriculturists' who show relevant revenue documents.[35] Prohibiting landless farmers from purchasing cattle is neither founded on reason nor on any adequate determining principle. Therefore, these Rules are *prima facie* arbitrary against the residents of non-border areas and landless farmers who are unreasonably prevented from purchasing cattle under the Rules.

Overstepping of the Rules beyond the set objectives of the Act, in addition to an Article 14 violation, also leads to illegality under the administrative law. It is a well recognised principle of delegated legislation that rules made under a statute must be in consonance with the object of the Act.[36] An ultra-vires rule will be declared as void. The validity in these scenarios is based on whether the delegated legislation tends towards the objectives of the Act. The present rules go beyond the scope of the Act first, by prohibiting sale for cattle for the purposes of slaughter[37] and second, by disallowing killing of cattle for religious purposes,[38] both of which are excluded from the

[35]Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 22(d)(iv).
[36]N.K. Bajpai v. Union of India, (2012) 4 SCC 653, ¶16.
[37]Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 22(d).
[38]Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 22.

ambit of 'cruelty' under the parent Act.[39] Therefore, the 2017 Rules are ultra-vires the Act of 1960 and void in law.

IV. THE ILLUSORY RIGHT TO TRADE

Another addition to the Pandora's box of violations that stem from the 2017 Rules hinges on Article 19. The freedom of trade, occupation and profession which is subject to certain restrictions.[40] However, such restrictions need to be made in interest of general public and should be reasonable in nature.[41] A restriction is not reasonable when it is arbitrary and beyond what is required.[42] The judicial test to determine an excess nature of restriction is whether there exists a less drastic measure to achieve the same objective.[43]

The Rules place a complete ban on purchase of cattle for slaughter in the 'animal market'.[44] Now even though, in theory, the Rules appear to be merely regulating the sale of cattle in the 'animal market', however. The practical application of the Rules leads to prohibition of slaughter owing to the expansive definition of 'animal markets'. The Central Government, in effect, has imposed a nation-wide ban on the slaughter of cattle and hence, their consumption by terming 'slaughter' as cruelty and making it a criminal offence. As per the definitions clause of the Rules;[45]

[39]Prevention of Cruelty to Animals Act, 1960, § 11(3)(e), No. 59 of 1960.
[40]INDIA CONST. art. 19(6).
[41]Modern Dental College and Research Centre v. State of Madhya Pradesh, AIR 2016 SC 26.
[42]Chintaman Rao v. State of Madhya Pradesh, AIR 1951 SC 118, ¶6.
[43]Mohammed Faruk v. State of Madhya Pradesh, (1969) 1 SCC 853, ¶10.
[44]Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 22.
[45]Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 2(b).

"animal market means a market place or sale-yard or any other premises or place to which animals are brought from other places and exposed for sale or auction and includes any lairage adjoining a market or a slaughter house and used in connection with it and any place adjoining a market used as a parking area by visitors to the market for parking vehicles and includes animal fair and cattle pound where animals are offered or displayed for sale or auction."[46]

The definition turns any place where animals are brought for the purpose of sale under the radar of Animal Market Committee, exposing the place to the prohibition on sale for slaughter. Now, if the sale for slaughter cannot take place from an area wherein the buyers and sellers assemble, the only option left is sale from individual farms. While sale from these farms might seem a safe and balanced solution, it is highly impractical. An individual owner of the cattle or a prospective buyer of the same cannot be expected to go from place to place in search of a cattle. Without a market to sell at or buy from, the demand and supply of the cattle will never intersect, leaving the price and sale indeterminate. A case in point is *Shreya Singhal v. Union of India,*[47] which tested the constitutional validity of §66A of the Information Technology Act, criminalizing the act of sending any information which may cause "annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will." It was contended by the Government that the freedom of speech is not completely curtailed because an individual is allowed to send information which does not fall into the categories listed in the §66A. The court highlighted the overly broad nature of the offence, holding that any form of act is capable of attracting the punishment in §66A.

[46]Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 2(b).
[47]Shreya Singhal v. Union of India, AIR 2015 SC 1523.

Hence, the section was declared to be unconstitutional on the grounds of vagueness and overbreadth.

Similarly, the Environment Ministry has effectively enforced a nationwide ban on the sale of beef by first, bringing 'slaughter' within the ambit of cruelty and second, making the trade of animals for slaughter in the extended area of animal markets - a criminal offence. Owing to the overly broad nature of the definition of 'cruelty' and 'animal market', farmers would only be able to sell cattle for slaughter from individual farms. As noted above, it is not practical because demand and supply of the cattle will never intersect, leaving the price and sale indeterminate.

Having established that, in effect, the Rules lead to a complete prohibition on sale of cattle for slaughter, there is minimum consensus on such prohibition being unconstitutional. The constitutional bench in *Hanif Qureshi* held that a complete ban on slaughter of buffaloes, bulls and bullocks without giving regard to their age and usefulness is not a reasonable restriction in the interest of general public.[48] The underlying reason behind the decision was that after a certain age, the cattle cease to be useful for the purposes of yielding milk or breeding. A restriction on right to trade is not reasonable when it is not made in interest of general public but "merely to respect susceptibilities and sentiments of a section of the people whose way of life, belief, or thought."[49] The Rules presuppose that the farmers require cattle for procuring milk, manure and for tilling the land. Thus, as per the Rules, the selling and reselling of cattle will only take place for rearing of cattle. However, there exists an alternate scenario where the cattle become unproductive and the only possible way of disposing it off is through sale for slaughter. Creating a complete ban on sale for slaughter forces the farmer to

[48]Mohd. Hanif Quareshi v. State of Bihar, AIR 1958 SC 731, ¶46.
[49]Mohammed Faruk v. State of Madhya Pradesh, (1969) 1 SCC 853, ¶10.

bear the economic burden of an unproductive cattle.[50] Furthermore, even for productive cattle, there are times during the agriculture season wherein the supply for cattle is extremely high as opposed to the demand. In the early months of 2017, Anantapur, a small district in Andhra Pradesh was facing famine conditions. In such a dire situation, the only manner in which the farmers could feed their family members was through selling cattle to slaughterhouses.[51] Further, it is not just farmers engaged in cattle rearing who suffer from the ban, it also dries up chains for supply through dairy farms. Presently, about 40 % of the income of the dairy farms in the country is earned through the sale of unproductive cows.[52] If they are not allowed to sell the unproductive cows, they will not be able to invest in new young ones without the 40 % income to be used as capital. Now in a situation where the dairy co-operatives are already burdened by the increasing dumping of milk powder from EU, Australia and New Zealand, the entire industry will be wiped out leading to a complete restriction on their right to trade.[53] Similar effects will also be caused in the leather industry which presently accounts for 12.93% of the world production of leather because of its dependence on stock from slaughterhouses.[54]

Thus, these Rules completely choke the freedom of movement of cattle in a market, not just going against the general interest of trade

[50]Alan Hetson, *An Approach to the Sacred Cow of India*, 12(2) CURRENT ANTHROPOLOGY, 191-209 (1971).
[51]Hoskote Nagabhushanam, *Anantapur: Drought Forces Farmers to Sell Cattle*, DECCAN CHRONICLE (March 16, 2017, 07:54 PM), http://www.deccanchronicle.com/nation/current-affairs/160317/anantapur-drought-forces-farmers-to-sell-cattle.htm.
[52]Seshadri Kumar, *Milking the Holy Cow*, FRONTLINE (Sep. 2, 2016), https://frontline.thehindu.com/cover-story/milking-the-holy-cow/article8994390.ece.
[53]*Id.*
[54]*Id.*

of farmers but even other traders whose right is so intrinsically linked with cattle slaughter.

V. EVERY MAN'S HOUSE IS HIS CASTLE: PRIVACY AND PERSONAL AUTONOMY

Article 21 of the Constitution, which contains the fundamental rights to life and personal liberty, has, through judicial consideration, been held to comprise a large number of other rights as well. Essential to the debate on the 2017 Rules are the right to privacy and personal autonomy, and the right to livelihood. The 2017 Rules are a gross violation of such rights, and as such, should be struck down.

The existence of a right to privacy was a contentious issue in Indian jurisprudence for several years. In 2017, however, the landmark judgment of the Supreme Court in the case of Justice K.S. *Puttaswamy v. Union of India* went a great way in clarifying the position of law in this respect. The Court, confirming a catena of previous decisions, held the right to privacy to be a fundamental right under the umbrella of Article 21 and a host of other freedoms under Part III of the Constitution.[55] Citing the interpretation of Warren and Brandeis in their seminal article on the right to privacy, the Court interpreted this right as a 'right to be left alone'.[56] More specifically, it was held that an individual's choice of food is his personal affair, and is part of the right to privacy.[57] If such food is not injurious to health, intrusions therein are violative of the right to privacy.[58] Limitations

[55]Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 [hereinafter *Puttaswamy*].
[56]*Id. See also* Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4(5) HARV. L.R. 193 (1890).
[57]*See* Puttaswamy, *supra* note 55, at 91; Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat, AIR 2008 SC 1892, ¶27.
[58]Shaikh Zahid Mukhtar v. State of Maharashtra, (2017) 2 ABR 140, ¶192.

on this right require the existence of compelling state interest, which must be proved by the State.[59]

Intricately connected with the right to privacy is the right to personal autonomy. This consists of a positive right to an individual to make decisions for himself and choose which activities to partake in, and a negative right to not be subject to interference by others.[60] This allows individuals to make free choices that "*affect the course of life*".[61] As contained in the right to privacy, the consumption of any food not injurious to health is also a part of the right to personal autonomy.[62] Further, it is vital to note that food habits have been adjudged to be an essential part of a secular culture, and therefore, before any restrictions are placed on such habits, the State must consider factors such as health, choice of food, the socio-economic status of society, and the availability of food at inexpensive prices.[63]

The 2017 Rules impose an indirect ban on the availability and consumption of beef by prohibiting the sale of cattle for slaughter in animal markets. As per most estimates, animal markets are the places from where most cattle are sourced for slaughter. Imposing such a restriction leads to the drying up of the chain of supply of cattle for slaughter. The overall effect is the scarce availability of beef in the market. Therefore, the Rules, by imposing a prohibition, albeit indirect, on choice of food, and causing an inability to exercise the right to choice of food in an effective manner, are violations of the right to privacy and personal autonomy. The State has no compelling interest to justify such a restriction. Although the purported aim of these Rules is to prevent the cruelty experienced by cattle during

[59]*Id.*, ¶202. *See also* Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat, AIR 2008 SC 1892, ¶4; Deena Dayal v. Union of India, 1983 AIR 1155.
[60]Anuj Garg v. Hotels Association of India, (2008) 3 SCC 1.
[61]*See* Puttaswamy, *supra* note 55, at 109.
[62]Shaikh Zahid Mukhtar v. State of Maharashtra, (2017) 2 ABR 140, ¶185.
[63]Saeed Ahmad v. State of Uttar Pradesh, Misc. Bench No. 6871 of 2017, at 17.

slaughter, this has already been dealt with by the Prevention of Cruelty to Animals (Slaughter House) Rules.[64] Further, the parent Act makes an exception in this respect with regard to animals being slaughtered for the purpose of providing food.[65]

Beef is an important source of food for minorities and weaker economic sections of Indian society, due in part to its affordability and availability. A large part of this stems from part that animal markets play in providing cattle for slaughter. Therefore, it must also be noted that the Rules do not, while imposing restrictions on sale for the purposes of slaughter, take into account factors such as the availability of food and price. This, too, hampers the effective exercise of personal autonomy.

A different challenge to the 2017 Rules can also be derived from the right to livelihood, under the umbrella of Article 21. Every individual has the right to live a life comprised of all those aspects which make it "*meaningful, complete and worth living*".[66] One of these aspects is the right of every person to have a livelihood.[67] Consequently, as the Supreme Court held in the case of *Olga Tellis v. Bombay Municipal Corporation*, the prohibition of any activity essential for an individual to earn his livelihood would lead to an abrogation of his right to life.[68]

As noted above, animal markets have a tremendous impact on the availability of cattle for slaughter for the purpose of acquiring food. They have been regarded as the "*crucial nuclei in the production cycle of animals*", such as cattle.[69] Estimates show that nearly 90% of

[64]Prevention of Cruelty to Animals (Slaughter House) Rules, 2001.
[65]Prevention of Cruelty to Animals Act, 1960, §11(3)(e), No. 59 of 1960.
[66]Dr. Ashok v. Union of India, (1997) 5 SCC 10, ¶4.
[67]Board of Trustees of the Port of Bombay v. Dilip Raghavendranath Nadkarni, (1983) 1 SCC 124, ¶13.
[68]Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180, ¶148.
[69]Sagari R. Ramdas, *Modi Government's New Restrictions on 'Cattle' Slaughter Will Hurt Indian Farmers the Most*, THE WIRE (May 27, 2017), https://thewire.in/agriculture/cattle-slaughter-restrictions-farmers.

the cattle sourced for slaughter are purchased at such markets.[70] Prohibiting the sale of cattle for slaughter from such markets would have a devastating impact on the livelihoods of all persons dependent on this trade, such as slaughter-house owners, butchers, and food processors, among others.[71] As noted in the introduction to this article, one need only consider the situation created in the State of Maharashtra, where the production cycle of cattle was destroyed and thousands of farmers lost their livelihoods after the state government enacted its ban on cattle slaughter in order to understand the ruinous effects of allowing such a law to subsist.[72]

VI. INDIRECT EXPROPRIATION OF THE FOREIGN EXPORTER'S INVESTMENT

Article 300A of the Constitution of India provides that a person cannot be deprived of his property other than by the authority of

[70]Sanjeeb Mukherjee, *Cleaver Falls on Sale, Purchase of Cattle for Slaughter*, BUSINESS STANDARD (May 27, 2017: 1:07 AM), http://www.business-standard.com/article/economy-policy/cleaver-falls-on-sale-purchase-of-cattlefor-slaughter-117052601549_1.html; *New Cattle Trade Rules: All Animals are Equal*, THE HINDU (May 28, 2017: 11: 21 PM), http://www.thehindu.com/opinion/editorial/on-cattleslaughter-ban-all-animals-are-equal/article18595323.ece.

[71]Prabhash K. Dutta, *Cattle Slaughter Economy: How Ban on Sale of Cattle for Killing May Affect Industry, Employment*, INDIA TODAY (May 29, 2017), http://indiatoday.intoday.in/story/cattle-slaughtereconomy-kerala-calf-beef-festival/1/965765.html.

[72]Sagari R. Ramdas, *The Beef Ban Effect: Stray Cattle, Broken Markets and Boom Time for Buffaloes*, THE WIRE (April 6, 2017), https://thewire.in/121728/beef-ban-cattle-market/ (Last visited on September 4, 2017); Sharad Vyas, *Maharashtra Farmers Resort to Distress Sale of Cattle*, THE HINDU (April 12, 2016), http://www.thehindu.com/news/national/other-states/maharashtra-farmers-resort-to-distress-sale-ofcattle/article8462993.ece.

law.[73] The 2017 Rules violate this Right to Property because first, it lacks authority of law and second, it is not made for public purpose and does not provide for compensation.

'Property' under Article 300A includes corporeal, incorporeal, tangible, intangible, visible, invisible, real or personal property.[74] It consists of right of free use, enjoyment and disposition without any control or diminution unless provided by the laws of the land.[75] It also includes an interest existing in a "*commercial or industrial undertaking*"[76], "*business*"[77] and "*assets, rights and obligations of a going concern*".[78] Deprivation occurs when the owner of the 'property' is dispossessed of the rights arising out of such 'property'.[79] Interference with investment to the extent that investor is unable to enjoy rights arising out of such investment is recognised as a form of deprivation of property.[80]

The investment of persons in commercial undertakings borne out of the slaughter of cattle, such as the beef exporters, amounts to an "*interest existing in a commercial undertaking*"[81] and is hence, 'property' within the meaning of Article 300A. The Rules, which place a ban on the sale of cattle for slaughter dispossess the investors of the right to enjoy the benefits arising out of such investment. Therefore, the Rules meaningfully interfere with the investment leading to deprivation of the property of the investor.

[73]INDIA CONST. art. 300A.
[74]8 Durga Das Basu, Commentary on the Constitution of India 9681 (8th ed. 2011).
[75]Jilubhai Nanbhai Khachar v. State of Gujarat, (1995) Supp. (1) SCC 596, ¶42.
[76]Chiranjit Lal Chowdhuri v. Union of India, 1950 SCR 869, ¶49.
[77]Saghir Ahmad v. State of Uttar Pradesh, (1955) 1 SCR 707, ¶25.
[78]Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248, ¶39.
[79]State of Bombay v. Bhanji Munji, (1955) 1 SCR 777, ¶7. *See also* Dwarkadas Shrinivas of Bombay v. Sholapur Spinning & Weaving Co. Ltd., 1954 SCR 674, ¶56.
[80]K.T. Plantation (P) Ltd. v. State of Karnataka, (2011) 9 SCC 1.
[81]Chiranjit Lal Chowdhuri v. Union of India, (1950) SCR 869, ¶49.

Now, such deprivation of property can only be undertaken through the exercise of 'authority of law'.[82] As already shown above, the Rules are ultra vires the parent Act and hence, do not satisfy the requirement of 'authority of law' under Article 300A.

Right to compensation and the objective of public purpose in cases of deprivation of property is not specifically mentioned as a requirement in the text of Article 300A. This implies that in situations of deprivation of property, compensation may not necessarily be awarded to Indian citizens and corporations. However, it is recognized as an implied right arising out of Article 300A for foreign investors.[83]Although there is no substantial jurisprudence on investments of foreign citizens with regard to compensation, it has been held that the same is subject to India's laws, as well as the international agreements signed between it and other foreign countries.[84] The applicable law, thus, for the determination of compensation will be the Bilateral Investment Treaties of India with other countries. 'Expropriation' in the Model BIT includes a permanent or near complete deprivation of the value of investment and the investor's right of management and control over these investments. Article 5.1 of the Model BIT of India states that adequate compensation is to be provided to foreign investors when the State takes measures that have an effect equivalent to expropriation.[85] Furthermore, the compensation must be "*adequate and reflect the fair market of the expropriated investment*".[86]

Foreign investors dealing with dairy products, cattle slaughter or any industry impacted by the sale or purchase of cattle, have been

[82]INDIA CONST. art. 300A.
[83]K.T. Plantation (P) Ltd. v. State of Karnataka, (2011) 9 SCC 1, ¶189.
[84]*Id.*, ¶220.
[85]Model Text for Indian Bilateral Investment Treaty, 2015, art. 5.1.
[86]*Id.*, art. 5.6.

deprived of their right to property. However, no compensation, fair or unfair, has been paid in lieu of such deprivation. Additionally, the concerned Article of the Model BIT mandates an objective of public purpose for a legal expropriation. The Rules, by violating various provisions of the Constitution and being against the general interest of cattle-rearers, dairy farmers, cattle traders and those involved in leather industry, clearly fail to satisfy the said objective.

Thus, the Rules do not adhere the condition under Article 300A leading to a constitutional violation.

VII. THE NEW REGIME: CONSTITUTIONALITY OF THE DRAFT RULES

The Rules were rolled back in December 2017 due to the backlash received by the Government from various stakeholders. In suppression of these old rules, the Ministry of Environment released a draft regulation titled 'Prevention of Cruelty to Animals in Animal Markets Rules 2018' ('draft Rules'). These draft Rules are aimed at addressing the challenges to the constitutionality of the 2017 Rules.

The draft Rules do not contain any restrictions on the sale of cattle at animal markets, other than those cattle which may be categorized as unfit animals. Primarily, these Rules cover issues pertaining to the facilities at animal markets, prohibited practices, and necessary compliances. Thus, even though these draft Rules still legislate on the subject of 'markets and fairs', they, in substance, regulate only the conditions and practices that an animal is subjected to in these markets. This falls squarely within the ambit of 'prevention of cruelty to animals', specified in Entry 17 of the Concurrent List.[87] Any encroachment upon the subject-matter of 'markets and fairs', as

[87]INDIA CONST. Sch. VII, List III, Entry 17.

specified in the State List, is merely incidental and the main objective remains to ensure the prevention of cruel practices in these markets. Furthermore, by virtue of removing the provisions of restrictions of sale of cattle, these Rules do not prohibit the sale of cattle for the purpose of slaughter. The significance of this is two-fold. First, the draft Rules are consistent with Article 14, 19, 21 and 300 of the Indian Constitution. Second, they are also within the ambit objective the Prevention of Cruelty to Animals Act and hence, not ultra-vires the Act.

Unlike the 2017 Rules, the draft Rules do not distinguish between cattle and other animals. This places both cattle and non-cattle owners on an equal footing for the purposes of the Rules. Consequently, the draft Rules do not envisage any differentiation which would call for a 'reasonable classification' examination under Article 14. The draft Rules will also be upheld on the touchstone of arbitrariness inasmuch as there is no ban on trading across state lines. This is in line with the rationale of the Rules, which is to prevent illegal smuggling of cattle through international borders. As explained above, an Article 19 violation in the previous Rules was based on the prohibition of trade of cattle in the 'animal markets'. The draft Rules have removed the prohibition on sale of cattle for slaughter, allow farmers and other traders to trade in cattle. As mentioned earlier, animal markets are responsible for a large percentage of cattle trade in the country. The removal of the prohibition therefore, protects the freedom of trade envisaged in Article 19. Likewise, the Rules do not hinder the right to privacy and personal autonomy under the umbrella of Article 21. This stems from the elimination on the prohibition on cattle slaughter, allowing individuals to exercise their right to choice of food, as part of the right to privacy and personal autonomy. Since there does not exist a ban on the sale of cattle for slaughter under the draft Rules, the beef exporters' right to enjoy the benefits arising out of the

investment in the cattle trade remains unobstructed. Ergo, there is no violation of Article 300.

The draft Rules, in addition to excluding the provision on prohibition of sale of cattle for the purposes of slaughter, have also excluded the provision disallowing killing of cattle for religious purposes.[88] For this reason, the draft Rules do not address any 'cruel' practice beyond those contemplated in the parent Act. As a result, these Rules are intra-vires the Act and hence, valid in law.

Therefore, it may be inferred that the Central Government reversed a constitutional disaster to turn it into a potentially viable solution.

VIII. CONCLUSION

Once enforced, the draft Rules will successfully address the issue of cruel practices in animal markets. However, their effectiveness in preventing the illicit smuggling of cattle at international borders still remains disputed. The Central Government has the authority to formulate the export policy of India.[89] In furtherance of this power, the Government has *restricted* export of live cattle.[90] At present, it is difficult for the Border Security Force to keep an absolute check on the cattle smuggled illegally into Bangladesh. This is due to the highly porous border that India shares with Bangladesh, a large portion of which is riverine in nature and not fenced.[91] There is an "*inability to substantiate the criminal intent as the alleged accused*

[88]Prevention of Cruelty to Animals in Animal Markets Rules, 2018.
[89]Foreign Trade (Development and Regulation) Act, 1992, § 5, No. 22 of 1992.
[90]Foreign Trade (Development and Regulation) Act, 1992, Schedule II, Table-B, No. 22 of 1992.
[91]Rahul Karmakar, *Chilli in Genitals, Pierced with Nails: How Cattle is Smuggled into Bangladesh*, HINDUSTAN TIMES (July 14, 2017, 8:31 PM), https://www.hindustantimes.com/india-news/tricks-of-the-trade-smugglers-torture-cattle-to-push-them-across-to-bangladesh/story MprydcZSNzACfBTUbJ3GQN.html [hereinafter Karmakar].

persons always took the plea that the cattle was meant to be consumed locally. This is because of the fact that the transporters do not carry any transit pass."[92]

This problem can be effectively solved if a formal cross-border cattle based supply chain of live cattle is permitted. In pursuance of this, legalization of over-age and non-milch cattle has received strong support from the Border Security Force.[93] In the present situation, when mere policing is not sufficient to control the crisis, the Central Government should rethink its national policy in favour of cattle export. The benefits of legalization are multifold. First, it would create a monitored flow of cattle from India, leading to a reduction of illegal trade across the border, which would allow the Border Security Force to clearly identify those traders who might not have the requisite permissions to carry on trade in cattle. Second, it would greatly reduce the instances of cross-border firing across the India-Bangladesh border. Currently, cattle smuggling is a primary reason for firing on this border.[94] Finally, it also addresses a grave problem related to using of gruesome or cruel practices to make the cattle forcefully storm through the fencing at the border, in order to avoid any checks by border patrols. It has been reported that a strategy adopted by these illicit traders includes inserting chili or petrol into

[92]Rining Lyngdoh, *Plea to Legalise Cattle Trade*, THE TELEGRAPH (March 12, 2016), https://www.telegraphindia.com/north-east/plea-to-legalise-cattle-trade/cid/1407264.

[93]Deeptiman Tiwary, *BSF Wants Legalization of Cattle Trade to Stop Border Smuggling*, THE TIMES OF INDIA (June 4, 2015, 07:54 PM), https://timesofindia.indiatimes.com/india/BSF-wants-legalization-of-cattle-trade-to-stop-border-smuggling/articleshow/47534228.cms.

[94]*Bangaldesh's Border Guard says Cattle Smuggling across India Border has Come Down*, THE INDIAN EXPRESS (September 20, 2016, 3:53 PM), https://indianexpress.com/article/india/india-news-india/bangladesh-border-guard-cattle-cow-smuggling-3040688/.

the genitals of the cattle, which makes them lash out in pain and storm through the fencing.[95]

Therefore, a push towards legalization of cattle export along with the effective implementation of the draft Rules would result in a marked reduction of the illegal smuggling of cattle as well as the instances of cruelty inflicted on these animals.

[95]Karmakar, *supra* note 91.

ELECTORAL BONDS AND FUNDING TO POLITICAL PARTIES IN INDIA: A CRITIQUE

Suryasnata Mohapatra[*]

Abstract

Indian democracy is characterized by a Parliament with multifarious party politics. The political parties are the major players in the Indian polity. These political parties require money for their sustenance, rallies and participation in the elections. They derive these monies primarily from the donations from individuals, sympathizers, industrialists and even outlaws. The sources are anonymous or pseudonymous. These donations run into hundreds of crore and lack transparent funding mechanism. As a result, the donors have a wide influence over the policy making of the winning parties and the governments become puppet at the hands of a few. So, as an initiative to get certain degree of check and transparency in the political financing, the Union Government in its Budget speech of 2017-18 had declared to bring electoral bonds as a monetary instrument in electoral donations by amending the RBI Act 1934 and the Finance Act 2017. This is made with an

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intent to have cashless donations and systematized cash tracing. Such a policy change came as an addendum to the controversial "demonetization" implementation. This policy seems to be a great initiative to reform the electoral finances and funding and came as an adherence to the recommendations of Law Commission, Election Commission and the Hon'ble Supreme Court. But the said policy contains few discrepancies which are presumed to cater to the needs of certain targeted persons. Thus, in this paper, the researcher shall be discussing the salient features of the recent electoral bonds policy along with a multidimensional criticism. It would further try to ameliorate the said gaps by suggesting measures which can aid in bringing transparency and contribute in reducing the menace of black money in the electoral system. Further, the researcher shall be citing certain electoral finance reforms and laws in other countries which can be beneficial in our country's electoral financing and diminish corrupt practices in the political parties.

Key Words - Black Money, Dinesh Goswami Committee Report on Electoral Reforms 1990, Election Commission, Electoral Bonds, Reserve Bank of India (RBI), Supreme Court (SC), The Representation of People's Act (RPA) 1961, 255th Law Commission Report.

"I mean to diminish no individual, institution or phase in our history when I say that India is valued the world over for a great many

things, but for three over all others: The Taj Mahal; Mahatma Gandhi; and India's electoral democracy."

– Gopalkrishna Gandhi

Corruption has spread to all spheres of our lives. The problem of the corruption is that it pollutes the ethos of a body and inducts malevolent vibes in its integral parts. In our case, the body is our electoral system and political parties as one of its integral part. Corruption has vandalized the well-being of the elections. The *prima causa* of corruption in the elections is money. Money is the attribute which decides the fate of a political party and not the electorates. Concerns have often been expressed in various quarters that money power is disturbing the level playing field and vitiating the purity of elections.[1] The electoral compulsions for funds become the foundation of the whole superstructure of corruption.[2] The consequences of not having reforms in electoral finances may be summed up as follows:

Firstly, it is an undeniable fact that financial superiority translates into electoral advantage, and so richer candidates and parties have a greater chance of winning elections. Money is bound to play an important part in the successful prosecution of an election campaign of richer candidates and supplies assets for advertising and other forms of political solicitation that increases the candidate's exposure to the public.[3]

[1]Election Commission of India, *Guidelines on Transparency and Accountability in Party Funds and Election Expenditure* (New Delhi: 2014), https://eci.gov.in/files/file/867-guidelines-on-transparency-and-accountability-in-party-funds-and-election-expenditure-matter-regardingdated-29082014/.
[2]Ministry of Law and Justice, *National Commission Report on Implementation of the working of the Constitution* (New Delhi: 2001), https://archive.pib.gov.in/archive/releases98/lyr2002/rsep2002/12092002/r120920024.html [hereafter NC Report].
[3]Kanwar Lal Gupta v. Amar Nath Chawla, 1975 AIR 308, ¶7.

Secondly, in furtherance of the first point is the issue of equality and equal footing between richer and poorer candidates.[4] Without equality between the candidates healthy competition is unable to sustain within the elections. A simple perusal of the Lok Sabha 2014 candidates reveals that 27% (or 2208 candidates) of all the candidates were "crorepati candidates," and the average asset of each of the 8163 candidates was Rs. 3.16 crores. The percentage of crorepati candidates increased from 16% in 2009 Lok Sabha elections.[5]

Furthermore, most of the funding received is from anonymous sources. A report from Association for Democratic Reforms shows data on funding of political parties, which stated that various political parties received Rs. 7,833 crore of funding from unknown sources between 2004-05 and 2014-15, which constitutes 69 percent of their total income during the period. Thus 69 per cent of the income of various political parties is anonymous and untraceable.[6]

Finally, the argument for election finance reform is premised on a more philosophical argument that large campaign donations, even when legal, amounts to what Lessig terms "institutional corruption", which compromise the political morality norms of a republican democracy. Here, instead of direct exchange of money or favour, candidates alter their views and convictions in a way that attracts the most funding. This change of perception leads to an erosion of public trust, which in turn affects the quality of democratic engagement.[7]

This shows opacity and flaw in the legal framework to check the corrupt practices. As an innovation to electoral financing policy, the Central Government has introduced Electoral Bonds as a monetary instrument for the sake of transparent donation to political parties. It

[4]NC Report, *supra note* 2.
[5]Law Commission of India, *255th Law Commission on Electoral Reforms* (New Delhi: 2015), 13 [hereafter ER Report].
[6]*Id*.
[7]ER Report, *supra* note 5, at 315.

is a welcoming step towards making the electoral processes corruption- free.

I. ABOUT THE ELECTORAL BONDS AND THEIR SIGNIFICANCE

The Central Government has devised a new monetary scheme known as "Electoral Scheme" by virtue of the power conferred under sub-section (3) of Section 31 of the Reserve Bank of India Act, 1934.[8] Electoral bond as defined in the scheme[9] means "a bond issued in the nature of promissory note which shall be a bearer banking instrument and shall not carry the name of the buyer or payee." It is designed to be a bearer instrument like a Promissory Note — in effect, it will be similar to a bank note that is payable to the bearer on demand and free of interest. It can be purchased by any citizen of India or a body incorporated in India.[10] The bonds shall be issued in the denomination of Rs. 1000, Rs. 10,000, Rs.1,00,000, Rs. 10,00,000 and Rs.1,00,00,000.[11]They can be purchased by giving a Know Your Customer Form ("**KYC**")[12] from notified branches of the State Bank of India (SBI) for 10 days each in month of January, April, July and October.[13] Such an innovative scheme is first of its kind implemented in any country and carries certain significance. The characteristics of this scheme are as follows

[8]The provision has authorized the Central Government to make or issue any promissory note expressed to be payable to the bearer of the instrument other than the Reserve Bank of India.
[9]Electoral Bond Scheme, 2018, § 2(a), No. 2 of 2018.
[10]Electoral Bond Scheme, 2018, § 3, No. 2 of 2018.
[11]Electoral Bond Scheme, 2018, § 5, No. 2 of 2018.
[12]Electoral Bond Scheme, 2018, § 4, No. 2 of 2018.
[13]Electoral Bond Scheme,2018, § 8, No. 2 of 2018.

I) The significant aspect of this scheme is that the bond will remain valid for 15 days and shall not carry the donor's name, although the payee will have to fulfil KYC protocols at the bank. It will ensure safety and security of the donor from the threat of any political parties.

II) To benefit from the electoral bonds scheme, the political parties must have been registered with the Election Commission and should have secured not less than 1 per cent of the votes polled in the most recent General Election to the Lok Sabha or a State legislative assembly. This can be seen as a measure for pushing out the non-serious candidates.[14]

III) Also, the bonds can be en-cashed by an eligible political party only through a designated bank account with an authorized bank. Every political party has to submit details of one designated account to the Election Commission and the bonds can be en-cashed only in that account.

IV) In order to achieve the success of the electoral bonds, the government has reduced the direct cash donations to a limit of Rs. 2000 and thus the donor will be compelled to donate through electoral bonds. It will ensure transparency in the funding to the political parties and the concerned state authorities (RBI and the Election Commission) will have information about the donors.

V) It is a good step so as to moving away from dubious cash given to political parties to moving to electoral bonds. The returns will have to be filed by the political parties through these bonds and therefore it is

[14]Navmi Krishna, *The Hindu Explains: What is an electoral bond and how do we get one?*, THE HINDU (Jan. 4, 2018, 4: 35 PM), https://www.thehindu.com/news/national/the-hindu-explains-what-is-an-electoral-bond-and-how-do-we-get-one/article22367124.ece, Last visited on 17th January 2019.

meant to be transparent, accountable and a small step towards electoral reforms.[15]

II. CRITICISM OF THE ELECTORAL BONDS

"Criticism may not be agreeable, but it is necessary. It fulfills the same function as pain in the human body. It calls attention to an unhealthy state of things."

– Winston Churchill

The lawmaker has been given discretionary power for the benefit of the public but it takes no time for discretion to become the handmaid of corruption where *the little man is pitted against the might of the state.*

Firstly, the procedural flaws in the formulation. This scheme was introduced in the Lower House as a money bill. But the said law doesn't fulfill any such criteria required to be regarded as a money bill as mentioned in the Constitution.[16] The requisite criteria for a bill to be regarded a money bill cover areas dealing with the imposition, abolition, remission, alteration or regulation of taxes, appropriation of moneys out of the Consolidated Fund of India.[17] The ulterior motive behind such action is that the Lower House has an edge over the Upper House in matters relating to the money bills[18] and the President shall sign on the proposed bill without exercising his veto powers.[19]

[15]*AIR spotlight summary on "Electoral Bond"*, INSIGHT IAS (Jan. 5, 2018), https://www.insightsonindia.com/2018/01/05/air-spotlight-summary-electoral-bond/.
[16]INDIA CONST. art 110.
[17]V.N SHUKLA, CONSTITUTION OF INDIA (12 ed. 2019, Eastern Book Company).
[18]INDIA CONST. art.109(2).
[19]INDIAN CONST. art 111.

But the last discretion on the typology of a bill lies only with Speaker and such discretion is not available for judicial scrutiny.[20]

Secondly, the legislative intent associated with the electoral bonds is to evade black money from the funding of the political parties and to have a transparent- cashless funding to the political parties. Per contra, the collateral action of the government accompanying the electoral bonds present a different scenario.

I) Section 29(c) of the Representation of People's Act,1951 is added to exempt the political parties from disclosing the donations received through the electoral bonds.

II) Section 182 (3A) of the Companies Act, 2013 to relax the companies from contributing to the political parties. This move is being criticized as this fallacy has strong sense of corporate bidding.

III) Section 13(A)(b) of the Income Tax Act 1961 providing scope to the Political Parties to incur huge monetary benefits through the donations through these bonds without getting liable to pay tax.

Thirdly, a plethora of fundamental rights are violated through this action. The fundamental rights pledge to attain the lofty goals of justice, liberty, equality, fraternity and the "dignity of the individual" set out in the Preamble.[21] So, shutting the eyes to this segment of rights is not acceptable.

I) The method adopted to pass the Finance Act, 2017 is symbolic of its arbitrary and unconstitutional provision. Certain specified provisions like maintaining secrecy of the donations and the procedures followed on in many ways is in accordance with the principles of arbitrariness and unreasonableness. Also, there is a lack of quantum of punishment for breach of confidentiality[22] which is

[20]Mohd. Sayed Siddiqui v. State of Uttar Pradesh, 1954 CriLJ 1607.
[21]Re: Ramlila Maidan Incident, (2012) 5 SCC 1.
[22]Finance Act, 2016, §31(2), No. 28 of 2016.

also a reason for vagueness and arbitrariness. The concept of reasonableness and non- arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.[23] Upon violation of this cardinal principle, the court may by applying a rational mind invalidate the impugned legislative as well as the executive action.[24]

II) The secrecy of the money donated and received herein through the electoral bonds is in direct violation of the right of a citizen to get information which in turn contravenes the freedom of speech and expression of a citizen.[25] By including the statutory right of Right to Information under the ambit of freedom under Article 19 (1) (a) and making it a fundamental right, the Hon'ble Supreme Court has paved way for citizens to avail information about public offices.[26]

Lastly, Clause 7(4) of the scheme[27] has mentioned that the requisite information of the bonds may be supplied on demand from a competent court. But the law has failed to specify the "competent court" to which such information can be submitted in case of registration of criminal case by any law enforcement agency. Furthermore, the scheme has not specifically mentioned at which stage of the proceeding i.e at investigation, trial or appeal, the banks are compelled to provide detailed information to the "competent court."

[23]Ajay Hasia v. Khalib Mujib Sehravardi, (1981) 1 SCC 722.
[24]Maneka Gandhi v. Union of India, (1978) SCC 248.
[25]Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal, (1995) 2 SCC 161.
[26]State of Uttar Pradesh v. Raj Narain, (1975) 4 SCC 428.
[27]The information furnished by the buyer shall be treated confidential by the authorized bank and shall not be disclosed to any authority for any purposes, except when demanded by a competent court or upon registration of criminal case by any law enforcement agency.

III. SUGGESTED MEASURES

The intent associated with the scheme of electoral bond is to have cashless donations to political parties in a transparent and accountable structure. But the concerned scheme might not be able to cater to the primary concern of having corruption free electoral processes because of certain discrepancies. The following suggestive measures to the scheme might be able to address the problems in its proper implementation.

The relaxation granted to the political parties from non-disclosures of donations through the electoral bonds in their annual financial asset report needs to be omitted.

The independent candidates should also be allowed to get donations through these bonds by amending clause 3 of the scheme.[28]

Procedure for disclosure of the information of donor needs to be specified comprehensively by changing clause 7 (4) of the scheme.[29]

All political parties registered under Section 29 A of the Representation of people's Act, 1961[30] need to be considered as public authorities to enable citizens to get information[31] under the Right to Information Act, 2005.The Apex Court had declared that Right to Freedom of Speech and Expression guaranteed by Article 19(1)(a) included the right to know every public act, everything that is done in a public way and by their public functionaries.[32] Since political parties also form an integral instrumentality with regard to

[28]Eligibility for purchase and encashment of the Bond.
[29]Confidentiality of the donor and condition for making the information disclosed before a competent court.
[30]Registration with the Election Commission of Association and Bodies as Political Parties.
[31]Any material including records and electronic messages which can be accessed by a public authority under any other law. *See* Right to Information Act, 2005, § 2(f), No. 22 of 2005.
[32]State of Uttar Pradesh v. Raj Narain, 1975 AIR 865.

public functionaries, bringing them under the ambit of the Right to Information Act, 2005 is justified.

Most importantly, structural reforms relating to electoral financing is necessary to get rid of corruption in the existing electoral set up. Some suggestive measures are as follows:

A. State Funded Elections

The role of big money in elections (and the associated chances of bribing, capture and lobbying) has sought to be reduced through public funding of elections. The idea of state funding has been proposed to reduce the unending increase in the cost of elections (and create a level playing field) and to curb corruption and the influence of black money. The state funding may be in terms of giving subsidies or any sort of material help. As per Dinesh Goswami Committee Report,[33] there should be partial state funding in the form of limited in-kind support for vehicle fuel (which is a primary campaign expense), rental charge for microphones, and issuance of voter identity slips and additional copies of electoral rolls. Furthermore, the state funding will also call for auditing and accounting by the Comptroller and Auditor General (C & AG) because of appropriation of public money.[34] But, the prevailing economic conditions of the country make it impossible for complete state funding.[35] So, partial state funding will be a judicious decision. Some European countries also follow the practice of partial public funding of political parties which are given in the tabular form:[36]

[33]Dinesh Goswami, *Report of the committee on Electoral Reforms* (New Delhi: 1990), Ministry of Law & Justice (India).
[34]INDIA CONST. art.148.
[35]Indrajit Gupta, *Report of the committee on State Funding of Elections* (New Delhi: 1998), Ministry of Law & Justice (India).
[36]ELIN FALGUERA ET AL., FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS 6 (International Institute for Democracy and Electoral Assistance, 2014).

United Kingdom	• Modest public funding of political parties. • Political parties receive direct public funding over each financial year for policy development purposes up to 2 million pounds on the basis of current legislative representation.
Sweden	• High Level of Public Subsidies exist for parties at various levels, with each party being given a base amount at the sub-national level along with additional state aid to party. Sub-organization and to party media based on past performance and current representation. • Indirect Subsidies include media access and the party affiliated press receives press support.
Italy	• Public funds are distributed according to the votes pulled and is given to candidates. • Indirect, in- kind subsidy in the

	form of free media access and state aid for radio and newspapers and reduce rates for sending electoral propaganda material by post to voters.

B. National Electoral Fund

A fund where all donors can openly contribute without expressing any preference for any political party. The funds could then be allocated to all registered political parties in proportion to the votes obtained. There can be tax benefit for those who donate to the fund. This will also address donor's concern for secrecy. It is seen in the electoral donations that donors are coerced to donate a particular party and violence have taken place because of such unruly behaviour and the use of criminal ailments for extortion by the concerned parties.[37]

C. A single electoral law with a Strong Enforcement Mechanism

The laws associated with the elections are very dis sorted and create ambiguity in the minds of the concerned persons. A single integrated law relating to elections along with proper mechanism is call for the time. For instance- The Representation of People's Act, 1961 is mainly associated with the conduct of elections and governs the moral conduct of individual person contesting the election. It lacks any sort of provision regulating the moral conduct of political parties.[38] Again, the said act lacks any penal measure relating to misconduct especially

[37]N.N. Vohra, *Committee Report on Criminalisation of Politics* (New Delhi: 1993), Ministry of Home Affairs (India).
[38]The Representation of People's Act, 1961 §29(c), No. 43 of 1951.

the corrupt electoral finances. A single integrated election laws containing:

- Disqualification criteria of Political Parties and its members.
- Penal provisions for any misconduct especially relating to corrupt practices
- Provisions governing the donors[39] to the Political parties.
- Compelling the Political Parties to make their spending and internal administration public.
- Setting up an investigation agency similar to Enforcement Directorate or CBI to look into matters associated to economic offenses done by the Political Parties and their respective members.
- Instituting special courts to try cases related to the election disputes, both Civil and Criminal matters.[40]

IV. CONCLUSION

Elections are the mean through which the citizens show their legitimacy and will towards the sovereign. These rustic ballot papers are not only a mean to elect an individual but an agreement of the population to elect a body of able persons who are speaking the legitimate interest of the whole population. So, the elections need to be conducted fairly to ensure that the ethos of the parliament is maintained. The government has taken up several steps to tackle the menace of corruption and the discussed Electoral Bond Scheme is a nascent initiative. It is a welcome step to clean up the elections and

[39]Kanwar Lal Gupta v. Amar Nath Chawla, 1975 AIR 308.
[40]Ashwini Kumar Upadhyay v. Union of India, Writ Petition (Civil) No. 699 of 2016.

the political parties. But the said scheme also contains criticisms which need to be addressed by the government, Election Commission and the Hon'ble Supreme Court. Awareness is the greatest agent for change.[41]Therefore, every initiative of the Government is only possible when there is popular and conscious awareness about the prevailing problems. Majority of the issue will get resolved when the general masses are aware of their rights, liability and the duties and act accordingly keeping in mind the welfare of the nation, the population and the self.

[41]David Gerken, *Eckhart Tolle's Most Important Saying: "Awareness is the greatest agent for change*, MEDIUM (Aug. 4, 2020), https://medium.com/change-your-mind/eckhart-tolles-most-important-saying-awareness-is-the-greatest-agent-for-change-21e713d64a90.

A NO BALL FROM SUPREME COURT – CRITICAL ANALYSIS OF UNION OF INDIA V. BCCI

Tushar Kapoor[*]

Abstract

The Apex Court, in BCCI v Union of India, held that Star India is obligated to share feeds of live cricketing events with Prasar Bharti so that it can transmit the same on its terrestrial and its own Direct-to-Home (DTH) network, and no other DTH and cable service providers, on grounds that the licensee of BCCI, i.e., Star India is incurring huge subscription losses and there is no need to read the provisions of the Cable Television Networks (Regulation) Act, 1995 (hereinafter referred to as the Cable Act) into the Sports Broadcasting Signals (Mandatory Sharing With Prasar Bharti) Act, 2007 (hereinafter referred to as the Sports Act). The author strongly disagrees with the opinion of the Court as the judgment goes against the mandate of the Sports Act i.e. to widen the base of viewership of sporting events of national importance, which in the current case is cricket. Despite the fact that there is no law designed for DTH service providers, the Guidelines For Obtaining License For Providing Direct-To-Home (Dth)

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Broadcasting Service In India of 2001 (hereinafter referred to as the Licensing Guidelines), along with the notifications issued by the Ministry of Information and Broadcasting, clearly state that DTH operators have to adhere to the provisions of the Cable Act. This is repugnant to S.8 of the Cable Act which states that there shall be no deletion or alteration of programs by the content rights owner when it is being shared on Prasar Bharti's channels. Moreover, the Sports Act provides for a revenue sharing model for the licensee of BCCI and Prasar Bharti, which points towards the fact that it is not an expropriatory legislation. The prohibition of the broadcast on Prasar Bharti's channels on cable and DTH operators is going to hamper the advertisement revenues of Star Network severely, much more than the subscription losses that it has been incurring. The fact that majority of cricket viewers have either a cable connection or a DTH service provider, this judgment will not only jeopardize the viewership of cricket in India, but may also be responsible for reduction in the viewership of Doordarshan.

In August 2017, the Apex Court, in *BCCI v Union of India,* [1] gave an unacceptable decision for millions of cricket fans as it

affirmed the decision of the Delhi High Court directing Prasar Bharti not to re-transmit the live feeds of cricket matches to private cable operators and DTH service providers by virtue of Section 3 of the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007.

I. BACKGROUND

BCCI awards media rights agreement to a certain licensee for broadcasting Indian cricket team's matches, pursuant to a bidding process. Earlier, Nimbus Sports held those rights from 2007 to 2012, but the same were acquired by Star Sports India subsequently.2 Now, as per S.3 of the Sports Act, 2007, BCCI's licensees were obligated to share the live feeds of cricket matches, as notified by Government as "sporting events of national importance", with Prasar Bharti for re-transmission on its terrestrial and DTH networks. However, the shared feeds were causing subscription losses to Star Sports as the people, instead of subscribing for the Star Sports channel, started viewing cricket matches on the Doordarshan channel. A writ petition was filed in 2007 before Delhi HC which was summarily dismissed by a single judge bench. Eventually, a letters patent appeal3 was filed in 2015, which overturned the previous decision. Subsequently, Prasar Bharti, Union of India and others preferred a special leave petition under Article 136 of the Indian Constitution before the Supreme Court.

[1]Board of Control for Cricket in India v. Union of India, (2018) 11 SCC 700.
[2]*Star Sports India bags BCCI media rights for Rs 6138.1 crore*, THE TIMES OF INDIA (APR. 5, 2018: 10:22 PM), https://timesofindia.indiatimes.com/sports/cricket/news/star-sports-india-bags-bcci-media-rights-for-rs-6138-1-crore/articleshow/63628236.cms.
[3]*Making a case for Letter Patents Appeal in the state*, THE TIMES OF INDIA (Nov 17, 2013, 05:27 AM), https://timesofindia.indiatimes.com/city/goa/Making-a-case-for-Letter-Patents-Appeal-in-the-state/articleshow/25916821.cms.

II. LAW INVOLVED AND RULING

The case predominantly was regarding the interpretation of S.3 of Sports Act according to which the content rights owner, carrying a live broadcast of sporting events of national importance, shall be required to share the same, devoid of its advertisements, with Prasar Bharti to enable it to re-transmit it on its terrestrial and direct-to-home networks. S. 3(2) of Sports Act also provides for a revenue sharing model between the content rights owner and Prasar Bharti as an exception when the feeds are shared with advertisement. However, the Supreme Court classified the aforementioned legislation as an *expropriatory legislation*, thereby strictly construing the language of the section, and kept the "private cable operators/DTH networks" out of the purview of "Direct-to-Home Networks" as stated in S.3. Additionally, the Court refused to take into consideration S. 8 of the Cable Act, 1995, according to which DD1 is notified as a mandatory channel to be carried by cable operators without any deletion or alteration of programs.[4] According to the Court, in absence of any legislative intent, the provisions of the Sports Act shall be allowed to operate independently, without being controlled by the conditions of S. 8 of Cable Act. It also ruled that the DTH network of private operators cannot be termed as "cable operators" within S.2. Consequentially, the court held that the live feeds received by Prasar Bharati from content rights owners is only for the purpose of re-transmission of the said signals on its own terrestrial and DTH networks and not to Cable Operators so as to enable the Cable TV operators to reach such consumers who have already subscribed to a cable network.

[4]The Cable Networks Regulation Act, 1995 § 8(2), No. 7 of 1995.

III. AUTHOR'S ANALYSIS

The author disagrees with the court's opinion on multiple grounds. Firstly, there is an absence of a comprehensive clarification/law with reference to the functioning of the DTH operators in India. Guidelines for obtaining the license for providing DTH services were released in 2001,[5] but the same do not extend to providing guidance to the providers of DTH service about the statutory compliances that they need to adhere to. For instance, the Cable Act, 1995 regulates the gamut of cable television networks, and with the digitization drive in the picture, amendments were made in 2011 to include the regulation of broadcasters providing the service through digital addressable system.[6] As far as the licensing guidelines for DTH service providers are concerned, clause 7.8 of the Schedule to the licensing agreement explicitly states that the licensee shall carry channels of Prasar Bharti on most favorable financial terms. Additionally, in 2007, the Ministry of Information and Broadcasting released a notification directing all the DTH service licensees to comply with the provisions of S.8 of the Cable Act, 1995.[7] Even though there is no comprehensive law to govern DTH operators and the same do not qualify as cable operators, notifications by the Ministry make the position crystal clear. S. 3(1) of the Sports Act mentions the term "terrestrial and Direct-to-Home networks" in its language and does not define the scope of DTH as just DD Free Dish (Prasar Bharti's DTH Network). The "must share" obligation, emphasized by the Apex Court, under the Sports Act is

[5]Ministry of Information and Broadcasting, Guidelines For Obtaining License For Providing Direct-To-Home (DTH) Broadcasting Service In India, Order No.8/1/99-PBC (Vol.II), (Issued on March 15, 2001), https://mib.gov.in/sites/default/files/GuidelinesforDTHServiceDated15.3.2001.pdf.

[6]Suchi Bansal, *In pursuit of Digitalizing India*, MINT (21 Sep 2017, 05:44 AM), https://www.livemint.com/Opinion/BxuAE4da07SbuUCfNrnbdN/In-pursuit-of-digitizing-India.html.

[7]Ministry of Information and Broadcasting, Amended Guidelines for Obtaining License for Providing Direct-To-Home (DTH) Broadcasting Service in India, Order No.8/1/99-PBC, (Issued on Nov.6, 2007), https://digitalindiamib.com/Detailsguidlinesupdated6.11.2007.pdf.

intended to mean Prasar Bharti's terrestrial networks and all those DTH networks on which the channels of Prasar Bharti are being broadcasted. There is no *intelligible differentia*[8] to discriminate between Prasar Bharti's DTH network and private DTH networks in relation to the sharing of the broadcast of cricketing events.It is pertinent to note that necessary clarification in the licensing guidelines of DTH operators or in the Sports Act would go a long way in clarifying the liability of DTH operators.

Secondly, the provisions of the Sports Act should not be interpreted strictly in isolation with the provisions of the Cable Act. The Apex Court has stated that by virtue of the Sports Act curtailing the rights of Star India Pvt. Ltd. under certain provisions of Copyright Act, it is of expropriatory character and should be strictly construed, without the provisions of the Cable Act being read into the Sports Act and granting it an extended interpretation. As held by Supreme Court in Devendra Singh v State of Punjab[9]and affirmed in subsequent decisions,[10] expropriatory legislations deal with the compulsory acquisition of properties of a citizen in the exercise of "eminent domain"and, therefore, require strict construction. The author here contends that the Sports Act is not an expropriatory legislation as there is no compulsory acquisition of property of an individual or an absolute curtailment of rights. Even though sharing the live feeds with Prasar Bharti is extracting some amount of revenue from licensees of BCCI, it does not mean that there is a compulsory acquisition of their property or revenue in the current case. S. 3(2) of the Sports Act, as an exception to the above clause, also provides for advertisement revenue sharing model in the ratio of not less than 75:25 between the content rights owner and Prasar Bharti. Moreover, the division bench

[8]Ram Krishna Dalmia v. S.R. Tendolkar, 1959 SCR 279.
[9]Devendra Singh v. State of Punjab, (2008) 1 SCC 728.
[10]Dev Sharan v. State of Uttar Pradesh, (2011) 4 SCC 769; Prabhawati v. State of Bihar, (2014) 13 SCC 721.

of the Delhi HC in ESPN Software Pvt. India Ltd. v Prasar Bharti and Anr[11] had clearly stated that the Sports Act is not an expropriatory legislation, which was later affirmed by the Hon'ble Supreme Court in Star Sports India (P) Ltd. v. Prasar Bharati[12] in 2016.

Even if the Sports Act is taken to be that of an expropriatory character, the approach by the Supreme Court to construe the legislation strictly and not contextually goes against the objective of the legislation. The Apex Court in Delhi Airtech Services Pvt. Ltd. v. State of UP[13] has held that the strict construction of an expropriatory legislation must be accompanied by literal and contextual interpretation so that the purpose of the legislation is not defeated. By limiting the scope of "Direct-to-Home Networks" to that of Prasar Bharti's DTH network and not private DTH networks, the Court, in the present case, has contributed to the eventual reduction in the viewership of cricket and has, therefore, jeopardized the object of the legislation, which is to provide access to the largest number of listeners and viewers, on a free-to-air basis, of sporting events of national importance. Additionally, the provisions of the Sports Act cannot be read in isolation to the provisions of the Cable Act as the former pertains to the sharing of the broadcast of cricket matches on Prasar Bharti's channels and the latter imposes an obligation on cable operators to mandatorily transmit Prasar Bharti's channels in their service. The provisions of the Cable Act, 1995 should not be understood to be whittled down by the enactment of the Sports Act, 2007, as stated by Mukul Rohatgi in his submissions. S.8(2) of the Cable Act, 1995 bars the DTH network operators from any deletion or alteration of the program from the re-transmitted Prasar Bharti's channels. Non-transmission of the cricket matches on Prasar Bharti's channels on cable operators would constitute a gross violation of the

[11]ESPN Software Pvt. India Ltd. v. Prasar Bharti and Anr, (2013) 204 DLT 339 (DB).
[12]Star Sports India (P) Ltd. v. Prasar Bharati, (2016) 11 SCC 433.
[13]Delhi Airtech Services Pvt. Ltd. v. State of Uttar Pradesh, (2011) 9 SCC 354.

Cable Act and make such cable operators liable to penal sanctions. Additionally, S. 8 of the Cable Act was enacted to obligate the cable operators to carry news and information concerning the nation[14] and to mitigate the growing popularity of foreign/private channels over Doordarshan.[15] S.3 of the Sports Act enables widening of the viewership base of cricket in India by incorporating a "must share" obligation. Considering the fact that a huge chunk of television viewers is on the radar of DTH service providers and cable operators, this judgment vehemently goes against the mandate of the respective provisions of the Cable Act and the Sports Act.

Lastly, according to the author, the reasoning that Star Sports India Ltd. is facing a loss of revenue due to the live feeds being shared on Prasar Bharti's and private cable operator's DTH networks and the money invested to the extent of Rs. 3,000 crore is not being realized in full, does not sustain. It is pertinent to note the observation of the Hon'ble Supreme Court in *Star Sports India (P) Ltd.* v. *Prasar Bharati*[16] that the coverage of Prasar Bharti is far more reaching insofar as the Indian population is concerned as it is present in every corner of the country. Sharing of such signals with Prasar Bharti on all kinds of DTH networks and cable operators magnifies the viewership of such matches. The advertisement revenues are directly proportional to the number of people viewing it. The increased viewership, as a result of sharing with Prasar Bharti, would generate more advertisement revenues to Star Sports rather than reducing them. Moreover, if the shared feeds are not allowed to be broadcasted on Prasar Bharti's channels of private cable/DTH operators, it is bound to reduce the viewership of cricket, which is the most decorated sport in India.

[14]Board of Control for Cricket in India v. Union of India, (2018) 11 SCC 700.
[15]Standing Committee on Cable T.V. Network (Regulation) Bill 1993.
[16]Star Sports India (P) Ltd. v. Prasar Bharati, (2016) 11 SCC 433.

A huge chunk of Indian population who watch cricket comprises of a section that can afford to have a DTH operator installed at home, but would not refer to subscribe to a Star Sports channel just for watching some of the cricket matches, unless it is broadcasted on their DD1 channel. The same, however, does not apply to the incidence of major ICC tournaments like the World Cup or the Champions Trophy because cricket enthusiasts may not want to miss such tournaments. However, these are not the only tournaments that the Indian cricket team plays in a calendar year. There are numerous other series (One Day International/Test Match/ T20 Match) that India participates in, either in India or on foreign soil. Those viewing every other match on DD1, before August 2017, would not prefer to subscribe to Star Sports or ESPN, just for the sake of watching an India- Zimbabwe series, or say, an India-Bangladesh series. This reluctance is bound to have a negative impact on the viewership of cricket in India. The consequential losses that the Star Network will suffer after the judgment, would, in any case, be more than the subscription losses than what it had been incurring.

As far as figures are concerned, out of 155 million households having TV connection, a miniscule number of people i.e. 4.6 million have Prasar Bharti's terrestrial networks;[17]approximately 22 million have DD free dish[18] or Prasar Bharti's DTH network and the rest have cable services and private DTH networks. Purchasing DD free dish just for the sake of watching matches would be an exaggeration of what the Supreme Court is endorsing, but the services offered by Prasar Bharti's DTH network are less lucrative than those of private

[17]Ashwini Vaidialingam, *Part II: Union of India v. BCCI – 'Doosra' from the Supreme Court on Broadcast of Cricket Matches by Prasar Bharti*, SPICYIP (Oct. 10, 2017), https://spicyip.com/2017/10/part-ii-union-of-india-v-bcci-doosra-from-the-supreme-court-on-broadcast-of-cricket-matches-by-prasar-bharti.html.

[18]Anushree Bhattacharya, DD FreeDish a hit with advertisers, broadcasters; subscriber base reaches 40 mn mark, FINANCIAL EXPRESS (July 11, 2017: 6:34 AM), https://www.financialexpress.com/industry/dd-freedish-a-hit-with-advertisers-broadcasters-subscriber-base-reaches-40-mn-mark/758045/.

DTH like TataSky, Airtel, etc. A huge chunk of people would continue to prefer private networks over Prasar Bharti's DTH services and in such a scenario, this judgment is bound to reduce the public access to a sport like cricket, which has in past gathered viewership of 201 million in a Champions Trophy final.[19]

Practically, it is also the case that the same result can be produced without requiring an intervention from a court as the private DTH operators can, in any case, make that sports channel a part of the basic subscription and add minimal costs to the price, which will, in turn, ensure that there are no subscription losses and the public access to cricket also does not suffer. It is high time that the Apex Court took into account a proper balancing of competing interests between private profits of BCCI's licensees and public access to cricket. Cricket has been at the top of priority of Indian television viewers for quite some time[20] and the same, if tampered with, would have a drastic effect on the popularity and the growing enthusiasm amongst youngsters to adulate iconic cricketers like Sachin Tendulkar in India.

[19]Gaurav Laghate, *India-Pakistan ODI clocks impressive TV viewership and creates history*, THE ECONOMIC TIMES (June 16, 2017: 12: 17 PM), http://economictimes.indiatimes.com/industry/media/entertainment/media/india-pakistan-odi-creates-tv-viewership-history/articleshow/59168451.cms.

[20]Rajender Sharma, *Cricket Undisputed Leader in Indian TV Viewership in 2017*, INSIDESPORT (Jan. 18, 2018), https://www.insidesport.co/cricket-undisputed-leader-indian-tv-viewership-2017-508012018/.

BOOK REVIEW: SUGATA BAG'S ECONOMIC ANALYSIS OF CONTRACT LAW

Aman Bahl[*]

Abstract

The economic analysis of law as it existed in the nineteenth century, and as it is apprehended in the twenty-first century, displays a few similarities but many differences. The fundamental similarity between these centuries is that the law comprises predominantly of contracts. The many disparities in this law influence the behaviour of its legal subjects in order to achieve particular ends. The economic analysis of Contract Law is often understood as a functional branch of Law and Economics. It is also recognized as an amalgamation of two individual and far-reaching branches, the Theories of Contract, and the Economics of Contract Law. Professor Bag in his book "The Economic Analysis of Contract Law" brings these emerging interpretations to light. In view of these constants and changes, this article reviews the position of contract law with regard to economics. It discusses the various illustrations and models mentioned by him in his book, and also brings to light the importance of his work in bringing intelligent

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and thought-provoking arguments to classroom discussion, thereby going a long way in bridging the gap between economics and law.

I. BOOK REVIEW

Emerging as the one of the most prominent perspectives in contemporary legal literature, the economic analysis of law is an instrumentalist theory of law which comprises two elements, namely, behaviour and ethics.[1] Under this theory, it is explained how law influences the behaviour of its legal subjects in order to achieve particular ends. Historically, economic analysis of law has assumed that law ought to seek effective means to maximize social welfare. When O. W. Holmes coined his "bad man" theory, he stated that reasonable, realistic, self-interested agents adhered with the law only insofar as noncompliance endangered them to the risk of sanctions.[2] However, the contemporary interpretations of the normative theories of law, employed by present-day analysts, have argued that certain legal institutions are designed to promote wealth maximization while others desire to achieve non-wealth maximizing objectives, such as distributive justice.[3]

The economic analysis of contract law is often understood as a functional branch of Law and Economics. It is also recognized as an amalgamation of two individual and far-reaching branches, the Theories of Contract and the Economics of Contract Law. Professor

[1]Rebecca Stone, Economic Analysis of Contract Law from the Internal Point of View, 116 Colum. L. Rev. 2005, 2006-07 (2016).
[2]*Id.* at 2006; *See also* Kevin Fleming, *An Economic Analysis of Contract Law: The Case of Efficient Reliance*, 10 U.S. A.F. Acad. J. Legal Stud. 159, 160 (2000).
[3]Sina Akbari, *Against the Reductionism of an Economic Analysis of Contract Law*, 28 Can. J. L. & Jurisprudence 245, 245-46 (2015).

Bag[4] in his book "the Economic Analysis of Contract Law"[5] brings these emerging interpretations to light. According to him, Contract Law and the Economics of Contract Law have developed independent identities from each other over the past few years. Through this book he intends to reconnect these two disciplines by explaining the correlation that exists between them. This book aims at drawing the attention of readers from both the undergraduate and post-graduate level, and while doing so, also appeals to scholars from both Economics and Law, particularly those who are interested in the economic foundation of law.

This book's central focus is on assessing the effect of damage remedies in contract law. Parties often enter into incomplete contracts. In that scenario, if either party breaches the contract, it is very difficult to ascertain the amount of damages that actually arises, as the damage may not always be in quantitative terms. It is therefore the duty of the contractor to understand the dangers of an incomplete contract as well as the remedies available in case of a negligent contract. In order to explain this, the book tries to convey the economic theory of contract, to provide for a framework to understand the legal concepts from an economic perspective. This has been achieved by drawing the reader's attention towards the latest developments in relation to law and economics by using vivid illustrations and real life day-to-day examples. After reading this book, both lawyers and economists will be able to apply the tools of economic analysis to understand the basic structure and function of the law, and in doing so, hone their approach towards legal issues.

This book consists of seven chapters. Additionally, these seven chapters can be divided into four parts. The first part is the

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[5]SUGATA BAG, ECONOMIC ANALYSIS OF CONTRACT LAW INCOMPLETE CONTRACTS AND ASYMMETRIC INFORMATION 3 (Springer, 2016) [hereinafter BAG].

introductory chapter that discusses the basic foundation of contracts and law; the second part explains the basics of contract law; the third and fourth parts provide detailed conceptual understanding of the damage remedies available in case of a breach between the contracting parties. The third part is intended for beginners while the latter for experts.

Part I of the book, which comprises an introductory chapter, offers a basic understanding of contracts and contract law. In this chapter, the author has correlated economics and law. In doing so, he has helped the reader familiarise himself with the two disciplines.[6] This chapter is crucial for those readers who have not acquainted themselves with either of the disciplines. The author further states that contract law plays a significant role in society as it acts as an enforcing mechanism. Throughout the chapter, both legal and economic views are considered by the author while highlighting issues concerning contractual incompleteness, informational asymmetry as well as specific investments. For readers outside the legal fraternity the concepts of welfare, efficiency and the principal-agent paradigm are explained, so as to build a strong base.[7]

Part II introduces the Economic Theory of Contract. In this part, the author explains the different market modes, the role incomplete information plays in markets, the kinds of parties that enter into a contract under different markets, and how these types of contracts help parties to benefit from trade. The author also lays stress on the incentives that are provided under numerous contracting scenarios. The author maintains throughout this part that trade is always profitable regardless of the uncertainty it offers. This chapter also seemingly illuminates how the incentives in a business relationship differ on the basis of the relationship between the parties. In order to

[6]BAG, *supra* note 5, at 2.
[7]*Id*. at 126.

demonstrate this, two types of transactions, viz. spot market and incomplete contracts are analysed and their further effect on the economy.

Part III consists of two chapters which provide great detail on the economics of damage remedies in cases of unilateral and bilateral reliance and one-sided information asymmetry. This part is targeted at amateur readers who do not have prior knowledge of essential economics and law concepts, such as breach of contracts, efficient breach, and efficient investments. In the course of this part, the reader at first acquaints himself with the present-day scenario of contract law, and then the general setup in which such contracts appear. Then moving on to the key concepts of contract breach and the remedies provided, the author explain these concepts with the use of complicated mathematical equations and comprehensive illustrations.

The first four chapters of the book are suitable for those who desire to create a foundation in Economics as well as Law. However, the last part is directed towards the advanced reader, who is accustomed to the complex concepts of Game Theory and mechanism design.[8] The author has continued to reflect on a trading environment which consists of two parties, where both parties decide to undertake a selfish reliance investment in their respective value functions. However, once the contract is binding, one of the two parties receives information about his or her valuation that remains hidden from the other party and to the courts. This part contributes to the legal debate over the adoption of specific breach remedies when the breach victim's expectation interest is difficult to evaluate. Finally, chapter seven presents the general conclusions and reflections of this study.

The chapter titled 'Mechanisms Under the Shadow of Expectation Damages', under this part, stands as one of the most educative chapters in the book, especially since the chapter deals with the

[8] *Id.* at 16.

various models developed for different kinds of valuations in inordinate detail. Professor Bag adopts a holistic and interdisciplinary approach to solving problems. When economic decisions involve groups, they are unlike those that comprise individual market transactions. Professor Bag's country-wide economic decisions and sound policymaking is one of the reasons why this book stands apart from the rest. This chapter also includes an extraordinary situation wherein two parties undertake a reliance investments while holding ex-post private information. This two-dimensional information asymmetry poses great difficulties for the parties in writing a simple contract. It also creates problems for the courts in settling the expectation interest of the victim of contract-breach. Two methods of justifying the expectation interest by the courts, namely, the subjective method and objective method, are used. To end with, the last chapter presents the general conclusions and reflections of this study.

The manner in which this book has been organized is consistent with that in an academic curriculum. The structure adopted by the author is a graded approach by building the models in consecutive chapters, so that the readers gradually get accustomed to the intricate mathematical requirements. While the chapters are created systematically, certain chapters seem forced, to conform to the seven-chapter plan. For instance, chapters five and six seem unnecessary. Some parts of chapter six are repetitive of the previous chapters. Ideally, the last two chapters could have been combined into one precise chapter. Since these two chapters are targeted at the advanced reader, the author should have skipped laying down the basic concepts of contract breach and damages again. As this book is aimed at the undergraduate and graduate level, the use of complex mathematical equations in the second and third chapter makes the concepts difficult to comprehend. Those readers who are not well-

versed with these mathematical concepts may find it difficult to grasp certain concepts even in the chapters that follow.

Keeping aside these two shortcomings, the author provides the readers with a detailed analysis of the law and economics, which is shown in a readable and interesting manner. The book brings to light many issues that had earlier been overlooked and this enables the reader to develop his financial and legal acumen in areas governed by contract law. Professor Bag's work presents broad analysis of an emerging concept of 'incomplete contracts and asymmetric information'. This area has not been worked upon extensively in the past and can be considered as a grey area with reference to contract law. Understanding the economic impact of contracts is as important as understanding the law that governs these contracts. The book has been able to convey the legal principles and economic concepts regarding contracts effortlessly.

Professor Bag's book is influenced by the works of Polinsky,[9] Miceli,[10] Cooter,[11] and Thomas Ulen.[12] Their works lay stress on how Law and Economics influence decision-making by providing extensive literature on this emerging discipline and its applicability to problems in tort law, contract law, property law, and litigation. In contrast, Professor Bag's book is limited to problems related to contract law, offering him the opportunity to provide his readers with exhaustive research and data on the economics of contract law. He reveals in his book thought-provoking and practical insights on how the trading environment together with laws structure the behavioural and contracting aspects of the concerned parties. The author examines

[9]MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (3D ED., 2003).
[10]THOMAS MICELI, ECONOMICS OF THE LAW: TORTS, CONTRACTS, PROPERTY, LITIGATION (Oxford University Press, 1997).
[11]ROBERT COOTER, THOMAS ULEN, LAW & ECONOMICS (6th ED., 2012).
[12]*Id.*

contracts in light of economic realities, contemporary issues and the idea of justice.

The title of the book 'Economic Analysis of Contract Law' is an appropriate title for this book as it blends theories of economics and contract law in an intelligible manner and reclaims the importance of law in determining the economic position of the country. The force of the arguments put forth in his book is strong, and they convince the reader of his interpretation, with the added persuasive power of illustrations and models. Professor Bag's work searches wide for theoretical inspiration while suggesting that people not only adjust to economic conditions but also establish unique economic circumstances.

The unfeigned objective of this book lies in its dealing with the assessment of the effect of damage remedies of contract law on incomplete contracts under an asymmetrical information scenario. The book does not endeavour to cover a comprehensive arrangement of legal subjects; rather, it attempts to recount a brief yet intelligible relation about the law and how a financial investigation can be utilized to reveal more insight into the viability of different legal rules from both the Civil and the Common Laws of agreements.

In conclusion, this book is a compelling example of the reductionist approach of economic analysis of law. It provides numerous provocative arguments for why commercial contract law should be limited to helping firms maximize profit and how breaching and performing contracts varies with circumstances.[13] The book provides valuable contribution to the existing literature on this emerging discipline, and is strongly recommended to researchers, professors, students, economists, lawyers, and judges. This book has the potential to transform the legal education in Indian law schools by acquainting the reader with a legal background to how they can apply the tools of

[13]BAG, *supra* note 5, at 33.

economic analysis to understand the basic structure and function of the law, and thereby bringing intelligent and thought provoking arguments to classroom discourses and thereby bridging the gap between economics and law.