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MESSAGE

I am extremely proud to announce Volume X Issue I of the NLIU Law Review to the legal community. The NLIU Law Review aims to serve as a forum for promoting discourse on contemporary and pressing legal concerns at both the national and international level. Since its inception, this student helmed publication has sought to cultivate a style of scholarship that explores both the theoretical and the practical concerns of the legal world. To ensure this, it has consistently employed stringent evaluation techniques with emphasis on oontemporaneity, critical thinking, originality and lucidity of prose.

In this Issue of the NLIU Law Review, the authors have delved into topics of social and economic relevance such as the introduction of group insolvency regime in India and the constitutionality of the National Register of citizens as well as pressing issues relating to the COVID-19 pandemic and its implications. The authors have attempted to draw a comprehensive background of these issues and proposed solutions for the lacunae in the existing legal framework.

I extend my congratulations to Prof. (Dr.) V. Vijayakumar and Prof. (Dr.) Ghayur Alam for another successful publication of the journal and commend the student members of the Law Review for their work and dedication through these trying times. May the Editorial Committee maintain the same vigour in the coming years, and may students, academicians, lawyers, judges and all other readers find this publication stimulating and beneficial.

(MOHAMMAD RAFIQ)

MESSAGE FROM THE PATRON

THE NATIONAL LAW INSTITUTE UNIVERSITY
Prof. (Dr.) V. Vijayakumar
M.A., M.L., M. Phil., LL.M., Ph.D.
Vice Chancellor

Ref.No. 2471 /NLIUB Date: 18-08-2021

MESSAGE FROM THE PATRON

I am pleased to present Volume X Issue I of the NLIU Law Review to our readers. Much in the vein of its predecessors, it presents to us several papers that will undoubtedly pique the interest of all legal professionals, students, researchers and teachers. Topics such as the introduction of the group insolvency regime in India, growth of telemedicine during the pandemic and the constitutionality of the National Register for Citizens are dealt with in great detail by the authors in this Issue. It is my earnest desire that the readers find themselves enriched by these contributions.

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

I would like to acknowledge the support and guidance received from the Patron-in-Chief of the Law Review, Hon'ble Shri Justice Mohammad Rafiq, Chief Justice, High Court of Madhya Pradesh. I extend my appreciation to Prof. (Dr.) Ghayur Alam for successfully supervising the publication of this volume through constant inputs to the student editors. I would also like to place on record my sincere appreciation to the Editorial Team for their meticulous work and hope that their enthusiasm only grows with each upcoming edition of this journal. I look forward to the feedback from the readers on the contents of this volume for constantly improving the quality of this Journal.

Prof. (Dr.) V. Vijayakumar
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NOTE FROM THE FACULTY ADVISOR

This is the first Issue of the tenth Volume of the NLIU Law Review. This Issue covers several themes of contemporary relevance and social significance. The student team managing this Law Review worked tirelessly through virtual and remote means to put together this Issue that covers topics ranging from the growth of telemedicine during the pandemic to the moribund state of transparency in the Indian electoral funding regime. The Issue also contains research papers on important issues such as the National Register of Citizens, the Surrogacy (Regulation) Bill, 2019 as well as indeterminacies in the existing Indian legal framework on anti-profiteering and anti-defection.

The NLIU Law Review has always provided a platform for students and academics from all over the country to present their scholarly opinions on legal issues. Our aim is to encourage ethos of academic excellence by building a culture of disruptive thinking and meaningful discussion through research papers that seek to take an untrodden or at least a less trodden path.

We would like to take this opportunity to express our sincere thanks and gratitude to Hon'ble Shri Justice Mohammad Rafiq, the Chief Justice of the Madhya Pradesh High Court, our Chancellor and the Patron-in-Chief of NLIU Law Review for his continuous guidance and support. Our sincere thanks and gratitude to Prof. (Dr.) V. Vijayakumar, the Patron of NLIU Law Review and our Vice-Chancellor for his tremendous support and guidance. We would like to extend our gratitude and thanks to all the contributors to this Issue who have made this endeavor a success and contributed to the growth of legal scholarship.

We invite and appreciate comments, suggestions and constructive criticism on the works published in this Law Review. Hope to have your active participation in our endeavor to help build a free culture

of dialogue, debate, discussion, discourse, disputation and disruption.

Prof. (Dr.) Ghayur Alam
Dean, Undergraduate Studies
Professor of Business and Intellectual Property Laws
National Law Institute University, Bhopal, India

EDITORIAL NOTE

The NLIU Law Review proudly presents to the readers Volume X Issue I, which brings to the forefront a completely unique corpus of legal research, exploring a variety of issues of relevance in both the international and domestic arenas. The issue includes several in-depth analyses of contemporary legal concerns as well as various attempts to provide realistic solutions to such concerns.

In the article, *Section 32A of the IBC: Shredding the Independent Corporate Personality?*, the author discusses the evolution of the principle of independent corporate personality and its recognized exceptions, and focuses on the implications of the inclusion of this principle within the Indian insolvency and bankruptcy framework.

'Ain't Women Religious?' – Critiquing the Muslim Personal Law from an Intersectional Feminist Perspective contributes to the feminist discourse and focuses on the lack of reforms and challenges faced by Muslim women owing to religious norms. It undertakes an examination of the reforms in feminist jurisprudence on Muslim personal law through the lens of intersectionality.

The article, *Telemedicine and Information Technology – A Concoction for Medical Frauds?*, elucidates upon the lack of a proper framework governing the practice of telemedicine in India, including the lack of measures to tackle new issues resulting from technological advancements. The article identifies the lacunae in the statute and recommends measures in order to safeguard patients from fraudulent medical practitioners.

The article, *"We're Here and We're Queer" – A Critical Appraisal of LGBT+ Protection within the International Refugee Paradigm* delves into the lesser discussed issue of queer migration. It brings to light the oppression and marginalization faced by the LGBT+ community in

the process for asylum application. The article seeks to highlight the lack of special mention provided to the community within refugee laws as well as conventions and recommends distinctive measures to safeguard their interests.

One Step Forward, Two Steps Back: A Critique of the Surrogacy (Regulation) Bill, 2019 critically analyses the 2019 Surrogacy Bill and identifies its shortcomings. The legislative comment elaborates upon the various constitutional and socio-economic concerns overlooked by lawmakers, in terms of the lack of autonomy provided to women, the exclusion of important stakeholders and the undue importance placed upon public morality. It scrutinizes the Bill through the lens of constitutionality by focusing on excessive delegation and overcriminalization.

The article *Interlocking Directorates: An Indirect Threat to Competition in India* contemplates on the legality of the concept of interlocked directors in companies within India and its anti-trust implications. It looks at the treatment of such directors in India vis-à-vis that in other jurisdictions and recommends a number of measures that are required to be implemented in order to safeguard competition in the Indian market.

In the article, *The Assam NRC: On the Touchstone of the Constitution*, the author brings to light legal issues pertaining to the highly debated National Register of Citizens. It analyses the various provisions of the Register implemented in Assam from a constitutional perspective, taking into consideration its historical context. The article emphasizes on the need for the existing regime to reconcile with constitutional rights.

Introduction of Group Insolvency Regime in India: Identifying the Challenges and Proposing the Solutions elucidates upon the lack of a group insolvency regime in India. It discusses the Report of the

Working Group on Group Insolvency and highlights its shortcomings and challenges, along with possible solutions that may implemented. On the other hand, *Evaluating the Constitutionality of a Deficient Transition: The Anti-Profiteering Law in India* is an in-depth analysis of the constitutionality of the anti-profiteering laws in India along with that of the National Anti-Profiteering Authority.

Moribund State of Transparency and Accountability in the Indian Electoral Funding Regime highlights the lack of financial scrutiny faced by political parties and their donors during elections. It examines the shortcomings of the electoral bonds scheme as well as the Finance Act, 2017 and proposes a more transparent legal framework in order to ensure accountability.

Finally, in *For Laws may come and Laws may go, but Defections go on Forever: A Critical Analysis of the Role of the Speaker in the Indian Anti-Defection Laws*, the authors seek to evaluate the role and function of the office of the Speaker and identify the paradoxical nature of this office as one of the leading causes for the ineffective realization of anti-defection laws. The article analyses the recommendations given by the Supreme Court and other tribunals in respect of this matter, and suggests a more holistic change within Indian polity.

The Editorial Board at NLIU Law Review sincerely hopes that the literary works presented herein prove to be engaging and insightful for the readers. The publication of this Issue is yet another step taken by the journal towards achieving its aim of excellence in legal scholarship. We would like to thank all the authors for their contributions, and commend their efforts towards academic research and writing during these trying times. We welcome any feedback that may help us improve the quality of our journal.

Editorial Board

SECTION 32A OF THE IBC: SHREDDING THE INDEPENDENT CORPORATE PERSONALITY?

Arnav Maru[*]

Abstract

The Insolvency and Bankruptcy Code was introduced at a time when the non-performing asset crisis was at an unimaginable peak. Solving this crisis topped the priority list of a desperate government trying to rescue the banking sector as well as the debt market. The Insolvency and Bankruptcy Code was a game-changer. It has been largely successful in improving the recovery rates through its time-bound and creditor-in-control approach. The regime is still in its nascent stage and found itself amended for the fourth time in 2020. The amendment introduced Section 32A, which added another accelerant to the corporate insolvency resolution process. The Section, however, due to its sweeping reach and mandate, has raised some eyebrows. The Section alters established principles of corporate law that may have effects that cannot be comprehensively pictured-presently. The existing literature on the amendment and the Section has focused on the overriding clause, the interpretation and conflict with other laws, and the benefits to

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resolution applicants. The discourse has failed to cover and question the theoretical foundations of what could be one of the biggest disruptions to the principle of independent corporate personality in recent times. This paper focuses on the evolution of the principle of independent corporate personality and its recognized exceptions and compares how they fit within the scope of the Section and its implications. It also addresses the concept of corporate criminal liability and its reduction to a mere exemplary status as a consequence of the provision. As a whole, the argument weighs economic efficiency against the body of common law and the need for stability therein to suggest that one must not necessarily overrule the other.

I. INTRODUCTION

The Bankruptcy Law Reforms Committee ("**BLRC**") was charged with revamping the insolvency and bankruptcy regime in India.[1] The first paragraph of the executive summary of the report submitted by the BLRC lucidly summarizes and defines the corporate structure in terms of debt and equity: "*The limited liability company is a contract between equity and debt*".[2] It reaffirms the complete control of equity owners over the corporate affairs, as long as no debt obligations remain outstanding, but envisages the transfer of control to creditors

[1]Ministry of Finance, *The report of the Bankruptcy Law Reforms Committee, Volume I: Rationale and Design* (4 November 2015).
[2]ibid ch 2.

in case of a default.[3] Such a shift in control has been identified as a cornerstone of the insolvency process,[4] and its apparent lack has been blamed for India's abysmal insolvency landscape before the enactment of the Insolvency and Bankruptcy Code, 2016 ("**the Code**" or "**IBC**").[5]

The Code has largely brought about a positive shift in Indian insolvency law, and this shift has been well recognized.[6] The creditor-in-control approach has been a significant contributor in this progress and stakeholders have been quick to adapt to the alteration. However, this adaptation, and the Code's treatment of the corporate debtor undergoing insolvency, has raised pertinent questions as to the independent corporate personality of the corporate debtor. Still, there is scathingly little literature to reconcile the trivial looking, yet immensely significant inconsistencies between modern company law and the insolvency regime.

This paper firstly attempts to identify one such point of inconsistency, the infringement of the principle of independent corporate personality by Section 32A of the Act. The next section deals with the most recent amendment to the IBC. The third section discusses the abundantly discussed concept of the independent corporate personality, its *raison d'être,* and practical limits. The fourth section delves into how Section 32A of the Code disregards the established jurisprudence on disregarding the independent corporate personality. After establishing the irregularity in the law, the following section discusses its implications on the concept of corporate criminal liability. The penultimate section tries to define the bounds of

[3] ibid.

[4] Stuart C Gilson and Michael R Vetsuypens, 'Creditor Control in Financially Distessed Firms: Empirical Evidence' (1994) 72 Wash U L Q 1005.

[5] Lalit Kumar, 'Our bankruptcy laws are a mess' (*The Hindu Business Line*, 10 March 2015) <https://www.thehindubusinessline.com/opinion/our-bankruptcy-laws-are-a-mess/article22512647.ece> accessed 17 June 2020.

[6] World Bank Group, Doing Business 2020, 'Ease of Doing Business Rankings'.

choosing economic efficiency over established principles of law. The conclusion summarizes the discussion in the context of the development of common law while posing a crucial question.

II. SECTION 32A OF THE IBC

Under the new IBC regime, a corporate debtor undergoing a corporate insolvency resolution process ("**CIRP**") can have one of two fates. The Committee of Creditors ("**CoC**") can accept a resolution plan submitted by a resolution applicant within the stipulated timeline and manner.[7] The CoC can come up with plans to either restructure the loan, modify repayment, liquidate assets, sell the business of the debtor as a going concern, *et cetera*. Alternatively, if the CoC is unable to reach a consensus as to resolution within the stipulated deadline, the adjudicating authority will order the liquidation of the assets of the debtor.[8]

The National Company Law Appellate Tribunal ("**NCLAT**"), in the case of *Binani Industries Limited v. Bank of Baroda*,[9] noted that the first objective of the IBC is "*resolution*", second is "*maximization of value of assets*", and the third is "*promoting entrepreneurship, availability of credit and balancing the interests*", in that exact order. Reinforcing a similar view, the Supreme Court noted in *Swiss Ribbons*[10] that the preamble of the Code does not refer to liquidation in any manner, and that it should be a remedy of the last resort. It further states that only in cases where, either there is no resolution plan, or the ones submitted do not meet a minimum required standard, should liquidation be considered as an option. Regulations 32 and 32A of the IBBI (Liquidation Process) Regulations, 2016 also support

[7] Insolvency and Bankruptcy Code 2016, s 30(4) (India).
[8] Insolvency and Bankruptcy Code 2016, s 33 (India).
[9] 2018 SCC OnLine NCLAT 521.
[10] *Swiss Ribbons v. Union of India* 2019 SCC OnLine SC 73.

such a position. Regulation 32(e) envisages the sale of the corporate debtor as a going concern. Regulation 32A prioritizes such a sale above other methods. Regulation 32A was added vide the 2019 amendment,[11] endorsing the stance and object of the IBC, which is to maximize value by keeping the business of the debtor as a going concern, unless limited by feasibility.

The question then arises as to the permissible limits to which the legislation can be moulded to ensure the fulfilment of its object. Certainly, it cannot transgress the principles laid down in the Constitution. Similarly, it cannot also violate a principle of natural justice. What about principles of law, which have a solid foundation in common as well as statute law, but do not meet the higher threshold of the abovementioned principles? The principle of independent corporate personality, as will be detailed in the subsequent section, is an indisputable principle of modern company law, with solid grounding in Indian case laws, as well as the Companies Act, 2013. Courts have laid down stringent boundaries on disregarding the corporate personality to preserve the fundamental rights, and in some cases, liabilities that accrue on a company.

The Insolvency and Bankruptcy Code (Amendment) Act, 2020 added Section 32A to the Code. The Section talks about the liability of the corporate debtor for prior offenses. The Section has come under the judicial scanner most prominently in the case of *Bhushan Power Steel*,[12] where its applicability to a particular resolution applicant was tested. The Section's validity has not been challenged before any

[11]Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations 2019.

[12]*JSW Steel v. Mahender Kumar Khandelwal* Company Appeal (AT) (Insolvency) No 957 of 2019.

judicial body as of yet, but commentators have expressed doubts over its sweeping nature.[13]

The Section starts with a *non-obstante* clause granting it power over anything contained in the Code or any other law. This overriding provision is in addition to Section 238 of the Code, which provides that it will prevail over any other law in force. The Section goes on to lay down that the liability arising from any offense committed by the corporate debtor shall cease from the date the resolution plan is approved. A qualification is added to limit the corporate debtors claiming under the Section to those who see a change in management as a result of the resolution plan. Summarily put, if the person responsible for the operation of the company, or the persons involved in the commission of the offense through conspiracy or abetment, are no longer in control or management of the debtor, then the corporate debtor will be absolved of liability on approval of the resolution plan.

While, as mentioned, concerns have been raised as to the provisions of the Section, the discourse has not covered the shredding of the corporate veil. It is submitted that the Section lifts the corporate veil to overlook the liability of the corporate debtor, the permissibility of which has not been properly dissected. Not only does this go beyond the principles of established company law, it disregards corporate personality and liabilities without sufficient justification. It is understood that the IBC has been enacted to promote economic efficiency and expediency, but does the realization of that objective permit overruling the foundational principles of company law?

However, since lifting the corporate veil is a prevalent concept, and was developed as an equitable remedy, why should objections be

[13] Nausher Kohli, 'Section 32A of the IBC - An amendment with far reaching consequences' (*Bar and Bench*, 8 April 2020) <https://www.barandbench.com/columns/policy-columns/section-32a-of-the-ibc-an-amendment-with-far-reaching-consequences> accessed 10 June 2020; Sikha Bansal, 'Ablution by Resolution' (*Vinod Kothari Consultants*, 12 December 2019) <http://vinodkothari.com/2019/12/ablution-by-resolution/> accessed 10 June 2020.

raised against Section 32A on this ground, since it promotes economic efficiency? The answer is twofold. First, that application of Section 32A dilutes the principle of corporate criminal liability, and consequently, it goes against the principles of independent corporate personality, by lifting the corporate veil for reasons not found in the theory of modern company law.

III. THE CONCEPT OF INDEPENDENT CORPORATE PERSONALITY

The origins of independent corporate personality could be traced to the case of *Salomon v. Salomon Co Ltd.*,[14] which rarely misses mention in a discussion about the independent personality of a corporation. It has not only formed the basis of modern English company law, but has also greatly influenced commercial law and its foundations globally.[15]The House of Lords, however, merely put into words what was already in practice since time immemorial.[16] The genesis can be found on the intersection of law and economics, where various theories have been forwarded to justify the existence of independent corporate personality.[17] The most prominent benefit and the leading theory stems from the fact that a separate corporate personality shields its stakeholder from unlimited liability, while still keeping doors open for proportionate profits. The veil of incorporation further conferred on a company almost the same rights

[14]*Salomon v. Salomon & Co Ltd* [1897] AC 22.

[15]Christopher Stanley, 'Corporate Personality and Capitalist Relations: A Critical Analysis of the Artifice of Company Law' (1988) 19 Cambrian Law Review 97, 97

[16]Robert W. Hillman, 'Limited Liability In Historical Perspective' (1997) 54 Wash. & Lee L. Rev. 615, 616.

[17]William W. Bratton and Joseph A. McCahery, 'An Inquiry into the Efficiency of the Limited Liability Company: Of Theory of the Firm and Regulatory Competition' (1997) Faculty Scholarship at Penn Law 904.

and powers as a human being,[18] and offered the added advantage of perpetual existence and succession.[19] The independent corporate form has been recognized in Indian jurisprudence,[20] and statute.[21]

IV. DILUTION OF THE INDEPENDENT CORPORATE PERSONALITY

As modern company law developed, and *Salomon* solidified the artifice of separate corporate personality, the need arose to find exceptions to the principle of the veil of incorporation to prevent its misuse by shareholders. As it stands now, courts possess the power to depart from the principle under certain conditions by 'piercing' or 'lifting' the corporate veil. Some conditions under which this concept may be applied are where the court finds incidences of fraud or illegality,[22] or when it is in public interest to lift the veil.[23] Lifting the veil does not render the corporate entity non-existent, but implies that the corporate personality would not be given full effect.[24] This usually leads to liability being imposed on the perpetrator responsible, along with the corporate vehicle.[25] This person is found liable by lifting the metaphorical veil and gleaming behind the corporate façade. The

[18]Ross Grantham and Charles Rickett, *Corporate Personality in the 20th Century* (Hart Publishing, Oxford 1998) 18.
[19]Denis Keenan and Sarah Richer, *Business Law* (Longman Publications, London 1987) 52.
[20]*Life Insurance Corporation of India v. Escorts Ltd. & Ors. (1986) 1 SCC 264.*
[21]Companies Act 2013, s 9 (India).
[22]*Delhi Development Authority v. Skipper Construction* (2000) 10 SCC 130.
[23]*Kapila Hingorani v State of Bihar* (2003) III LLJ 31.
[24]Cheng-Han Tan, Jiangyu Wang, and Christian Hofmann, 'Piercing the Corporate Veil: Historical, Theoretical & Comparative Perspectives' (2019) 16 Berkeley Bus. L.J. 140, 140.
[25]ibid.

concept is widely recognized in Indian jurisprudence.[26] The Companies Act 2013 itself stipulates the liability of directors and managerial personnel under certain conditions, which is an example of a statutory disregard of corporate personality.[27]

The recent case of *Balwant Rai Saluja v. Air India* clarified the Indian legal position of piercing the corporate veil and relied on the English case of *Prest v. Petrodel*[28] while doing so. The case took an abundantly clear stance on the piercing of the veil, stating that the principle should be applied in a restrictive manner, and only in scenarios where it is established that the corporate form was a mere sham created to avoid liability.[29] The judgement further quoted the English case of *Ben Hashem v. Ali Shayif*,[30] while referring to the six key principles that govern the piercing of the veil. The principles extensively referred to the presence of improprieties linked to the corporate structure and concealing liability, the control of the corporate in the hands of the wrongdoers, and the company being a façade for fraudulent activity.

The abovementioned principles make it clear that corporate personality may be overlooked only under a limited set of conditions. It may be noted that the process cannot be undertaken merely to fulfil "*the interests of justice*" if certain other conditions are not met. This places the process of overlooking the corporate personality at a seemingly high pedestal. Examples of lifting the veil include, but are not limited to, prevention of fraud or misconduct,[31] prevention of tax

[26] *Life Insurance Corporation of India v. Escorts Ltd. & Ors*. *(1986) 1 SCC 264; State of U.P v. Renusagar Power Co. 1988 AIR 1737; Delhi Development Authority v. Skipper Constructions Co. (P) Ltd. (1996) 4 SCC 622.*

[27] Companies Act 2013, ss. 34, 35, 39, 339 (India).

[28] [2013] 2 AC 415.

[29] *Balwant Rai Saluja v. Air India Ltd.* (2014) 9 SCC 407, 441.

[30] 2008 EWHC 2380 (Fam).

[31] *Gilford Motor Company v. Horne [1933] T CH 935.*

evasion,[32] prevention of bypassing welfare legislation,[33] use of company for illegal purposes,[34] or, as discussed above, in cases where the corporate form is a mere sham.[35] It would not be improper to conclude that the corporate veil is lifted so that the real wrongdoer can be properly subject to the punishment prescribed by law, and does not evade punishment by hiding behind a corporate facade.

At the risk of generalization, it can be stated that the corporate form came into being to shield and protect the shareholders from excessive liability, and that lifting this veil, in certain *exceptional* conditions, is necessary to prevent the abuse of the independent corporate form.

Focusing the discussion back on Section 32A of the IBC, a few points of departure may be noted. The Section is clear in terms of the liability it seeks to absolve. The liability must rest on the corporate debtor. The liability of the debtor being discharged contingent on the change in management leads to the implication that the management is being held responsible, although not in real terms. This process lifts the corporate veil to look beyond the corporate personality and pins responsibility on to the persons on control. The intended consequence of disregarding the corporate personality is to absolve the debtor that is undergoing the overhaul in control and management from liability.[36] The rationale accorded to the process is that the new

[32] *Sir Dinshaw Maneckjee Petite, Re AIR 1927 Bom 37 Khe; CIT v. Sri Meenakshi Mills Ltd AIR 1967 SC 819.*

[33] *Workmen of Associated Rubber Industry Ltd. v. Associated Rubber Industry Ltd,* [1986] 59 *Comp. Cas. 1341.*

[34] *PNB Finance Limited v. Shital Prasad Jain (1990) 19 DRJ 10.*

[35] *Delhi Development Authority v. Skipper Construction Company (1996) 4 SCC 622.*

[36] Arjun Gupta, Abhinav Harlalka & Simone Reis, 'Ghosts of the Past: Another Shot in the Arm for Acquisition under IBC' (*Nishith Desai Associates,* 8 May 2020) <http://www.nishithdesai.com/information/news-storage/news-details/article/ghosts-of-the-past-another-shot-in-the-arm-for-acquisition-under-ibc.html> accessed on 29 November 2020.

management must not suffer for the wrongs of the previous.[37] It can be stated, without arousing major concerns, that the corporate veil has indeed been lifted.

The jurisprudence behind lifting the corporate veil is concentrated around the factor of wrongdoing by personnel in control, hiding behind the veil. As summarized above, the theory provides an equitable remedy against a person who was using the fact of incorporation as a mere façade to carry out wrongful acts. Section 32A seeks to do something entirely different. By separating the management and the corporate debtor, it seeks to absolve the debtor of any culpability. The corporate veil is lifted and the wrongdoer is punished *instead* of the company, to protect the company and its shareholders from the misdeeds of a responsible few. In the present case, the corporate debtor itself must be found guilty of some wrongdoing before being absolved by the passage of a resolution plan. The evolution of the principle took place in a completely different context and served a wholly different purpose.

The argument can be summed up by following a short trail of logical inferences. The corporate veil has traditionally been lifted in instances where the corporate personality was a mere façade. While this diluted the strength of the corporate personality, it was seen as a necessary remedy to prevent inequity. When this rule of equity with narrow boundaries is stretched to meet economic ends, it dilutes the factum of a legal personality to a mere artifice, to be moulded according to policy needs of the moment. Moreover, as the next Section will detail, rights are correlated with duties, and stand at the very root of our legal system. Since a criminal offense is a violation of a duty to another, making criminal liability disappear into thin air raises questions on the rights accorded to a corporation in the first place.

[37] ibid.

V. THE EFFECTS ON CORPORATE CRIMINAL LIABILITY

Possessing similar rights as human beings also brings the other, inseparable side, which is, bearing the same liabilities as well. Corporations even attract criminal liability, even though a common-sense approach to establishing *mens rea* necessary to commit a crime, would dictate that an artificial person is not capable of possessing the same.[38] The concept is not new,[39] and courts have battled with inculpating artificial persons with criminal liability since the sixteenth century.[40] While the common law beginnings of the imposition of such liability are obscure and bereft of conscious direction,[41] the law has now solidified itself in the form of precedent as well as a statutory mandate. Agents acting on behalf of corporates may violate regulatory statutes, commit criminal offenses as well as strict liability offenses for which a corporation may be found guilty.[42]

The Companies Act, 2013 provides for corporate criminal liability as well as individual liability for directors. The Supreme Court has affirmed the same on various instances.[43] While the debate rages on the efficiency, desirability, and the necessity of corporate criminal

[38]V.S. Khanna, 'Corporate Mens Rea: A Legal Construct in Search for a Rationale' (1996) Discussion Paper No. 200 Harvard Law School.

[39]Cynthia E Carrasco and Michael K Dupee, 'Corporate Criminal Liability' (1999) 36 Am Crim L Rev 445.

[40]*Androscoggin Water Power Co. v. Bethel Steam Mill Co.* 64 Me. 441 (1875); *State v. Great Works Milling & Mfg. Co.* 20 Me. 41 (1841).

[41]Thomas J Bernard, 'The Historical Development of Corporate Criminal Liability' (1984) 22 Criminology 3.

[42]Bruce Coleman, 'Is Corporate Criminal Liability Really Necessary' (1975) 29 Sw LJ 908; *State v. Lehigh Valley R.R.* 90 N.J.L. 372, 103 A. 685 (Sup. Ct. 1917); See also, Ananthi Bharadwaj, 'Corporate Manslaughter and Corporate Homicide Act, 2007' (2009) 21 (1) NLSI Rev 201.

[43]*Standard Chartered Bank and Ors. etc. v. Directorate of Enforcement,* AIR 2005 SC 2622.

liability,[44] discussing the same falls out of the scope of this paper. This paper takes a positivist stance towards the existence of corporate criminal liability and does not comment on its efficacy. Since, the theory is time tested, has a nearly global recognition, and has found a place in Indian statute books, the argument builds upon the premise that imposition of such a liability on corporations serves a deterrent and penal purpose.[45]

Most recently, the cases of *Iridium India Telecom Ltd. v. Motorola Incorporated*[46] and *Standard Chartered v. Directorate of Enforcement*[47] blurred the distinction between corporate criminal liability and criminal liability otherwise, by affirming that corporates can be prosecuted for crimes that mandate imprisonment as a punishment. The judgments have added weight to the concept of corporate criminal liability and promoted the use of criminal sanctions to regulate corporate behaviour.[48] Further, as Indian company law distinguishes between individual liability of directors and, in some cases, shareholders, from the liability of a corporation as an independent person, it will be assumed that they serve separate and independent purposes, and that one is not dispensable even if the survival of the other is ensured. Section 32A of the Code destroys the efficacy and purpose of imputing corporates with criminal liability. It does so by exculpating the body corporate based on the mere factum

[44]John T. Byam, 'The Economic Inefficiency of Corporate Criminal Liability' (1982) 73 J. Crim. L. & Criminology 582; Bruce Coleman, 'Is Corporate Criminal Liability Really Necessary' (1975) 29 Sw L.J. 908.

[45]Henry Edgerton, 'Corporate Criminal Responsibility' (1927) 36 Yale LJ827, 833; VS Khanna,'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109 Harvard Law Review, 1477, 1484; Harold J. Laski, 'The Basis of Vicarious Liability' (1916) 26 Yale L.J. IO5, 111; LH Leigh, *The Criminal Liability of Corporations in English Law* (1969) 1, 12.

[46](2011) 1 SCC 74.

[47](2005) 4 SCC 530.

[48]V Umakanth and Mihir Naniwadekar, 'Corporate Criminal Liability and Securities Offerings: Rationalising the Iridium-Motorola Case' (2013) NLSIR (Spl. Issue) 144, 167.

of change in control while undergoing the insolvency process. Furthermore, by doing so, it hits at the foundation of an independent corporate personality by reducing a criminal conviction to a mere exemplary role. The following paragraphs elaborate on the reasons underlying this position.

The imposition of criminal liability on corporates is relevant from a jurisprudential perspective. Corporates are recipients of numerous rights.[49] The Supreme Court, in the case of *State of Rajasthan v. Union of India*,[50] stated that "*legal rights are correlatives of legal duties and are defined as interests which the law protects by imposing corresponding duties on others*". Lord William Blackstone defines a crime as a "*violation of the public rights and duties due to the whole community, considered as a community*".[51] When a corporation is accorded a set of rights, it is bound by the accompanying and corresponding duties. Criminal acts, which are a subset of the violation of some such duties, invite punishment from the society and state. As discussed, the punishment serves a deterrent purpose. Absolving the company of a violation of its duties, but continuing conferring it with rights goes against the fundamentals of the theory of rights on which our legal system rests. Recognizing a body corporate capable of committing a crime, and then blurring the distinction between the corporate and its constitutive elements will

[49] Article 14, Article 20, Article 21, Article 22, Article 25, Article 27, and Article 28 of Part III of the Constitution of India grant these rights to 'persons' as against 'citizens'. Companies are excluded from being citizens by the virtue of Part II of the Constitution and the Citizenship Act, 1954, but are considered to be legal persons; *See, Chitranjit Lal Chowdhari v. The Union Of India* 1951 AIR 41; *State of Bombay v. R.M.D. Chamarbaugwalla* 1957 AIR 699; The Law Commission of India, *Hundred and First Law Report on Freedom of Speech and Expression under Article 19 of the Constitution: Recommendation to extend it to Indian Corporations* <www.lawcommissionofindia.nic.in/101169/Report101.pdf> accessed 1 June 2020.

[50] AIR (1977) SC 1361.

[51] Sir William Blackstone, *Commentaries on the Laws of England*, vol 4 (17th edn, 1830) 5.

have the unintended consequence of blurring the independent corporate form as well.

The argument garners further strength if the rationale of Section 32A is stretched to a hypothetical. A company X is convicted of an offense requiring it to pay a fine of Rs. 10 lakhs. Between the date of the commission of the offense and the conviction order by the competent court, X completely overhauls its management and control. Can it then petition a competent court to set aside its conviction on the account that the control and management of the company has changed entirely since the commission of the offense? X then files for insolvency and moratorium is ordered before the fine was payable. The resolution plan is approved with a new management, and X stands exonerated from the offense and liability for the payment of the fine owing to Section 32A. This misuse of the corporate façade now has the backing of the letter of law. Such fraud, which earlier demanded the piercing of the corporate veil and punishment of the wrongdoers in control, now has the authority to overlook the corporate personality for the perpetration of the fraud itself.

Section 32A talks about a change in control and management, while the Code does not specifically define the phrase. The recent case of *Arcelor Mittal*[52] defined the two words individually with respect to their use in the IBC. The term management would include the *de jure* management of the company and would include the Board of Directors, 'managers', and 'officers', as per the Companies Act, 2013.[53] 'Control' as per the Companies Act has been defined as "*the right to appoint majority of the directors or to control the management or policy decisions*".[54] Section 32A creates a disjunctive condition and a change in either control *or* management, and not both. A strict reading of the Section would lead to the interpretation that

[52]*Arcelor Mittal (India) (P) Ltd. v. Satish Kumar Gupta* (2019) 2 SCC 1.
[53]ibid, ¶48.
[54]The Companies Act 2013, s 2(27) (India).

even a change in the Board of Directors of the Company post the approval of resolution plan would render the company eligible to take shelter under Section 32A. The disjunctive requirement creates an easy way out for a controlling shareholder to merely change the management of the company after the insolvency process is initiated. Furthermore, shareholders own the company and are the ultimate beneficiaries of any financial gains it makes. An application of this Section might mean that the company may be exculpated of a crime even if the shareholding pattern remains exactly as it was at the time of the commission of the offense. The various contours of the misuse of the provision also involve myriad questions of the reality of the corporate structure. What separates the corporate from merely being an artifice made up of a group of people is the fact of its independent personality, rights and liabilities. The imprecise definition of control and management, and their many valid interpretations as highlighted above, may lead to manoeuvres that cost the legal corporate structure its very essence.

Besides diluting the principle and efficacy of corporate criminal liability, the provision has also received criticism due to its application in the recent case of Bhushan Power & Steel Limited ("**BPSL**"), the case that has been theorized to be the *raison d'etre* of the provision in the first place.[55] JSW Steel Ltd. submitted a resolution application in the CIRP of BPSL. The adjudicating authority approved the resolution plan on September 5, 2019, and the Directorate of Enforcement ("**ED**") attached the assets of BPSL under the provisions of the anti-money laundering law on October 10, 2019. Section 32A was applied to the facts of the case to reject the ED's arguments to attach the property of BPSL. The matter is currently sub-judice before the Supreme Court.[56] The Court herein will have the opportunity to clarify the application of Section 32A and decide

[55]Kohli (n 13).

[56]Civil Appeal No(s). 1808/2020.

on the scope of its application. The current NCLAT judgement in the matter implies that Section 32A has wide-reaching powers, to the extent that it overrides the provisions of the Prevention of Money Laundering Act, 2002. The finding is *prima facie* perverse to previously established law.[57] One of the implications of this ruling is that illegal acts, such as concealing proceeds of crime, aiding in tax evasion, *et cetera*, can be perpetrated using the corporate structure and a legitimate way out can be found out of liability since the Code and Section 32A have been ornamented with *non-obstante* clauses having power over any criminal legislation that precedes the passing of the Amendment Act.

VI. A QUESTION OF MORALITY OF LAW?

The legislation may, in due course, raise questions of equality under Article 14 of the Constitution. Both the old test,[58] as well as the new test,[59] under Article 14 may be used to ground such contentions against section 32A. Both unreasonable classifications, under the old test, as well as arbitrariness, under the new test, can be used to attack the legislation. However, this section analyses the infrequently inked challenge based on the morality of law. The 1981 case of *R.K. Garg v. Union of India*[60] discussed the questions arising out of the Special Bearer Bonds (Immunities and Exemptions) Act, 1981 ("**Bearer Bonds Act**") and its moral bearings. There are many parallels between the aforementioned legislation and the present section in discussion. The Bearer Bonds Act brought the discussion of economic necessity and moral boundaries of law to the forefront. The legislation

[57] *Directorate of Enforcement v. Axis Bank* 2019 SCC OnLine Del 7854; *Shah Brothers Ispat Pvt. Ltd. v. P. Mohanraj* 2018 SCC OnLine NCLAT 415.
[58] *Anwar Ali Sarkar v. State of West Bengal* AIR 1952 Cal 150.
[59] *E.P. Royappa v. State of Tamil Nadu* (l974) 4 SCC 3.
[60] *R.K. Garg v. Union of India* AIR 1981 SC 2138.

sought to bring the 'black money' back into the economy by incentivizing tax evaders to invest the black money into the bearer bonds. Such an investment would grant the evaders immunity from prosecution for evasion and bar any inquiry into the source of the money. It was seen as putting a "*premium on dishonesty*" and rewarding tax-evasion at a cost to the honest taxpayer.[61] The majority judgement in the case upheld the validity of the legislation. While the petitioner contested that morality is the foundation of laws,[62] the Supreme Court categorized it as only a passing element of Article 14. In doing so, it affirmed that if a law is "*reeking with immorality*", it can be held arbitrary and thus violative of Article 14 and thereby unconstitutional.[63] A legislation not crossing that threshold would invite no valid challenge on the grounds of immorality.

Gupta J, in his dissenting opinion held the law to be invalid. He also quoted Friedmann, "*There cannot be — and there never has been — a complete separation of law and morality*",[64] while holding that reasonableness does not exclude notions of morality and ethics. Gupta J believed that economic efficiency, if not pushed to the limit of necessity, did not trump the moral foundations of our laws. He reasoned that the act puts a "*premium on dishonesty without even a justification of necessity*".[65]

Section 32A of the Act has not been introduced as a necessity but rather as a method to lure potential investors. The corporate debtor also gets a premium on dishonesty as well as a criminal conviction and liability merely by declaring insolvency. These grounds can validly be raised to make a dent on the reasonableness of the

[61] Lira Goswami, 'Law and Morality: Reflections on the Bearer Bonds Case' (1985) 27 Journal of the Indian Law Institute 3, 496.
[62] ibid.
[63] *R.K. Garg v. Union of India* AIR 1981 SC 2138, at 2155-56.
[64] *R.K. Garg v. Union of India* AIR 1981 SC 2138, at ¶30 (per Gupta J.).
[65] *R.K. Garg v. Union of India* AIR 1981 SC 2138, at ¶29 (per Gupta J.).

enactment as the NPA crises has well passed its peak, inviting no need for increased economic efficiency of the IBC.

VII. THE END GOAL?

The amended provision has come to the rescue of many bidders who were earlier scared off by prior criminal liabilities of the corporate debtor.[66] It is likely that the amendment may also make strides in improving the ease of doing business in India, taking it further up on the World Bank Ease of Doing Business rankings. However, the focus needs to be drawn on the limits that can and cannot be traversed to reach economic efficiency. The Code was amended to include Section 32A in the backdrop of the CIRP of BPSL. The insolvency of BPSL is one of the biggest yet with claims amounting to a total of Rs. 47,158 crores.[67] The policy incentive on the part of the government is well understandable. However, instead of rushing such a behemoth provision into the statute, the singular case of BPSL may have been dealt with through an executive order. The Central Government, under Section 237 of the Companies Act, has the power to amalgamate two companies in public interest. The provision could have been utilised to deal with one-off situations involving convicted corporates.

The government has also mulled decriminalizing corporate crimes in a recent report.[68] Corporate criminal liability as a deterrent vanishing

[66]Pallav Gupta and Devarshi Mohan, 'IBC (Amendment) Ordinance, 2019: Providing a much-needed relief to the Prospective Investors' (*Bar and Bench*, 13 January 2020) <https://www.barandbench.com/apprentice-lawyer/ibc-amendment-ordinance-2019-providing-a-much-needed-relief-to-the-prospective-investors> accessed 17 June 2020.

[67]Insolvency and Bankruptcy Board of India, *Insolvency and Bankruptcy News* (January to March 2020, Vol. 14) 20.

[68]Ministry of Corporate Affairs, *Report of Company Law Committee* (14 November 2019).

from the statute books, compounded by the effects of Section 32A, further endangers the principle of independent corporate personality. While corporate crimes have been decriminalized, there has been no discourse or move towards diluting the principles of lifting the corporate veil. The process is, thus, made easier for persons engaging in white-collar crimes, as the deterrence of a financial penalty on their holding in the company has considerably fallen.

While ease of doing business is an extremely relevant factor in a developing economy such as ours, we must not lose sight of traditionally sound principles of law. Corporate law was initially developed to shield shareholders from unlimited liability and disproportionate risk. An entire body of law regulating corporate behaviour has since developed around the traditional principles. This development has been slow and has allowed for stakeholders and participants to adjust to changes in a reasonable manner. Customs and customary principles have also solidified into the practice of corporate exchanges.[69]

To bring in such a radical change not only disrupts the traditional and customary understanding of what a company stands for, but also does not allow for practice to build around it organically, trampling the legitimate expectations of stakeholders. As it happened in the case of BPSL, the ED had to oppose the application of the Section to the case, as the anti-money laundering law does not allow for abrupt absolutions of criminal liability. The fact of 'proceeds of crime' somehow being dissolved into the assets of the corporate debtor runs contrary to settled notions of justice and equity. Similarly, it would not come as a surprise if the Section results in litigation due to inconsistencies with the company law or other sets of legislation operating in different fields.

[69] 'Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law' (1955) 55 Colum. L. Rev. 1192.

VIII. CONCLUSION

While talking about the common law and its evolution, Oliver Wendell Holmes, Jr. stated "*The life of the law has not been logic: it has been experience*".[70] Accounting for all the fundamentals that make common law what it is, he ended the line of thought with the following: "*The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past*".[71]

This article has tried to build on the argument that the latest Amendment to the IBC has the potential to shake the fundamentals of company law. The corporate structure and personality have slowly and gradually developed into its present form. Similarly, exceptions and limits to those exceptions, in the form of safeguards, have calculatedly evolved to prevent inequity and fraud. The limited exceptions to an independent corporate personality enable the courts to look behind the veil of incorporation to the actual perpetrators using the corporate façade.

Section 32A uses the principle of disregard of corporate personality to safeguard the interests of successful resolution applicants by absolving an insolvent corporate debtor of prior liability. The fruits of this Section are available to a debtor who will undergo an overhaul in its control and management. The principle of corporate criminal liability thus loses its ground to economic considerations, and a wrongdoing corporate escapes criminal liability.

The government, while making policy decisions that affect the very root of established legal principles must bear in mind the ripple effect

[70]Edmund Fuller, 'Oliver Wendell Holmes, Jr.' (*Encyclopaedia Britannica*, 20 April 2020) <https://www.britannica.com/biography/Oliver-Wendell-Holmes-Jr> accessed 19 June 2020.
[71]ibid.

that a small tweak in a regime may have. The effect on the gigantic body developed to regulate corporate behaviour is yet to react and adapt to the change. Justice Holmes's words could not be more appropriately reflected than at the end of this discussion. While the introduction of Section 32A may seem like the logical step to promote the ease of doing business in India, the success or failure of the provision, and the insolvency regime, will depend on the history of corporate and commercial law, and the meandering course that it has taken to reach its present form. This article was written with the intention to spark a debate on an often-marginalized topic about the validity of provisions that, while not crossing the threshold of unconstitutionality, do transgress existing principles of established law. The fate of Section 32A is yet to be determined by the Supreme Court, and it remains to be seen which takes the upper hand between the sanctity of the corporate personality and the lure of economic gain.

'AIN'T WOMEN RELIGIOUS?' - CRITIQUING THE MUSLIM PERSONAL LAW FROM AN INTERSECTIONAL FEMINIST PERSPECTIVE

Farhan Zia[*]

Abstract

India has witnessed great changes in its Muslim personal law, which much like other personal laws has not been just towards women. But the feminist legal reforms that have occurred through legislative or judicial means have largely been from outside the paradigm of religion. This leads to Muslim women being governed by personal laws which are largely created by male interpretations and/or state interference, implicitly condoning (and at times supporting) an illegitimate hierarchy of sexes, which under the guise of protection of religion, greatly impacts the identity of the Muslim woman. Feminist jurisprudence operates exclusively by reforming social and legal norms, while excluding religious norms entirely.

This article, therefore, undertakes an examination of the reforms in and feminist jurisprudence on Muslim personal law through the lens of intersectionality. It will

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provide a brief introduction to the sources of Muslim personal law and the judicial and juristic trends that have led to its patriarchal nature. Subsequently, a theoretical examination of feminism will be undertaken to highlight its exclusion of religious Muslim women from its subjects. This creates a conundrum where Muslim women are caught between either being Muslim or being women. Islamic feminism, a transnational discourse and movement which has emphasized on injecting women's voices into hermeneutics and the critical study of Islamic jurisprudence will then be described in brief. The article thus concludes, that Islamic feminism serves as a method that is both intersectional as well as important for creating legal change that preserves the religious autonomy and identity of the Muslim woman.

I. INTRODUCTION

Personal law in India has been the source of much debate and controversy. There have been lengthy Constitutional Assembly debates about the Hindu Code Bills, several demands for a Uniform Civil Code and a history of controversy over Muslim Personal Law ("**MPL**") which started in the 1980s and was recently seen in the *Shayara Bano v. Union of India* ("**Shayara Bano**") where the Supreme Court invalidated the practice of triple talaq.[1] It does not come as a surprise that the personal law system in India, when viewed

[1] *Shayara Bano v. Union of India* (2017) 9 SCC 1.

through a gender lens, points out many inequalities, especially when referring to MPL. While it cannot be said that Indian law has made no attempts to alleviate the unfair laws against Muslim women, it can also be contested that these attempts have been outside of the paradigm of religion and have involved either imposition of secular law or overreach by judges in their roles, such as the *Muslim* Women (Protection of Rights on Divorce) Act 1986. This leaves Muslim women with personal laws which are largely created by male interpretations and/or state interference, implicitly condoning (and at times supporting) an illegitimate hierarchy of sexes, which under the guise of protection of religion, greatly impacts the identity of the Muslim woman. This protection of religion implicitly assumes that religion and its laws are for men to create.

At the same time, state interference is itself undesirable because for feminist jurisprudence to increase and maintain intersectionality, it is necessary to take into consideration the importance of the religious and cultural identity of Muslim women and prevent infringement of these identities by any law made for the welfare of women in general. With *Shayara Bano* still being a recent memory and the practice of polygyny and *nikah halal* soon to be examined by a constitution bench of the Supreme Court,[2] it is important to examine the feminist jurisprudence of MPL. Muslim women get caught between Western feminists who often think of Islam as antithetical to feminism[3] and Muslim reactionaries, who cling to narrow, oppressive interpretations, solidifying western stereotypes.[4] This article examines the reformation of MPL from an intersectional feminist lens to highlight certain assumptions that the feminist struggle has held in India,

[2] *Sameena Begum v. Union of India* (2018) SCC OnLine SC 610.

[3] Margot Badran, *Feminism in Islam*: *Secular and Religious Convergences* (One world, 2009) 1.

[4] Asma Lamrabet, 'An Egalitarian Reading of the Concepts of *Khilafah, Wilayah and Qiwamah'* in Ziba Mir-Hosseini et al. (eds), *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (Oneworld 2014) 118.

relating to securing Muslim women's rights. If feminism operates exclusively by reforming social and legal norms but opposing or at best distancing itself from religion at the same time, it would be eschewing religious norms. It is likely that this would produce an incomplete understanding of Muslim women's experiences and discrimination, often originating from religious sources and would not only force them to be alienated from the mainstream feminist movement[5] but also impose laws that diminish what Farrah Ahmed has called religious autonomy.[6] This article highlights that this creates a conundrum, where the law is required to be reformed but also not overlook the importance of women's religious identities, in a system that already emphasizes personal laws created from an understanding of religion that overlooks the voices of the myriad women who also subscribe to it.

The Islamic feminist movement, a transnational discourse that began in the late twentieth century and which has worked as a local movement as well in India with Muslim women's rights activists[7] has emphasized on injecting women's voices into hermeneutics, subsequently using the different meanings derived by these women to create legal reforms. Agreeing with the importance of such hermeneutics in creating laws, this article critiques the law in view of the Islamic feminist project and analyses the arguments of Islamic feminists for the purpose of producing an intersectional feminist perspective in India that offers a way out of the conundrum at hand.

[5]Huma Ahmed-Ghosh, 'Introduction' in Huma Ahmed-Ghosh (ed), *Contesting Feminisms: Gender and Islam in Asia* (State of New York Press, 2015) 6.

[6]Farrah Ahmed, *Religious Freedom Under the Personal Law System* (OUP New Delhi, 2016) 55.

[7]Nadja-Christina Schneider, 'Islamic Feminism and Muslim Women's Rights Activism in India: From Transnational Discourse to Local Movement – or Vice Versa?' (2009) 11(1) Journal of International Women's Studies 56-71.

II. MUSLIM PERSONAL LAW IN INDIA AND REFORMS

Muslim Personal Law in India or Muhammadan law, as is commonly called has been said to be "*so intimately connected with religion that [it] cannot readily be dissevered from it*".[8] The sources of this *shari'a* in general are the Qur'an believed to be the direct word of God by the Muslim faith, the *sunnah, ijmā* and *qiyas*,[9] only the former two considered divine although there is dissent as to the divine nature of *sunnah*.[10] While it is important to understand a meaningful distinction between *shari'a* and *fiqh*, for the purposes of this article it is sufficient to know that *shari'a* is the knowledge that can only be identified from the divine sources of Qur'an and *sunnah*, while *fiqh* is its human understanding and application to create practical legal rules. 'The path of *sharī'ah* is laid down by God and His Messenger; the edifice of *fiqh* is erected by human endeavour'.[11] It has been argued that despite classical theorists of Islam having emphasized the infallible and unchangeable nature of the law of the Qur'an — the primary source of Islamic law, it has changed with changing times and society and has not become fossilized.[12] It shall be shown in forthcoming discussion, how important this distinction is to reformers today.

Reforms in these derived laws have not been easy. Among other interpretative concepts in Islamic law, *ijtihad* plays a great role. Literally meaning 'striving or exertion', *ijtihad* is defined as "*the total expenditure of effort … in order to infer, with a degree of probability,*

[8] *Gobind Dayal v. Inayatullah* (1885) 9 All 775,781.

[9] Asaf A. A. Fyzee, *Outlines of Muhammadan Law* (5th edn, OUP 2008) 12,13.

[10] Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (OUP, 2008) 19.

[11] ibid 16.

[12] Syed Jaffer Hussain, 'Legal Modernism in Islam: Polygamy and Repudiation' (1965) 7(4) Journal of Indian Law Institute 384-398 <https://www.jstor.org/stable/43949855> accessed 27 December 2020; Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press, 2016) 21-40.

the rules of Sharī'ah from the detailed evidence in the sources".[13] In other words, it is the right to interpret the divine sources of Islamic law. However the Indian legal system gave recognition to the concept of the 'closing of the door of *ijtihad*': a widely-believed consensus by tenth-century religious scholars – which Muslims thereafter widely adhered to – to put an end to *ijtihad*.[14] In the case of *Aga Mahomed Jaffer v Koolsom Beebee* the Privy Council accepted this doctrine of closing of doors, allegedly due to political reasons and held, "*It would be wrong for the Court on a point of this kind to put their own construction on the Koran in opposition to the express ruling of commentators of such antiquity and high authority*".[15] A disinclination to facilitate legal reforms in Islamic law thus, received a binding legal precedent.

With this, it set a legal trend which has been criticized for firstly, being in line with the colonial objective of keeping their Muslim subjects backwards while pleasing the conservatives who disapproved *ijtihad* and secondly, for the continued reliance on commentaries of 'high authority', which are prone to inaccuracies because of translation from Persian or Arabic to English.[16] The latter additionally can be observed to be giving primacy to commentaries exclusively of male voices, considering that few of these commentaries could be found to be written by women. Both these trends are evident in the legal reforms in MPL. The first was present in the Parliament's reversal of the *Shah Bano* judgment — a move criticized by many as Muslim appeasement[17] and both can be seen in the most recent *Shayara Bano* where the minority judges declared it the task of the

[13] ibid 163.
[14] ibid (n10) 94.
[15] (1896-97) 24 IA 196.
[16] Anees Ahmed, 'Reforming Muslim Personal Law' (2001) 36(8) Economic and Political Weekly 618-19 <https://www.jstor.org/stable/4410313 > accessed 27 December 2020.
[17] Salman Khurshid, *Triple Talaq: Examining Faith* (OUP 2018) 14.

Imam— the religious head — to interpret and decide the correct teachings of Islam. This raises the concern that since most religious heads are male, the judges assume that he would be objective in a case where the respondent itself is a major religious body, comprising such religious scholars, out of which only a handful are women.[18] The entanglement between the state and patriarchal religious organisations forces Muslim women to look for alternative ways to secure their rights. At the same time, the colonial state did interfere by deciding which matters would be governed by MPL, which religious doctrines would be treated as law even if it was regarded as not mandatory by scholars. This displaced a system of "*different interpretation and nuanced instances of discretion that often accompanies shari'a norms… [with] a rulebound legal system*".[19] MPL thus, became a crystallization of traditions, mostly patriarchal in nature, that might otherwise have evolved. This works to maintain the existing power relations. [20]

Asghar Ali Engineer, a noteworthy Indian scholar known for his work on women's rights in Islam was deeply critical of the Muslim jurists, the *ulema,* for their mechanical application of the British-made MPL.[21] These jurists religiously followed the notion of 'the closing of the gates of *ijtihad'* which was popularised by the Western author Joseph Schacht. He argued that following a period of *ijtihad* in its formative years, there was a consensus which prohibited further *ijtihad*, beginning an age where new legal doctrines could not be

[18]Out of the 50 Executive members in the All India Muslim Personal Law Board (AIMPLB) only 4 are women and out of 149 General members, only 26 are women <http://www.aimplboard.in/index.php> accessed 21 October 2019.

[19]Micheal R. Anderson, 'Islamic Law and the Colonial Encounter in British India' (1996) 7 WLMUL 24.

[20]Gopika Solanki, *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism and Gender Equality in India* (Cambridge University Press, 2011) 65.

[21]Asghar Ali Engineer, 'Women's Plight in Muslim Society' (2006) Nov. 1-15 *Secular Perspectives* <http://www.csss-isla.com/wp-content/uploads/2015/06/November-1-15-06.pdf> accessed 22 June 2019.

derived independently from the Qur'an and *sunnah*, but only from the already existing *fiqh* rules of a scholar's school of legal thought.[22] Modern scholars have attacked Schacht's thesis as being mythical, by demonstrating that it had never been so that *ijtihad* had completely stopped. Those qualified to perform *ijtihad* and the process itself always existed in varying capacities throughout history.[23] Engineer criticizes the Indian *ulema* for continuing to shy away from *ijtihad* and continuing to apply the medieval formulations of classical Islamic law. They issue *fatwas* without any consideration of its consequences. The most apt illustration of this is the case of Imrana, a young married Muslim woman who was raped at gunpoint by her father-in-law. This was followed by a *fatwa* by a Deobandi scholar, which opined that due to sexual relations with her father-in-law, her marriage was invalidated.[24] The Supreme Court noted several such *fatwas*, some even forcing survivors to marry their rapist. However, though it was restricted and discouraged, the court allowed *fatwas* to continue being issued.[25]

The *qadi*—the Muslim predecessor to the colonial judge— operated very differently from the current judges. No *qadi* was bound by the opinion of another, unlike *stare decisis* in common law. Instead, they would mutually recognize differences in interpretations to achieve justice in varying factual situations. Unlike the *qadi*, who was trained in the spirit of Islam and Islamic law, the British and later Indian judges instead applied principles textually and mechanically based on

[22]Joseph Schacht, *An Introduction to Islamic Law* (OUP 1965) 69-75.

[23]Wael B. Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16(1) International Journal of Middle East Studies 3-41; Ahmed Fekry Ibrahim and McGill University, 'Rethinking the Taqlīd Hegemony: An Institutional, Longue-Durée Approach' (2016) 136(4) Journal of the American Oriental Society 801-16, 804.

[24]Barbara D. Metcalf, 'Imarana: Rape, Islam, and Law in India' (2006) 45(3) Islamic Studies 389-412, 389-90.

[25]*Vishwa Lochan Madan v.Union of India & Ors.* (2014) 7 SCC 707.

digests and commentaries.[26] While judges themselves are not competent to interpret religious sources, recently they have attempted to mitigate the rigour of MPL against women. In a case dealing with a challenge to Section 494 of the Indian Penal Code for allowing polygamy for Muslim men, the Allahabad court relying on several commentaries held:

"*Polygamy under Islam was always an exception, and never a generality. Then polygamy went and goes with the obligation of equality, equity, justice to be discharged or dispensed amongst more than one wife. The Koran speaks of conscience as an obligation on the husband before taking two, or three or four wives. It speaks of equality of love amongst wives, and equality which is within the sole perception of the woman, not the male. It is a hard discipline of the Islamic religion which requires perfection as any wife in a polygamous marriage can as of right speak out in a case of inequal treatment, and make matters difficult for a husband*."[27]

The High Courts of Kerala,[28] and recently Gujarat[29] have also made similar observations. In these examples, the court took note of scholarly opinions that were more just towards women's rights and used them to inform their understanding. A brief hint of acceptance of such a method can be observed in the judgement of Kurian, J. in the *Shayara Bano* case, which recognizes the religious importance of MPL but instead of protecting it as religious freedom, he tested *talaq-*

[26] Asghar Ali Engineer, 'The Need for Codification and Reform in Muslim Personal Law in India' (2000) Dossier 22 WLUML 57 <http://www.wluml.org/node/332> accessed 27 December 2020.

[27] *Chandra Pal and others v. Keshav Deo & Ors* 1989 (1) AWC 527.

[28] *Amina v. Hassan Koya* 1985 KLT 596.

[29] *Jafar Abbas Rasoolmohammad Merchant v. State of Gujarat* (2015) SCC OnLine Guj 5552.

e-biddat as a practice against Qur'an and Islamic teachings itself.[30] However despite such attempts, the underlying reality persists: Islam and legal rule-making in Islam is exclusively hegemonized by men and secular law continues to overlook this. Thus, MPL continues to harbour practices like polygyny, *nikah halal* and until very recently, *talaq-e-biddat*, all of which are unjust towards women. *Shayara Bano* has not dealt with many of these practices that are unjust towards women.[31]

III. INTERSECTIONALITY AND FEMINISM

Exploring reform in MPL requires that it be understood that some of the main agents of change, i.e., feminists and the State have more often than not been in dissonance with the experiences of religious women and religion as another social division that can contribute to change. There have been great debates about the fundamental right to religious practice and propagation, the judge's role as theologian and the fate of religious practice being tested on the touchstone of 'constitutional morality' as emphasized in the *Sabrimala case*.[32] While the State's opinion of religion is a topic of much interest in itself, this article focuses only on the former to show how feminism often excludes religion.

In the introduction to Bell Hooks' *Ain't I a Woman,* her criticism of mainstream feminism, that, it assumes that 'All women are White and all Blacks are men',[33] started a movement for the development of a method of recognizing social divisions to understand analytical

[30] ibid (n 1) para 25.

[31] *Sameena Begum v. Union of India & Ors* (2018) SCC OnLine SC 610.

[32] *Indian Young Lawyers Association v. The State of Kerala* (2018) SCC OnLine SC 1690.

[33] Bell Hooks, *Ain't I a Woman* (South End Press 1981).

differences between women.[34] First coined by Kimberle Crenshaw, it set in motion a significant transformation of feminism which came to be called intersectionality.[35] Hooks' criticism brings to light the tendency for women to be constructed as a single homogenous group by only considering their shared oppression and ignoring the specific ones by overlooking the power relations between different groups of women.[36] Beginning with a focus on the specific struggles of Black women in "*the various ways in which race and gender interact to shape the multiple dimensions of Black women's experiences*", the idea of intersectionality has now expanded much beyond and draws attention to intersections of race, class, sexuality, caste, ability and nation.[37]

Intersectional feminism raises the question that if feminist theory claims to capture the experiences and aspirations of all women, then who is it that defines what 'woman' is? To Hooks, feminism is "*a movement to end sexism, sexist exploitation, and oppression*", and so it must include the lived experiences and struggles of all those who are struggling against sexism.[38] This becomes especially important when certain groups such as Black women in Crenshaw's case or Muslim women are left out from feminism reflecting their experiences. This implicitly means that the definition of 'woman' as defined by mainstream feminists would not include Black or Muslim women. This leads to what has been called gender essentialism, which

[34]Nira Yuval-Davis, 'Intersectionality and Feminist Politics' (2006) 13(3) European Journal of Women's Studies 193-209, 193.

[35]Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 University of Chicago Legal Forum 139-167.

[36]Sara Salem, 'Feminist critique and Islamic feminism: the question of intersectionality' (2013) 1(1) The Postcolonialist 1-8.

[37]Jakeet Singh, 'Religious Agency and the Limits of Intersectionality' (2015) 30(4) Hyptia 657-674.

[38]Bell Hooks, *Feminism is for Everybody: Passionate Politics* (South End Press, 2000) 1.

has been a criticism by many against feminists such as Catherine MacKinnon, for creating a universal idea of 'woman' but which actually only includes middle-class, heterosexual, white women thus, making the experiences of other women ancillary to the interests of feminism and silence them.[39] This makes it difficult to speak about a universal 'woman.'

In the Indian context, another problem with mainstream feminism that follows from this has been the emphasis put on choice. Chandra Mohanty has argued that while western feminism is itself not a monolith, there have been similarities in much scholarship that has formed the idea of the third world woman from a western feminist lens, which has tended to homogenize religious women as victims who are unable to see the allegedly inherent patriarchy in their religion, thus reproducing colonial notions.[40] With choice being a necessary element for autonomy and agency that western feminists rely on, being religious becomes a blanket oppressive force which takes away from women and their agency as they relinquish their rights to become part of an oppressive community. This is exacerbated by the False Consciousness thesis, which propounds that Muslim women are brainwashed victims of men and patriarchal institutions, Islam included, who act against their own objective interest by following religion.[41] Such a view overlooks the possibility that women can choose to be religious. It creates a convenient distinction between which choices are emancipatory by assuming that choices can be made outside of power relations and thus, the choice to

[39]Larissa Beherndt, 'Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse' (1993) 1(1) Australian Feminist Law Journal 35; A Harris, 'Categorical Discourse and Dominance Theory' (1989) Berkeley Women's Law Journal 181-182.

[40]ibid (n 36).

[41]Sarah Bracke, 'Author(iz)ing Agency: Feminist Scholars Making Sense of Women's Involvement in Religious 'Fundamentalist' Movements' (2003) 10 (3) The European Journal of Women's Studies 335-346.

be religious —religion itself being seen as depriving of agency— is not free, while other choices may be. An example of this is the Western view that a woman wearing a *burqa* would be thought of as being regressive and a victim to Islam. It has been argued, however, that for many Muslim women, wearing a *burqa* (or not wearing it) can be a political act of asserting her identity or agency.[42] So the same way 'objectivity' is itself an example of the reification of white male thought,[43] it may be said that feminism becomes a reification of the white, heterosexual, secular female thought.

IV. ISLAMIC FEMINISM

If intersectionality in feminist jurisprudence is the aim, then how exactly may Muslim women argue against patriarchy from within their religion, especially if MPL is riddled with patriarchal practices and androcentric laws? This article proposes Islamic feminism as a solution to the conundrum at hand. With its many varying definitions and shades, a brief understanding of Islamic feminism is required to understand its application in India. It can be defined as a discourse or "*an analytical category to understand a multi-faced phenomenon where Islam is used to argue for an expansion of women's rights or a term of identity*."[44] It is both a transnational discourse that started in the late 1990s and a local movement in India, with the latter existing independently before the former started.[45] The key idea of Islamic feminism is the use of feminist hermeneutics to produce readings of

[42]Kelsy C Burke, 'Women's Agency in Gender-Traditional Religions: A Review of Four Approaches' (2012) 6(2) Sociology Compass 122-133; Ghazala Jamil, *Muslim Women Speak: Of Dreams and Shackles* (SAGE Publications, 2018) 105-121.

[43]Gloria T. Hull and Barbara Smith, 'Introduction' in Gloria T. Hull, Patricia Bell Scott and Barbara Smith (eds), *But Some of Us are Brave* xxv (The Feminist Press, 1982).

[44]Liv Tønnessen, 'Islamic Feminism' (2014) 1 Sudan Working Paper CMI:SWP.

[45]ibid (n 7).

religious sources which are used to women and debunk the relationship between patriarchy and Islam. For this it is immensely important to understand the immutability of *shari'a* versus the flexible *fiqh.* That State sanctioned Muslim family laws – either enacted or customary – is fixed and non-negotiable is a belief that is commonly held. Women's demands for justice are silenced by designating these laws as 'God's Law' and God's direct commandments.[46] Muslim jurists also carry the same assumption that MPL is divine law which cannot be tampered with by humans.[47] This presents an obstacle to reform and so, Islamic feminists stress on the difference. They apply their own *ijtihad* and highlight the egalitarian nature of Islam to argue that the patriarchal model is against Islamic values.[48] Two voices emerged out of Islam's evolution: 1) an ethical vision with spiritual equality of men and women and 2) a hierarchical structure based on male-female relationship. The androcentric and misogynist Arabic society in which Islamic doctrine subsequently developed, emphasized and eventually sacralised the latter voice of hierarchy.[49]

Two ways in which Islamic feminism operates have been identified by Mulki Al- Sharmani. The first, a feminist exegesis of the Qur'an, which looks to the Qur'an as a source of liberation for Muslim women and the second, is an engagement with *fiqh* which is deconstructed to highlight the hierarchy of genders that has been part of Islamic law.[50] The working of both methods shall be illustrated

[46]Tamir Moustafa, 'Islamic Law, Women's Rights, and Popular Legal Consciousness in Malaysia' (2013) 38(1) Law & Social Inquiry 168-188, 168.
[47]ibid (n 21).
[48]ibid (n 3) 4.
[49]Leila Ahmed, *Women and Gender in Islam: Historical Roots to a Modern Debate* (Yale University Press, 1992) 66-83; Ziba Mir-Hosseini, 'The Construction of Gender in Islamic Legal Thought and Strategies for Reform' (2003) 1 (1) HAWWA: Journal of Women of the Middle East and the Islamic World 1–28, 4.
[50]Mulki Al- Sharmani, 'Islamic Feminism and Reforming Muslim Family Laws' EUI Working Paper RSCAS 2011/29.

presently to clarify how Islamic feminism helps Muslim women exercise agency and bring positive changes to their legal rights, especially in the context of family law.

A. Women in Classical Law

Ontologically, conservatives prove male authority by the theological idea of a woman as unequal and supplementary to man and the traditional Islamic view on female sexuality as well as readings of Qur'anic verses granting men a 'degree' above women. The woman was created for the man and from the man; ontologically making man God's primary creation and the woman secondary, who is additionally also made responsible for what is known as Man's Fall from the Garden of Eden.[51] Her prime function is hence, childbirth.

The traditional view on sexuality is equally problematic. Female sexuality is viewed as active and dangerous, directly linking security of social order to a woman's sexuality and confuses sexual self-determination of a woman with uncontrolled promiscuity and *fitna* (chaos), with women being primary agents of *fitna* and destructive for social order.[52] It causes men to lose focus and capitulate to the sexual advances of women.[53] It is the epitome of *fitna* and synonymous with Satan.[54] This necessitates the suppression of female sexuality through means including, *inter alia*, veiling. The control over women's sexuality is also central to much Qur'anic interpretation which forces upon women a religious duty to protect their chastity for the honour

[51]Riffat Hasan, 'Equal Before Allah? Woman-man equality in the Islamic tradition' (1987) 7(2) Harvard Divinity Bulletin.

[52]Al-Ghazali, *Revival of Religious Learnings,* Vol 1 (Fazl-Ul-Karim tr, Darul-Ishaat 1993).

[53]Fatima Mernissi, *Beyond the Veil: Male-Female Dynamics in Muslim Society* (Saqi Books 2011) 26.

[54]Al-Ghazali, *Revival of Religious Learnings*, vol 3 (Fazl-Ul-Karim tr, Darul-Ishaat 1993).

of men.[55] This traditional view is problematic because firstly, it is androcentric in its approach, as it seeks to systematically protect men by suppressing female sexuality and maintaining the man as superior over women. Secondly, this treats women not only as threats to humanity, but also outside of it, leading to a dehumanization that propagates the idea that men are the primary recipients of God's message. Any liberation of women is opposed since Muslim societies socialize men in a manner which does not equip them to deal with self-determined women, and so it is conflated with chaos.

B. Deconstructing Classical Law

This forms much of the basis for much of the imbalance in the legal rights of women and men in MPL and *fiqh* in general. Islamic feminist scholars criticize *fiqh* by arguing that rights in marriage and gender roles are therefore constructed in a fashion that is hierarchical and discriminatory against women through the law. They argue that in relation to women's rights, *fiqh* rulings do not embody the ideals of the *shari'a*, but rather the jurists' shared legal and gender assumptions which were a product of the social norms of their times, especially in the formative period of Islam.

Mir Hosseini demonstrates this with the illustration of marriage. She argues that even though jurists took great care to not equate marriage with a sale, the conception of women's rights in a marriage is built on the logic of sale. The analogy itself has featured and affirmed repeatedly in court judgments with differing opinions.[56] The woman's sexuality becomes a commodity, which is accessed exclusively by her husband, even if she herself is not his commodity. There is an

[55]Saddiya Shaikh, 'Exegetical Violence: *Nūshuz* in Qur'anic Gender Ideology' (1997) 17 Journal for Islamic Studies 48-73, 49.

[56]*Abdul Kadir v. Salima* (1886) ILR 8 All 149; *Anis Begam v. Muhammad Istafa Wali Khan* AIR 1933 All 634; *Hijaban v. Ali Sher Khan* MANU/UP/0287/1921; *Khatoon Begam v. Saghir Husain Khan* AIR 1945 All 321; *Ghiasuddin Babu Khan v. Commissioner Of Income-Tax* (1985) 153 ITR 707 AP.

exchange of duties and rights: the man's right to 'unhampered sexual access' and the woman's duty to provide it and the woman's right to maintenance and the man's duty to provide it.[57] The husband's right over sexual pleasure was to such a degree that he could also restrict the wife's movements to keep her available for himself. Failure to obey the husband would result in forfeiting his support.[58] But the Qur'an condemned the subjugation of women, which is the opposite of what was achieved by relying on the logic of a contract of sale. Engineer states that the Muslim scholarly discourse for "*women is duty-based and for men is right-based*", which is the opposite of the Qur'anic discourse.[59] Therefore, the marriage contract and its duties were elevated to a religious, immutable status, remaining a contract but something more as well. The extent of this is so deep that it can be seen in the works of Asaf A.A. Fyzee, regarded as a modern reformist scholar and cited frequently by courts.[60]

Classical jurists, by citing God as the authority, made the foundations of women's gender rights virtually fixed. This fixture reflected the culture and social fabric of the society of that time. This was underpinned by the exclusion of women from participating in the knowledge production of both, religion and law, which marginalized their voices.[61] Later scholars found support in two ideas: complementarity and science. While men and women are equal, God assigned different roles to them and so, there is no hierarchy. This essentially means that women's natures complement men's and vice versa, describing it as not only natural and harmonious, but also

[57]Ziba Mir-Hosseini, 'The Construction of Gender in Islamic Legal Thought and Strategies for Reform' (2003) 1 (1) HAWWA: Journal of Women of the Middle East and the Islamic World 1–28, 7.

[58]Kecia Ali, 'Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law' in Omid Safi (ed) *Progressive Muslims* (One World, 2006) 170.

[59]ibid (n 21).

[60]Fyzee (n 9) 70.

[61]ibid (n 57) 13-14.

divine. Since the values attached to these gender roles may vary in differing contexts, this has been criticized as an inherently unequal relationship, which is rhetorically constructed so that a disruption would fundamentally destroy Islam.[62]

An illustration of such complementarity espoused by many contemporary feminist scholars, is that classical Islamic law levies no obligation on the wife to perform housework.[63] Such an argument is used to push forward a view of Islamic law as egalitarian and liberal. It implicitly accepts the complementary nature of the obligations of the husband and wife, immediately limiting the framework within which such feminists can argue. Kecia Ali criticizes such arguments for overlooking that the reason housework is not being made an obligation is because her main legal role is to be sexually available to the husband. 'Sex in marriage was almost exclusively a female duty and a male right'.[64] There were no enforceable rights for women. Socio-economic circumstances also cannot be ignored, since all women would not be in a position to avoid housework if there is no help, which makes the family laws which are based on such ideas largely unsustainable. Later 'scientific' justifications –alien to classical *fiqh*– also began being used, arguing that it was women's nature to live under rule and leadership of husbands by emphasizing female psychology – allegedly emotional and nurturing – and biological functions of childbirth; and extending it to domestic functions.[65]

Women were consistently excluded from active participation in the process of developing *fiqh*. Islamic history itself has the presence of

[62]Amina Wadud, *Inside the Gender Jihad: Women's Reform in Islam* (One World 2006) 27-28.
[63]ibid (n 50) 12-13.
[64]ibid (n 58) 173-179.
[65]Omaima Abou-Bakr, 'The Interpretative Legacy of Qiwamah as an Exegetical Construct' in Ziba Mir-Hosseini et al. (eds), *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (One World, 2014) 98.

many significant women like Khadijah and Aishah, yet classical *tafsir*[66] has created and defended male authority, primarily by dictating that women are "*weak, inferior, intellectually incapable, and spiritually lacking*", and justify traditional gender roles by attributing to it a divine mutuality and complementarity.[67] Women were confined to being objects, rather than the subjects of Islamic law. The ideals of *shari'a,* which advocate for equality, justice and freedom were ignored and even deterred in being implemented by the social norms of the formative period of Islamic jurisprudence. These social norms became legal norms on being used by jurists who assimilated these into jurisprudence and commentaries, establishing ideas of ownership and authority over women.[68] Yet, these *tafsir*, which were supposed to be ancillary to the Qur'an, "*became part of that past actuality now attached to the contents of the Quran, with the consequence that [it] came to be regarded as beyond question or doubt*",[69] and it is these interpretations which are applied when constructing the *shari'a,* personal laws, private Islamic affairs and public policies.

C. De-Patriarchalising Islamic Law

Fazlur Rahman's work is one of the first to present and argue for a thematic study of the Qur'an over a passage-by-passage study to achieve a holistic understanding of the Qur'an.[70] A distinction must be made between Qur'an's moral injunctions and legal enactments specifically aimed at its seventh century audience. Muslim tradition

[66]*Tafsir* (pl. *tafasir)* is the Arabic word which most commonly refers to commentaries on the Qur'an based on exegesis.

[67]Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (OUP 1999) 7; Amina Wadud, *Inside the Gender Jihad*: *Women's Reform in Islam* (One World, 2006) 28.

[68]ibid (n 57) 21-22

[69]John Burton, *The Collection of the Quran* (Cambridge University Press, 1977) 271.

[70]Fazlur Rahman, *Major Themes of The Qur'an,* (Bibliotheca Islamica, 1994).

has failed to do so and has instead looked at the Qur'an as a religious source of laws, which creates contradictions within different verses of the Qur'an and fails to understand its underlying unity. "*Some of the greatest restrictions on women, causing them much harm, have resulted from interpreting Qur'anic solutions for particular problems as if they were universal principles*".[71] Instead of being a lawbook, Qur'an, as Rahman argues, "*is the divine response, through the Prophet's mind, to the moral-social situation of the Prophet's Arabia, particularly to the problems of commercial Meccan society of the day*".[72] Verses then must be divided into three types: 1) verses with universal aims, such as justice and equality, 2) temporary verses with time specific application, such as distribution of war spoils and 3) verses that need reinterpretations with change in time.[73]

Islamic feminists use creative theological arguments to prove the anti-patriarchal nature of the Qur'an. Masculinizing God and supporting male hierarchy is anti-Islamic, since it is akin to idolatry and violates the principles of 'God's Unity', which is central to Islam.[74] The androcentric notion of 'Creation' is also denied. Riffat Hasan notes that the Qur'an nowhere makes a distinction between the creation of man and woman, with the above assumptions seeping in through pre-Islamic foreign influences. She relies on hermeneutics and linguistics, to argue for the lack of gender-specificity in the Qur'anic verses. Verse 4:1 describes women and men as being made of a single *nafs* (soul) which is conceptionally neither male nor female, with no

[71]Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (OUP 1999) 99.
[72]Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (University of Chicago Press, 1984) 5.
[73]Asma Lamrabet, 'An Egalitarian Reading of the Concepts of *Khilafah*, *Wilayah* and *Qiwamah'* in Ziba Mir-Hosseini et al. (eds), *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (One World, 2014) 121-122.
[74]ibid (n 2) 106.

linguistic basis to attribute the original *nafs* to the male Adam.[75] The Qur'an has used the word *adam* not only as a name but as a collective noun, often interchangeably used with *al-insān*, meaning humanity. Ḥawwā' (Eve) is not directly named and instead mentioned as Adam's *zawj* (mate),[76] which is a masculine noun, and so it does not exclusively refer to women. Adam then, not necessarily male, makes its *zawj* not necessarily female.[77] Not only is this important to establish gender-neutrality in this context, but also to provide an equal moral capacity to women and men, so that it is not women who have to be specifically regulated. This methodology illustrates the first method of Islamic feminism in Al-Sharmani's distinction.

Hasan finds in *hadith* literature the seeping in of ideas of inequality into Islamic traditions, including the *Sahih al-Bukhari* and *Sahih Muslim*, the two most authoritative Sunni Islamic sources after the Qur'an. The validity of the content of a *hadith* is determined by its list and chain of transmitters. Much of the views on the dangers of female sexuality are also derived from *hadith* which attribute sayings to the Prophet by transmitters that paint misogynist pictures and increase the dehumanization by sayings likening women to animals. Fatema Mernissi has posited that many of these are reflective of the transmitters' personal misogynist views and even mistakes in listening, and on a historical analysis appear to have logical holes, fitting too conveniently in the political circumstances of the transmitter at times. They also contradicted clarifications given by the Prophet's wives, undoubtedly a stronger source for confirming the practices of the Prophet, with many clarifications that they gave–more

[75]Amina Wadud, *Inside the Gender Jihad: Women's Reform in Islam* (One World, 2006) 31-32; Asma Barlas, "*Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an* (University of Texas Press, 2002) 19-20.

[76]See *Surah- al Baqarah* 2:35; *Surah al-A'raf* 7: 19; *Surah-Ta Ha* 20: 117.

[77]Riffat Hassan, 'Made from Adam's Rib: The Woman's Creation Question', (1985) 27 Al-Mushir Theological Journal of the Christian Study Centre 124–155, 126.

egalitarian in nature– not being incorporated in the compilation of the *hadith,* including al-Bukari's *hadith.*[78]

Similar methods are used for deriving new meanings out of the Qur'an and deconstructing those meanings from the Qur'an as well as other sources, which contribute to creating a hierarchy among genders. This must not be confused with arguments of many apologetic scholars who, while unearthing the rights of women in Islam fail to notice the hierarchical background within which rights are being searched for. Instead, a new approach to the Qur'an is required which radically changes the concepts of marriage, divorce and other matters pertaining to family laws.[79] In Engineer's view, the *ulema* is contradictory in its support of Qur'anic ideals and its immutability on one hand, and on the other, its application to women's rights.[80] The Qur'anic verses on polygyny (4:3) demand justice between wives as a necessary qualification, which makes polygyny an exception and not the rule. Yet, the *ulema* completely ignore this, instead making polygyny virtually a privilege for Muslim men. Islamic feminists argue that Islam is opposed to polygyny. It restricted already rampant polygyny and intended for it to gradually end with the progress of society from the pre-Islamic ways of Arabia. They intra-textually read Verse 3 and Verse 129 of the fourth *surah* of the Qur'an:

a) If you can be just and fair among women, then you can marry up to four wives. [Verse 4:4]
b) If you cannot be just and fair among women, then you may marry only one.

[78]Fatima Mernissi, *Women and Islam: An Historical and Theological Enquiry* (Mary Jo Lakeland tr., Basil Blackwell 1991) 49-84.
[79]ibid (n 58) 181.
[80]ibid (n 21).

c) You cannot be just and fair among women. [Verse 4:129][81]

Therefore, you cannot marry multiple women. The Gujarat High Court has taken cognizance of such arguments. It has also relied on scholarly work which historically contextualizes polygyny and commented, "*the code upon which polygamy rests in Islam is strict and difficult to keep…It is for the maulvis and Muslim men to ensure that they do not abuse the Quran to justify the heinously patriarchal act of polygamy in self-interest*".[82]

While Qur'anic re-interpretation is beneficial, from a legal point of view, a focus on jurisprudence is just as necessary. The second group of scholars in Al-Sharmani's distinction, such as Ali and Mir-Hosseini deconstruct Islamic law to separate its divine elements from its human ones and subject it to historical contextualization to highlight the inequality at its very source i.e., within the knowledge-development process, which is very much what modern family laws rest on.[83] Ali argues that Islamic feminism must focus on jurisprudence because even if scriptural re-interpretations are achieved, the field of jurisprudence is entirely left to traditionalist thinking otherwise.[84] Some scholars focus solely on re-interpretation while others on jurisprudence. In Al-Sharmani's view, both groups are of great importance and work in synthesis, where the first unearthing an anti-patriarchal Islam which provides normative weight to the legal reforms in Muslim family laws. Islamic feminism, much like other academic projects, has its own politics and internal disagreements, which need not be discussed here. What needs to be understood is its multi-level methods of operation and the impact it serves. Its most important function is that it brings women to the

[81]Azizah Al-Hibri, 'A Study of Islamic Herstory: Or How Did We Ever Get Into This Mess?' (1982) 5(2) Women's Studies Intl Forum 207-219, 216.

[82]*Jafar Abbas Rasoolmohammad Merchant v. State of Gujarat* (2015) SCC OnLine Guj 5552, para 42, 61-62.

[83]ibid (n 50) 13.

[84]ibid (n 58) 182

forefront of Islam, participating as moral and intellectual equals to men in the construction of religion and religious laws.

V. ISLAMIC FEMINISM AS INTERSECTIONALITY

This article argues that feminist jurisprudence needs to look at multiple axes of 'woman' and religion. This will be supported by two reasons, both of which work interconnectedly: first, that the existing personal laws already do not recognize women as being part of constructing Islam; second, that following a path that seeks to end gender injustice without addressing reforms in MPL implicitly falls prey to the same assumption that Islam is inherently patriarchal, the consequences of which would adversely impact the religious autonomy of Muslim women.

A. MPL Hinders Religious Autonomy

In Farrah Ahmed's view, religious autonomy means personal autonomy of human life in the specific sphere of religion. She relies on Rawls to create a link between self-respect and autonomy— which he stated to be essential to one's life[85]— and argued that non-recognition of any important part of a person's identity injures the person's self-respect, in turn reducing autonomy. Charles Taylor has suggested that non-recognition or misrecognition constitutes a form of oppression. He writes:

The thesis is that our identity is partly shaped by recognition or its absence often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Non-recognition or

[85] John Rawls, *A Theory of Justice* (5th edn, Universal Law, 1972) 178, 440.

misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.[86]

Building on this thesis, it can be contested that the current system of MPL does not recognize any heterodoxy in its laws, to the extent that it confines itself to crystallized patriarchal traditions and relies on old commentaries which are considered 'authoritative', as mentioned earlier. This brings with it the issue that even a person who interprets a religious doctrine differently will be forced to govern herself by an interpretation of that doctrine that she does not agree with. Thus, MPL, being a collection of state-endorsed religious interpretations, misrecognizes such people who do not share the same interpretation of religious doctrine. Ahmed has argued that this interpretation of religious doctrine might be of great importance to a person's religious life.[87] This becomes even more important when different sects and schools of jurisprudence of Islamic law in India are considered.

However, the focus of this article is women and their interpretations, which only adds to this, since most of the current personal law is based on older and patriarchal rules, if not inaccurate collections of interpretations. If heterodoxy is not recognized, then the current law will be followed, which creates gender hierarchies. These can have drastic deviations from the interpretations of a woman which can be exemplified in the following; Verse 4:34 of the Qur'an, which talks about marital discord includes the Arabic word *Wahjurūhnna* the most obvious meaning of which is to 'separate beds from your wife'. This has however been interpreted by revered Muslim scholars as 'confining the wife to home', 'refusing to talk to her during sex' and

[86]Charles Taylor, 'Multiculturalism and the Politics of Recognition' in C Taylor, A Gutaman, and J Habermas, *Multicultarism: Examining the Politics of Recognition* (Princeton University Press, 1994) 25.
[87]ibid (n 6) 111.

even 'tying her up and forcing her to have sex.'[88] Realistically, polygyny, which is interpreted by Islamic feminists to be unacceptable in Islam, has been a part of MPL. This shows that by not recognizing the importance of individual interpretations, a wife could very well be forced to be governed by the misogynistic interpretations that become law, which is not only unjust on the face of it, it is also forcing onto her a religious practice that she does not believe in.

This raises questions of her autonomy being affected. There are many ways for religious women to exercise agency and reinterpret their religion to empower themselves while navigating the complexities of their lives.[89] The same way that the law here is painting all Muslims with the same brush, feminist jurisprudence, by ignoring the agency of religious women is contributing to harming their religious autonomy. This is evident in the Indian struggle against the gender injustices of MPL. There has been a great demand for a Uniform Civil Code, a proposal that is also enshrined in Article 44 of the Indian Constitution. The secular nature of the demanded code became increasingly Hindu, with secularism itself taking a character of 'secularism in a Hindu way'[90] and the demands for gender justice became coloured with the community and nationalist politics for a united India. It could thus, interfere with the ability of Muslim individuals to live by their religious norms and religious practices.[91] Proponents of the Uniform Civil Code would overlook these difficulties for Muslim women who seek to be religious, which is implicitly defining feminism in a 'secular' manner, presenting the

[88]Sa`ddiya Shaikh, 'Exegetical Violence: Nūshuz in Qur'anic Gender Ideology' (1997) 17 Journal for Islamic Studies 49-73, 65.

[89]Kelsey C Burke, 'Women's Agency in Gender-Traditional Religions: A Review of Four Approaches: Women's Agency in Gender-Traditional Religions' (2012) 6(2) Sociology Compass 122-133, 123-29.

[90]Nadja-Christina Schneider, 'Islamic Feminism and Muslim Women's Rights Activism in India: From Transnational Discourse to Local Movement – or Vice Versa?' (2009) 11(1) Journal of International Women's Studies 56-71, 60.

[91]ibid (n 6) 169.

same problems as mainstream Western feminism. Many major women's organisations seem to have withdrawn support for such a code because of the increasing exploitation of their cause by Hindu nationalists.[92] Consequently, some scholars —both Muslim and otherwise— have suggested codification of MPL as an alternative.[93]

At the same time, the limits of intersectionality must also be recognized. It can be argued that the framework of intersectionality limits itself to prevent oppression and not to protect a woman's religious identity. However, Jakeet Singh's identification of the relationship between intersectionality and religious women's agency can be used to argue against this view. Singh argues that "*critiques of, and resistance to, power and oppression are always grounded in a particular ethical-political formation*", which makes it so that power and oppression in a society cannot be seen in isolation since the responses to these are created from within that ethical-political formation.[94] This is evident in the rejection of feminism by many Muslims, with a great number being women who view it as a Western notion that is disregarding and unaccommodating of the cultural values of their religion and community.[95] Feminism often appears to many Muslim women as another hegemonizing force— the *civilising mission* of sexual politics. Muslim women fear derision for their

[92]Zoya Hasan, 'Secularism, Legal Reform and Gender Justice in India' in Katja Füllberg-Stolberg et al. (eds) *Dissociation and Appropriation: Responses to Globalization in Asia and Africa* (Arabische Buch, 1999) 137-150, 138.

[93]Asghar Ali Engineer, 'Women's Plight in Muslim Society' (2006) Nov. 1-15 *Secular Perspectives* http://www.csss-isla.com/wp-content/uploads/2015/06/November-1-15-06.pdf accessed 22 June 2019 22 June 2019; Justin Jones, 'Towards a Muslim Family Law Act? Debating Muslim Women's rights and the codification of personal laws in India' (2020) 28(1) Contemporary South Asia 1-14.

[94]ibid (n 37) 669-670.

[95] Huma Ahmed-Ghosh, 'Introduction' in Huma Ahmed-Ghosh (ed), *Contesting Feminisms: Gender and Islam in Asia* (State of New York Press, 2015)6.

recognition of hierarchies. [96] This makes it important to include a feminism that both validates their religion and experiences while at the same time reforms laws for their welfare.

B. Muslim Identity

Amina Wadud stated that defining Islam provides power. Western media defines Islam as whatever Muslims do, such as oppressing women despite principles, ideals and values to the contrary.[97] It caricatures Muslim men as 'polygamous and abusive', and Muslim women as 'veiled, shackled, and secluded'.[98] Western feminists, believing Islam to be irretrievably patriarchal, create binaries between believing Muslims and feminists, from which Muslim women must choose one.[99] Islamic Feminism is a principled method for women to not have to be governed by male interpretations of Islam and to be able to define Islam for themselves, who choose to define it as unaccepting of patriarchy. This can develop a jurisprudence that breaks this binary of Muslim/feminist by letting a woman be both at the same time, with no fundamental contradictions.

Identity as Muslims is crucial in such a discussion. Laws do not exist in a vacuum but rather in a political society. Even more than the alleged divine nature of MPL, Indian Muslim jurists have resisted reforms since it is viewed as an attack on their Muslim identity. But what is more important is that Muslim women equally identify as Muslims. Relying on an empirical study, Engineer has argued that

[96] Ghazala Jamil, *Muslim Women Speak: Of Dreams and Shackles* (SAGE Publications, 2018) 118.
[97] ibid (n 62) 21.
[98] MM Hasan, 'The Orientalization of Gender' (2005) 22(4) The American Journal of Islamic Social Sciences 26-56, quoted in Md. Mahmudul Hasan, 'Feminism as Islamophobia: A review of misogyny charges against Islam', (2012) 20 Intellectual Discourse, 58.
[99] Amina Wadud, 'The Ethics of Tawhid over the Ethics of Qawamah' in Ziba Mir-Hosseini et al. (eds), *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (One World 2014).423-424.

Muslim women do not favour changes in MPL even though they detest the current laws.[100] A Malaysian author also writes, "*For most Muslim women, rejecting religion is not an option. We are believers, and as believers we want to find liberation, truth, and justice from within our own faith*".[101] However, this is a conscious choice to believe —not a coercive one — which is emancipatory at the same time, keeping the personal and religious autonomy of the Muslim woman intact and not presenting them as 'passive victims'.[102] The limits of intersectionality will then have to be pushed to reach the understanding that religious identity can be of key importance to the Muslim woman. Inclusion of religion into feminism would firstly, assist in developing legal reforms in MPL that are not solely made out of experiences of men and secondly, protect the religious autonomy of women by not imposing any secular laws in opposition of religious practices, such as a Uniform Civil Code which may not be neutral in character. This has been the case in Tunisia, where, by the exercise of *ijtihad*, the reformers made use of a reading which is the same as the Islamic feminist endeavour illustrated above, to deny men the right to polygyny.[103] While its politics of *shari'a* and its reform can be distinguished from India, the point remains that a woman-friendly re-interpretation of Islam can be and has been employed to change the Muslim family laws.

Instead of being opposed to secular feminism, Islamic feminism is an independent site or middle space 'between secular feminism and

[100]Asghar Ali Engineer, 'Status of Muslim Women' (1994) 29(6) Economic and Political Weekly 297-300, 298.

[101]Zainah Anwar, 'What Islam, Whose Islam? Sisters in Islam and the Struggle for Women's Rights' in Robert W. Hefner (ed) *The Politics of Multiculturism* (University of Hawai'i Press, 2001) 227.

[102]ibid (n 7) 59.

[103]Noel J Coulson, *A History of Islamic Law* (Edinburgh University Press, 1964) 211; Mounira M Charrad 'Tunisia at the Forefront of the Arab World: Two Waves of Gender Legislation' (2007) 64(4) Washington and Lee Law Review 1513-1528, 1518.

masculinist Islamism'.[104] An illustration is found in Wadud's interpretation of *talaq*, which states that there need not be complete removal of a woman's power to repudiate marriage.[105] The Qur'an does not prohibit a woman's right to divorce, which can assist in justifying laws such as the *Dissolution of Muslim Marriages Act, 1939*, which gives Muslim women the right to get a judicial divorce. The *Shah Bano* judgment then is not in opposition to the Islamic feminist reformatory strategy either. Looking at MPL through an intersectional lens, Islamic feminism is identified as a beneficial solution to the dilemmas of feminism versus Islam that Muslims get trapped in.

Religion has always played a great role in the construction of legal norms and change. *Brown v. Board of Education* would have likely been circumvented by American citizens if Christian abolitionists would have not relied on Biblical arguments to debunk the religious prescription of slavery. Mackinnon herself has greatly influenced feminist jurisprudence and brought about legal change by changing the narrative through pushing boundaries of awareness of oppression by the law. While it is true that a change in the narrative is required for a legal change to be effective (or at times happen in the first place), it can be argued that for religious reforms, this change in narrative is insufficient if not accompanied by a change in the scriptural interpretation, which provides scriptural support to the change in narrative. [106]

[104]Riffat Hasan, 'The Development of Feminist Theology as a Means of Combating Injustice Toward Women in Muslim Communities/Culture' (1995) 28(2) European Judaism: A Journal for the New Europe 80-90, 88.

[105]Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* 80 (OUP, New York, 1999).

[106]Russell Powell, 'Catharine Mackinnon May Not Be Enough: Legal Change and Religion in Catholic and Sunni Jurisprudence' (2007) 8(1) Georgetown Journal of Gender and the Law 1-5.

VI. CONCLUSION

This article has argued that feminist jurisprudence, by overlooking the importance of a religious identity of a Muslim woman is harming the woman by 1) maintaining the view of her as a 'passive victim' of Islam, thereby contributing to the idea that Islam is inherently patriarchal and hence the woman is only a coerced subject of it and 2) by reducing her religious autonomy by not recognizing her identity as only a woman and not Muslim. Th experience of one person as Muslim and woman are inseparable. The experiences of being both create a site for the intersection of religion and gender, which inevitably include the hierarchical rules of MPL that govern these women. An analysis in intersectionality was then performed to argue that Islamic feminism serves as a medium for Muslim women to resist and reform the specific oppression faced by them. Women are just as Muslims as men are. Women-inclusive *tafsir* shows drastic differences in the Qur'an's meanings. The conservative assumption about regressive practices promoting gender hierarchies are not argued to not be rooted in and are even contradicted by the Qur'an. Islamic feminists recognize that while mere reinterpretation is not enough, it is still a valuable tool.[107] Not only does it delegitimize religious sanction to gender hierarchies, but it also provides Muslim women and men methods to search for an equal, unoppressive society within their religion, especially by deconstructing and reconstructing *fiqh*. Thus, looking at the Qur'an as a trans-historic and trans-cultural text and re-interpreting it constantly to find the best meaning is necessary.

[107] Asma Barlas, "*Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an* (University of Texas Press, 2002) 2.

TELEMEDICINE AND INFORMATION TECHNOLOGY– A CONCOCTION FOR MEDICAL FRAUDS?

Ramya Sankaran[*] *& Manoj Mohapatra*[**]

Abstract

The outbreak of the Covid-19 pandemic has drastically changed the outlook of medical services globally. One of the most significant developments is the steady rise of telemedicine practice, which involves delivery of health care amenities using information and communication technologies. Telemedicine service is promising as it ensures access to health care from the comfort of the homes of patients who require medical aid. It safeguards both health care practitioners and patients from exposure to life threatening viruses and promotes their well-being. The technological tools that can be used to deliver and/or avail telemedicine services are widely subjected to regulation by legislation or guidelines, specific to their unique purpose and / or general framework governing information technology. These laws are intended to prevent commission of fraud by miscreants using information technology

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tools, and impose obligations on the technology service providers to ensure prevention of such frauds. However, in India, neither the specific legislations governing telemedicine practice nor the general laws governing use of information technology, sufficiently address issues concerning misuse of technological tools, especially telephone/ mobile phone and chat platforms such as WhatsApp, Facebook Messenger, etc., for perpetrating medical frauds. This paper identifies the lacunae in the legal framework governing telemedicine practice in India, which is not sufficiently armed with measures that can address the dangers posed by use of telephones/ mobile phones and chat platforms to provide medical services. Furthermore, measures that can be implemented to safeguard patients from the grip of fraudulent practitioners offering telemedicine services have been evaluated and suggested, in this paper.

I. INTRODUCTION

Telemedicine is a mode of medical practice wherein health care services are delivered by health care professionals, using information and communication technologies.[1] It features the use of technology

[1]World Health Organisation Report on the Second Global Survey on eHealth, 'Telemedicine Opportunities and Developments in Member States' (*World Health Organisation*, 2010), para 1.1 <www.who.int/goe/publications/goe_telemedicine_2010.pdf> accessed 27 December 2020.

platforms specifically developed for this purpose. These include telemedicine mobile applications and websites, as also, other widely used modes of information transfer, such as telephone/ mobile phone, internet, chat platforms (viz. WhatsApp, Facebook Messenger, etc.) and data transmission systems (viz. Skype, email, fax, etc.).[2] A few examples of technological platforms which facilitate telemedicine consultations are Practo, mFine, DocsApp.

Telemedicine is a boon to the elderly, chronically ill and differently abled patients who may find it difficult to venture out of their homes to seek medical aid. It is a very useful tool for providing medical services to individuals who live in geographies where their nearest doctors are miles away. The wide range of telecommunication tools employed in telemedicine services, ensure access of medical aid to populations living in remote localities of the country where communication channels may not be well established and to people who do not own devices such as smart phones and computers that could support use of specific digital applications. The widespread use of telephone / mobile phone for audio calling and text messaging (including through WhatsApp) can help reach out to the masses, including those who are not aware of technology platforms that enable the provision of telemedicine services.

It is to be acknowledged that the practice of telemedicine can be subject to large scale misuse by fraudulent individuals who may, during a telemedicine consultation, represent themselves as a health care professional or even a patient. The risk of misuse of telephone/mobile phone and other chat platforms such as WhatsApp, Skype, etc., by fraudsters is greater than the risk of misuse of

[2]Board of Governors in Supersession of the Medical Council of India, 'Telemedicine Practice Guidelines Enabling Registered Medical Practitioners to Provide Healthcare Using Telemedicine' (*Ministry of Health and Family Welfare*, 25 March 2020), para 1.4.1 <www.mohfw.gov.in/pdf/Telemedicine.pdf> accessed 27 December 2020.

technology platforms, as the latter are subjected to increased obligations under the law to protect the interest of patients by *inter alia* preventing identity theft and medical fraud. For instance, the Telemedicine Practice Guidelines Enabling Registered Medical Practitioners to Provide Healthcare Using Telemedicine of India[3] ("**Guidelines**"), requires technology platforms that work with a network of medical practitioners, enabling patients to consult via their platform, to conduct due diligence of these medical practitioners before listing them on their mobile application / website.[4] The Guidelines also contain plenary provisions which provide for blacklisting of these technology platforms in the event of any violation of the same.[5] However, telephone operators/ telecom service providers and chat platforms are not subjected to such oversight under the Guidelines. This disparity in regulation/oversight of the technology platforms on one hand and the telephone service providers and chat platforms on the other hand, has the potential to make the users of chat platforms and telephone services, vulnerable to medical frauds.

This paper aims to emphasize 'medical frauds' in the practice of telemedicine from the perspective of possible identity theft by individuals posing as Registered Medical Practitioners (as defined below); and breach/ misuse of confidential / medical information of patients due to such identity thefts. The paper further highlights the practical issues of identification and 'tracing' of fraudulent individuals in light of the inherent limitations of certain technological tools such as telephones/mobile phones and chat platforms. The authors also explore the enactment of a specific and more

[3]Board of Governors in Supersession of the Medical Council of India, 'Telemedicine Practice Guidelines Enabling Registered Medical Practitioners to Provide Healthcare Using Telemedicine' (*Ministry of Health and Family Welfare*, 25 March 2020) <www.mohfw.gov.in/pdf/Telemedicine.pdf> accessed 27 December 2020.

[4]ibid para 5.2.

[5]ibid para 5.7.

comprehensive preventive legislation as a solution to identity theft whilst availing telemedicine services.

II. BRIEF OVERVIEW OF THE TELEMEDICINE PRACTICE GUIDELINES

Until recently, there was no legal framework governing the practice of telemedicine in India. In fact, the Hon'ble Bombay High Court in *Deepa Sajeev Pawaskar & Anr. v. The State of Maharashtra*,[6] had questioned the legitimacy of the practice of telemedicine in India, at least with respect to telephonic consultations. The Hon'ble High Court in the said case, *inter alia* held that prescription of medicines to patients, via telephone, without making sufficient inquiry regarding their symptoms constituted culpable negligence, attracting criminal liability under the Indian Penal Code, 1860 ("**IPC**").

In March, 2020, in wake of the Covid-19 pandemic the Ministry of Health and Family Welfare, Government of India[7] ("**MoHFW**") notified the Guidelines, containing overarching principles and practical framework, to enable Registered Medical Practitioners to provide healthcare services through information and communication technologies. India followed the practice of introducing the said Guidelines as a non-legislative measure, similar to the practice adopted in Singapore[8] and Australia.[9]

[6] SCC OnLine Bom 1841.

[7] Ministry of Health and Family Welfare Government of India (2020) <www.mohfw.gov.in/> accessed 27 December 2020.

[8] Ministry of Health Singapore, 'National Telemedicine Guidelines' (2015) <www.moh.gov.sg/docs/librariesprovider5/resources-statistics/guidelines/moh-cir-06_2015_30jan15_telemedicine-guidelines-rev.pdf> accessed 27 December 2020; The Ministry of Health of Singapore ("MoHS").

However, to provide statutory validity to the Guidelines, the Board of Governors in the Super Session of Medical Council of India adopted the Guidelines vide the Indian Medical Council (Professional Conduct, Etiquette and Ethics) (Amendment) Regulations, 2020[10] ("**Amendment Regulation**"), which amended the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 ("**Regulation**"). By virtue of the Amendment Regulation, Registered Medical Practitioners under the IMC Act, have been authorised to provide telemedicine consultations in accordance with the Guidelines,[11] which have now been made part of the Regulation by its incorporation in Appendix 5 thereof. It is pertinent to note that the Regulation was issued under Section 20A read with Section 33(m) of the Indian Medical Council Act, 1956 ("**IMC Act**") which authorizes the Indian Medical Council to make regulations prescribing standards of professional conduct, etiquette and ethics for medical practitioners. Therefore, the incorporation of the Guidelines as Appendix 5 of the Regulation, makes any violation of the terms of the Guidelines on part of a physician, a professional misconduct, attracting disciplinary action in terms of Chapter 7 of the said Regulation.

As per the Guidelines, 'Telemedicine' involves delivery of health care services by Registered Medical Practitioners using information and communication technologies. These include:

[9]Medical Board of Australia, 'Guidelines for Technology Based Consultations by Patients' (16 January 2012) <www.medicalboard.gov.au/Codes-Guidelines-Policies/Technology-based-consultation-guidelines.aspx> accessed 27 December 2020.

[10]Medical Council of India, 'Board of Governors in Super Session of Medical Council of India Notification' (Medical Council of India, 25 March, 2020) <www.mciindia.org/CMS/wp-content/uploads/2019/10/Public_Notice_for_TMG_Website_Notice-merged.pdf> accessed 26 June 2020.

[11]ibid para 3.8 .

(x) communication leveraging information technology platforms (viz. Voice, Audio, Text & Digital Data exchange);[12] and

(y) telemedicine tools such as (i) telephone, (ii) video, (iii) devices connected over LAN, WAN or internet, (iv) chat platforms (viz. WhatsApp, Facebook Messenger etc.), (v) mobile app, (vi) internet based digital platforms for telemedicine or (v) data transmission systems (viz. Skype/ email/ fax etc.)[13]

The Guidelines define a Registered Medical Practitioner ("**RMP**") as a person enrolled in the State Medical Register or the Indian Medical Register maintained in accordance with the IMC Act.[14] Furthermore, Sub- Regulation 1.1 of Regulation 1(B) of the Regulation which deals with character of a physician, describes a physician as, a doctor having a qualification of MBBS or an MBBS with a post graduate degree/ diploma or an equivalent qualification in any medical discipline.[15] The Regulation also provides that no person other than a doctor who has the requisite qualifications as prescribed by the Medical Council of India ("**MCI**"), and who has registered himself/herself with the Indian Medical Council / State Medical Council, shall practice medicine.[16] Therefore, unless the aforementioned criteria are met, no person can practice telemedicine in India.

[12]Board of Governors (n 2) para 1.2.

[13]ibid para 1.4.1.

[14]ibid para 1.3. See also Code of Criminal Procedure, 1973, s 53 Ex. (b) - which defines a "registered medical practitioner" as "*a medical practitioner who possesses any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register*."

[15]Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.

[16]ibid para 1 (B) (1.1.3). See also Indian Medical Council Act, 1956, s 23.

The Guidelines cover telemedicine consultations as between (a) a patient and an RMP,[17] (b) a patient and an RMP through a caregiver,[18] (c) a health worker and an RMP[19] and (d) an RMP and another RMP/ specialist.[20] For the purpose of this paper, the authors will however, restrict their analysis to consultations as between an RMP and a patient.

Under the Guidelines, an RMP is entitled to provide telemedicine consultations to patients from across any part/ region of India.[21] The Guidelines mandates RMPs providing telemedicine services to uphold the same professional and ethical norms and standards as are generally applicable to in-person treatments, but within the inherent limitations of the practice of telemedicine.[22] In addition to prescribing medicines to patients, an RMP is also permitted under the Guidelines to provide health education and counselling to its patients.[23] Imparting health education would include information pertaining to diet, physical activities, hygiene practices, etc.[24] Counselling would be a more specific advice given to patients depending upon their underlying condition such as food restrictions, home physiotherapy etc.[25] The ambit of telemedicine services as under the Guidelines is hence broad in nature.

[17]Board of Governors (n 2) para 4.1.

[18]ibid para 4.2; A caregiver, for the purpose of the Guidelines, could either be a family member of the patient or any member who the patient authorizes to represent him/her.

[19]ibid para 4.3; A "health worker", for the purpose of the Guidelines "*could be a Nurse, Allied Health Professional, Mid-Level Health Practitioner, ANM or any other health worker designated by an appropriate authority*".

[20]Board of Governors (n 2) para 4.4.

[21]ibid para 1.3.1.

[22]ibid para 1.3.2.

[23]ibid para 3.7.

[24]ibid para 3.7.2.

[25]ibid para 3.7.3.

The Guidelines necessitate obtaining a patient's consent by the RMP, in case of any telemedicine consultation.[26] A patient's consent can either be implied or explicit.[27] In case the patient contacts an RMP and wishes to obtain consultation, then in such a scenario the patient's consent is implied.[28] However, if it is an RMP who wishes to initiate a consultation, then an explicit consent from the patient has to be obtained.[29] An RMP should aim to obtain sufficient medical information pertaining to the patient before making a professional judgment.[30] Upon taking a holistic view of the situation, an RMP should be reasonably comfortable as to whether a telemedicine consultation would be in the interest of the patient.[31] If physically examining a patient is necessary to obtain critical information for the purposes of consultation, then an RMP should not proceed with the consultation unless the patient is physically examined.[32] Furthermore, in cases of emergency, the Guidelines provide that all patients must be advised to obtain immediate in-person consultation with the RMP.[33] However, if the RMP is of the opinion that a patient's condition can be appropriately managed through a telemedicine consultation, an RMP can proceed to, as discussed above, prescribe medicines, provide health education and/or counselling.[34] Here, it is

[26]ibid para 3.4.
[27]ibid para 3.4.
[28]ibid para 3.4.1.
[29]ibid para 3.4.2.
[30]ibid para 3.5.
[31]ibid para 3.1.1.
[32]ibid para 3.5.1.
[33]ibid para 4.5.
[34]ibid para 4.1.1.2.

extremely pertinent to note that an RMP cannot prescribe to a patient any medicine that is listed in Annexure 1 of the Guidelines.[35]

Furthermore, under the Guidelines, it is incumbent on an RMP to *inter alia* maintain from time to time (a) a record of the telemedicine interaction with a patient which may include phone logs, text messages etc., (b) patient records, reports, (c) a record of prescriptions that the RMP may have provided to the patient.[36] The Guidelines require every RMP to display his/her registration number as designated by the State Medical Council or the Indian Medical Council on prescriptions, electronic communication etc. given to the patients.[37] Additionally, the Guidelines also impose an obligation on an RMP to protect patients' privacy and confidentiality.[38] An RMP bears the responsibility of being cognizant of the data protection and privacy laws and should fully abide by such laws in order to protect the confidentiality of his/her patient similar to the way in which they would protect patient information in in-person care.[39] However, RMPs shall not be responsible for breach of confidentiality of the patient if there is reasonable evidence to show that such a breach was a result of either a technology breach or a breach by a person other than the RMP.[40]

As stated above, the Guidelines permit an RMP to provide telemedicine consultations *inter alia* using tools such as telephones, chat platforms, technological platforms, such as mobile applications and websites, etc.[41] Thus, various modes of communication devices

[35]ibid para 3.7.4; Para 3.7.4 also includes "*Medicines listed in Schedule X of Drug and Cosmetic Act and Rules or any Narcotic and Psychotropic substance listed in the Narcotic Drugs and Psychotropic Substances, Act, 1985*".
[36]ibid para 3.7.2.
[37]ibid para 3.2.5.
[38]ibid para 3.7.1.1.
[39]ibid para 3.7.1.2.
[40]ibid para 3.7.1.3.
[41]ibid para 1.4.1.

could be employed in rendering telemedicine consultations. However, these technological tools have certain limitations which have been identified to an extent under the Guidelines. Firstly, in the cases of communication done through 'audio' mode, such as by the use of telephones / mobile phones, the Guidelines *inter alia* provide that the said mode could be used by imposters who may represent themselves as the real patients.[42] In this regard, it is pertinent to note that in addition to the risk of imposters representing themselves as the real patients, there is also an additional risk of imposters exhibiting themselves as an RMP over the telephone which has not been identified in the Guidelines. Secondly, in the case of 'text-based' communication, such as the use of WhatsApp, SMS etc., the Guidelines *inter alia* provide that there cannot be any surety of the identity of a doctor or a patient.[43] Thirdly, in the case of 'video' based communication done through the use of video facilities, for instance on chat platforms, the Guidelines *inter alia* stipulates that a patient's privacy can be compromised.[44] Hence, in light of these limitations, one must not ignore the possibility of large scale misuse by fraudulent individuals who may choose to represent themselves as RMPs, and exploit the discrepancies/ limitations inherent in the use of these technologies.

In this regard, it is pertinent to note that the Guidelines impose an obligation on the RMP to put in place a mechanism, whereby the RMP's credentials and contact details could be verified by a patient availing telemedicine consultation. Furthermore, in relation to telemedicine services provided via technological platforms (which are specially designed to provide telemedicine services) such as Mobile Apps, websites that work across a network of registered RMPs, the Guidelines additionally impose an obligation on the technology

[42]Board of Governors (n 2) para 2.
[43]Ibid.
[44]Ibid.

platforms to ensure that consumers are consulting with duly registered RMPs.[45] This is done by imposing obligations on technology platforms to conduct due diligence (i.e. comprehensive measures of verification) before listing any RMP on their platforms.[46] Furthermore, for consumers' ease of reference, platforms are mandated to provide details such as name, qualification, registration number and contact details of all the RMPs listed on their respective platforms.[47] In case any non-compliance with respect to the same is noted, technology platforms are bound to report to the Board of Governors in supersession of the MCI, who may then choose to take appropriate action.[48] Importantly, the Guidelines also mandate the technology platforms to have adequate mechanisms in place to address grievances or queries of consumers.[49] The rigidity of the Guidelines in regulating the technology platforms can further be substantiated on the basis that, any violation by the technology platform may lead to the said platform being blacklisted, and in such an event, no RMP would be permitted to use the said platform to provide telemedicine services.[50]

However, in relation to other modes of telecommunication, such as telephone, WhatsApp, skype, etc. the obligation to establish a mechanism through which a patient can verify an RMP's credentials is solely imposed on such RMP.[51]

[45]ibid para 2.5.1.
[46]ibid para 2.5.2.
[47]ibid para 2.5.2.
[48]ibid para 2.5.3 - For present list of Board of Governors in supersession of the MCI *See*, 'Board of Governors', Medical Council of India (2020) <https://www.mciindia.org/CMS/about-mci/office-bearers> accessed 27 December 2020. Link not active.
[49]Board of Governors (n 2) para 2.5.6.
[50]ibid para 5.7.
[51]ibid para 3.2.2.

III. ANALYSIS OF THE INFORMATION TECHNOLOGY LAWS APPLICABLE TO TELEMEDICINE PRACTICE

Apart from the IMC Act and the Regulation, the information technology laws in India also play a pivotal role in the practice of telemedicine since telemedicine consultations are provided by RMPs using different forms of information technologies mentioned above. In this regard, the Guidelines do expressly stipulate that the information technology aspect is primarily governed by the Information Technology Act, 2000 ("**IT Act**") and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011. However, in addition to the IT Act and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, the authors are of the opinion that the Information Technology (Intermediaries Guidelines) Rules, 2011 ("**IT IG Rules**)" would play an equally important role in the regulation of the information technology aspect in India. It is essential to note that the Draft Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018 ("**Draft Rules**") were published by the Ministry of Electronics and Information Technology on 24th December, 2018, but are yet to come into force. However, assuming that the Draft Rules come into force in the present manner, reference would be made to the Draft Rules, in this paper, as and when relevant for the purposes of this article.

In this section, the authors have examined certain relevant provisions of the information technology that are applicable to the practice of telemedicine. The analysis in this section is restricted to only those sections that are crucial to the discussion in this paper.

In order to understand the applicability of information technology laws to the practice of telemedicine, emphasis needs to be laid on some of the salient provisions of the IT Act. The expressions

'addressee'[52], 'originator'[53] and 'intermediary'[54] as defined in the IT Act would bring clarity in understanding the context in which communication would take place between an RMP and a patient. In the practice of telemedicine, an 'originator' or an 'addressee' could either be an RMP who disseminates information to people about him/her offering telemedicine services or a prospective patient who contacts an RMP to obtain telemedicine consultation. For example, if a prospective patient sends a text message to an RMP to obtain telemedicine consultation, then in that scenario, the person sending the text message would be the 'originator' and the RMP receiving the text message would be the 'addressee'.

However, it is pertinent to note that the said transfer of information between the RMP and a prospective patient is facilitated by a medium i.e., an intermediary. The expression 'intermediary' is defined in the IT Act, and means any person who receives, stores or transmits any electronic record[55] on behalf of another person. It is essential to state

[52]An addressee "*means a person who is intended by the originator to receive the electronic record but does not include any intermediary*"; The Information Technology Act 2000, s 2(1)(d).

[53]An originator "*means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary*"; The Information Technology Act 2000, s 2(1)(za).

[54]*Intermediary, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes*. The Information Technology Act 2000, s 2(1)(w).

[55]"*Electronic record*" means "*data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche*"; The Information Technology Act 2000, s Section 2(1)(t); and "*data*" means "*a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored*

that the definition of an 'intermediary' as under the IT Act is inclusive in nature and includes telecom service providers, web-hosting service providers etc. Some examples of telecom service providers would include Airtel, Vodafone etc. and web-hosting service providers would include GoDaddy, Hostinger etc. In light of the said definition, it can be safely assumed that the majority of tools of telemedicine as prescribed under the Guidelines, such as telephones, mobile phones, chat platforms such as WhatsApp,[56] Facebook Messenger, technology platforms such as Mobile apps and websites, would fall within the purview of an 'intermediary' as under the IT Act. The said assumption can be derived from the fact that all of the afore stated tools would act as the medium to receive, store or transmit any form of communication between the RMP and a patient.

The use of a wide range of intermediaries'/ technological tools for the practice of telemedicine also raises a fear of its misuse by imposters exhibiting themselves as an RMP. The importance of intermediaries in facilitating the practice of telemedicine in India and a possible scope of their misuse warrants a question: 'How are intermediaries governed under the information technology laws of India?' The IT IG Rules lay down the mandatory procedures which all intermediaries would have to abide to. These mandatory procedures include observing due diligence when intermediaries publish their privacy policies, user agreements etc. on their platform.[57] Such privacy policies, user agreements etc. as published by intermediaries shall inform users of their platform to not host, display, publish, upload,

internally in the memory of the computer"; The Information Technology Act 2000, s 2(1)(o).

[56]The Ministry of Electronics and Information Technology in a response to a Lok Sabha question responded by stating that "*WhatsApp is intermediary within the definition of the Information Technology (IT) Act, 2000*"; Lok Sabha, 'Unstarred question no. 1415' (*Lok Sabha*, 27 November 2019) <http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=7809&lsno=17> accessed 27 December 2020.

[57]The Information Technology (Intermediaries Guidelines) Rules 2011, Rule 3.

modify, transmit, update or share any information which *inter alia* impersonates any person or violates any law for the time being in force.[58] Thus, in light of the same, telecom service providers, chat platforms and technology platforms, also being intermediaries in the practice of telemedicine, would be mandated to fulfill the above due diligence procedures.

It is questionable as to whether the above due diligence procedures of merely informing the users to not engage in certain practices would restrain imposters from carrying out fraudulent activities by acting in the guise of an RMP. In the opinion of the authors, such procedures may not cause restraint amongst imposters, however, they may in fact safeguard an intermediary from incurring any liability for the act of an imposter as under Section 79 of the IT Act. Section 79 of the IT Act exempts intermediaries from incurring liability in certain circumstances. For instance, intermediaries are not liable for hosting / making available information, data or communication links of third parties if either (a) the function of the intermediary was solely to facilitate access to a communication system or (b) the intermediary had no role in initiating the communication, selecting the receiver of the communication and selecting or modifying the information which was contained in the said communication or (c) the intermediary has observed the procedure of due diligence as under the IT Act and the IT IG Rules. Therefore, in the practice of telemedicine, for instance where the chat platform 'Facebook' is the intermediary, Facebook may evade liability for the act of an imposter who had accessed and misused its platform by establishing either that (a) it had merely facilitated access to its communication system or (b) it had no role in initiating the communication between the imposter and a patient, selecting the patient and selecting or modifying the information that the imposter and / or the patient had communicated with each other or

[58] The Information Technology (Intermediaries Guidelines) Rules 2011, Rule 3 (2).

(c) it had observed the procedure of due diligence (as discussed above) as under the IT Act and the IT IG Rules.

IV. DISPARITY IN THE REGULATORY FRAMEWORK

On a fair reading of the Guidelines, it is apparent that the chief purpose of the Guidelines is to safeguard the health and lives of the patients and also to prevent offenders from making use of information technology to defraud patients. Ancillary to this purpose is the protection of the privacy and confidentiality of the users availing telemedicine services.

As discussed earlier, due diligence of RMPs is required to be carried out by the technological platforms, in terms of the provisions of the Guidelines, prior to their listing therein, in order to ensure that the said RMPs are duly registered with the concerned medical councils and also comply with the relevant laws. These technology platforms are also mandated to provide the names, qualifications, registration numbers and contact details of all the RMPs listed on their portal. These measures are intended to protect the users of telemedicine services from medical frauds ranging from identity theft (impostors claiming to be RMPs) to dissemination of incorrect credentials by RMPs to provide services which they are qualified to render.

It is relevant to note that although many RMPs may choose to register themselves with technology platforms in order to provide telemedicine services, a significant proportion of healthcare professionals may opt for providing such services individually, on their own account, by using tools such as telephones, chat platforms such as WhatsApp, Facebook Messenger etc. WhatsApp for instance is considered to be a quick, cost-effective and user-friendly tool in the

clinical health sector.[59] However, unlike technology platforms, such tools are not subject to any scrutiny under the Guidelines. In defense of the Guidelines, telephones and chat platforms are designed for a broad array of services and not specifically for telemedicine practice and hence, cannot in any case either be subject to regulation under the Guidelines or fall under the regulatory purview of MoHFW/ MCI. Also, it may not be practically feasible for certain service providers that do not specifically create portals for telemedicine services to render the kind of security that the applications such as technology platforms can provide. Nevertheless, this leads to users who avail telemedicine amenities through telephone and other chat applications, not being guaranteed the same degree of protection by the Guidelines. Telephone operators/ telecom service providers and chat platforms are not required to particularly scrutinize the identity of the persons providing telemedicine facilities using their platform. This gap in the legal framework leaves open to the fraudsters an opportunity to not only commit medical frauds, but also get hold of and misuse private and confidential data of the patients that use these tools of telemedicine.

Furthermore, as discussed above, the Guidelines solely leave it to the RMPs to ensure that there is a mechanism for a patient to verify their credentials and contact details when tools such as telephones, mobile phones, chat platforms, etc. are used to render telemedicine services. In this regard, the Frequently Asked Questions on Telemedicine Practice Guidelines[60] issued by the Board of Governors in

[59] *CJ Opperman and M Janse van Vuuren, 'WhatsApp in a Clinical Setting: The Good, the Bad and the Law' (2018) 11(2)* South African Journal of Bioethics and Law *102.*

[60] Board of Governors in Supersession of the Medical Council of India, 'Frequently Asked Questions [FAQs]on Telemedicine Practice Guidelines', Medical Council of India <https://mciindia.org/MCIRest/open/getDocument?path=/Documents/Public/Portal/LatestNews/Final_FAQ-TELEMEDICINE%20%206-4-2020..pdf> accessed 26 June 2020.

supersession of the MCI provide that RMPs should mention/ display their Indian Medical Councilor State Medical Council registration number for teleconsultations. It further provides that the patients may, if they desire, cross verify the registration details of the RMPs on the websites of relevant medical councils. However, it is pertinent to note that the websites of the medical councils contain only the names of the RMPs and their registration details, such as registration number, qualification, registration date and validity.[61] Since the aforesaid websites do not provide a mechanism to a patient to verify the contact details of an RMP, the patient would be unable to ascertain if they are indeed in contact with the RMP as listed / displayed therein.

Thus, there is clearly a disparity in regulation of provision of telemedicine services when, on one hand, specific technological platforms are used and on the other hand, common telecommunication channels such as telephone/ mobile phones and other chat platforms are used.

V. RISK OF IDENTITY THEFT AND BREACH OF DATA PRIVACY

The aforesaid loophole in the regulation of telemedicine practice in India can lead to issues of identity theft of RMPs and breach of data privacy of the patients who avail such services.

The term identity theft connotes a crime wherein a person's personal data is wrongfully obtained by another and is used by the latter for

[61]Maharashtra Medical Council, Mumbai, 'RMP Information' (2020) <https://www.maharashtramedicalcouncil.in/frmRmpList.aspx> accessed 27 December 2020.

fraudulent or deceptive purpose, typically for economic gain.[62] In India, there is no legislation that specifically defines the term identity theft. Section 66C of the IT Act[63] lays down the punishment for identity theft and stipulates that fraudulent and dishonest use of electronic signature, password or any other unique identification feature of any other person, would be punishable with imprisonment extending up to a period of three years and fine up to Rupees 1 lakh. Section 66D of the IT Act provides punishment for cheating by personation by using any communication device or computer resource.[64] Though the aforesaid provisions of the IT Act penalize the offense of identity theft, they are preventive provisions which can safeguard the interest of patients.

Use of telephone/mobile phones and chat applications, being intermediaries, pose a real danger of identity theft. The details of the RMP which are available on the websites of the relevant medical council can be conveniently misused by an imposter. This could jeopardize the health and lives of persons seeking medical aid using telecommunication devices and platforms other than specialized telemedicine apps. Furthermore, apart from the aforesaid, any information provided by the users of these telecommunication devices / platforms to such imposters could also be appropriated for fraudulent and dishonest use.

[62]The United States Department of Justice, 'Identity Theft' (16 November 2020) <https://www.justice.gov/criminal-fraud/identity-theft/identity-theft-and-identity-fraud> accessed 27 December 2020.

[63]*S 66C- "Punishment for identity theft. – Whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lakh".*

[64]*S 66D- "Punishment for cheating by personation by using computer resource. – Whoever, by means of any communication device or computer resource cheats by personation, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees".*

VI. 'TRACING' OF IMPOSTORS AND ITS LIMITATIONS

The IT IG Rules impose certain obligations on the intermediaries, wherein intermediaries are, when required by a lawful order, obliged to provide information or any assistance to authorized Government agencies for investigative, protective and cyber security activity.[65] The Draft Rules, assuming that they will come into force in the present manner, aim to further expand this obligation of the intermediaries by requiring them to enable tracing of originators of information on their platform.[66] Therefore, under the Draft Rules, if required by lawfully authorized Government agencies, intermediaries will be bound to trace the originators who have used their platform to transmit disputed information. In the sphere of telemedicine services, a telecom service provider (in case mobile phone has been used by an imposter to communicate with a customer over a mobile call), chat platforms (in case such platform has been used by an imposter to communicate with a customer) or technology platforms may be required by any lawfully authorized Government agency to trace the originator of any disputed information.

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[65](7) *When required by lawful order, the intermediary shall provide information or any such assistance to Government Agencies who are lawfully authorised for investigative, protective, cyber security activity. The information or any such assistance shall be provided for the purpose of verification of identity, or for prevention, detection, investigation, prosecution, cyber security incidents and punishment of offences under any law for the time being in force, on a request in writing staling clearly the purpose of seeking such information or any such assistance*.

[66]*"(5) When required by lawful order, the intermediary shall, within 72 hours of communication, provide such information or assistance as asked for by any government agency or assistance concerning security of the State or cyber security; or investigation or detection or prosecution or prevention of offence(s); protective or cyber security and matters connected with or incidental thereto. Any such request can be made in writing or through electronic means stating clearly the purpose of seeking such information or any such assistance. The intermediary shall enable tracing out of such originator of information on its platform as may be required by government agencies who are legally authorized*.

This novel concept of 'tracing' as under the Draft Rules can here be interlinked with the disparity as maintained by the Guidelines in solely overseeing/regulating technology platforms and not telephones/mobile phones or chat platforms. It can be noted here that tracing of the originator by a technology platform can be successfully undertaken since technological platforms are mandated to conduct due diligence of RMPs before listing them. In case a technology platform fails to conduct such due diligence, they may be blacklisted.

The primary question that needs to be addressed then is: "*How far is 'tracing' an imposter a possibility, particularly when the more convenient/easily accessible tools of telephones/mobile phones and chat platforms have been put to use in the practice of telemedicine*?". It is clear that if an imposter is successfully traced, the provisions governing identity theft under the IT Act, as discussed above, can be exercised to punish the imposter for his/her fraudulent act. However, considering the large possibility of imposters (a) obtaining stolen SIM cards or (b) purchasing SIM cards by providing fake or incorrect details or (c) using fake caller ID information,[67] it would be practically impossible for telecom service providers to trace the originator of the information. Furthermore, chat platforms like WhatsApp feature End-to-End Encryption ("**ETEE**"). An ETEE feature allows only the originator and the addressee to view and read what is sent and received by them. Even WhatsApp cannot have any access to such information which the originator and addressee have shared amongst themselves.[68] An ETEE feature would therefore make

[67] Andrew Johnson, 'Scammers can fake caller ID info' (*Federal Trade Commission Consumer Information*, 4 May 2016) <https://www.consumer.ftc.gov/blog/2016/05/scammers-can-fake-caller-id-info> accessed 27 December 2020.

[68] "*Security by Default*

WhatsApp's end-to-end encryption is available when you and the people you message use our app. Many messaging apps only encrypt messages between you and them, but WhatsApp's end-to-end encryption ensures only you and the person you're communicating with can read what is sent, and nobody in between, not even

it impossible to track the originator of information, unless a mechanism of traceability is built in the said platform.[69] The requirement of 'tracing' may in fact be technically impossible to satisfy for many intermediaries.[70]

Therefore, even if the mechanism of 'tracing' as envisaged under the Draft Rules comes into force, it may be very unlikely to get a grip on imposters practicing telemedicine on a large scale across India using tools such as telephone/mobile phones and chat platforms.

VII. WILL SINGLE-MODALITY COMMUNICATION INCREASE SCOPE OF MEDICAL FRAUDS?

Single-modality communication involves communication primarily through one mode of communication (i.e., solely through telephonic conversations (audio) or text messages, email exchanges etc. (text) or skype etc. (video)), as opposed to multi-modal communication which involves use of more than one mode of communication (i.e., video consultations with patients along with text communication).[71] On a

WhatsApp. This is because your messages are secured with a lock, and only the recipient and you have the special key needed to unlock and read them. For added protection, every message you send has its own unique lock and key. All of this happens automatically: no need to turn on settings or set up special secret chats to secure your messages."; WhatsApp, 'WhatsApp Security' (2020) <https://www.whatsapp.com/security/> accessed 27 December 2020.

[69]Press Trust of India, 'WhatsApp Reject's India's Demand for Message Traceability' (*NDTV*, 23 August 2018) <https://www.ndtv.com/india-news/whatsapp-rejects-indias-demand-for-message-traceability-1905217> accessed 27 December 2020.

[70]Software Freedom Law Centre, 'The Future of Intermediary Liability in India' (2020) <https://sflc.in/future-intermediary-liability-india> accessed 27 December 2020.

[71] General Medical Council, 'Regulatory Approaches to Telemedicine' (1 March 2018) <www.gmc-uk.org/about/what-we-do-and-why/data-and-research/research-

fair reading of the Guidelines, it is clear that telemedicine consultations in India can be provided through either single-modal and/or multi-modal communication.

It is relevant to note that in the States of Oklohoma[72] and Maine[73] of the United States of America, the definition of 'telemedicine' expressly excludes medical services that are provided solely through audio-only communication, text messages, instant messaging communication etc. Therefore, in these states, telemedicine services cannot be provided through single-modality communication. The regulator in the said states mandates communication in telemedicine services to be multi-modal. One of the reasons for such an approach,

and-insight-archive/regulatory-approaches-to-telemedicine> accessed 27 December 2020.

[72]Telemedicine "*means the practice of health care delivery, diagnosis, consultation, evaluation and treatment, transfer of medical data or exchange of medical education information by means of a two-way, real-time interactive communication, not to exclude store and forward technologies, between a patient and a physician with access to and reviewing the patient's relevant clinical information prior to the telemedicine visit*." Furthermore, "*Telemedicine" and "store and forward technologies" shall not include consultations provided by telephone audio-only communication, electronic mail, text message, instant messaging conversation, website questionnaire, nonsecure video conference or facsimile machine*"; 'Enrolled Senate Bill 726' (*Oklahoma Medical Board*, 17 May 2017) <www.okmedicalboard.org/download/877/sb726_Telemedicine_Law_Nov_1_2017.pdf> accessed 27 December 2020.

[73]Telemedici*ne "means the practice of medicine or the rendering of health care services using electronic audio-visual communications and information technologies or other means, including interactive audio with asynchronous store-and-forward transmission, between a licensee in one location and a patient in another location with or without an intervening health care provider. Telemedicine includes asynchronous store-and-forward technologies, remote monitoring, and real-time interactive services, including teleradiology and telepathology. Telemedicine shall not include the provision of medical services only through an audio-only telephone, e-mail, instant messaging, facsimile transmission, or U.S. mail or other parcel service, or any combination thereof.*; Government of Maine, 'Telemedicine Standards of Practice' (2016) <www.maine.gov/md/sites/maine.gov.md/files/inline-files/Chapter_6_Telemedicine%20.pdf> accessed 27 December 2020

in the age of enhanced use of information technologies, could be the difficulty in verifying the person's identity who is acting as an RMP.

As discussed above, higher risks of medical frauds such as identity theft in the practice of telemedicine may surface from the use of telephone/mobile phones and chat platforms. The risk of medical frauds by imposters are likely to be more prevalent in cases where telemedicine consultations are provided through single-modality communication. The Guidelines do obligate RMPs to exercise their professional judgment in determining whether a telemedicine consultation is appropriate in the first place and whether the circumstances warrant an in-person consultation with the patient.[74] An RMP may, upon considering the circumstances, use his/her best judgement in determining mode of technology to be used to offer telemedicine consultations.[75] However, it is pertinent to note that the said scrutiny as under the Guidelines are for RMPs. An imposter acting under the guise of an RMP may either not be aware of the Guidelines or even if he/she is, such Guidelines are unlikely to restrain him/her from committing medical frauds.

In light of the same, it seems fair to conclude that the concerns of 'identity theft' in the practice of telemedicine in India can to an extent, in instances where a patient can identify the doctor on sight, be eliminated by excluding single-modality communication, since patients would then be more capable of ensuring that the person providing them telemedicine services is an RMP. However, it is essential to note that not many people in India may be possessing mobile phones with a camera so as to enable them to obtain video consultation. Also, even if a person is possessing a mobile phone which does have a camera, issues concerning internet connectivity may make it difficult to obtain a video consultation. Thus, although

[74]Board of Governors (n 2) para 3.1.1.
[75]Board of Governors (n 2) para 3.3.3.

the Guidelines seem to allow use of either single-modal and/or multi-modal communication, excluding single-modal communication would exclude a large proportion of the Indian population from availing telemedicine services. Additionally, considering the fact that not all patients would be aware of the physical appearances of RMPs from whom they wish to avail telemedicine services, requiring mandatory multi-modal communication under the Guidelines would not be of much help.

VIII. RECOMMENDATIONS – PREVENTION OF MISUSE OF GENERAL MODES OF TELECOMMUNICATION IN TELEMEDICINE PRACTICE

In light of the issues identified in the sections hereinabove, the authors suggest implementation of the following preventive measures in the Regulation:

A. Making identity verification of RMPs Mandatory

This can be done through providing photo identification of RMPs along with their other details in the websites of the relevant medical council and in a website / mobile application created specifically by the relevant authority to create awareness about telemedicine services. Restricting use to only registered phone numbers and verified chat applications accounts and messengers accounts for provision of telemedicine services – the details of dedicated phone numbers and chat application account details that are verified by the relevant medical council should be displayed on the aforesaid website / mobile application devoted specifically to create awareness regarding telemedicine services.

To address the possibility of an RMP changing his / her phone number over the course of time, provisions must be made regarding

immediate notification and updating of any change of such information in (a) the websites of the relevant medical council and (b) in the website / app created to provide general awareness to the users of the telemedicine services.

For remote areas of the countries and users who do not have devices that support use of the aforesaid mobile applications / websites that contain details of the RMPs, dedicated toll-free number must be provided where patients can receive details regarding RMPs who can provide telemedicine services in their locality and their registered telephone numbers / verified chat application accounts.

The aforementioned safeguards should also be implemented with respect to telemedicine services provided using specific telemedicine mobile applications/ websites. It is pertinent to note that, providing photo identification and details of the registered phone numbers of RMPs on the websites of the relevant medical councils would also significantly axe the drawbacks of single-modality communication in telemedicine practice.

B. Sensitizing the users of telemedicine services to only deal with verified RMPs

The users of the telemedicine services should be sensitized to receive medical help only from verified phone numbers and chat applications accounts of the RMPs, and only after confirming the same on the toll-free number allotted in their area/locality or dedicated mobile application / website established for this purpose.

Users should also be sensitized on availing medical facilities on unregistered numbers and the dangers of identity theft and data piracy.

C. Dissemination of information regarding telemedicine apps and toll-free numbers

The users should be made aware of the website / mobile application specifically established for facilitating telemedicine facilities where the phone numbers and the identities of the RMPs can be cross verified. The toll free numbers where patients can call to receive details regarding doctors in their area who provide telemedicine services should also be widely distributed publicly from a reliable source.

Media, government notices, government messages, pamphlets etc. could be employed for disseminating details of the aforesaid.

D. Enactment of Specific Preventive Legislation

A comprehensive legislation should be enacted to prevent exploitation of patients who use telemedicine services. This legislation should be specific to the issues of telemedicine, and seek to prevent medical malpractice, and fraud in use of the telecommunication tools as well as protect the privacy and confidentially of the patients availing such telemedicine services. The authors are of the opinion that such legislation would effectively address information technology nuances specific to the practice of telemedicine when compared to having two legislations enacted – one dealing with the medical aspect and the other dealing with the information technology aspect.

E. Establishment of New Administrative Bodies

The practice of telemedicine is at a nascent stage but has the potential for rapid growth in India. However, in order for the benefits of telemedicine to reach the masses without being subject to frauds, new administrative bodies both at National and State/District levels need to be established to *inter alia* (a) provide assistance to both RMPs and patients in providing and availing telemedicine services, respectively; (b) address grievances of users availing telemedicine services; and (c) monitor the practice of telemedicine in general.

IX. CONCLUSION

Unlike other forms of frauds, medical fraud has the potential to risk lives and health of many people. Ensuring that only an RMP is providing telemedicine service is extremely essential in order to maintain public confidence in the practice of telemedicine, especially in today's world where telemedicine consultations have become the need of the day. The MoHFW and the MCI have a crucial role in making telemedicine services safe and accessible to the Indian population, some of whom are technologically and geographically challenged.

The authors are of the opinion that the aim, currently, should be to introduce measures that prevent medical frauds such as identity thefts. It is insufficient to merely leave it to the general legislation on information technology to identify (i.e., trace) and punish fraudulent individuals committing such identity thefts as only prevention thereof can safeguard the lives and health of millions of patients from the danger of getting wrong treatment. This is vital in a country like India considering the fact that laws regarding identity theft are still upcoming and yet to be comprehensively explored.

Furthermore, general legal framework on information technology and IPC contain provisions relating to data privacy, punishment for identity theft, fraud etc., but only a special statute, specific to telemedicine practice and frauds perpetrated in relation thereto would be able to address the nuances of the field by stipulating preventive measures as recommended by the authors in the previous section.

In light of the aforesaid, the authors suggest that a comprehensive telemedicine legislation should be enacted and an administrative body to oversee the telemedicine practice in India should be established to effectively tackle the upcoming and growing need of telemedicine services.

ONE STEP FORWARD, TWO STEPS BACK: A CRITIQUE OF THE SURROGACY (REGULATION) BILL, 2019

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Abstract

The Surrogacy (Regulation) Bill, 2019 is a much-awaited law which seeks to regularize the multi-million-dollar industry of surrogacy in India, which was, until now, functioning without any concrete legislative framework. The need for this law was felt because of the exploitation of surrogate mothers by unethical practices of middlemen and occasionally by intending couples, and abandonment of children born out of surrogacy. It provides for the setting up of National and State Surrogacy Boards to, inter alia, supervise the functioning of surrogacy clinics and to monitor the implementation of the provisions of the Bill. It also provides financial protection to the surrogate mother in the form of medical expenses and insurance coverage. However, the prohibition of commercial surrogacy and adherence to the altruistic model of surrogacy has raised various constitutional and socio-economic concerns. The option of surrogacy

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has been limited strictly to infertile Indian married heterosexual couples, which has opened the Bill to castigation on the grounds that it is exclusionary to LGBTQ+, live-in couples, single parents, widow(er), divorcees, OCIs and PIOs. The conditions imposed on the eligibility of the surrogate mother has also drawn the ire of certain stakeholders as being conservative, and placing undue importance on the amorphous concept of 'public morality'. In the background of emphatic reiteration of the right to privacy and growing demand of the autonomy of women and their freedoms, this article attempts to evaluate the Bill from an objective legal lens. This article begins with scrutinizing the constitutionality of the Bill by applying the Golden Triangle test, then evaluating the issue of Excessive Delegation and overcriminalization, finally moving on to cover other miscellaneous issues.

I. INTRODUCTION

The surrogacy industry in India is estimated at around 400 million dollars per year and has witnessed the emergence of over 3000 fertility clinics all over the country.[1] The Surrogacy (Regulation) Bill,

[1]Shubhangi Priya, 'Evaluating Surrogacy Legislation in India' (*Social and Political Research Foundation*, 2 Aug 2019) <https://www.sprf.in/post/2019/08/02/evaluating-surrogacy-legislation-in-india> accessed 23 June 2019.

2019 ("**the Bill**") was passed by the Lok Sabha on 5th August 2019. The Bill bans commercial surrogacy and permits only altruistic surrogacy i.e., surrogacy with no monetary compensation apart from coverage of medical and insurance related expenses of the surrogate mother.[2] Subsequently, the Rajya Sabha, on 21st November 2019, referred the Bill to a Select Committee which submitted their report on 3 February 2020[3] ("**Select Committee Report**"). The 228th Law Commission Report[4] also recommended banning commercial surrogacy and allowing only the altruistic model of surrogacy. Earlier, the 2016 version of the Bill had been considered by the 102nd Department-related Parliamentary Standing Committee on Health and Family Welfare[5] that submitted its report on 10th August 2017 ("**Parliamentary Committee Report**"). In 2002, the Indian Council of Medical Research (ICMR) had laid down guidelines for surrogacy, which made the practice legal, but did not give it legislative backing.[6] The Bill has raised a number of constitutional, socio-economic, legal, and women's rights concerns.

In this article, a detailed analysis of the Bill is presented with special focus on the aspect of constitutionality. The article examines these issues applying the jurisprudence developed through numerous precedents on the subject, in the context of reasoning furnished by the abovementioned committee reports which give conflicting recommendations on various key provisions of the Bill. The ethical and moral debate on the act of surrogacy itself is outside of the purview of this article.

[2] Surrogacy (Regulation) Bill 2019, s 4(ii).

[3] Rajya Sabha, *Report of the Select Committee on Surrogacy (Regulation) Bill, 2019* (presented on 5 February 2020).

[4] Law Commission, *Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy* (Law Com No 228, 2009).

[5] Department-related Parliamentary Standing Committee On Health And Family Welfare, *The Surrogacy (Regulation) Bill 2016* (Rajya Sabha No. 102, 2017).

[6] ibid para 5.17.

II. THE GOLDEN TRIANGLE TEST AND MORE: SCRUTINIZING THE CONSTITUTIONALITY OF THE BILL

A. Deriding Equality: The Litmus Test of Article 14

Under the Bill, only an intending couple can opt for surrogacy. Intending couple has been defined as "a *couple who have been medically certified to be an infertile couple and who intend to become parents through surrogacy*".[7] The Bill imposes certain conditions of eligibility on the intending couple and the surrogate mother for them to avail altruistic surrogacy. Since these conditions restrict certain categories of people from engaging in altruistic surrogacy, the article examines whether they violate the fundamental right which guarantees "*every person equality before the law, and equal protection of the law*" under Article 14 of the Constitution of India.

In the case of *M. Nagaraj and Ors. v. Union of India and Ors.*[8] the Supreme Court held that, "*Article 14 confers a personal right by enacting a prohibition which is absolute. By judicial decisions, the doctrine of classification is read into Article 14. Equality of treatment under Article 14 is an objective test. It is not the test of intention. Therefore, the basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances.*" For an Act or provision to pass the reasonable classification test under Article 14, following conditions must be fulfilled: (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question.[9] This section

[7] Surrogacy (Regulation) Bill 2019, s 2(r).
[8] *M. Nagaraj and Ors. v. Union of India and Ors*. AIR 2007 SC 71.
[9] *Budhan Choudhry v. State of Bihar* 1955 SCR (1)1045.

focuses on whether the numerous conditions set out for the intending couple and the surrogate mother pass the reasonable classification test of Article 14.

a) Restrictions Imposed on The Intending Couple

In order to have a child through surrogacy in India the intending couple needs to fulfil the following requirements:

I. Either or both suffering from proven infertility[10]

II. Age of intending couple is between 23 to 50 years in case of female and between 26 to 55 years in case of male[11]

III. Married for five years and are Indian citizens[12]

IV. Should not have a surviving child[13]

The above restrictions eliminate a wide range of people from availing surrogacy. Multiple concerns on imposing these conditions have been raised by organisations, activists, scholars and parliamentarians. In light of Article 14, the conditions imposed on the couple can be tested for intelligible differentia and rational nexus.[14] The conditions of being legally married for five years required under the Bill can be put to test for violating Article 14 of the Constitution.

Only heterosexual couples can get married under the personal laws of respective communities and Special Marriage Act, 1954 in India. The proviso requiring couples to be legally married for opting surrogacy effectively excludes non-heterosexual couples. It further eliminates the chances of other live-in couples, single parents, widow(er) and divorcees from having a child through surrogacy. If the permissible

[10] Surrogacy (Regulation) Bill 2019, s 4(ii)(a).
[11] ibid, s 4 (iii)(c)(I).
[12] ibid, s 4 (iii)(c)(II).
[13] ibid, s 4 (iii)(c)(III).
[14] *Vikram Cement v. Union of India* AIR 2007 SC 7.

classification test is applied, it must be examined if the above categorisation of people by allowing only married couples is based on intelligible differentia and if there is a rational nexus with the object of the Act.

The argument presented by the Department of Health Research ("**the Department**") for keeping the above classification for excluding single woman has been to protect the rights of child born out of surrogacy, as marriage is an institution where both partners have mutual legal responsibility of the child that can be equally shared.[15] The view extended in favour of the classification is therefore, based on the premise that married couples are bound by a legal institution and can provide the best environment for the protection and growth of the child, which is the object sought to be achieved by the statute. The argument advocates that only married couples are capable of raising children in a safe and wholesome environment as they are bound by an institution and can share the responsibility. In this regard, it is pertinent to note that live-in relationships are recognised under Protection of Women from Domestic Violence Act, 2005 as a r*elationship in the nature of marriage* through Supreme Court Judgment in the case of *Nandakumar and ors. v. State of Kerala and ors.*[16] The courts have also held that children born out of live-in relationships are legitimate under the law.[17] Further, Central Adoption Resource Authority Guidelines allows single females and males to adopt a child (with the condition that men cannot adopt a girl child).[18]

Although live-in relationships and children born out of such relationships have been recognised through different judgments and

[15]Select Committee Report (n. 3) para 3.22.

[16]*Nandakumar and Ors. v. State of Kerala and Ors*. AIR 2018 SC 4321[10].

[17]*S.P.S. Balasubramanyam* v. *Suruttayan* AIR 133 SC 460; *Tulsa v. Durghati*ya AIR 2008 SC 1193.

[18]Adoption Regulations 2017, s 5.

adoption guidelines allows adoption by single parents, the classification on the basis of marriage can be argued as arbitrary as it is based on a presumption that married couples would be best suited to raise a child. Married couples, even though bound by a legal institution, can separate from each other and also do not guarantee development of the child in a nourishing environment. Studies over the years have shown that children raised by same sex couples do as well emotionally, socially and educationally as children raised by heterosexual couples.[19] Moreover, research has shown that problems faced by single mother families are by no means exceptional, and the same problems are also faced by two parent families.[20] Based on this, it can be contended that the provision makes unreasonable classification between these categories of people. The clause curbs the freedom of non-heterosexual couples and single parents to have a child through surrogacy and infringes on the fundamental tenet of personal freedom. It was observed in *Navtej Singh Johar and ors v. Union of India*,[21] "*What is of importance is that when discrimination is made between two sets of persons, the classification must be founded on some rational criteria having regard to the societal conditions as they exist presently, and not as they existed in the early 20th century or even earlier.*" The presumption in the present Bill is founded on an erroneous criterion which discriminates against single persons, live-in couples and couples belonging from LGBTQ+ community. The objective of the statute is protection of children born out of surrogacy. The above classification requires a rational nexus to this objective. As mentioned above, the classification is based on regressive presumption and is discriminatory in nature. The object aimed to achieve from the classification is in no way affected if the child is raised by a married couple, live-in couple or a single parent.

[19]Ken W Knight, 'The kids are OK: it is discrimination, not same-sex parents, that harms children' (2017) 9 MJA 207.

[20]Ellen L. Lipman, 'Child Well Being in Single Mother Families' [2002] P75-82.

[21]*Navtej Singh Johar v. Union of India* AIR 2018 SC 4321.

Another condition worth mentioning is that the intending couple should be married for *at least five years* to avail surrogacy.[22] The rationale given by the Department for the five years waiting period is that the couple should avail and exhaust all possible Assisted Reproductive Technology Treatments (ART), and only use surrogacy as the last resort.[23] The above provision, although appears harmless, can have grave implications for some intending couples. This condition tied with allowed age to avail surrogacy for couples can have grave implications for couples who marry late or have a substantial age difference. In the case of *Anuj Garg and Ors. v. Hotel Association of India and Ors.*[24] it was stated that the legislation should not only be assessed on its proposed aims but rather on the implications and the effect. If the present clause is imposed, and many couples have to wait for five years then they may not be able to have a child through surrogacy.

b) *Restrictions Imposed on The Surrogate Mother*

The Bill defines a surrogate mother as a woman who is genetically related to an intending couple and bears a child through surrogacy fulfilling the requirements provided in the Bill.[25] The following conditions are imposed on the surrogate mother under the Bill:

I. Married with a child of her own[26]

II. Between the age of 25-35 years[27]

III. Close relative of the intending couple[28]

[22]Surrogacy (Regulation) Bill 2019, s. 4(iii)(c)(II).
[23]Select Committee Report (n. 3) para 3.10.
[24]*Anuj Garg and Ors. v. Hotel Association of India and Ors* AIR 2008 SC 663.
[25]Surrogacy (Regulation) Bill 2019, s 2(zf).
[26]ibid, s 4(iii)(b)(I).
[27]ibid, s 4(iii)(b)(I).

IV. Not act as surrogate for more than once in her lifetime[29]

V. Only for altruistic purposes[30]

The conditions required to act as surrogate mother precludes many genuine women from acting as surrogate mothers. Concerns have been raised on many of the above points; however, this section covers the condition of the surrogate mother being married with a child of her own and its validity under Article 14. Subsequent sections of this article will cover how the altruistic model infringes Article 19(1)(g) of the Constitution.

The Bill specifies that *"no woman, other than an ever-married woman having a child of her own.*"[31] If the reasonable classification test is applied, the classification here is based on the marital status of the surrogate mother and the fact that she should also have a child of her own. In the Select Committee Report, it was observed by the committee, if a young widow or a divorced woman wishes to have a child they might not be able to because of the social stigma attached to pregnancy of a single woman in the society and she should therefore, be given the option to avail surrogacy.[32] If the same logic is applied in the present classification, that a single woman is disallowed from acting as a surrogate mother because of the social stigma, it is observed that it is an imposition of society's moral standards that eliminates the choice of genuine women to act as surrogate mothers. Additionally, the requirement to have a child of her own first before acting as a surrogate can also be only seen as an ambiguous moralistic idea that the surrogate should be a mother of her own child first, prior to acting as surrogate mother to deliver a child for somebody else.

[28]ibid, s 4(iii)(b)(II).
[29]ibid, s 4(iii)(b)(IV).
[30]ibid, s 4(ii)(b).
[31]ibid, s. 4(iii)(b)(I).
[32]Select Committee Report (n 3) para 4.24.

Given that the object of the statute is the protection of the children and surrogate mother from exploitation,[33] the above classification would lead to an absurd implication that a single woman in the absence of a husband would be exploited. Moreover, the condition that a woman needs to have a child of her own to act as a surrogate mother for altruistic purposes does not have nexus with the proposed classification. Here as well, the nexus is based on moralistic ideas and age-old perceptions of women and motherhood. Any practice which is not immoral by societal standards cannot be thrust by the legislature of its own notion of morality to impose control, and such legislation has to pass the muster of constitutional provisions.[34] From the above discussion, it can be said that there is no reasonable nexus between the basis of classification and the object of the statute under consideration. Therefore, these provisions of the Bill are discriminatory in nature and perpetuate age-old ideas of morality.

It was held in the case of *ShayaraBano and Ors. v. Union of India (UOI) and Ors*.[35] that when something is done by the legislature capriciously, irrationally and/or without adequate determining principle, such principle would manifestly be arbitrary. The above discussed restrictions put on intending couples and the surrogate mother lack any rational and adequate determining principle, and appear to be suffering from the vice of manifest arbitrariness.

B. *Freedom of Trade and Right to Livelihood: Ripples of the Ban on Commercial Surrogacy*

'Commercial surrogacy' is defined in the Bill as "*commercialisation of surrogacy services or procedures or its component services ... or*

[33] ibid para 4.1.
[34] *State of Maharashtra v.Indian Restaurants and Hotel Association* AIR 2019 SC 589.
[35] *Shayara Bano and Ors. v. Union of India (UOI) and Ors.* AIR 2017 SC 4609.

trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother".[36] Sub-section (ii)(c) of Section 4 of the Bill bans surrogacy for financial gain and allows surrogacy only for altruistic purposes. In this aspect, the Bill of 2019 makes a departure from the Bills of 2008 and 2014 which permitted commercial surrogacy.[37] In addition, only a 'close relative' can act as a surrogate mother for the intending couple.[38] Since commercial surrogacy had become a source of income for a faction of underprivileged women,[39] the question which naturally arises is that, whether the complete ban on commercial surrogacy is in contravention of Article 19(1)(g) of the Constitution of India which grants every citizen of India the freedom of trade and occupation.

Whether this blanket ban on commercial surrogacy previously implicitly acknowledged as legal by the Supreme Court[40] is sound legally, ethically and morally is a complex question with compelling arguments on either side. The view that favours the ban primarily relies on "*...reported incidents of unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy...rackets of intermediaries, unregularized clinics practicing*

[36]Surrogacy (Regulation) Bill 2019, s 2(f).

[37]Bhumitra Dubey, Yash Tiwari, 'Analysis of the Surrogacy (Regulation) Bill, 2020' (2020) ILJ <https://indialawjournal.org/analysis-of-the-surrogacy-regulation-Bill.php> accessed 28 December 2020.

[38]Surrogacy (Regulation) Bill 2019, s 4(iii)(b)(III).

[39]Neeta Lal, 'India Poised to Restrict Surrogate Pregnancies' (*YaleGlobal Online, 2019)*
<https://yaleglobal.yale.edu/content/india-poised-restrict-surrogate-pregnancies> accessed 27 June 2020.

[40]*Baby Manji Yamada v.Union of India* AIR 2009 SC 84, *Jan Balaz v.Anand Municipality* AIR 2010 Guj 21. In both these cases, the Court directed the enactment of legislation on surrogacy.

surrogacy...noble act of motherhood".[41] The other view prominently propounded by the United Nations Population Fund (UNFPA), other stakeholders and various non-governmental organizations, point out that a complete ban on practice will drive it underground and instead advocate that the law should introduce strict regulation and protection mechanisms to regulate commercial surrogacy.[42] The Bill purports to balance these two extreme views by allowing only altruistic surrogacy and banning and criminalizing commercial surrogacy. Since the prohibition on commercial surrogacy has been a highly contested subject, this section analyses the constitutional contentions in the context of Article 19(1)(g) and the right to livelihood under Article 21.

a) Dissecting 'Reasonable Restriction' Under Article 19(1)(g)

An activity can be regarded as a 'trade or business' under Article 19(1)(g) if it is carried on for a profit motive.[43] Here, commercial surrogacy can fairly be considered a 'trade or business' because it serves as a means of livelihood for the surrogate mother.

The test to assess the constitutionality of a restriction under Article 19(1)(g) on the freedom of trade and occupation is, that it should be a reasonable restriction under Article 19(6) i.e. it should not be arbitrary and excessive and it should be made in public interest.[44] This test was further elucidated in *Sivani's* case[45] by stating that, in examining reasonableness, the broad criterion is whether the law strikes a proper balance between social control on one hand and the right of the individual on the other hand. Judicial scrutiny would entail taking into

[41] Select Committee Report (n 3) para 5.8, para 4.1.
[42] ibid para 2.12.
[43] *Unni Krishnan v. State of Andhra Pradesh* 1993 AIR 2178.
[44] *Chintaman Rao v. State of Madhya Pradesh* 1951 AIR 118.
[45] *M.J. Sivani and Ors. v. State of Karnataka and Ors*. AIR 1995 SC 1770.

account factors like nature of the right enshrined, underlying purpose of the restriction imposed, evil sought to be remedied by the law, its extent and urgency, how the restriction is or is not proportionate to the evil and the prevailing conditions at that time.[46]

In the present Bill, admittedly, the primary evil sought to be remedied is the exploitation of surrogate mothers at the hands of middlemen, and occasionally intending couples. As noted in the Parliamentary Committee Report, the potential for exploitation is linked to the lack of regulatory oversight and lack of legal protection to the surrogate and can be minimized through adequate legislative norm-setting and robust regulatory oversight.[47] The automatic equivalence of commercial surrogacy with exploitation seems misplaced. Therefore, in light of this observation, it becomes arguable that, instances of exploitation being reported might have been largely due to the lack of comprehensive and binding legislation on the subject, and therefore, allowing commercial surrogacy within the regulatory framework that the Bill proposes would have possibly reduced such instances. In western countries where commercial surrogacy is legal, risks (both physical and psychological) of surrogacy have been largely mitigated by intensive counselling and support for surrogate mothers and intended parents.[48] At the consultations stage, there were also concerns raised by stakeholders that endorsing altruistic surrogacy will enforce emotional and social pressure on close female relatives without any compensation for immense emotional and bodily labour of gestation involved in surrogacy as well as loss of livelihood.[49] The livelihood of numerous women who choose to become surrogates for

[46] ibid.

[47] Parliamentary Standing Committee Report (n 5) para 5.17.

[48] Viveca So¨derstro¨m-Anttila,Ulla-BrittWennerholm, Anne Loft, Anja Pinborg4, KristiinaAittoma¨ki, Liv BenteRomundstad, and Christina Bergh (2015) Human Reproduction Update Vol.0, No.0 pp. 1–17, 2015 <https://pubmed.ncbi.nlm.nih.gov/26454266/>.

[49] Parliamentary Standing Committee Report (n. 5) para 5.8.

economic benefits is at loggerheads with the reasoning of Select Committee Report which purports to prevent 'forced labour' and states it as a ground to justify the altruistic model.[50]

Herein, another important aspect is the test of proportionality recently also enunciated in the case of *Modern Dental College*[51] in the following words, "*there needs to be a proper relation ('proportionality stricto sensu' or 'balancing') between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right*". Interference prescribed by state for pursuing the ends of protection should be proportionate to the legitimate aims and the standard for judging the proportionality should be a standard capable of being called reasonable in a modern democratic society.[52] Here, it is pertinent to discuss the 'compensated surrogacy' model that the Parliamentary Committee Report endorsed. Emphasizing that a surrogate is the most important stakeholder in this whole process, "*the compensation should be commensurate with the lost wages for the duration of pregnancy, medical screening and psychological counselling of surrogate; child care support or psychological counselling for surrogate mother's own child/children, dietary supplements and medication, maternity clothing and post-delivery care and should be fixed by relevant authorities, not subject to bargain*".[53] The Select Committee Report adopts these recommendations partially providing for coverage of the above-mentioned expenses (to be prescribed later under rules) except loss of wages. Whether the compensated model is more proportionate to the state aim of curbing exploitation remained an issue which divided the

[50]Select Committee Report (n 3) para 4.3.

[51]*Modern Dental College and Research Centre v. State of Madhya Pradesh* AIR 2016 SC 1559.

[52]Anuj Garg (n. 25).

[53]Parliamentary Standing Committee Report (n 5) para 5.8.

opinion of various stakeholders represented in the Committee. It is indeed difficult to reconcile a model which offers no benefits to the surrogate mother for undergoing great physical and mental ordeal with the abovementioned reasonableness standard. In fact, there are numerous instances wherein the money earned from undertaking surrogacy has helped them alleviating their families from poverty, eventually reducing their dependency to take up surrogacy again.[54] The social control exerted by the State by imposing such a blanket ban is asymmetrically biased against the rights of the women.

b) Exploring Alternative Models

The other standard of judging reasonability of restriction which amount to prohibition is that a total prohibition must also satisfy the test that a lesser alternative would be inadequate.[55] It was observed in the case of *Anuj Garg*,[56] in the context of barring employment of women in certain workplaces on grounds of security concerns that, instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the state as well as law modelling done on this behalf.[57] The compensated model (discussed above) also proves to be a viable alternative model. Therefore, it is arguable that, the Bill would have been more practical and protecting in women's freedom had it supplied complementary models like employment counselling and connecting surrogates with opportunities for paid employment outside of surrogacy and fertility

[54]Neeta Lal, 'India Poised to Restrict Surrogate Pregnancies' (*YaleGlobal Online, 2019)*
<https://yaleglobal.yale.edu/content/india-poised-restrict-surrogate-pregnancies> accessed 27 June 2020.
[55]*State of Gujarat v. Mirzapur Moti KureshiKassabJamat* 2005 (2) MPJR (SC) 407 *(approved in State of Maharashtra v. Indian Restaurants and Hotel Association 2019 SCC OnLine SC 41).*
[56]Anuj Garg (n 25).
[57]ibid.

clinics that can help women create economic sustainability for themselves and their families.[58] Admittedly, the government does have schemes like Mahila Shakti Kendra Scheme (MSKS), Scheme Training and Employment Programme for Women (STEP) etc, however, if, despite these schemes women were taking up surrogacy, it implies that it was possibly due to gaps in the implementation of these programmes. This lacunae in the policy requires a comprehensive action plan, instead of a blanket ban.

c) Imposition of a Regressive Moral Standard

It is also pertinent to note that, making commercial surrogacy illegal denies women agency over their own bodies while also depriving them of livelihood.[59] Studies suggest one key motivation among surrogate parents is altruism; others have specific goals in mind, such as sending their children to better schools or clearing family debt, for many it is a pathway out of poverty.[60] The Parliamentary Committee Report itself notes that, a lot of women that were examined by the committee stated that alternative means of livelihood available for them were, if not more, equally exploitative and significantly less remunerative than surrogacy.[61] Permitting women to provide reproductive labour for free to another person but preventing them

[58]Sarah Huber, SharvariKarandikar and Lindsay Gezinski, 'Exploring Indian Surrogates' Perceptions of the Ban on International Surrogacy' (2017) 2018, Vol. 33(1) 69-84 <https://journals.sagepub.com/doi/pdf/10.1177/0886109917729667> accessed 27 June 2020.

[59]Neeta Lal, 'India Poised to Restrict Surrogate Pregnancies' (*YaleGlobal Online, 2019)*
<https://yaleglobal.yale.edu/content/india-poised-restrict-surrogate-pregnancies> accessed 27 June 2020.

[60]ibid.

[61]Parliamentary Standing Committee Report (n 5) para 5.18.

from being paid for their reproductive labour is grossly unfair and arbitrary.[62]

However, the Select Committee Report makes certain regressive comments to support the prohibition on commercial surrogacy, venturing as far as implying that commercial surrogacy is an immoral and unethical practice and women who engage in such practices will not be treated with same respect as other women and mothers get in the society.[63] It arguably places undue reverence on the 'noble act of motherhood', declaring altruistic surrogacy as 'setting an example of a model woman', denigrating the financial benefits that surrogate mothers derive which in turn are used to improve their standards of living. A feminist critique of the reasoning furnished in the Select Committee Report demonstrates 'the noble act of motherhood' hints of biological essentialism, which is frequently used to reinforce conventional sex roles, gender divisions of labour, and inequalities of power, were biologically determined and therefore could not be challenged.[64] The undertones of essentialism can be observed in the reasoning furnished in the Select Committee Report, which states that, "*The surrogate mother shows a strong inclination to render selfless service and takes a forward step to abolish the stigma of infertility from the society*." The problem of essentialism is one of overgeneralization, stereotyping, and a resulting inability to even 'see' characteristics that do not fit preconceptions and in practice, this leads to discrimination[65] and hence it is not a desirable rationale for basing crucial legislation.

[62]Parliamentary Standing Committee Report (n 5) para 5.18.

[63]Select Committee Report (n 3) para 4.9 - 4.11.

[64]Raewyn Connell, 'Feminism's Challenge To Biological Essentialism' (*The Sydney Morning Herald,* 2013) http://www.raewynconnell.net/2013/03/feminisms-challenge-to-biological.html> accessed 28 December 2020.

[65]Anne Philips, 'What's wrong with Essentialism?' (2011) Distinktion: Scandinavian Journal of Social Theory 11:1, 47-60

d) Deciphering The 'Public Interest' - 'Public Morality' Conundrum

Perhaps the most contentious aspect of constitutionality of the restriction introduced by the Bill arises when an examination of the ban on commercial surrogacy is done on grounds of public interest. For the purpose of prohibiting illegal/immoral trade, or trade injurious to public welfare, the government is empowered to regulate the prevailing conditions of the concerned trade.[66] If the precedents on regulation of liquor trade are traced, it is observed that, it has been repeatedly held that there was no fundamental right to carry on trade in liquor because of the reasons of public morality, public interest and harmful and dangerous character of liquor.[67] The aforesaid ratio jeopardized the observations in *Krishan Kumar's case*,[68] wherein it had been held that while standards of morality could afford guidance to impose restrictions, they could not limit the scope of the right. It is observed that if challenged in Courts, the precedents which curb the freedom on trading liquor and also activities related to prostitution[69] can plausibly be argued to uphold the ban of commercial surrogacy on grounds of 'morality' and 'public interest' as it commodifies motherhood.[70] There is also uncertainty surrounding the contention

<https://wtsoneww.tandfonline.com/doi/abs/10.1080/1600910X.2010.9672755?src=recsys> accessed 28 December 2020.

[66] Sivani (n 46).

[67] *Nashirwar v. State of Madhya Pradesh* AIR 1975 SC 360.

[68] *Krishna Kumar Narula Etc v. The State Of Jammu And Kashmir &Or*s 1967 AIR 1368.

[69] *State Of Uttar Pradesh v. Kaushaliya* 1964 SCR (4)1002.

[70] Select Committee Report (n 3) para 4.8.

whether surrogacy is *res extra commercium*[71]and therefore, not entitled to the protection of Article 19(1)(g).

However, there are equally if not more meritorious arguments opposing the prohibition on commercial surrogacy. The United States Supreme Court in the case of *Joseph Patstone*[72] held that the state may direct its law against what it deems evil as it actually exists without covering the whole field of possible abuses, but such conclusions have to be reached either on the basis of general consensus shared by the majority of the population or on the basis of empirical data. Admittedly, no empirical studies have been undertaken by the government on this issue. The aforesaid ratio has also been approved in the case of *State of Maharashtra v. Indian Restaurants and Hotel Association*[73] wherein the Hon'ble Supreme Court struck down a rule which was imposed on grounds of public morality, prohibiting dancing in certain establishments also holding that, dancing is not *res extra commercium*. This was held despite the fact that it was submitted that girls had not opted for this profession out of choice but have been brought into this by middle men or other exploitative factors much like in the case of surrogacy.[74]

Additionally, numerous provisions run the risk of in fact appearing contrary to public interest. The Parliamentary Committee Report, noted that whereas it is desirable that women be discouraged from opting for surrogacy as a means of livelihood, the altruistic model proposed by the Bill in fact is divorced from reality.[75] In the *Indian*

[71]Res extra commercium means a thing outside of commercial intercourse i.e. things not subject to ownership, commerce, or trade, such as the high seas or air (Oxford Reference).

[72]*Patsone v. Pennsylvania* [1914] 58 L Ed 539: 232 US 138 (1914).

[73]*State of Maharashtra v. Indian Restaurants and Hotel Association* AIR 2019 SC 589.

[74]ibid para 24.

[75]Parliamentary Standing Committee Report (n 5) para 5.40.

Restaurants and Hotel Association case[76] it was brought on record that, many of women relieved from employment in dance bar establishment have been compelled to take up prostitution out of necessity for maintenance of their families and that the impugned legislation has proved to be totally counterproductive and cannot be sustained being *ultra vires* Article 19(1)(g). These concerns are also valid in the context of surrogacy, wherein women from underprivileged backgrounds will either have to function in the unregulated surrogacy industry functioning underground or take up other desperate measures. It is state's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance with the requirements of the profession they choose to follow.[77] Commercial surrogacy is analogous to the aforesaid cases in numerous aspects and provides some jurisprudential guidance in the event the Bill is challenged in courts. Here it is worth mentioning that the government has submitted, that the stringent punishment in the provisions of the Bill and allowing any woman to be a surrogate only once, monitoring provisions in the Bill and need based additional measures/policy interventions made by the National Surrogacy Board would go a long way in preventing black marketing of surrogacy services.[78]

From the above discussion, it can be concluded that various aspects and implications of the Bill exist on a thin line between unconstitutionality and Article 19 and Article 21 (discussed below) of the Constitution. It also remains to be seen how the Bill finally materializes.

[76]*State of Maharashtra v. Indian Restaurants and Hotel Association* AIR 2019 SC 589.
[77]Anuj Garg (n. 25).
[78]Select Committee Report (n.3) para 3.4.

C. The Article 21 Paper Tiger: Examining The Bill From The Lens of Right to Privacy

In August 2017, in the case *Justice K S Puttaswamy v. Union of India*,[79] a nine-judge bench of the Supreme Court in a landmark judgment held that right to privacy is an inalienable fundamental right. Right to privacy was held to be an element of human dignity which is the foundation of other fundamental rights, and further the court stated that, the duty of the state is to safeguard the ability to take decisions and the autonomy of the individual- and not to dictate those decisions[80] Approving the ratio in *Suchita Srivastava's* case,[81] the court held that the right to make reproductive choices is a part of a woman's right to privacy, dignity and bodily integrity-dimension of "personal liberty" under Article 21. The right to make a decision about reproduction is essentially a very personal decision, the intrusion of the State into such a decision making process of the individual is scrutinized by the constitutional courts.[82]

a) Privacy From The Perspective Of Intending Couples

The Bill limits the option of surrogacy solely to infertile[83] Indian heterosexual married couples within the altruistic framework, criminalizing any other circumstance where people may want to opt for surrogacy[84] (covered in detail in Section C). This exclusionary policy infringes the reproductive autonomy of a host of other categories of people like, single parents, widow(er), un-married,

[79] *Justice K.S. Puttaswamy v. Union of India* AIR 2017 SC 4161.
[80] *ibid.*
[81] *Suchita Srivastava v. Chandigarh Administration* AIR 2010 SC 235.
[82] *B.K. Parthasarathi v.Government of A.P. and Ors*. AIR 2000 AP 156.
[83] Surrogacy (Regulation) Bill, s 2(p): "infertility" means the inability to conceive after five years of unprotected coitus or other proven medical condition preventing a couple from conception.
[84] Surrogacy (Regulation) Bill, s 35.

LGBTQ+ couples, divorcees etc. who may want to have children. The reasoning given by the government that LGBTQ+ couples are not legally recognized and hence are excluded from deriving the benefit of surrogacy[85] is jeopardized in the light of the decision in *Navtej Singh Johar*.[86] It also ignores the legal recognition granted to live-in couples by Supreme Court.[87] If the state cites legal complications and custody issues for denying access to surrogacy outside a marriage, it may have an uphill task meeting the just, fair and reasonable standard.[88] The waiting period of five years for infertile couples (who are permitted to opt for surrogacy) also has the effect of curtailing the reproductive choice as World Health Organization terms infertility as "*a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse*".

It is observed that considerable freedom has been taken away in terms of choices that people may want to resort to for having children (but are unable to by conventional methods for various reasons). The instrumental facet of dignity signifies that dignity and freedom are inseparably intertwined, each being a facilitative took to achieve the other.[89] Dignity is inextricably grounded in all fundamental rights, including privacy. Decisional autonomy was explicitly propounded in the *Puttaswamy case*, as including "*intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress*".[90]

[85]Answer given by the Health Minister answer in Lok Sabha on 5 August 2019.
[86]*Navtej Singh Johar v. Union of India* AIR 2018 SC 4321.
[87]*S. Khushboo v. Kanniamma* AIR 2010 SC 3196.
[88]Arijeet Ghosh, Nikita Khaitan, 'A Womb of One's Own: Privacy and Reproductive Rights' (Economic and Political Weekly, 2017) Vol. 52, Issue No. 42-43 <https://www.epw.in/node/150120/pdf> Accessed 20 June 2020.
[89]Puttaswamy (n 80).
[90]ibid para 142.

If the state purports to restrict this reproductive autonomy, then the aforesaid restriction must pass the test of proportionality laid down in *Puttaswamy*[91]and *Modern Dental College*.[92] The first requirement is that there must be a law in existence to justify an encroachment on privacy, which is also an express requirement of Article 21. Second, the requirement of a need, in terms of a legitimate state aim, which should ensure that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary state action. Third, the restriction must be proportional to the object and needs to be fulfilled by the law and fourth, that it should be the least restrictive measure.

The first condition is fulfilled by enacting the Bill, and the second condition has been already discussed in Section B(1) of this article. Hence, it is now important to examine the third and fourth condition of proportionality and least restrictive measure respectively. The least restrictive measure prong of the proportionality test is a fact-based test as it necessarily entails for the court to examine various alternative measures that can be adopted to achieve the intended goal of the state.[93] A judgment must be made whether the government measure is the best of all feasible alternatives, considering both the degree to which it realizes the government objective and the degree of impact upon fundamental rights.[94] There is little merit in considering adoption as an alternative to surrogacy, as surrogacy and adoption have to be an equal choice and in the name of adoption, the

[91]Puttaswamy (n 80).

[92]*Modern Dental College and Research Centre v. State of Madhya Pradesh* AIR 2016 SC 1559.

[93]Ankush Rai, 'Proportionality in Application – An Analysis of the "Least Restrictive Measure' (Indian Constitutional Law and Philosophy, 2020) <https://indconlawphil.wordpress.com//?s=proportionality+test&search=Go> accessed 28 June 2020.

[94]Per Bilchiz Test approved in *Anuradha Bhasin v. Union of India* 2020 ALL MR (Cri) 1372.

Government cannot take away the reproductive rights of couples to have a biologically related child through surrogacy.[95] As already discussed in Part 2(b) of the article, it can be argued that the compensated model endorsed by the Parliamentary Committee Report is a less restrictive measure, which balances the rights of the surrogate mother against the freedom of choice of the intending couple and hence more proportional to the object of the law i.e. prevention of exploitation of surrogate mothers. In fact, the Parliamentary Committee Report had criticized the narrow ambit of the eligibility provision, and gone as far as observing that such provisions render the whole option of surrogacy virtually nugatory[96]. The eligibility conditions as they stand now, have the effect of dictating the decision of reproduction for people, instead of allowing them to exercise their autonomy.

b) Privacy from The Perspective Of The Surrogate Mother

The decisional autonomy mentioned above, also extends to the surrogate mother herself. The conditions of eligibility for the surrogate mother already discussed in Section B(1) of this Article run afoul of Article 14, the same sets of conditions are also arguably in contravention of right to privacy.

It is pertinent to mention the case of *State Of Uttar Pradesh v. Kaushaliya*[97] wherein the court upheld a section of Immoral (Traffic) Prevention Act, 1956 which discriminated between women who engage in prostitution and other women of different occupation on grounds of public morality.[98] This deserves reconsideration in light of *Puttaswamy,* where the centrality of choice was highlighted on

[95] Parliamentary Standing Committee Report (n 5) para 5.23.
[96] ibid para 5.40.
[97] *State Of Uttar Pradesh v. Kaushaliya* 1964 SCR (4) 1002.
[98] ibid para 17.

various occasions, with Justice Chelameswar correctly pointing out that decisional autonomy includes choice of work.[99] Therefore, if decisional autonomy includes choice of work, then surely there exists no *a priori* moral difference between someone who is a 'prostitute' and someone who is engaged in any other occupation.[100] Since there exist similar grounds of public morality and exploitation of women to prohibit the surrogacy industry as there does in prostitution, it is noted that the aforesaid 'choice of work' as a facet of decisional autonomy can possibly be extended to surrogate mothers.

The repeated portrayal of surrogate women as being 'vulnerable' due to their economic conditions[101] has an effect of ignoring the role 'choice' plays in given circumstances and ultimately denying women agency over their bodies. However, certain research studies show that surrogates exercise a kind of pragmatism in their choice to undertake surrogacy.[102] Interviews with women who chose to provide gestational services for a fee have shown that it is a well-considered decision made in constrained economic conditions.[103] This appears as a 'better option' than the kind of underpaid wage labour the surrogates perform at the local factory in harsh, unhealthy conditions.[104] Thus, to choose stigmatized work like prostitution or surrogacy does not only mean the lack of other available options but

[99]Guatam Bhatia, 'The Supreme Court's Right to Privacy Judgment – V: Privacy and Decisional Autonomy' (Indian Constitutional Law and Philosophy, 2017) <https://indconlawphil.wordpress.com/2017/08/31/the-supreme-courts-right-to-privacy-judgment-v-privacy-and-decisional-autonomy/> accessed 28 June 2020.

[100]ibid.

[101]Select Committee Report (n.3) para 17.

[102]Rudrappa's (2012) study cited in Anindita Majumdar, 'The Rhetoric of Choice: he Feminist Debates on Reproductive Choice in the Commercial Surrogacy Arrangement in India' (2014) 18(2) 275–301<https://journals.sagepub.com/doi/abs/10.1177/0971852414529484> accessed 28 December 2020.

[103]Gargi Mishra, 'Our Notions of Motherhood' *Indian Express* (9 August 2019).

[104]Rhetoric of Choice (n 103).

also a conscious choice in itself.[105] Agency forms an essential way of giving voice to those who feel unempowered within an arrangement that seems overwhelmingly debilitating.[106] Thus, it can be argued that exercising agency over one's body is another notable manifestation of right to privacy.

Notwithstanding the arguments furnished above, the aforesaid issue is contentious as there is scarce jurisprudence on reproductive rights in the context of surrogacy in India. Irrespective of the earlier cases wherein the Supreme Court had entertained cases pertaining to surrogacy without going into the legality thereof,[107] any future challenge to the Bill, will be a pioneer in laying down the constitutional position on commercial surrogacy.

D. To Delegate Or Not To Delegate: Investigating The Powers Given To The National Surrogacy Board

It is a settled principle that the Indian legislature cannot confer unfettered power to the executive to make regulations which are necessarily the function of the legislature; contravention of the same would be *ultra vires* the Constitution.[108] Delegation is valid only when it is confined to legislative policy and guidelines which are adequately laid down and the delegate is only empowered to implement such policy within the guidelines laid down by the legislature.[109] When the Constitution entrusts the duty of law-making to Parliament and the Legislatures of States, it impliedly prohibits them from throwing away that responsibility on the shoulders of some

[105] ibid.
[106] ibid.
[107] Manji Yamada, Jan Balaz (n 41).
[108] *Hamdard Dawakhana (Wakf) v. Union of India* AIR 1960 SC 554 [35].
[109] *IK. Industries Ltd.* v. *Union of India* [2007] 13 5CC 673 [66].

other authority.[110] There are two instances where the Bill delegates power to the National Surrogacy Board ("**the Board**") constituted by a Central Government notification[111] to prescribe certain regulations and conditions that risk endangerment if challenged as being *ultra vires* of the Constitution.

In the first instance, the Bill specifies certain eligibility criteria for the intending couple (as mentioned above). In addition to these conditions the Bill allows the Board to prescribe "*such other conditions as may be specified by the regulations*" that the couple may be required to fulfil in order to acquire an eligibility certificate from the appropriate authority.[112] In the second instance, the Bill specifies the purposes for which surrogacy procedure can be undertaken.[113] Here, the Bill grants the power to the Board to prescribe "*any other condition or disease*" to qualify for availing surrogacy.[114] In the Memorandum Regarding Delegated Legislation in the Bill, it is stated that "*the matters in respect of which the said rules and regulations may be made are matters of procedure and administrative detail, and the delegation of legislative power is of a normal character*".

It is pertinent to note that in a later section of the Bill, it is mentioned that any regulation made by the Board under the Bill shall be laid down before each House of Parliament, as soon as may be after it is made, to make any modifications or annulments, however, such annulment shall be without prejudice to the validity of anything done previously under those rules and regulations.[115] The introduction of this section makes room for the legislature to deliberate on a condition decided by the Board and gives power to the legislature to

[110] *Kishan Prakash Sharma and Ors. v. Union of India and Ors*. AIR 2001 SC 1493.
[111] The Surrogacy (Regulation) Bill 2019, s 14(1).
[112] ibid s 4 (iii)(c)(IV).
[113] ibid s 4 (ii).
[114] ibid s 4 (ii)(e).
[115] ibid s 49.

annul any rule or regulation that it does not approve. However, the process before which a rule or regulation can be annulled by the Parliament is lengthy and time consuming as Parliament presides only twice in a year, and considering the clause states that the decision of the Parliament will not affect the validity of any act already done under its provisions, leaves inordinate room for the Board to exercise unfettered and unregulated powers for a long duration of time amounting for the argument of excessive delegation to come into picture. Therefore, the next part shall apply the test for excessive delegation to analyse if the powers allocated to the Board under the Bill are within constitutional limitations.

a) Applying The Test For Excessive Delegation

Whether the power delegated by the legislature to the executive has exceeded the permissible limits, in a given case, depends on the exact nature of power that has been delegated and the standards which have been set to guide the administrative authority. The test adopted in the case of *Hamdard Dawakhana (Wakf) v. Union of India* ("**Hamdard case**")[116] was that it should not amount to *abdication* of the legislative function. In Hamdard case, the Court invalidated Section 3(d) of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, which used the term "*or any other disease or condition which may be specified in rules made under this Act*", on the basis that there was no legislative guidance on how these "diseases" were to be selected. It was further observed, "*Parliament has established no criteria, no standards and has not prescribed any principle on which a particular disease or condition is to be specified in the Schedule*".[117] Similarly, in the present Bill, the legislature has delegated the power of prescribing additional conditions for undertaking the practice of

[116] *Hamdard Dawakhana (Wakf) v. Union of India* AIR 1960 SC 554 [35].
[117] ibid para 34.

surrogacy. The Board can decide the extra conditions the intending couple needs to fulfil in order to avail surrogacy services, as well as any other condition or diseases required to exercise surrogacy in India. Applying the above standards set out by the Supreme Court to the present Bill, it is observed that the powers delegated to the administration are well beyond 'only matters of procedure and administrative detail'.

The power to determine the requirements for opting surrogacy involves profound deliberation and resolution which falls under the ambit of the powers of the legislature. However, while allowing the Board to prescribe extra conditions, the board is now exercising powers which are, in fact, legislative in nature. Further, the Bill does not prescribe any criteria, standard or principle on the basis of which the additional conditions or the diseases are to be selected. In the aspect of delegating powers to the administrative authority, the Bill is analogous in nature to Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 and seemingly falls short of meeting the criteria set out by this test. Without any guidance from the legislature, the power given to the Board exceeds appropriate delegation which the parliament can authorize.

Another test to ascertain excessive delegation has been laid down by the Supreme Court in the case of *Gwalior Rayon Silk Mfg v. Asst. Commr. Of Sales Tax*[118] written by Justice Khanna while referring to Willoughby, an American constitutional scholar wherein he propounded that while the real law-making power may not be delegated, a discretionary authority may be granted to executive and administrative authorities[119] : (1) to determine in specific cases when and how the powers legislatively conferred are to be exercised and (2) to establish administrative rules and regulations, binding both upon their subordinates and upon the public, fixing in detail the manner in

[118] *Gwalior Rayon Silk Mfg v. Asst. Commr. Of Sales Tax* AIR 1974 SC 1660.
[119] ibid para 24.

which the requirements of the statutes are to be met, and the rights therein created to be enjoyed.

In the present Bill, the legislature does not only allocate the powers to determine the time and manner in which requirements of the Bill are to be met, but also confers the power to establish those requirements to the Board.[120] The Bill also omits to specify details for the manner in which the requirements of the statute to provide those conditions are to be met. The only condition specified under the Bill is that the regulation should not be inconsistent with the provisions of the Bill.[121] Therefore, the Bill flounders in specifying clear guidelines for the Board to follow in case of prescribing regulations and allows the board to legislate which is evidently a case of excessive legislation.

III. A CASE OF OVERCRIMINALIZATION? - TAKING A LOOK AT THE OFFENCES UNDER THE BILL

The Bill penalizes the practice of commercial surrogacy with strict punishments. The medical practitioners practicing commercial surrogacy can be imprisoned for a period of up to 5 years and with fine up to 10 lakh rupees, and the intending couple seeking commercial surrogacy can be imprisoned for up to 5 years with fine up to 5 lakh rupees. All the offences prescribed under the act are cognizable, non-bailable and non-compoundable.[122]

As per the Bill, "*anyone undertaking commercial surrogacy can be punished for a period of up to 10 years of imprisonment and a fine of*

[120]The Surrogacy (Regulation) Bill 2019, s 4(ii)(e), 4(iii)(c)(IV).
[121]The Surrogacy (Regulation) Bill 2019, s 48.
[122]ibid, s 40.

up to 10 Lakh rupees under the Bill".[123] The word 'undertaking' implies that even a woman who agrees to be a surrogate for an intending couple due to poverty or unfortunate circumstances can be held liable for a disproportionately high prison term and fine. It is pertinent to note that the Bill places the surrogate mothers on par with agents and other touts running a racket of commercial surrogacy as both sets of alleged perpetrators can be prosecuted and subject to the same punishment i.e., imprisonment for a period for up to 10 years and fine up to rupees 10 lakhs. In simple words, the surrogate mother is being placed on par with the very people who have been exploiting such women. The provision is in conflict with the Statements of Objects and Reasons of the Bill which seeks to prohibit the exploitation of surrogate mothers and to protect the rights of children born through surrogacy. Here, by punishing the women who undertake surrogacy, it targets the very section of society which it aims to protect through the intended legislation.

One view also suggests that the punitive measures in the Bill are inserted to prevent exploitation of surrogate mothers and the word 'undertaking' does not extend to surrogate mothers. The Bill however, does not exclusively mention that surrogate mothers would not be penalized under the Bill and leaves room for undesirable interpretational uncertainty.

Further, if a surrogate renders services other than within the permissible limits of the Bill, it shall be presumed that she was compelled to do so by her husband, the intending couple or any other relative, depending on the case and they will be held liable for abetment.[124] The Bill introduces the clause for presumption of guilt on the part of people related to the surrogate mother, and holds them liable under abetment of the offence. However, it fails to mention whether the surrogate mother will be deemed innocent so far as the

[123] ibid, s 35.
[124] ibid, s 39.

guilt of others in compelling her is presumed. The Immoral Traffic (Prevention) Act, 1956 punishes persons living on the earnings of prostitution.[125] The act explicitly mentions that, *"any person living on the earnings of prostitution of any other person"* shall be punished. With the use of the term 'any other person' the act clears the air that the person involved in the sex work themselves would not be held liable under this section. The Surrogacy Bill, however, falls short of mentioning that the surrogate mothers would be protected from penal actions. In the absence of which, the uncertainty of excessive prison terms and fine looms over the surrogate mother.

It has been alleged that the aforesaid punitive provisions showcase the state's heavy reliance on criminal law for managing social issues, criminalization of choice and prejudiced ideas of what constitutes a family.[126] Though the issues of over-criminalization and disproportionate consequences for people, there is no sustained or coherent dialogue amongst law makers on the policy of criminalization followed by the criminal justice system in India.[127] The imposition of the harsh punishments prescribed for the intending couples and surrogate mother involved is disproportionate to the 'crime' committed. The concerned parties are neither criminals nor are they threat to the society.[128] Moreover, penal sanctions on the commissioning parents would have a definite impact on the surrogate child as it would be separated from his/her own biological parents.[129] It is more reasonable that harsh punishments are limited to mala fide and fraudulent activities.

[125]The Immoral Traffic (Prevention) Act 1956, s 4.

[126]Gargi Mishra, 'Our Notions of Motherhood' *Indian Express* (9 August 2019).

[127]LatikaVashist 'Re-thinking Criminalisable Harm In India: Constitutional Morality As A Restraint On Criminalisation' (2013) Journal of the Indian Law Institute Vol. 55, No. 1, pp. 73-93.

[128]Parliamentary Standing Committee Report (n 5) para 5.160.

[129]ibid.

IV. OTHER MISCELLANEOUS CONCERNS

There are certain other concerns under the Bill, relating to health and technology like the definition of infertility, passing of the. Artificial Reproductive Techniques Bill, prohibition on the storage of embryo and gamete, etc.[130] These issues are outside the purview of the present article. However, there are some concerns, which touch upon some legalities, and are hence discussed below.

A. Definition of 'Altruistic Surrogacy' and 'Close Relative'

In section 2(b) to the Bill, 'altruistic surrogacy' is defined as, "*the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative*."

Here, provision is made for transferring the medical expenses and insurance coverage to *either* the surrogate mother *or* her dependents *or* her representative. This can open the possibility of misuse of the money by such other relative who is receiving it on the surrogate's behalf. It is even more problematic, if a *representative* is allowed to receive money which may include agents and middlemen, who are in fact perpetrators of the exploitation that the Bill so emphatically seeks to prevent.

The Bill, till date does not contain definition of 'close relative' which is admittedly a key term of eligibility for the surrogate mother. It is

[130]PRS Legislative Research, 'Issues for Consideration: The Surrogacy (Regulation) Bill, 2019' (*PRS Legislative Research,* 2019) https://www.prsindia.org/sites/default/files/Bill_files/The%20Surrogacy%20%28Regulation%29%20Bill%202019-Issues%20for%20Consideration%20%282%29.pdf.

reported that the National Surrogacy Board that will be made under the Act will clarify the definition.[131]

B. Provision for Abortion of Foetus

According to sub-section (vi) of Section 3, abortion of the surrogate child cannot be done without the written consent of the surrogate mother and an authorization by the appropriate authority. The authorization of the appropriate authority shall be subjected to the provisions of Medical Termination of Pregnancy Act, 1971 ("**MTP Act**"). However, no time limit has been mentioned by which the appropriate authority has to give the permission. It is pertinent to note that the MTP Act does not allow pregnancy to be terminated after a 20 weeks period.[132] In the absence of any prescribed time limit for the appropriate authority to reply, the period of 20 weeks can likely be crossed leaving the surrogate mother with no choice but to carry the pregnancy to term. Although it is not mentioned in this section that the time period would be prescribed in the rules, it should be noted that the rules which will be made once the Bill is passed can contain the time limitation.

The Bill further states that no person may force the surrogate mother to abort the foetus.[133] If a child being born out of surrogacy arrangement is at the risk of physical or mental abnormalities, under the Bill only the surrogate mother's consent will be required to abort the child and the intending couple will have no role in this decision.[134]

[131]Select Committee Report (n 3) para 3.12.

[132]Medical Termination of Pregnancy Act 1971, s 3.

[133]The Surrogacy (Regulation) Bill 2019, s 9.

[134]PRS Legislative Research, 'Issues for Consideration: The Surrogacy (Regulation) Bill, 2019' (*PRS Legislative Research*, 2019) <https://www.prsindia.org/sites/default/files/Bill_files/The%20Surrogacy%20%28Regulation%29%20Bill%202019-

Given the fact that it is the intending couple who have to raise the child, their decision has not been allowed any weight under the Bill. There is no question that the opinion of the surrogate mother should hold the most importance, however, the Bill omits to even mention to consider the opinion of the intending couple in the decision.

C. Lack of Procedure for Appeals and Reviews

According to Section 4, the surrogate mother and the intending couple are required to obtain certificates of eligibility and essentiality from the prescribed authorities before they can opt for altruistic surrogacy. However, the Bill does not specify a review or appeal procedure in case the surrogacy applications are rejected.[135] It is pertinent to note that, other laws such as the Transplantation of Human Organs and Tissues Act, 1994, and adoption related provisions of the Juvenile Justice (Care and Protection) Act, 2015 provide the procedure for review and appeal, in case such an application is rejected.[136] In the absence of an appellate/review mechanism within the Bill, the only recourse available seems to be under the writ jurisdiction, which is again an expensive and time consuming process.

V. CONCLUSION

To conclude the analysis, we are tempted to borrow the following words from the Parliamentary Committee Report, "*the Committee is convinced that the altruistic surrogacy model as proposed in the Bill is based more on moralistic assumptions than on any scientific criteria and all kinds of value judgments have been injected into it in a paternalistic manner*". After subjecting the altruistic model to the

Issues%20for%20Consideration%20%282%29.pdf> last accessed 27 December 2020.

[135] ibid.

[136] ibid.

various constitutional tests, it becomes arguably indefensible. The disproportionate reliance on 'noble ideals of motherhood' which ultimately proves to be a 'public morality' argument is given undue reverence, disregarding the economic benefits that the surrogate mothers derive from commercial or even compensated surrogacy. It also has the effect of denying women agency of their bodies, and treating them as entities which require constant protection by the State by policing. Stifling means of livelihood of these women with the lack of focus on measures to discourage commercial surrogacy simultaneously in the form of vocational training and employment opportunities indicates an abdication of responsibility. Additionally, the discriminatory provisions guised in the form of 'eligibility criteria' are untenable in light of progressive rights-based judgments like *Puttaswamy, Navtej Singh Johar,* and *NALSA.* The spirit of the aforesaid judgments calls for equal treatment of these marginalized groups and rectifies laws, granting them civil rights on par with the rest of the population. For a great section of the categories of people including LGBTQIA community (and others mentioned above) are excluded from acting as 'intending couples', surrogacy is an indispensable method through which they can have biological children. The aggressive restraint on their reproductive choices violates their right to privacy grounded in the fundamental rights of Article 14, 19 and 21. The tough punishments meted out in the Bill, without addressing core concerns of the surrogacy industry, are an indication of over reliance on the coercive power of the government. In addition to this, there are the technical issues in the form of excessive delegation on the Surrogacy Boards and lack of prescription of appellate and review procedure in case of rejection of certificate of eligibility for the surrogate mother and the intending couples. These provisions call for rectification. At this juncture, it is our submission that the recommendations of the Parliamentary Committee Report which endorsed a compensated surrogacy model, and more inclusive

provisions of eligibility are more appropriate in balancing rights of the surrogate mother with that of the prospective parent(s) who desire children through surrogacy. It remains to be seen whether these recommendations are adopted before the Bill is passed by the Parliament. It will also be interesting to note the Court's findings if the constitutionality of the Bill is challenged in the future.

"WE'RE HERE AND WE'RE QUEER" – A CRITICAL APPRAISAL OF LGBT+ PROTECTION WITHIN THE INTERNATIONAL REFUGEE PARADIGM

Shriya Kamat[*] *& Priyal Sanghvi*[**]

Abstract

The oppression and marginalization of the LGBT+ community in various societal spheres have been long known, but 'queer migration' due to persecution based on their identity is a relatively recent phenomenon. LGBT+ applicants face a range of legal, social and procedural hurdles throughout their asylum application process. In general, the experiences of LGBT+ individuals are often homogenized, and the assessing authorities fail to take into account factors such as race, religion, and nationality, which play a vital role in the persecution faced by them. A disproportionate emphasis lies on proving their sexual/gender identity, as opposed to their past persecution, which points towards a need to pay close attention to issues of credibility. The Convention Relating to the Status of Refugees, 1951 provides a range of

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rights to refugees; however, the living reality of LGBT+ refugees in host countries is entirely different. They face discrimination while accessing housing, employment, medical assistance, etc. Due to their LGBT+ status as well as their refugee status, they are doubly marginalized, and hence the denial of their socio-economic rights amounts to a violation of their fundamental human rights. Such a denial defeats the primary purpose of refugee law, which is to offer surrogate protection to refugees. The authors have analyzed reports of LGBT+ refugees in different countries to emphasize the need for structural changes in their asylum regimes. Such refugees are fundamentally different from and more vulnerable than ordinary refugees, which warrants the need for distinctive measures in order to safeguard their interests.

I. INTRODUCTION

Targeted violence and discrimination against individuals based on their sexual orientation and gender identity ("**SOGI**") is largely prevalent across the world. However, it has recently been recognized as a ground for seeking asylum in other countries under the Convention Relating to the Status of Refugees, 1951 ("**Convention**").[1] More specifically, SOGI has been recognized as a

[1]Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 1 A (2) (Refugee Convention).

characteristic constituting *membership of a particular social group*.[2] This recognition is based on the fact that it is an 'immutable characteristic' and a fundamental aspect of one's identity, which they should not be required to hide or change.[3] Despite this, however, LGBT+ asylum seekers routinely face persecution in the form of severe human rights violations in their home countries, due to which they escape and seek asylum in relatively safer host countries.

Various issues underlie the broad theme of this paper; however, the authors intend to focus on the threshold for persecution under the Convention, the specific issues faced by LGBT+ persons during the process, and the different changes needed in the international refugee framework to make it more inclusive of and sensitive towards the LGBT+ community. Part II of this paper will analyze what kind of acts constitute persecution and explore whether and how an individual's SOGI can act as the underlying cause for persecution, as well as the standard applied by different courts in order to determine the same. Part III and IV will then examine issues of credibility of asylum applications and the manner in which Refugee Status Determination ("**RSD**") is conducted. Part V will focus on case studies of Turkey, Canada, and the European Union to unpack the obstacles faced by an LGBT+ asylum seeker at every stage of the process, and how they face discrimination even after being granted refugee status. The authors have chosen these particular countries primarily because they have established refugee law frameworks in place and are signatories to the Convention. These countries are also those where asylum is most frequently sought as they have anti-discrimination laws in place and are relatively safer in terms of other

[2] ibid.

[3] Benjamin Perryman, Deborah Morrish & Abbas Kassam, 'The Nebulous Nexus Between Sexual Orientation and Membership in a Particular Social Group', [2014] Human Rights Nexus Working Group Meeting, 10th World Conference of the International Association of Refugee Law Judges, Tunisia, 3.

persecutory activities. Thereafter, the paper will focus on the socio-economic discrimination faced by such asylum seekers both during and after RSD and analyze the changes that could be made to the overarching framework in order to ensure better protection of such refugees. Finally, Part VI will provide certain recommendations pertaining to structural changes that could be introduced in the system in order to make it more sensitive to the needs of this community.

II. SOGI AS A GROUND FOR PERSECUTION

Refugees and asylum seekers are entitled to basic non-derogable human rights in accordance with several international human rights instruments, both during and after the status determination process. Such rights include a range of civil, political and socio-economic rights, such as the right to physical security and bodily integrity, right against arbitrary detention, freedom of expression and association, amongst others. For the LGBT+ population, these rights are routinely violated in the form of arbitrary arrest and detention, rapes and torture, discrimination in access to public services, etc.[4] The principle of non-discrimination is also firmly rooted in the Convention which implies that all the provisions and rights under the Convention must be implemented in a non-discriminatory manner.[5] Principle 23 of the Yogyakarta Principles also emphasizes on how everyone has the right to seek asylum from persecution in another country, including when

[4] 'What amounts to 'a serious violation of international human rights law'? '(Geneva Academy, 2014), <https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf> last accessed 27 December 2020.

[5] Preamble, Refugee Convention.

such persecution is on the basis of their SOGI,[6] apart from other rights such as freedom from torture and exploitation,[7] housing,[8] education,[9] health[10] and other basic human rights.

The term 'particular social group' ("**PSG**") as mentioned in Art. 1(A)(2) of the Convention has been subject to a variety of interpretations in the past; however, the most significant one is the 'immutable characteristic' theory. Admittedly, some courts have also taken differing views to state that only a voluntary association of individuals can constitute a particular social group under the Convention.[11] The *Matter of Toboso Alfonso*[12] was the first case to recognize homosexuality as an immutable characteristic, where a gay asylum seeker was granted asylum for being persecuted on the basis of his identity. The Court in *Amanfi v. Ashcroft*,[13] where the applicant faced persecution because of his imputed identity as a homosexual, upheld that persecution on the basis of SOGI can be perpetrated on the basis of imputed or perceived identity.

A fundamental criticism of this interpretation of PSG is that it assumes that an individual's sexuality or gender identity remains static throughout their life. It fails to recognize that such identities are often fluid and can change with time and experiences.[14] It can also be

[6]International Commission of Jurists, 'Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity', (March 2007), principle 23 (A) (Yogyakarta Principles).

[7]Yogyakarta Principles, principle 10.

[8]Yogyakarta Principles, principle 15.

[9]Yogyakarta Principles, principle 16.

[10]Yogyakarta Principles, principle 17.

[11]*Canada- Attorney General v. Ward* [1993] 2 S.C.R 689 (Can.).

[12]*Matter of Toboso Alfonso* [1990] BIA 20 I. & N. Dec. 819.

[13]*Amanfi v. Ashcroft* [2003] 3d Cir. 328 F.3d 719.

[14]Moira Dustin & Nina Held, 'In or out? A Queer intersectional approach to 'Particular Social Group' membership and credibility in SOGI asylum claims in Germany and the UK, 2018', *GenIUS – Rivista di studi giuridici sull'orientamento*

affected by external factors such as culture and general social and political surroundings. As a result, SOGI does not necessarily always have a visible external manifestation.[15] That being said, visibility can still be an essential factor in determining whether the persecution occurred 'on account of' a Convention ground, i.e., the nexus between the persecution and the protected characteristic under the Convention.[16] A significant number of LGBT+ asylum seekers do not have sexual relations or partners and are persecuted based on their identity alone. Therefore, the court in the case of *In Re Acosta*[17] acknowledged that homosexuality is constituted by identity, and not by its performance or action. However, it is essential to consider that a lot of LGBT+ individuals conceal their identity out of fear.[18] Hence, placing undue importance on visibility in LGBT+ asylum claims to establish membership of a PSG may go against the fundamental principles of refugee law i.e., to provide a regime of surrogate protection.

While there is no universally accepted definition of persecution, scholars have argued that major and recurring human rights violations broadly encompass it.[19] This, by implication, suggests that not every human right violation will amount to persecution. Article 9(1)(a) of

sessuale e sull'identita' di genere, No. 2, 74, 78 (2018); Alex Powell, 'Interviews with Asylum Seekers Reveal Why the Home Office Rejects So Many LGBT Claims*'*, (*The Conversation*, 4 September 2019), <https://theconversation.com/interviews-with-asylum-seekers-reveal-why-the-home-office-rejects-so-many-lgbt-claims-122905> accessed 16 June 2020.

[15]Johannes Lucas Gartner, '(In) Credibly Queer: Sexuality Based Asylum in the European Union' in Judith S. Goldstein & Anthony Chase (eds), *Transatlantic Perspectives on Diplomacy and Diversity* (2015).

[16]Fadi Hanna, 'Punishing Masculinity in Gay Asylum Claims' [2005] 114 Yale L. J. 913, 914.

[17]*In Re Acosta* [1985] BIA 19 I. & N. Dec. 211.

[18]ibid.

[19]John Tobin, 'Assessing GLBTI Refugee Claims: Using Human Rights Law to Shift the Narrative of Persecution Within Refugee Law' (2012) 44 International Law and Politics 448, 452; James Hathaway, 'Fear of Persecution and the Law of Human Rights*'* (2002) 91/1 Bulletin of Human Rights 99.

the European Qualification Directive states that the relevant acts must be 'sufficiently serious' by their nature or repetition to constitute a 'severe violation of basic human rights'. The United Nations High Commissioner for Refugees ("**UNHCR**") Guidelines encompass a variety of acts which qualify as persecution: violence, detention, torture, and other grave forms of human and socio-economic rights violations.[20]

The threshold for persecution under the Convention is unclear and has been differently interpreted across the world.[21] This lack of clarity can perhaps be explained by the inherent difference between international human rights law and refugee law, i.e., while the former seeks to protect all human rights irrespective of the degree of violation, the latter is more concerned with providing a regime for surrogate protection in light of a home country's breakdown of state protection. It also focuses more on the violation of human rights based on a Convention ground.[22]

A 'well-founded fear' of persecution is a pre-requisite for making an asylum claim.[23] However, it is incredibly subjective and depends on the applicant's narrative. To determine well-founded fear, the applicant's subjective fear of persecution should be given primary importance. The UNHCR Guidelines specify that past persecution is not a pre-requisite for granting asylum.[24] The UNHCR acknowledges

[20]UNHCR Guidelines, para 20-25.

[21]B.C Nirmal, 'Refugees and Human Rights' [2001] 6 Indian Society of International Law (ISIL) Yearbook of International Humanitarian and Refugee Law 1.

[22]Tobin, (n 19) 451.

[23]Refugee Convention, art 1(A) (2).

[24]UNHCR, 'Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the context of Article 1 A(2) of the 1951 Convention and/or its Protocol relating to the Status of Refugees', (23 October 2012), HCR/GIP/12/01, para 18 (UNHCR Guidelines).

that a lot of such applicants might be fearful of 'coming out' and thus, tend to conceal their identity. Apart from this, a common aspect of such cases is that they are extremely fact-specific and depend on the circumstances and evidence produced.[25] This ambiguity, in turn, leaves a lot of discretionary powers with the authorities to determine claims in line with the host country's political, religious and xenophobic agendas.[26]

The UNHCR also emphasizes on how a pattern of discrimination or targeted harassment could reach the threshold for persecution in some instances.[27] More importantly, each claim of persecution must be analyzed after taking into account the objective circumstances in the home country as well as prevalent homo/transphobia, and subjective lived experiences of the applicant. Aaron Sussman argues that there are certain indicative factors of a 'pattern or practice of persecution' on the basis of SOGI in a country, and that the presence of these factors create an atmosphere where LGBT+ persons are more likely to face persecution.[28] He bases this on the analysis drawn by the US Court of Appeals in the case of *Bromfield v. Mukasey*,[29] where the court analysed such factors present in Jamaica and drew an affirmative conclusion regarding the presence of persecution. Hence, these factors can be used as proof for creating a presumption of well-

[25]Roger Haines QC, 'Gender-Related Persecution', in Erika Feller, Volker Türk & Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003); UNHCR, 'Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity', (21 November, 2008) para 10 (UNHCR Guidance Note).

[26]Swetha Sridharan, 'The Difficulty of U.S. Asylum Claims Based on Sexual Orientation', (*Migration Policy Institute*, 29 October 2008), <https://www.migrationpolicy.org/article/difficulties-us-asylum-claims-based-sexual-orientation> accessed 16 June 2020.

[27]UNHCR Guidance Note, para 10.

[28]Aaron Sussman, 'Expanding Asylum Law's Pattern or Practice of Persecution Framework to Better Protect LGBT Refugees*'* [2013] 16 University of Pennsylvania Journal of Law and Social Change 111, 123.

[29]*Bromfield v. Mukasey*, 543 F. 3d 1071 (9th Cir. 2008).

founded fear. They include laws that criminalise homosexuality, mob violence and state-sponsored violence, ingrained societal homophobia and homophobic culture, amongst others.[30] However, these factors are relatively loosely worded and might lead to an abuse of the RSD procedure by applicants. Creating such a strong presumption may have the impact of allowing applicants to use their SOGI to gain asylum when their reason for persecution was not on the basis of their SOGI. This possibility of abuse is why intersectionality of persecution and its contextualisation against a certain background must be a strong consideration in the determination of claims, instead of looking at the presence of one factor in isolation.

LGBT+ persons all over the world routinely face discrimination and harassment on the basis of their identity, although they are equally entitled to all human rights.[31] The question that then arises is whether they can be reasonably expected to conceal this identity or not be as open about it as they would like, in order to avoid persecution or harassment? The UK Supreme Court in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*[32] emphatically laid down that LGBT+ persons should not be expected to conceal their identity in order to escape or avoid persecution in their country. This position differs significantly from earlier jurisprudence which laid down the 'reasonable tolerance' test, according to which LGBT+ individuals could be expected to avoid persecution by hiding their identity. Scholars have also argued that being forced to hide one's identity can also be a form of self-oppression.[33] It is violative of the fundamental principles of equality, privacy, and non-discrimination as laid down in international human

[30]Sussman, (n 28) 124-129.

[31]UNHCR Guidance Note, para 9.

[32]*HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31.

[33]Tobin, (n 19) 451.

rights instruments.[34] Therefore, such an act would amount to persecution, even though it does not result in an explicit harm to the individual. This view is also supported by the broader reading of the term persecution, i.e., any act which involves a human right violation. However, considering the tests discussed above, not every human right violation would amount to persecution and should be contextualized in each situation depending on the vulnerability and specific impact on the victim, the magnitude of violation of the right, the previous acts of the persecutor, whether such acts were state-sanctioned, etc.[35]

The Yogyakarta Principles acknowledge that LGBT+ persons are entitled to human rights on an equal footing as the rest of the world and also recognize the obligation of states to grant asylum on the basis of persecution due to SOGI.[36] Although not binding, these principles are of persuasive value in the interpretation of human rights jurisprudence and a law criminalizing homosexuality would qualify as persecution not only as per human rights law[37], but also according to the UNHCR Guidelines, which emphasize on how anti-homosexuality laws are strongly indicative of persecution, irrespective of whether they are enforced or the kind of penalties they impose.[38] It is widely accepted that such laws are inherently discriminatory and violative of human rights jurisprudence in general.[39] Hence, although the existence of such laws creates a strong presumption of persecution, the burden is still on the applicant to show the existence of his/her well-founded fear of persecution. The Court of Justice of the

[34]International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art. 27 (ICCPR).

[35]Geneva Academy, (n 4) 34.

[36]Yogyakarta Principles, principle 23 (A).

[37]Senthorun Raj, 'Asylum, Sexual Orientation and,' (2015) The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies, 2.

[38]UNHCR Guidelines, para 17.

[39]*National Coalition for Gay and Lesbian Equality v. Minister of Justice & Ors* [1998] (12) BCLR 1517 (CC) (S. Afr).

European Union, in *X, Y & Z v. Minister voon Immigratie von Asiel*,[40] held that unless the actual implementation of such laws is persecutory, the existence of these laws in itself will not constitute persecution. There needs to be some element of individuated persecution. This interpretation is not in line with the broader human rights understanding of the term persecution and results in narrowing the scope of protection.

III. ANALYSING THE REFUGEE STATUS DETERMINATION PROCESS

The issues faced by LGBT+ refugees and asylum seekers during RSD are unique as compared to other refugees. Despite them being granted rights under the Convention, deep-seated social prejudices create hurdles in the interview and screening process of the asylum seekers. The general legal rule is that the burden of proof is on the applicant to prove his SOGI and substantiate his claim. The authorities investigate the facts with the evidence produced and adjudge the credibility of the claim. The authorities are duty-bound to actively co-operate with the applicant through the entire process.[41] The RSD assesses the claims on two aspects; the applicant's credibility and the evidence produced. UNHCR provides extensive guidelines to assess the credibility of the applicant and offers a uniform evidentiary standard for countries to follow.

On the credibility aspect, the UNHCR Guidelines state that a sensitive and personalised system should be adopted to assess the applicant's

[40] *X, Y &Z v. Minister voon Immigratie von Asiel* Joined cases C-199/12, C-200/12 & C-201/12, [2014] OJ C9/8.

[41] UNHCR 'UNHCR's Oral Submissions at the Court of Justice of the European Union: Hearing of the case of Minister voor Immigratie en Asiel v A, B and C' (25 February 2014) C-148/13, C-149/13 & C-150/1325 para 7.

claim.[42] A conducive environment should be ensured during the screening process to enable applicants to present their claims fearlessly.[43] The focus should not be on the applicant's sexual practices but his experiences and feelings in order to ascertain his SOGI.[44] Although, there is no straightjacket formula to determine the credibility of the applicant's SOGI claim, the UNHCR Guidelines provide probable indicators; for instance, if the applicant identifies himself as an LGBT+ or has 'come out' to others, that ascertains his SOGI.[45] Whether the applicant has engaged in, or has the desire to engage in sexual or romantic relations is another strong indication.[46] Instances of feeling 'different' in their childhood about their SOGI can aid in determining the claim. Moreover, the applicant's non-disclosure of his identity to his family members, previous heteronormative marriage or children out of wedlock should not have an adverse effect on his claim.[47] Transgender applicants may or may not have undergone medical surgery or treatment to match their identity. The applicant may or may not know the LGBT+ community, its culture, or terminology. All these factors do not diminish the credibility of the applicant as it is shaped by his social, economic, and cultural background.[48] These indicators are not conclusive but only act as a helping hand in ascertaining the credibility of the claim.

On the evidentiary front, the UNHCR Guidelines clearly state that the applicant's testimony alone should be taken as primary evidence, as

[42]UNHCR Guidelines, para 62.

[43]UNHCR Guidelines, para 58.

[44]UNHCR, IARLJ and ELENA 'Summary Report: Informal Meeting of Experts on Refugee Claims relating to Sexual Orientation and Gender Identity' (September 2011) para 9.

[45]UNHCR Guidelines, para 63.

[46]ibid.

[47]Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 Intl J Hum Rts 1, 2.

[48]ibid para 7.

they often face persecution from their community or family.[49] It is impermissible to demand documented proof of intimate acts from their private sphere; thus, there is no mandate to produce photographic or documentary evidence or oral statements from witnesses.[50] Additionally, no form of medical testing to determine the applicant's sexual orientation is permitted.[51] Alternatively, forcing a physical demonstration of intimate acts is prohibited as it is a violation of their fundamental human rights.[52] However, medical evidence in the form of sex-change surgeries, hormonal treatments, etc., may be used as corroborative evidence to strengthen the applicant's claim.[53] The UNHCR Guidelines acknowledge that, information on the treatment of LGBT+ persons in the specific home country is often absent; thus, that should not be the sole ground to deny the presence of persecution.[54]

IV. ISSUES OF CREDIBILITY AND EVIDENCE

A significant number of asylum claims are rejected due to their apparent lack of credibility.[55] The problem here, however, lies in the

[49]UNHCR Guidelines, para 64.

[50]Satvinder Juss, 'Sexual Orientation, and the Sexualisation of Refugee Law' (2015) 22 (1) Intl J Minority & Group Rts 128, 152.

[51]UNHCR 'UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on persecution due to Sexual Orientation' (April 2011) para 3.1 (UNHCR Comments on Practice of Phallometry).

[52]UNHCR Guidelines, para 64.

[53]ibid para 65.

[54]ibid.

[55]Casper Latham, 'Credibility of Asylum Claims' (*Richmond Chambers*, 13 August 2019) <https://immigrationbarrister.co.uk/credibility-in-asylum-claims/> accessed 23 June 2020; Alex Powell, 'Interviews with Asylum Seekers Reveal Why the Home Office Rejects So Many LGBT Claims' (*The Conversation*, 4 September

disproportionate emphasis placed on proving one's SOGI as opposed to proving the persecution faced due to their SOGI.[56] This emphasis is demonstrative of a growing trend aimed at ensuring there is as less number of false claims as possible. While on the one hand, it is essential to determine the genuineness of an application, the method of determining the same is often insensitive and degrading.[57] Although UNHCR provides guidelines and a broad framework for the authorities to follow to ensure that LGBT+ applicant's claims are justly accepted, the reality is drastically different.

Firstly, the applicants flee their home country due to persecution from their community or government, leaving them traumatized and in a highly vulnerable position.[58] Majority of them are uncomfortable revealing intimate details about their personal life to the interviewing officials and reliving their trauma.[59] Owing to the sensitivity of the subject matter, the applicant's version of the event during the interview might not always be consistent, detailed, or complete. The psychological trauma, as well as inherent homophobia, affects the interview process, which makes the applicant hesitant or incapable of narrating the event with accuracy, leading to inconsistencies and misrepresentations in the information provided.[60] This hesitation is often used against the applicant as an instrument to strip his

2019) <https://theconversation.com/interviews-with-asylum-seekers-reveal-why-the-home-office-rejects-so-many-lgbt-claims-122905> accessed 23 June 2020.

[56]Gartner (n 15) 45.

[57]Janna Wessels, 'Sexual Orientation in Refugee Status Determination' (Working Paper Series No. 73, Refugee Studies Centre, Oxford Department of International Development April 2011), 13.

[58]Veronica Carlino, 'Fairness Considerations: The Impact of Sexual Orientation on Asylum, Refugee Status, and Persecution' (2012) 18 New Eng J Intl & Comp L 477, 484.

[59]Sheldon Magardie, '"Is the Applicant Really Gay?" Legal Responses to Asylum Claims Based on Persecution Because of Sexual Orientation' (2003) 55 Agenda: Empowering Women for Gender Equity 81, 82.

[60]Jenni Millibank and Laurie Berg, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 (2) JRS 195, 198.

credibility, not accounting for the psychological factor that affects the applicant while narrating his persecution.

Other applicants resist disclosing the real reason for fleeing their country, the event of persecution and their true identity as they fear social stigma or harassment in the host country or discrimination by interviewing officials.[61] They fear being ostracised, harassed, or victimized by the other refugees and asylum seekers as well because the confidentiality of their claim is not always maintained. Interviews are often held in small crowded offices, adding to the asylum seeker's reluctance to freely communicate the details with the authorities which is often employed to question the credibility of the applicant.[62]

Secondly, although the UNHCR Guidelines state that the applicant's testimony in itself is sufficient evidence to prove his SOGI, the authorities, in reality, do not adhere to this principle. There is a culture of disbelief when it comes to claims based on SOGI, primarily since it is easier to make bogus SOGI claims owing to its inherent limitations of refuting it.[63] This disbelief has resulted in a widespread practice amongst officers to demand corroborative evidence from the applicants in addition to their testimony, which the applicants are not always in the position to produce.[64] Applicants seldom have the liberty to gather documentary evidence before fleeing their country, much like other asylum seekers. This demand for corroborative evidence places legitimate applicants at a significant disadvantage by excessively increasing their burden of proof. Although, it can be argued that the mere testimony of an applicant is insufficient to form

[61] Amnesty International, 'Crimes of Hate, Conspiracy of Silence' (Amnesty International Publications 2001) 24.
[62] Magardie (n 59) 83.
[63] David A. B. Murray, 'Queer Forms: Producing Documentation in Sexual Orientation Refugee Cases' (2016) 89 (2) Anthropological Q 465, 479.
[64] Jenni Millibank, 'The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 (1) IJRL 1, 21.

the entire basis for granting asylum and there needs to be some concrete evidence to prove one's LGBT+ status, the circumstances under which the claimants leave their country should also be considered. Obtaining such evidence can be challenging and therefore, expecting it as a pre-requisite for asylum can be unreasonable.[65]

Thirdly, the RSD of the claim is eventually in the hands of the authorities, whose inherent prejudices and expectations come into play.[66] The interviewing officials often rely on the stereotypical idea of mannerisms and appearances to adjudge the SOGI of the applicant, such as a gay man must be flamboyant and feminine, and a lesbian should be butch in their dressing and demeanour.[67] As in many countries, homosexuality is looked at only as an externally visible characteristic. The case of *In Re Soto Vega* becomes relevant in this context as the applicant's claim therein was rejected because he did not display stereotypically homosexual external characteristics.[68] The authorities often engage in inappropriate and sexually explicit questioning.[69] They do not account for cultural and regional differences amongst the applicants; thereby, compelling them to frame their experiences in accordance with westernized concepts of SOGI, so as to fit into the definition laid down in their domestic refugee law and the Convention.[70] Further, there is a tendency to view the entire LGBT+ community as a monolith and comprising mainly of homosexuals. Since the homosexual asylum claims are more in number as compared to bisexual or transgender claims, the spotlight

[65] ibid.

[66] UNHCR Guidance note, para 36.

[67] ibid.

[68] *In Re Soto Vega* [2004] BIA A-95880786.

[69] Marta D'epifanio, 'Credibility Issues of LGBTI Asylum-Seekers in the Refugee Status Determination' [2011] Istanbul Bilgi U. 48.

[70] UNHCR 'Discussion Paper on the protection of lesbian, Gay, Bisexual, Transgender and Intersex Asylum Seekers and Refugees' (22 September 2010) para 31 (UNHCR Discussion Paper).

is primarily on homosexual asylum seekers, effectively sidelining the rest of the LGBT+ spectrum.[71] Several transsexual applicants face specific problems such as gender mismatch with the one specified on their ID and difficulty in accessing public spaces.[72] Bisexual claims are also not given importance and are assessed according to a rigid understanding of sexuality.[73]

The interviewing officials and the interpreters often lack formal training in interviewing vulnerable groups. They have inadequate knowledge and little conceptual understanding of sexual identity, sexual orientation, gender identity, and LGBT+ terminology.[74] They are unaware of the complexities around gender identity and the issues faced by transgender and intersex individuals. Thus, they are often not equipped to hold interviews for the applicants and to adjudge upon their claims. Further, the applicants are from varied cultural and regional backgrounds. They lack an understanding about the correct vocabulary and terminology concerned with SOGI either due to illiteracy or unfamiliarity with the language in the host country, or absence of LGBT+ terminology in the home country. The interpreters must bridge the language and cultural gap; however, ill-informed or an insufficient number of interpreters affects the accurate assessment of claims.

[71]Sean Rehaag, 'Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia' (2009) 13 The Intl J Hum Rts 415, 418.

[72]Rasha Younes, '"Don't Punish Me for Who I Am" Systemic Discrimination Against Transgender Women in Lebanon' (*Human Rights Watch*, 3 September 2019) 61 <https://www.hrw.org/report/2019/09/03/dont-punish-me-who-i-am/systemic-discrimination-against-transgender-women-lebanon> accessed 23 June 2020.

[73]Dustin (n 14) 81.

[74]United Kingdom Lesbian and Gay Immigration Group, 'Failing the Grade: Home Office Initial Decisions on Lesbian and Gay Claims for Asylum' (April 2010) 11 <https://uklgig.org.uk/wp-content/uploads/2014/04/Failing-the-Grade.pdf> accessed 23 June 2020.

Fourthly, although the UNHCR Guidelines explicitly prohibit any form of medical testing to ascertain the sexual orientation of the applicant,[75] certain countries use penile and vaginal plethysmography.[76] Authorities use visual stimuli to measure the degree of arousal without accounting for individual or cross-cultural experiences and psychological factors.[77] Such tests not only infringe human rights but also have no scientific backing.[78] Regardless, they are frequently used to ascertain the SOGI of the applicants,[79] making the interview process exceptionally arbitrary and unmerited. Additionally, in several cases, the authorities have rejected the application if the applicant was married to the opposite sex in the home country;[80] or had children out of wedlock;[81] or had sexual relations with the opposite sex.[82] The authorities ignore that the applicants in their home country are often forced to conform to societal norms induced by family pressure and even coerced into marriages. They might need to hide their real identity to prevent ostracization. There may be instances where the applicant might also discover his SOGI after several years. The authorities often fail to account for these possibilities while assessing credibility of claims.

Fifthly, in regressive countries, there is little to no accurate 'country of origin' information. The existence of LGBT+ people and the

[75]UNHCR Guidelines, para 65.

[76]European Union Agency for Fundamental Rights, 'Current Migration Situation in the EU: Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum Seekers' (March 2017) 6 (EU Asylum Seekers Report).

[77]ibid.

[78]UNHCR Comments on Practice of Phallometry, para 3.1.

[79]UNHCR's Comments on the Practice of Phallometry in the Czech Republic (n 40); UNHCR Discussion Paper, para 33.

[80]Jenni Millibank and Catherine Dauvergne, 'Before the High Court: Applicants S396/2002 and S395/2002, a Gay Refugee Couple from Bangladesh' [2003] 25 (1) The Sidney L Rev 97, 123.

[81]*Leke v Canada (Minister of Citizenship and Immigration)* [2007] FC 848.

[82]UNHCR Guidelines, para 63.

discrimination and abuses that they are subjected to are often suppressed;[83] thus, making it extremely difficult for asylum seekers to corroborate their claims.

Lastly, the intersectionality of identity also plays a crucial role in the assessment of many LGBT+ claims. Often, an LGBT+ asylum seeker's religious, ethnic, or other identities play a role in their persecution. For example, Muslim asylum seekers faced Islamophobia in host countries in the post 9/11 scenario, which also intersected with their sexuality-based oppression.[84] The cause of persecution itself may be a combination of factors which culminate differently in each individual's life. Therefore, it can be challenging to ascertain the cause of persecution due to significant overlaps.[85] This lack of clarity can result in placing an even higher burden of proof on the applicants to establish their cause of persecution. However, as long as the applicants can establish that their persecution was even partly due to a protected Convention ground, they are eligible for protection.[86] This intersectional persecution or oppression can exacerbate their feelings of isolation and mental distress and place them in a position where they are unable to comprehend the reason for their persecution.[87] The UNHCR Guidelines, while acknowledging the subjectivity associated with every applicant's experience, emphasize on how the RSD process should be sensitive in this regard and should strive to create an overall safe environment for them to

[83]UNHCR Discussion Paper, para 23.

[84]'Muslim LGBTIQ+ Refugees More Likely to Gain Asylum in Germany if they Conform to Stereotypes' (*Taylor and Francis Group*, 25 July 2019) <https://www.eurekalert.org/pub_releases/2019-07/tfg-mlr072419.php> accessed 23 June 2020.

[85]Dale Buscher, 'Unequal in Exile: Gender Equality, Sexual Identity, and Refugee Status' (2011) 3 Amsterdam L Forum 92, 96.

[86]*Gafoor v INS*, [2002] 9th Cir. 231 F.3d 645, 652.

[87]Buscher (n 85) 94.

make their claims.[88] That being said, the UNHCR Guidelines, Guidance Notes and other authorities merely serve as tools of interpretative guidance and are ultimately not binding on the states parties. Therefore, in reality, many countries employ their own RSD procedures which significantly differ from the UNHCR Guidelines, and thus, there is a need to bring them in conformity with the same. Several countries do not even collect data on the asylum claims of LGBT+ applicants, as a result of which there is no analysis as to how many such claims are successful.[89] The inherent drawback of refugee law can explain this inconsistency, i.e., a primary dependence on States' political will for its effective implementation.

An analysis of the RSD process exposes its bitter reality. The authorities in most countries ignore the UNHCR Guidelines, the domestic instruction manual[90] and domestic judgments[91] while adjudicating LGBT+ claims. The applicant is imposed with an overwhelming burden of proof. On one hand, when applicants do not reveal their SOGI-based persecution due to fear of social discrimination and stigmatization, they get their claims rejected due to a lack of credibility. On the other hand, when the applicants reveal their SOGI, their application still gets rejected if their mannerism or appearance does not conform to preconceived notions of SOGI, or if they are unable to produce corroborative evidence of their SOGI. Therefore, attempts have been made by various countries to sensitize RSD procedures and implement training programs for their officials

[88]UNHCR Guidelines, paras 58, 59.

[89]European Commission, 'Ad Hoc Query on NL AHQ on National Asylum Policies Regarding LGBT asylum-Seekers' (*European Migration Network*, 2 May 2016) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/ad-hoc-queries-2016.1061_-_nl_ahq_on_national_asylum_policies_regarding_lgbt-asylum_seekers.pdf> accessed 23 June 2020.

[90]U.S. Citizenship and Immigration Services, 'Guidance for Adjudicating LGBTI Refugee and Asylum Claims' (RAIO Combined Training Course 2011) (US – RAIO Training Course).

[91]UNHCR's Oral Submissions (n 41).

to help them better assess such claims.[92] This effort is only a small measure in light of the pervasive discrimination against LGBT+ refugees, and there is a need to amend various aspects of the asylum process in order to make a significant impact.[93]

V. POST STATUS DETERMINATION: AN ANALYSIS

The discrimination faced by LGBT+ asylum seekers owing to their identity goes beyond the RSD process. Even after attaining refugee status in the host country, they continue to be one of the most vulnerable groups in the society. They face significant hardships during the resettlement process as well. Factors such as ingrained homophobia and transphobia, issues in documentation and intersectional oppression create further barriers in offering them adequate protection and result in a denial of their socio-economic rights. The authors have examined the asylum regimes of Turkey, Canada and the European Union in order to study the treatment of LGBT+ refugees. These countries have varying degrees of tolerance towards the LGBT+ community and also differ in economic development and thus, can provide a broader understanding of the quality of life of LGBT+ refugees post the RSD process. In terms of international treaty obligations with respect to the protection of refugees, these countries are signatories to the Convention as well as the 1967 Protocol relating to the Status of Refugees which imposes on them certain binding obligations such as guaranteeing basic humanitarian treatment to refugees, amongst others.

[92]EU Asylum Seekers Report 8; US – RAIO Training Course 29.
[93]Sridharan (n 26).

A. Case Study on the treatment of refugees in Turkey

Turkey has ratified the Convention and the Protocol Relating to the Status of Refugees, 1967, and provides protection to refugees under the same. Turkey receives thousands of asylum seekers from Asia, Africa, Europe, and the Middle East; however, it provides protection only to individuals originating from Europe owing to its own limitations.[94] Non- European asylum seekers are allowed to stay temporarily during the pendency of the application for resettlement with UNHCR. The refugees are assigned to pre-designated 'satellite cities' by the Turkish government. However, they are seldom provided with any financial support by the government or the UNHCR. The burden of housing, food, and healthcare costs falls on the refugees themselves. This puts LGBT+ refugees and asylum seekers in a perilous position.[95]

The LGBT+ refugees and asylum seekers in Turkey are highly vulnerable and live an extremely precarious life. Although the domestic law in Turkey does not criminalize homosexuality, there prevails an intolerant environment and animosity towards the sexual minorities in the society. The LGBT+ refugees and asylum seekers have often been victims of verbal and physical harassment, taunts, threats, beatings, and sexual assault by the local community.[96] Additionally, because they are non-citizens and cannot speak the local language, they are targeted more than the Turkish LGBT+ population. Moreover, the refugees have little faith in law enforcement as the

[94]Helsinki Citizens' Assembly-Turkey and Organization for Refuge, Asylum, and Migration, 'Unsafe Haven: The Security Challenges Facing Lesbian, Gay, Bisexual and Transgender Asylum Seekers and Refugees in Turkey' (June 2009) 2 (Unsafe Haven).

[95]ibid 1.

[96]'"We Need a Law for Liberation": Gender, Sexuality, and Human Rights in a Changing Turkey' (*Human Rights Watch*, 22 May 2008) 25 <https://www.hrw.org/report/2008/05/21/we-need-law-liberation/gender-sexuality-and-human-rights-changing-turkey> accessed 23 June 2020 (Human Rights Watch).

local police are either unwilling or incapable of protecting them. Although, the refugees are entitled to the same rights as the citizens in terms of police protection and legal recourse,[97] the police rarely investigate cases filed by them.[98] Instead the police often engage in victim-blaming and reprimand the refugees for filing complaints.[99] As a result, they fear going outside and prefer staying at home. Scholars have argued that this results in double marginalization, which is a result of their intersecting oppression, i.e., that of their LGBT identity, as well as that of their race or nationality. It is not merely the effect of simultaneously belonging to both communities, but the multi-layered effect this has on their lives.[100]

The refugees have to personally incur the cost of housing, which becomes burdensome for the LGBT+ refugees and asylum seekers as they seldom find a job, having fled their country with a minuscule amount of money. They are generally housed together, but their apartments are overcrowded and small. Landlords discriminate against them by refusing to lease them a place or evict them, in case their SOGI is discovered at a later stage.[101] There have been instances of neighbours filing bogus complaints to the police or landlords in order to get such refugees evicted on account of their SOGI.[102] Although, Turkish law does not explicitly prohibit housing discrimination based on SOGI, certain protections are given to legal tenants.[103] However, the majority of LGBT+ refugees do not sign

[97]Constitution of the Republic of Turkey arts. 10, 12.
[98]Unsafe Haven (n 94) para 3.3.
[99]ibid.
[100]Pamela Heller, 'Challenges Facing LGBT Asylum Seekers: The Role of Social Work in Correcting Oppressive Immigration Processes' (2009) 21 J of Gay & Lesbian Social Services, 295.
[101]Human Rights Watch (n 96) 42.
[102]Unsafe Haven, (n 94) para 3.4.
[103]Code of Obligations and Real Property Rentals Act No. 6570 (1955).

official housing contracts and thus, are unable to avail protection of the law. Additionally, although they have a legal right to file a case against the landlord, court charges and exorbitant legal fees make any legal recourse inaccessible.

Turkish refugee regulation recognizes all asylum seekers' right to seek employment.[104] However, in reality, the employment process is extremely strenuous, expensive, and complicated, and thus, very few can exercise this right. The refugees are mandated to submit identification proof, educational documentation, hold a six-month residence permit and obtain a sponsorship from the employer to apply for a job.[105] Obtaining all three is extremely difficult; therefore, only a small number of refugees can obtain employment legally. Besides, there exists an inherent bias in the local community that makes it more difficult for LGBT+ refugees to obtain employment.[106] Majority of the LGBT+ refugees fail to find a job despite several efforts, due to their external appearance. Some are even humiliated and targeted with sexual slurs by customers.[107] They face employment termination too, if their SOGI is revealed later. Such a situation inadvertently compels LGBT+ refugees to engage in illegal employment. These employers take advantage of their vulnerable position and subject them to inhumane working conditions and low pay. They face employment discrimination, sexual harassment, physical violence, and mistreatment both from employers and co-workers.[108] With the pressure of economic survival and lack of alternatives, they keep enduring the ill-treatment.

[104]Ministry of Interior General Directorate of Security Circular No.57 (22 June 2006) art. 19.
[105]Unsafe Haven, (n 94) 20.
[106]'World Refugee Survey 2009: Turkey' (*United States Committee for Refugees and Immigrants*, 17 June 2009).
[107]'Report on Turkey: Fourth Monitoring Cycle' (*European Commission against Racism and Intolerance*, 8 February 2011) para 138.
[108]Unsafe Haven, (n 94) 21.

Some even resort to sex work for survival and are often forced to engage in unprotected sex by the clients, in addition to being subjected to continuous harassment and violence.[109] Thus, LGBT+ refugee sex workers face multi-layered marginalization - they are refugees, belong to the LGBT+ community, are employed in a socially- ostracized job, and have minimal access to healthcare. They are forced into this occupation, which opens them to health issues through sexually transmitted diseases and compromises their physical safety.

LGBT+ refugees, like other refugees, are required to pay for their medical costs. UNHCR provides minimal financial support only to the most vulnerable. Medical care is inaccessible to a majority of them due to their vocational and financial marginalization.[110] They are unable to meet the expenses of treatments, surgeries, and medicines. Furthermore, owing to their marginalization and past trauma, they suffer from anxiety, depression, PTSD, suicidal thoughts, insomnia, etc. Mental health problems are apparent, but mental health support systems are inaccessible in the satellite cities to which they are assigned.

The LGBT+ refugees and asylum seekers in Turkey are incredibly marginalized, with virtually no employment, healthcare, housing, and financial assistance. They are socially ostracized and face frequent physical, mental, and sexual assault with no legal recourse.

B. Case Study on the treatment of refugees in the European Union

[109] Unsafe Haven, (n 94) 22.

[110] Tulin Gencoz & Murat Yuksel, 'Psychometric Properties of the Turkish Version of the Internalized Homophobia Scale' (2006) 35 Archives Sexual Behavior 597, 600.

All European Union Member States are signatories to the Convention, and they implement the guidelines laid down under the Convention through national legislation.[111] Additionally, the European Qualification Directive lays down a uniform standard for qualification of stateless persons and protection that should be extended by the EU member states.[112] It expressly mentions SOGI as a valid ground for persecution,[113] which resonates with the principles of equality and non-discrimination enshrined in the EU Charter of Fundamental Rights.[114] The qualification provides for a standard of assessment of credibility, evidence[115] and protection such as a resident permit and accommodation,[116] access to employment,[117] healthcare[118] and social welfare.[119] The Asylum Procedures Directive is adopted to provide professional training to interviewing officers and interpreters on issues concerning LGBT+.[120]

Although, on paper, the refugees are given complete protection; in practice, the reality is drastically different. At the stage of assessment, the Court of Justice of the European Union has laid down clear cut parameters for the applicants claiming refugee status based on SOGI.

[111]Anita Orav, 'The EU and the UN Refugee Agency (UNHCR): At a glance' (*European Parliament Research Service*, May 2015).

[112]Council Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast) [2011] OJ L 337/9.

[113]Orav (n 111).

[114]Charter of Fundamental Rights of the European Union [26 October 2012] OJ C 326/02 arts. 20, 21 (EU Charter).

[115]EU Charter, art. 4.

[116]EU Charter, arts. 24, 32.

[117]EU Charter, art. 26.

[118]EU Charter, art. 30.

[119]EU Charter, art. 29.

[120]Council Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and withdrawing International Protection (Recast) [2013] OJ L 180/60.

In *Minister voor Immigratie en Aiel v. A, B, and C*, the UNHCR reiterated that the applicant's testimony counts for primary evidence, tests for ascertaining SOGI are impermissible, and any previous heteronormative marriage or sexual relations or the existence of children by itself does not affect the credibility of the applicant.[121] However, in Hungary, the authorities seek evidence beyond the applicant's testimony as proof that the applicant belongs to the LGBT+ community. Therefore, they assign psychiatrists to perform tests on the applicants to assess their sexual orientation.[122] On the other hand, authorities in Finland often lack the academic capability and skill to assess claims made by LGBT+ applicants.[123] The training of reception staff is not done in a systematic format; no specific training or educational session takes place in France and Greece to ensure awareness about LGBT+ issues and terminology.[124] The interviewing officers, staff members, and police working with LGBT+ refugees rarely attend educational seminars on how to interact with vulnerable groups.

In Germany and Spain, LGBT+ citizens are frequent victims of homophobia, transphobia, harassment, and violence, which render LGBT+ refugees and asylum seekers vulnerable to it as well. Hate crimes are perpetrated by individuals, government, private organizations, and vigilante groups. The hate crimes against LGBT+ refugees are rarely officially recorded or reported; thus, the available data and numbers are inaccurate and misleading.[125] Civil society organizations and several unofficial sources in Denmark, Sweden, Finland, and the Netherlands regularly report instances of physical

[121] UNHCR's Oral Submissions (n 41) para 12.
[122] EU Asylum Seekers Report, 6.
[123] ibid.
[124] ibid 8.
[125] ibid 13.

and verbal assault, sexual harassment, threats, stigmatization, and discrimination.[126]

Most EU member states do not provide private or LGBT+ specific accommodation for LGBT+ refugees. However, countries like Denmark, France, and Finland try to relocate them on a case-to-case basis.[127] In Sweden, refugees with special social needs are allotted special security accommodation, and LGBT+ refugees qualify for such special housing, especially if they have been victims of harassment in their previous housing.[128] However, the demand for these special housing units is higher than the supply; thus, not all eligible LGBT+ refugees can avail of this facility. Women are preferred over men, especially gay men, for transfer to more secure accommodation. Cisgender gay men are only moved when they face some sort of harassment or discrimination.

Majority of the EU member states provide necessary healthcare, including vital treatments and emergency care to all refugees, including the LGBT+ refugees. However, the problem arises in gaining access to hormonal treatment for transgender refugees. Hormonal treatment is of particular importance as interruption of such treatment has dire physical and psychological consequences on the refugee-patient.[129] There is an absence of universal guidelines or practices followed by all member states concerning the completion of already initiated hormonal treatment. On one hand, Sweden, France, and Denmark assess the urgency on a case-to-case basis and accord

[126] ibid 14.
[127] ibid 13.
[128] 'Accommodation with the Migration' (*Swedish Migration Agency*) <https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/While-you-are-waiting-for-a-decision/Accommodation/Accommodation-with-the-Migration-Agency.html> accessed 23 June 2020.
[129] EU Asylum Seekers Report, 14.

treatment.[130] On the other, Finland and Netherlands automatically permit already initiated treatment to continue even at the stage of the asylum process.[131] While countries like Greece, Hungary, and Poland do not extend hormonal treatment to refugees or asylum seekers at all.[132]

On a detailed analysis of the policies, societal norms and behaviour, it is evident that the LGBT+ refugees are reduced to the margins of the society in the EU states. The EU states have been unable to protect the interests of the LGBT+ refugees. However, they have acknowledged the hardships faced by the LGBT+ refugees and have taken steps to improve the system. Majority of the EU states have established policies to handle LGBT+ claims, introduced LGBT+ sensitivity training, attempted to improve conditions in reception facilities, and collated statistics on LGBT+ asylum seekers. However, the EU member states still have a long way to go in terms of treating their LGBT+ refugees at par with their citizens.

C. Case Study on the treatment of refugees in Canada

LGBT+ applicants and refugees in Canada frequently face lack of access to necessary facilities such as medical care, housing, lawyers, etc. during the application process. This also has a bearing on the quality of their claim and the kind of evidence they can produce. Given how a large part of the decision hinges on the nature of the evidence, a lack of access to lawyers puts them at an unfair disadvantage.[133] The RSD procedures of most countries also do not cater to the specific needs of disabled, HIV positive, or racially

[130] ibid 14.
[131] ibid 15.
[132] ibid 15.
[133] Angus Grant & Sean Rehaag, 'Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System' (2015) Osgoode Legal Studies Research Paper Series, 3.

marginalized sections of LGBT+ asylum seekers.[134] Most of them are not allowed to work, and hence even basic sustenance is a challenge.

In Canada, there is a provision for 'designated country of origin' ("**DCO**") which signifies those countries that are determined relatively safe to return to for asylum seekers. LGBT+ individuals from such countries are subjected to expedited asylum procedures. The criteria on the basis of which such countries are determined 'safe' fail to consider factors which impact the everyday life of an LGBT+ person.[135] For example, merely because homosexuality is not criminalized in a country does not mean it is safe in all respects for a homosexual or another member of the LGBT+ spectrum. A large number of corrective rapes, police brutality and generally anti-homosexual or transsexual culture are reported in countries such as Brazil and South Africa, both of which seem to be LGBT+ friendly countries on paper.[136]

Recent changes in Canada's immigration regime adversely affected a lot of marginalized asylum seekers. Those who come from DCOs are given shorter work permits and are not allowed to access basic or advanced healthcare through the integrated federal health program. Canada also has a system whereby refugees are given social insurance cards starting with the number 9, thus revealing their refugee status.[137] These measures, combined with generally prevalent homophobia and

[134]Nick J. Mule & Erika Gates-Gasse, 'Envisioning LGBT Refugee Rights in Canada: Exploring Asylum Issues*'*, 16, (*OCASI*, June 2012), <https://ocasi.org/downloads/Envisioning_Exploring_Asylum_Issues.pdf> accessed 23 June 2020 (Envisioning).

[135]ibid 20.

[136]Amnesty International, 'Making Love a Crime: Criminalisation of Same Sex Conduct in Sub Saharan Africa' [2013], <https://www.refworld.org/pdfid/51d2a0144.pdf> accessed 6 October 2020.

[137]Canada Research Team of Envisioning Global LGBT Human Rights, 'Envisioning LGBT Refugee Rights in Canada: Is Canada a Safe Haven?*'*, (*OCASI*, September 2015), 29, <https://ocasi.org/sites/default/files/lgbt-refugee-rights-canada-safe-haven_0.pdf> accessed 23 June 2020.

xenophobia, prevents them from accessing employment even during the asylum process. Racial discrimination is one of the most common forms of discrimination in Canada, and the intersection of this with a person's LGBT+ and refugee status can create multiple forms of oppression for these persons.[138] The asylum law regime also does not cater to the specific needs of differently-abled or HIV positive applicants.[139] Many of them face severe mental health issues due to the arduous asylum process as well as their past persecution, for which they are unable to access primary healthcare.[140] This also creates great barriers in their resettlement into the country after being granted asylum.

Therefore, there is a need to create LGBT+ friendly spaces even amongst seemingly LGBT+-friendly countries. The UNHCR should ideally step in to ensure a more sensitized and enhanced RSD procedure for LGBT+ claimants. For example, in Turkey, the UNHCR has stepped in to take palliative measures by making specific recommendations to promote inclusivity in their refugee regime. These include measures such as enacting specific anti-discrimination legislation with SOGI as a protected ground, laws to prevent violence and hate crimes, and specific amendments to their penal laws in order to prohibit discrimination against such refugees while trying to access housing, employment, and education.[141] Decision-makers should also be trained to focus more on the persecution faced by the claimants as opposed to establishing their identity.[142]

[138]Envisioning, (n 135) 10.

[139]Envisioning, (n 135) 26.

[140]Sarah Hall & Rohan Sajnani, 'Mental Health Challenges for LGBT Asylum Seekers in Canada', (*OCASI*), <https://www.amssa.org/wp-content/uploads/2015/06/Envisioning-Mental-Health-Information-Sheet1.pdf.> accessed 23 June 2020.

[141]Envisioning, (n 135) 9.

[142]UNHCR Guidelines, para 60 (ii).

VI. RECOMMENDATIONS: QUEERING THE SYSTEM

LGBT+ refugees and asylum seekers experience persecution in a complex manner. They are most vulnerable to discrimination, violence and sexual abuse in the refugee system; however, they are given the least priority. Since LGBT+ refugees and asylum seeker's claims give rise to unique challenges, they require unique solutions to safeguard their interests. Therefore, the authors propose specific recommendations to make the refugee system more inclusive and sensitive to the issues and needs of LGBT+ refugees.

Firstly, all countries should be signatories to the Convention Relating to the Status of Refugees, 1951 in order to make them obligated to grant asylum to those asylum seekers and refugees who are forced to flee from their home country due to persecution. They should inculcate the provisions of the Convention into their domestic law to ensure the protection of LGBT+ refugees. Further, courts must also adopt a more liberal approach towards what constitutes persecution and give more importance to the subjective experience of the applicant. At the same time, courts must also objectively analyse the situation of home countries of asylum seekers. While determining whether a particular act or law qualifies as persecution, international human rights instruments should also be given importance.

Secondly, there is a need to re-examine the current refugee law policies and framework to formulate a custom-made approach for each member of the LGBT+ community. It is vital to recognize that each group of the LGBT+ community requires a tailored approach and detailed individual attention in future policies and frameworks made in the sphere of refugee law. While it may appear that the LGBT+ refugees and asylum seekers have gained much traction over the years, in reality, research and studies have been limited only to gay men, while lesbians, bisexuals, and transgender people are side-

lined.[143] Moreover, statistics prove that there exists a lacuna in research on lesbians; their issue is integrated with gender-based issues and ignored on the sexual orientation front.[144] Women's sexual orientation gains less traction as women's sexual activity has historically been less visible and less threatening to the society when compared to gay men's sexuality.[145] Lesbian refugees and asylum seekers face multi-layered marginalization: as a refugee, a lesbian, and as a woman. Furthermore, bisexual asylum seeker's claims are repeatedly rejected because of the notion that their freedom of 'choice' absolves them of any fear of persecution.[146] Bisexual applicants challenge the very core of asylum procedures that is based on binary sexual orientation. There is a need to re-analyse the principle of fear of persecution, specifically from the viewpoint of bisexuals, and emphasis should be given to flexible or fluid categories as well.[147] Thus, it is imperative to individually research on the invisibility of lesbians, bisexuals and transgender persons, their claims, and the unique problems faced by them during the asylum procedure and formulate and implement appropriate policies in the host countries.

Thirdly, every interviewing official and interpreter should go through a mandatory training programme that educates and familiarises them to concepts of sexual orientation, gender identity, and LGBT+

[143]UNHCR, 'Protecting Persons with Diverse Sexual Orientations and Gender Identities' (December 2015) para 1.3.

[144]Victoria Neilson, 'Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims' (2005) 16 Stanford L & Poly Rev 417, 440.

[145]Fatma E. Marouf, 'The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender' (2008) 27 Yale L & Poly Rev 47, 84.

[146]Millibank (n 60) 213.

[147]Juss (n 50) 144.

UNHCR Guidelines, para 66.

terminologies and other related legal issues.[148] This training should specifically address unique issues that arise in LGBT+ claims and should aim to sensitize the officials to the difficulties that are specific to the applicants. They should be trained to neither ask needlessly invasive intimate questions nor ascertain credibility based on stereotypical mannerisms and looks.[149] They should be instructed to be attentive, to make use of appropriate terminology while addressing the applicant, and to adhere to absolute confidentiality and impartiality. The interviews must always be conducted in private rooms or offices to maintain privacy and confidentiality. The comprehensive UNHCR guidelines pertaining to credibility and evidentiary standard should be universally followed by the interviewing authorities.[150] Further, measures ought to be taken to develop and adopt interview techniques and tools which incorporate the perspectives of sexual minorities and vulnerable groups.[151]

Fourthly, authorities should recruit and maintain an adequate number of trained interpreters to communicate in the required language so as to bridge the gap between the applicant and the interviewing officials. Measures must be taken to avoid recruiting interpreters from the local asylum population in order to ensure a safe space for LGBT+ refugees to express their claims freely.[152] Authorities should attempt to assign a female or a male interviewing official and interpreter based on the applicant's preference to ensure a comfortable setting during the interview.[153] A regular sensitization training should also be conducted for individuals from the health sector, education sector,

[148]UNHCR Guidance note, para 37.

[149]Amanda Gray & Alexandra McDowal, 'LGBT refugee protection in the UK: from discretion to belief?' (*Forced Migrants Review*, 2013) 24 <https://www.fmreview.org/sogi/gray-mcdowall> accessed 23 June 2020.

[150]UNHCR Guidelines, paras 62- 66.

[151]UNHCR Discussion Paper, para 63.

[152]Unsafe Haven, 13.

[153]ibid 26.

social assistance, and police department who interact with the LGBT+ refugees and asylum seekers. Such measures will reduce the harassment and discrimination that the LGBT+ refugees and asylum seekers face.

Fifthly, the host countries need to make necessary modifications to provide real protection to the LGBT+ refugees and asylum seekers. The asylum process or resettlement process for the applicants should be expedited, and efforts should be made to create an environment that is conducive for the refugees during the pendency of the claim. Additionally, a conscious effort should be taken to allot the LGBT+ refugees to cities or zones with local LGBT+ communities or with communities that are tolerant towards them, in order to ensure integration in the society. Furthermore, they should be re-assigned immediately to a safer location if instances of harassment or discrimination occur.

Domestic anti-hate crime legislation should be passed and implemented with explicit provisions penalizing discrimination and violence on the basis of SOGI as well as discrimination in employment and housing due to an individual's SOGI. Further, the police personnel should respond adequately and instantaneously to complaints filed by the LGBT+ refugees. A specially designated police officer must be assigned to work on cases related to the LGBT+ community.

Sixthly, measures should be taken to reduce economic hardships on the LGBT+ refugees by easing the process for securing housing, employment, and healthcare. Housing permit fees that are imposed by several countries should be waived off for all impoverished refugees and asylum seekers. The government should consider waiving off cumbersome procedural mandates like documentation and fee requirements on a case-to-case basis to increase the accessibility to

jobs for refugees.[154] The government bodies should also take necessary measures to ensure free universal health care and access to medication akin to its citizens.

Lastly, steps should be taken to maintain accurate and updated information in the country-of-origin information reports on the treatment of all groups of LGBT+ individuals. Accurate country of origin information will drastically reduce the burden on the applicant to prove fear of persecution during the assessment procedure.

Through the adoption of these recommendations, the refugee law regime will get one step closer to ensuring a safe, equal and inclusive environment for LGBT+ refugees and asylum seekers to live in.

VII. CONCLUSION

LGBT+ refugees form one of the most vulnerable groups in the refugee system. They are in a constant battle with their family, community, government and themselves. They are victims of human rights violations in their home country, forcing them to flee in order to seek asylum at a safer place in the hope of having a better life. However, most of the host countries turn out to be an unsafe haven for them. There is a general perception of disbelief against the LGBT+ claimants in the RSD process. Even when the LGBT+ claimants gain refugee status, they face discrimination in healthcare, employment and housing in the host countries where the society is intolerant towards the LGBT+ community. Although, a wide range of countries like Canada, Turkey and EU member states have been analysed, the conclusion drawn is the same. LGBT+ refugees do not receive the treatment that they are entitled to; they continue to be a severely marginalized group in society.

[154] Unsafe Haven, 26.

The host countries should ensure that their life and dignity is safeguarded. The host country is responsible for their protection not only during the screening and assessment process but also during their entire stay. Since the issues of LGBT+ refugees are unique, they require special attention. Thus, there is an urgent need to queer the entire system.

INTERLOCKING DIRECTORATES: AN INDIRECT THREAT TO COMPETITION IN INDIA

Siddhant Bhasin[*] *& Pragya Saraf*[**]

Abstract

The paper seeks to highlight the issue of interlocked directors within companies in India. They are persons who are on the board of two or more companies or have represented the same investor in two or more competing firms. This practice provides a channel of information as well as decision making which, if coordinated by competing firms can be detrimental to competition and adversely affect consumers' interest. Currently under Indian law, there is no express bar on interlocked directorates, which limits the ability of competition authorities to tackle such issues head-on. Consequently, heavy reliance becomes extensions of other general principles on a case-to-case basis. In this paper, we look at other jurisdictions for inspiration to help arrive at a legal solution that is suitable to India. A comparison is drawn between the approach of India and the EU and the contrast of both of those approaches with the United States. A number of other developing economies (China, Japan

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& South Korea) which have already dealt with the subject are reviewed to understand the different institutional approaches. Contextualising the responses of competition authorities around the world, with the circumstances in India, a number of recommendations are made, including – the need for legislative intervention, the threshold of prohibition and the requirement of government-regulator collaborations. These steps are important to safeguard the competition environment and fulfil the objective aims of Indian competition law.

I. INTRODUCTION

With increasingly creative ways for companies to perform at the cost of the final consumer, it becomes important for a competition law regime to be equally robust and responsive. Indirect connections between companies by virtue of the connections of their directors or other key management personnel provide for a platform for companies to engage in anti-competitive behaviour. One such connection is an interlocked director. An interlocked director is one who sits on the board of two or more competing companies, thus linking these companies in an indirect manner. Although the Indian Competition Act, 2002 ("**Act**") does not have any specific provision which opposes interlocking directorates, the concept is recognized tangentially by the Competition Commission of India ("**CCI**") in its merger control cases.[1] This paper seeks to analyse how such

[1]Arihant Agarwal and Aditya Mukherjee, 'Interlocking Directorates and its Relevance to Competition in India'', (2020) The Indian Review of Corporate and Commercial Laws, 22 January, <https://www.irccl.in/single-

interlocked directors could be a problem for competition law. Part I will deal with the concept of interlocks as well as the role that directors play in a company. Part II seeks to look into the manner in which the European Union ("**EU**") deals with the anticompetitive effects of interlocking directorates. Part III will discuss the position of the United States on such directors. Part IV will examine the Indian position in light of Section 3 of the Act, as well as the Companies Act, 2013. The parallels and deviations between the positions across jurisdictions will be highlighted and finally, we seek to provide recommendations for the manner in which such interlocked directorates can be evaluated and reduction in consequent anti-competitive effects, effectuated.

II. WHAT ARE INTERLOCKING DIRECTORATES AND THEIR EFFECTS

The concept of interlocking directorates is the ability of one director to sit and serve on the board of multiple corporations.[2] Interlocking directorates are not illegal *per se,* as the Companies Act allows a person to be a director and hold the office of a director in up to twenty companies at the same time with the restriction that only ten of them can be public companies.[3] The problem arises in the event where such interlocks occur in competing companies and they seek to gain from such links, to the detriment of the integrity of the market and the consumers. The concept of interlocks extends beyond the title of 'director' and could be the result of different offices like that of a

post/2020/01/22/Interlocking-Directorate-and-its-Relevance-to-Competition-in-India> accessed 20 April 2020.

[2]Michael E. Jacobs,' 'Combating Anticompetitive Interlocks: Section 8 of the Clayton Act as a Template for Small and Emerging Economies'', (2014) 37(3) Fordham Intl L.J. 643.

[3]The Companies Act 2013, Section 165.

CEO or an auditor, or when different people on each board represent the same person.[4] Interlocking directorates can thus provide access to sensitive information on prices, costs, future strategies and other key competitive decisions that can assist competitors to reach explicit or implicit agreements and to monitor their adherence to such agreements.[5] They can be direct (one person sitting on the board of two competing companies) or indirect (different persons linked by close family relation or sitting on the board of a third unrelated company).

Johannes Pennings enquires into whether interlocked directorates provide an unfair advantage to the corporations that have them?[6] Firms enter into such interlocked directorates to develop connections and manage their dependence on other organisations. It is seen mostly in the case of oligopolies, where companies must develop strategies to cope with the competition in an environment with some degree of interdependence. "*Interdependence on competitors requires firms to improve their information about market conditions so that they can neutralize the adverse effects of competitive interdependence*" says Pennings.[7]

The study conducted by Pennings seeks to understand whether the theoretical prediction of interlocking directorates that contribute to better organisational effectiveness, due to acquisition of better intelligence or anticipation of contingencies,[8] can be confirmed in

[4]Vidir Petersen, 'Interlocking Directorates in the European Union: An Argument for Their Restriction', Eur. Bus. L. Rev. (forthcoming 2016).

[5]Directorate for Financial and Enterprise Affairs Competition Committee, '*Roundtable on Antitrust Issues Involving Minority Shareholding and Interlocking Directorates*', (DAF/COMP(2008)30).

[6]J.M.Pennings, 'Interlocking Directorates: Origins and Consequences of connections among organisations' Board of Directors' (Jossey-Bass 1980).

[7]ibid.

[8]Oliver E. Williamson, 'Markets and hierarchies: analysis and antitrust implications: a study in the economics of internal organization' (1975).

practice. The study having looked at a number of corporations from diverse fields concludes thus:

"*well-interlocked firms perform better than poorly interlocked firms. The effect of the from-financial interlocks appears to be strong, as does the effect of the to-financial interlocks. Quasi-competitive collusion, in the form of horizontal interlocks, does not enhance the effectiveness*."[9]

The conclusion of this study provides the basis of the rationale for regulatory intervention in cases of interlocked directorates. Although information asymmetry will always benefit the better informed, it becomes the duty of a regulator to level the playing field within the market so as to reduce the negative effects of such asymmetry, as far as possible. The minimum disclosure requirements,[10] disclosures between related parties,[11] as well as strict penalties for trading or communicating unpublished price sensitive information,[12] are examples where the regulatory body seeks to reduce information asymmetry.

The management of the corporate entity is undertaken by a board of directors, who are appointed by the shareholders. These directors have the responsibility to carry on the operations of the company. There exists an agency relationship between the company and the director.[13] The directors also act as trustees of the money and properties of the company wherein, they must account for the money

[9]J.M.Pennings, 'Interlocking Directorates: Origins and Consequences of connections among organisations' Board of Directors' (Jossey-Bass 1980).

[10]Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Regulation 4.

[11]Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Regulation 23 and Schedule V Para A.

[12]Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, Regulation 3 and Regulation 4.

[13]*Ferguson v. Wilson* (1886) LR Ch App 77.

over which they exercise control.[14] In exercise of their duties, the directors are privy to sensitive information relating to the company or its business, the company's strategic goals and future prospects. Since there exists a fiduciary relationship between the company and its directors,[15] the company in theory, must wholly be able to trust the director and believe that the director would look after the company's interests.[16] When such director is appointed to the board of two competing companies, it opens an unofficial channel of information that is not publicly available, either giving both companies or the more powerful one leverage over the another and consequently an incentive to act in concert. In both cases, it becomes the duty of the regulatory body to take into account and monitor anticompetitive effects and actions.[17]

At this stage, it must be clarified that this paper does not seek to prove that interlocks *per se* should be prohibited. It seeks to show firstly, the negative effects on competition by turning a blind eye to interlocks, and secondly, that only those interlocks which cross a certain threshold should be prohibited.

The OECD 2008 Policy Roundtable also came to the conclusion that although there is no *per se* illegality of structural links between competitors, interlocking directors (and minority shareholdings) can have negative effects on competition by reducing the individual incentive to compete or by facilitating collusion.[18] A 2002 Study in

[14]*Sharp, re* (1892) 1 Ch 154; *Great Luxembourg Railway Co. v. Sir William Magnay* (1858) 25 Beav 586.

[15]The Companies Act 2013, Section 166; *Sangramsinh P. Gaekwad &Ors., v. Shantadevi P. Gaekwad* AIR 2005 SC 809.

[16]*Turner Morrison & Co. Ltd. v. Shalimar Tar Products* (1980) 50 Comp Case 296 (Cal); *New Zealand Netherlands Society Inc v. Kuys* (1973) 1 WLR 1126 (PC); *Rajeev Saumitra v. Neetu Singh* 2016 SCC Online Del 512.

[17]The Competition Act 2002, s 18.

[18]Directorate for Financial and Enterprise Affairs Competition Committee, '*Roundtable on Antitrust Issues Involving Minority Shareholding and Interlocking Directorates*', (DAF/COMP(2008)30).

the United States showed the presence of a tight network of directors sitting on the boards of major United States corporations [19]. The observations include – eleven of the 15 largest companies, including Pfizer and Citigroup, having at least two board members who sit together on another board; one-fifth of the 1,000 largest companies in the United States sharing at least one board member with another of the top 1,000.[20]

The competition issues around interlocks can also be derived from issues around common investors of companies.[21] In a study conducted on banking companies, it was concluded that, "who *owns the banks matters for how the banks compete*".[22] The interest rates, depositing fees, and depositing thresholds have seen a price rise with increase in competition. Although the study doesn't show the mode of coordination, the situation of having a common owner is similar to having interlocked directors – an indirect common link between companies. This empirical study, although limited in scope, highlights the effects on competition and therefore, is another example of how such indirect links could adversely affect the market.

Further, the above effects can be substantiated by the manner in which they have been dealt with, in a number of jurisdictions. The legal responses to interlocks around the world support the claim that interlocked directors have a serious adverse impact on competition which must be curbed. Although different jurisdictions recognize the problem to different degrees, there is widespread agreement and acknowledgement of the problem itself.

[19]Matt Krantz, 'Web of Board members ties together Corporate America' *USA Today,* (USA 24 November 2002).
[20]ibid.
[21]Asaf Eckstein, *'The Virtue of Common Ownership in an Era of Corporate Compliance',* 105 Iowa L. Rev. 507 (2020).
[22]Azar, José and Raina, Sahil and Schmalz, Martin C., Ultimate Ownership and Bank Competition (May 4 2019).

The Model Law on Competition,[23] which was revised by the Intergovernmental Group of Experts, raises competition concerns from an arrangement like that of interlocking directorship, while defining the same under Chapter VI. The possibility of sharing administrative control, which affects decisions regarding investment or production, consequently leads to the formation of common strategies on prices, or market allocations.[24] Even on a vertical level, the integration of activities between suppliers and customers can have significant anti-competitive effects. The Model Law prohibits transactions, "*including interlocking directorships*" of any nature (vertical or horizontal), when two conditions are met – the proposed transaction substantially increases the ability to exercise market power, *and* the resultant market share in the country or part of it will result in a dominant firm or in a significant reduction of competition in the market.[25] The conditions prescribed are a conjoint condition, which means that one has to prove both a positive effect on the business of the company in terms of market power as well as a negative effect on the resultant market share. This twin combination, in the opinion of the authors, raises the bar for the regulatory body to prove a causal link between interlocks and market power, especially since these indirect links affect the position of the firms indirectly. In addition to the subversive strategy and consequent effects, the evidence to prove such a causal link would be difficult to collect since it would be in the possession of the company under investigation.

Under the Japanese Anti-monopoly Act,[26] Chapter IV deals with inter alia shareholdings and 'interlocking officers'. Article 13 provides for

[23]United Nations Conference on Trade and Development, Intergovernmental Group of Experts on Competition Law and Policy, Seventeenth Session, '*Model Law on Competition (2018): Revised Chapter VI',* (UNCTAD TD/B/C.I/CLP/L.10, 2018).
[24]Ibid.
[25]Elimination or control of restrictive business practices: Antimonopoly Law; UNCTAD, Model Law Competition, 2010, Chapter VI.
[26]Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, 1947.

the restriction of interlocked directors where such position "*substantially restrains competition in any particular field of trade*".[27] There is a substantive assessment of the kind of effects on competition by virtue of such an interlock. In South Korea, the Monopoly Regulation and Fair-Trade Act[28] prevents the 'business combination' of interlocked directors, which substantially restricts competition in any given area of trade. The reporting obligations in South Korea are governed by their understanding of 'control'. Prima facie, control is established when the share in the target exceeds 50 per cent, however, in cases where only a minority stake in the target is acquired, the control can be established by other surrounding factors like director interlocks or transactional relationships, which can together show that the acquirer exerts substantial influence on the target.[29]

In the case of Brazil, the legal scheme is wide enough to give power to the authorities to hold actions as violations of the law, as long as the objective or effect is anticompetitive 'regardless of fault' and 'even if not achieved'.[30] The list of offences is wide enough to incorporate coordination due to interlocks.

Having established the theoretical and statistical issues prevalent due to interlocks and the legal responses across jurisdictions, it is clear that this problem must be tackled via legislation or regulatory rules. The current Indian formulation of 'appreciable adverse effect on competition' is not wide enough to include transfer of information via

[27]Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade, 1947 (Shitekidokusen no kinshioyobi k0sei torihiki no kakuhonikansurnhritsu) (Law No. 54, 1947).

[28]Monopoly Regulation and Fair Trade Act, 1980.

[29]Directorate for Financial and Enterprise Affairs Competition Committee, '*Definition of Transactions for the purpose of merger control review*', (DAF/COMP(2013)25).

[30]Brazilian System for Protection of Competition, Law N° 12.529 (November 30 2011).

interlocks and the same will be discussed in the latter part. From the variety of ways in which interlocks can influence competition, Indian competition law requires a substantive assessment of cases wherein interlocks exist. Factors like - potential competition, consumer effect, and coordinated effects, traditionally used to evaluate a merger, could be important for the regulator to make a decision on a permissible or impermissible interlock. The discussion of the likely/recommended substantive criterion of a valid or invalid interlock takes into account the position of the EU and the United States on the issue. Further, the possibility of regulatory collaboration could increase the resources available to the regulator, and help arrive at a more accurate determination in a quick and efficient manner.

III. INTERLOCKING DIRECTORATES IN THE EU

The current EU Competition Law regime finds its source under Article 101 and Article 102 of the Treaty of the Functioning of the EU, which deals with agreements that restrict competition and abuse of dominance respectively.[31] The Council Regulation 139/2004 ("**2004 Regulation**") provides the basis for the review of 'concentrations' with an 'EU dimension' of mergers and acquisitions within the EU.[32] The 2004 Regulation introduced the test of 'significantly impeded effective competition',[33] which provided for greater certainty and predictability as well as plugging the gap to

[31]Consolidated versions of the Treaty of the Functioning of the European Union [2012] OJ C326/01; Competition (European Commission) <https://ec.europa.eu/competition/antitrust/overview_en.html> accessed on 29 April 2020.

[32]Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) 2004.

[33]Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) 2004 Article 2(2) and Article 2(3); *Western Digital Irland/Vivti Technologies*, Case No. COMP/M.6203, Commission decision of 23 November 2011, recital 1038.

review anti-competitive effects resulting from a merger, where the merged entity would not become dominant.[34] In 2014, the European Commission came out with a White Paper which proposed to extend the 2004 Regulation to a situation where a minority stake was held in an undertaking.[35]

The acquisition of minority shareholding and the concept of interlocking directorates have similar effects and therefore, it is important to look into the 'theories of harm' due to minority acquisition. The White Paper discusses the harms wherein the minority shareholder uses their position to limit the competitive strategies available to the company, thereby weakening it as a competitive force. The degree of influence plays a key role in determining harm. In the case of *Seimens*,[36] the factum of voting rights helped determine factors like - influence and anticompetitive effect due to financial incentive. In this case, along with information rights being given to the parties involved, the power of the minority to effect significant changes in the capital structure or operation were material to the adjudication. In the case of *Ryanair,*[37] a minority stake was already held in Aer Lingus and later, they sought to merge. The merger was denied by the Commission on the basis of dominance. This goes to show that the regulator is aware of the intertwined nature of – common shareholding and interlocks, and their consequent effect

[34]European Commission, '*Towards more effective EU merger control*', (White Paper, COM(2014) 449 final); Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), 2004, Recital 25; *UPS/TNT Express*, Case No. COMP/M.6570, Commission decision of 30 January 2013; *Universal Music Group/EMI Music* Case No. COMP/M.6458, Commission decision of 21 September 2012.

[35]ibid.

[36]*Siemens/VA Tech* Case No. COMP/M.3653, Commission decision of 13 July 2005.

[37]*Ryanair/Aer Lingus I* Case No. Case COMP/M.4439, Commission decision of 27 June 2007, confirmed by the General Court in Case T-342/07 *Ryanair v Commission* [2010] ECR II-3457; See also case *Ryanair/Aer Lingus III* Case No. COMP/M.6663.

on competition. We see the manner in which the minority stake, coupled with voting rights as well as appointment of directors to the board, allows for control to permeate through competitors. In the case of *Toshiba,*[38] the merger with Westinghouse was denied due to possible elimination of competition. Toshiba held a stake in the competitor of Westinghouse and had veto rights as a result of its shareholding. The possibility of the use of such influence to restrict that competitor from entering into newer fields of competition was the rationale of disallowing the transaction.

One of the first cases relating to minority shareholding was the *British American Tobacco Case*,[39] wherein the ECJ gave due weightage to the issue as to whether the shareholding was an "*instrument for influencing the commercial conduct*" of the company in an anti-competitive manner. In the case of *Enichem,*[40] a joint venture was exempted only when the associated companies or parents did not hold any participation in the competitors so as to affect the economic behaviour of the joint venture.[41] In another case,[42] the court relied on *coordination of business behaviour* and *information flows*. In this case, the court allowed the acquisition of a minority stake in the target, since the corporate structure made either of the two virtually

[38]*Toshiba/Westinghouse* Case No. COMP/M.4153, Commission decision of 19 September 2006.

[39]Joint Cases 142, 156/84, *British American Tobacco Company Limited and R.J. Reynolds Industries Inc/Commission* ECR [1987] 4487.

[40]*Enichem/ICI* Commission Decision 88/87/EEC on 22 December 1987, [1988] OJ L 50/18, Case No. IV/31.846.

[41]Enzo Moavero Milanesi & Alexander Winterstein, '*Minority shareholdings, interlocking directorships and the EC Competition Rules – Recent Commission practice*', (*European Commission*, February, 2002) <https://ec.europa.eu/competition/publications/cpn/2002_1_15.pdf> accessed on 29 April 2020.

[42]*Olivetti-Digital* Commission Decision 94/771/EC on 11 November, 1994, OJ [1994] L 309/24, Case No. IV/34.410.

impossible. In the case of *Allianz/Dresdner,*[43] the European Commission was concerned about the reduction of competition since there was considerable cross-shareholding in competitor firms. Both groups reduced their joint holdings in other firms and refrained from exercising voting rights in excess of their reduced shareholding, thereby allowing them to merge. The Philip Morris Doctrine (*British American Tobacco*) was also applied to the case of *British Telecom,*[44] wherein the court looked into the possibility of the nominee directors of British Telecom in its competitor firm, to coordinate its business behaviour as well as access to confidential information. The Court finally questioned the ability of British Telecom to exert control or influence on the competitor.

From the perusal of the cases above, it becomes clear that emphasis is laid on coordination of businesses to the detriment of consumers and competition generally, as well as the negative effects of information sharing. This enquiry is more remarkable, since there are no specific provisions providing for a prohibition to the practice of interlocked directors. The regulatory body does give due weightage to the consequences of minority shareholdings in competitor companies and the rights granted therewith, including board seats and rights. The harms of both coordinated and non-coordinated acts due to information sharing or one-way information gathering, are apparent. An argument, on the basis of the previous cases, can be made for the introduction of a rebuttable presumption in the cases of interlocked directors and minority shareholding.

It is also pertinent to note the argument against any further law-making with regard to interlocks. It has been argued that the current

[43]'Commission clears acquisition of Dresdner Bank by Allianz AG', (*European Commission*, 19 July 2001) IP/01/1040, <https://ec.europa.eu/commission/presscorner/detail/en/IP_01_1040> accessed on 29 April 2020.

[44]*BT-MCI* Commission Decision 94/579/EC on 27 July, 1994, [1994] OJ L223/36, Case No. IV/34.857.

competition law regime is sufficient to deal with the anti-competitive effects of both minority shareholdings and interlocked directors.[45] Under the EU Merger Regulation, a concentration can be deemed to exist on the basis of change of control.[46] The test of 'control' focuses on the possibility of exercising influence in the target company.[47] Gabrielsen argues that the substantive test laid down in Article 101 TFEU, which has a broad scope to deal with restrictive agreements and/or concerted practice between undertakings, is enough legal basis for action, and deterrence against the anti-competitive effects of interlocked directors.[48]

However, as a policy consideration one must look into the efficiency of the law when it is applied *ex post* and when it is applied *ex ante*. In a scenario where only Article 101 is the legal basis of action against an anti-competitive interlock, the action taken only after the effects of the agreement or coordination is apparent. A simple notification requirement, that too in cases of a merger, is a very narrow *ex ante* prohibition/regulation. This can be remedied by having a clear prohibition with sound thresholds.

The EU dimension provides a number of insights which can be imported for the Indian competition law regime. First, that interlocks have to and must be continued in order to be taken seriously as a medium of anti-competitive effects. Second, even though there is no blanket prohibition there should be certain and determinative factors (coordination in business & information flow) which provides basis

[45]Tommy Staahl Gabrielsen, ErlingHjelmeng and Lars Sorgard., 'Rethinking Minority Share Ownership and Interlocking Directorships: The Scope for Competition Law Intervention' (2011) 36 E. L. REV. 837.

[46] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), 2004, Article 3.

[47]Tommy StaahlGabrielsen, ErlingHjelmeng and Lars Sorgard., 'Rethinking Minority Share Ownership and Interlocking Directorships: The Scope for Competition Law Intervention' (2011) 36 E. L. REV. 837.

[48]ibid.

for the regulator to stop a transaction. Both regimes however, struggle with the gap in legislation on the topic, which forces them to rely on an object-based approach. A legislative initiative to alter the Merger Regulation as well as the Competition Act, to include a clear threshold for prohibition, would support economic efficiency and legal predictability.

IV. INTERLOCKING DIRECTORATES IN THE US

The United States legal jurisprudence specifically prohibits existence of interlocking directorates in competing firms. Section 8 of the Clayton Act, 1914 prohibits the appointment of a person as a director or an officer in corporations that are engaged in commerce and are in competition with each other by virtue of their type of business or location. If there is an agreement between them that eliminates competition, it would violate anti-trust laws.[49] This provision is subject to applicability of certain *de-minimus* thresholds and is a *per se* prohibition, i.e., it is a strict liability provision, not depending on actual harm caused to competition. It is violated if there exists a prohibited interlock even though there is no proof of any harm to competition or intention to coordinate prices, final product or any other such relevant and sensitive business decision. The purpose of this section is to "*nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates*".[50]

The Federal Trade Commission ("**FTC**") of United States has focused on the importance of the prohibition under this Section[51] on several occasions. In a recent news article published by the FTC, the Bureau

[49]The Clayton Act 1914, s 8.
[50]*United States v Sears, Roebuck & Co.* 111.F. Supp.614, 616 (S.D.N.Y. 1953).
[51]The Clayton Act 1914, s 8.

of Competition reminded the market players to ensure avoidance of the *per se* prohibition on interlocking directorates.[52] It shed light on the importance of mindfulness required in the corporate world especially in situations of market developments, mergers and spin-offs, where the company and the directors could create unexpected interlocks.[53] In order to avoid litigation cases occurring due to Section 8 violations, the FTC takes stringent measures. For example, it monitors companies which share board members and takes the required action in advance – like passing an order which eliminates the interlock. For example, in 2009 Eric E. Schmidt, Chief Executive Officer of Google and board member of both Google and Apple, stepped down from the board of Apple after FTC raised a concern with the companies that this overlapping of directors between the competing firms would lead to anti-trust issues and violation of Section 8.[54] As Google and Apple increasingly competed, after continuous investigation from the FTC over the remaining interlocking directorates, Arthur D. Levinson who was a corporate board member of both Google and Apple at that time, stepped down from Google's board in 2009.[55] FTC's Bureau of Competition in

[52]Michael E. Blaisdell, Bureau of Competition, 'Interlocking Mindfulness' (Federal Trade Commission, June 26 2019), <https://www.ftc.gov/news-events/blogs/competition-matters/2019/06/interlocking-mindfulness?utm_source=govdelivery> accessed 2 May 2020.

[53]ibid.

[54]'Statement of Bureau of Competition Director Richard Feinstein Regarding the Announcement that Google CEO Eric Schmidt Has Resigned from Apple's Board' (*Federal Trade Commission*, August 3 2009) <https://www.ftc.gov/news-events/press-releases/2009/08/statement-bureau-competition-director-richard-feinstein-regarding> accessed on 2 May 2020.

[55]'Statement of FTC Chairman Jon Leibowitz Regarding the Announcement that Arthur D. Levinson Has Resigned from Google's Board' (*Federal Trade Commission*, October 12 2009) <https://www.ftc.gov/news-events/press-releases/2009/10/statement-ftc-chairman-jon-leibowitz-regarding-announcement> accessed on 2 May 2020.

alignment with the Bureau of Economics investigates alleged anti-competitive business practices and takes the required action.[56]

It is pertinent to point out that Section 8 also gives a one-year grace period to fix interlocks that arise subsequently as a result of change in the capital, surplus, or in the affairs of the company from whatever cause (like interlocks resulting from mergers and spin-off), thus, making him or her ineligible to serve on both the boards.[57] This grace period could be problematic as a director who is previously ineligible to sit on the board under the statute, continues to serve the board for another year after the date on which he became ineligible to serve the board.

Interlocks that are not in violation of Section 8, could still give rise to claims and doubts under the other competition laws in the United States. Section 1 of the Sherman Act that has no exceptions, limits collusive behaviour or unreasonable information sharing among competitors, including when such conduct occurs in the context of an exempt interlock. It is this provision that prohibits interlock directorates from practicing anti-competitive conduct during the one-year grace period under Section 8 of the Clayton Act. Interlock directorates have been challenged under Section 1 of the Sherman Act when there was a conspiracy and anti-competitive conduct through information exchange.[58] Further, Section 5 of the FTC Act may also reach interlocks that do not technically meet Section 8's interlock requirements but violate the policy against horizontal interlocks expressed in the latter. This provision prohibits unfair methods of competition. It could pose a threat to interlocks that are not there

[56]'Statement of Bureau of Competition Director Richard Feinstein Regarding the Announcement that Google CEO Eric Schmidt Has Resigned from Apple's Board' (*Federal Trade Commission*, August 3 2009) <https://www.ftc.gov/news-events/press-releases/2009/08/statement-bureau-competition-director-richard-feinstein-regarding> accessed on 2 May 2020.

[57]The Clayton Act 1914, s 8(2).

[58]*Perpetual Fed. Sav. & Loan Ass'n.* 90. F.T.C. 608.

between potential competitors. The FTC also sometimes alleges Sections 8 and 5 violations together.[59] For example, Section 5 can reach interlocks involving banks, which are exempt from Section 8, and competing non-bank corporations.[60]

The FTC has provided certain practices after reviewing interlocks, which would help companies to not violate Section 8, thus avoiding interlocks.[61] They are: 1. Monitor the company's assets and check it annually against the *de minimus* threshold as given under Section 8, which is announced every year in January and takes effect immediately. 2. Track new products or offerings for each interlocked company that is likely to create new areas of competitive sales. 3. Review documents that track market developments. 4. Be cautious when mergers and acquisitions take place as these two situations have high possibilities of creating interlocks. 5. Monitor board members and officers by seeking periodical report on their position outside the company.

Even though Section 8 may be ineffective sometimes, the United States dealings with management interlocks clarifies that 'real utility' can be gained when legislature courts and commentators thoroughly address corporate law and competition law in a unified manner.[62] Although the uniformity and predictability is laudable and it makes the regulator's job easier by not having to make a substantive assessment of facts and circumstances necessary after passing the *de minimis* threshold. It also ignores surrounding facts and any benefits

[59] *In re Borg-Warner Corp.* 101 F.T.C. 863.

[60] *In re Perpetual Fed. Savings & Loan Ass'n* 90 F.T.C. 608, 657 (1977).

[61] Debbie Feinstein, Bureau of Competition, 'Have a plan to comply with the bar on horizontal interlocks', (*Federal Trade Commission*, 23 January 2017), <https://www.ftc.gov/news-events/blogs/competition-matters/2017/01/have-plan-comply-bar-horizontal-interlocks> accessed on 2 May 2020.

[62] Michael E. Jacobs, 'Combating Anticompetitive Interlocks: Section 8 of the Clayton Act as a Template for Small and Emerging Economies' (2014) 37(3) Fordham Int'l L.J. 643.

that may come from highly qualified individuals serving multiple companies. One must give weight to the deterrence effect of the US law on the topic; however, one should be sceptical of the effects on Indian companies if the law is lifted and added to the Indian Competition Act, 2002 as is.

V. INDIAN POSITION AND ITS RELATIONSHIP WITH COMPANY LAW

The Companies Act, 2013 allows a person to be a director and hold office of a director in up to twenty companies at the same time with the restriction that, only ten of them can be public companies.[63] Multiple directorships are ideally not a threat when they are companies which are not in competition. However, they can pose a threat to the competition in India when a person is a director in two or more competing/interdependent organizations. Organizations do not operate in socio-economic vacuum, and one must give consideration to the probable actions and reactions of other organizations when they perform certain activities.[64] Studies previously cited have indicated the existence of web-like linkages within corporations. The confidential information shared with directors or other key managerial personnel for taking business decisions, then becomes available to those outside that corporate entity.

In the case of *Excel Crop Care Limited v. CCI*,[65] the court remarked that the purpose of curbing anti-competitive agreements is to ensure a "*level playing field*" for all market players, so as to help markets be competitive. Competition law enforcement deals with anti-

[63] The Companies Act 2013, s 165.

[64] J.M.Pennings, '*Interlocking Directorates: Origins and Consequences of connections among organisations' Board of Directors*' (Jossey-Bass 1980).

[65] *Excel Crop Care Limited v. Competition Commission of India,* (2017) 8 SCC 47.

competitive practices arising from the acquisition or exercise of undue market power by firms that result in consumer harm in the forms of higher prices, lower quality, limited choices and lack of innovation.[66] In the case of *CCI v. SAIL*,[67] the court stated the threefold advantages of perfect competition *viz.* allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices.

The real possibility of coordination, and information exchange via interlocks, frustrate the underlying rationales of the competition law regime – level playing field, information symmetry, efficiency and consumer interest.

This Part will deal with –- (i) Interplay between the Companies Act, 2013 and the Act;(ii) the new Amendment Bill to the Act; and (iii) policy recommendations.

(i) Indian Jurisprudence and the relationship between the Act vis-à-vis the Companies Act, 2013.

Section 3(1), read with Section 3(3) of the Act,[68] prohibit anti-competitive agreements which cause adverse appreciable effects on the competition within India, with respect to production, supply, distribution, storage, acquisition or control of goods or provision of services, and declares it void. As defined under the Act, an agreement here includes any kind of arrangement or understanding, or action done in concert, notwithstanding that the agreement is formal or written or if it intends to be legally enforceable.[69] This definition is

[66] ibid.
[67] *Competition Commission of India v. Steel Authority of India* (2010) 10 SCC 744.
[68] The Competition Act, 2002, s 3.
[69] The Competition Act, 2002, s 2(b).

inclusive and not exhaustive.[70] Section 3(3) prohibits organisations from entering into agreements that directly or indirectly determine purchase or sale prices, limits or controls production, supply and market, shares market source of production, etc. and extends to any sort of information exchange or communication between the competitors. Section 3(3) is a *per se* violation. Though the Section presumes appreciable adverse effect on competition, the same is rebuttable and can be refuted with evidence by analysing the factors listed under Section 19(3) of the Act to determine a Section 3(3) prohibition on the facts of the case.[71] Thus, to establish such kind of an anti-competitive behaviour, the CCI observes whether the persons have entered into an "agreement" for information exchange that led to collusive action in the market.

The Act does not expressly prohibit or draw any restrictions on interlock directorates. Although the act has not addressed the problem, it can be argued that the preamble along with the broad theme of the Act prohibits activities undertaken by interlocked directors in competing companies. Here, a distinction is being made between the *fact* of having interlocks in competing firms and the *activities undertaken* by those interlocks once in office. A difference between – 'that they exist' and 'what they do'. In this manner, an object-based approach, similar to an approach employed by the EU, is used to make such exchange actionable by the CCI.

One of the greatest effects of interlocked directors in competing firms is felt inside board meetings, where not only are they privy to confidential information and future strategic planning, but also have the ability to shape the final result due to voting (diversify the business of the company, to approve amalgamation, merger or

[70] *Competition Commission of India v. Coordination Committee of artistes and technicians of West Bengal Film and Television and Ors.* (2017) 5 SCC 17.

[71] *Sunshine Pictures Private Ltd. v. Central Circuit Cine Association* Case No. 52/2010.

reconstruction, to takeover a company or acquire a controlling or substantial stake in another company etc.). It has been held that, such common platforms provide an umbrella for companies to act in a coordinated manner and arrive at a formal or informal arrangement about pricing and production strategies that contravenes the Competition Act.[72] Although the Companies Act, 2013 requires the directors to mandatorily hold board meetings as prescribed thereunder, where important discussions and decisions of the organizations take place including special resolutions,[73] the compliance is looked at by the Ministry of Corporate Affairs ("**MCA**") through the lens of corporate governance. Thus, the regulatory body as well as the nature of enquiry is different from what would be under scrutiny of competition law.

Further, on the point of evidence, the directors are required to maintain books of minutes of the proceedings of every general meeting of any class of shareholders or creditors, every resolution passed by postal ballot and every meeting of its Board of Directors or of every committee of the Board.[74] The minutes should contain a fair and correct summary of the proceedings, all appointments made in the meeting, the names of the directors present at the meeting, in case a resolution is passed, the names of directors, if any, dissenting from or not concurring with the resolution, to name a few.[75] A different minutes book is required to be maintained for general meetings of members, board and its committee meetings, and the creditor's meetings, which shall be initialled or signed on each page of every such book by the Chairman of that meeting.[76] The minutes book

[72]*Builders Association of India v. Cement Manufacturers Association* Case No. 29/2010 (2016 CCI Order).
[73]The Companies Act, 2013, s 173 read with s 175, s 179 and The Companies (Meetings of Board and its Powers) Rules, 2014, Rule 8.
[74]The Companies Act, 2013, s 118.
[75]ibid.
[76]Companies (Management and Administration) Rules, 2014, Rule 25.

would provide for the communication that took place in the meetings and the associated inter-organizational decision-making between the key individuals of the respective company, who are privy to sensitive information of the company. Thus, it would prove to be a substantial piece of evidence to determine the intention of the interlocking directors. These evidences like the platform of meetings, the minutes of the meetings, etc. provide a strong piece of evidence and act as a 'smoking gun' to evaluate whether the interlock directorates have been acting in any coordinated behaviour and whether there exists an anti-competitive agreement.

The directors are required to disclose their concern, or interest in any company or companies or bodies corporate, firms, or other association of individuals and any changes made with respect to the same in the board meetings.[77] These disclosures shall also include shareholding interest.[78] Such disclosure requirements can be leveraged towards greater enforcement of the (possible) prohibition against interlocked directorates in competing companies.

The discussion around the problem of interlocks serves another purpose – it brings attention to the area of tension between corporate governance laws and competition law. The MCA along with the Securities and Exchange Board of India ("**SEBI**") in the case of listed companies, regulate the disclosure, eligibility and other requirements for directors who are appointed to the Board. While SEBI and MCA have a periodic disclosure and form requirements, the CCI's mandate is narrow and enquiries are conducted on case- to- case basis as a result of a motion, on its own accord or due to information received. A platform or channel of communication, with free flow of information between the regulators, is an important requirement for the efficient and smart regulation of corporate India. Rather than having the regulators wrestle for jurisdiction, hierarchy and/or

[77]The Companies Act, 2013, s 184.

[78]Companies (Meetings of Board and its Powers) Rules, 2014, Rule 9.

oversight, with a common monitoring mechanism – the problem of interlocks and consequent information exchange could be more robustly tackled. The manner of regulatory collaboration could vary – specified information sharing or a separate review mechanism. From a policy perspective, the former would be preferred as it would reduce a regulatory hurdle rather than add one.

Despite legislative silence, in the past few years the CCI has adjudicated upon issues that arise out of common ownership/management *vis-à-vis* its impact on competition and has recognised the same. In the *Liner Shipping* case, three competitors were forming a joint venture by merging their liner shipping business; however, the other businesses were outside the scope of this joint venture.[79] The CCI objected that this joint venture could lead to spill-over of information of the non-integrated businesses. In lieu of this, the parties were required to offer information on spill-over protection remedies wherein, they agreed that the directors and executives of the joint venture so formed would not receive or exchange sensitive information from the other businesses that is not a part of the venture of the respective parties or exchange information to third parties. In a similar case,[80] the CCI had approved an acquisition of Fortis Healthcare Limited (FHL), a company operating in the multi-speciality, super-speciality and diagnostic centre in India by Northern TK Venture Limited ("**Acquirer**"), which is an investment company. A member of the acquirer's group, IHH Healthcare Berhad, had an interest in a joint venture operating a competing hospital. The issue that this joint venture could be used as a platform for co-ordination by the competitors was addressed by a "*rule of information control*". This ensured that the joint venture and the combined entity would operate as separate, independent and competitive businesses which

[79] *Liner Shipping case* (Combination Registration No.C-2016/11/459, Order dated 29 September 2017).

[80] *Northern TK Venture Pte Limited and Fortis Healthcare Limited* (Combination Registration No. C-2018/09/601, dated 29 October 2019).

included not appointing common directors on the joint venture or the entity created post transaction and not sharing commercially sensitive information and any such commitment to prevent information sharing.

In a recent deal of acquisition of approximately 3% shareholding in Intas Pharmaceutical by Canary Investment and Link Investment, both being affiliates of ChrysCapital, the CCI while approving the same, again directed its attention towards the anti-competitive concerns of the deal.[81] Along with increasing ChrysCapital's shareholding to approximately 6% in Intas Pharmaceutical, the deal allows ChrysCapital and its affiliates the right to receive information with respect to Intas' day-to-day affairs, a right to appoint a director on the Board and a right to veto corporate actions like amendment to the charter documents, commencement of new business and change in capital structure. ChyrsCapital had minority shareholdings in other competing companies like Mankind Pharma and Eris Lifescience (10%), GVK Biosciences and Curatio Healthcare (less than 20%) in the pharmaceutical market apart from in Intas. The combined market share of Intas and the shareholding of ChrysCapital in these entities was greater than 30% in more than 20 pharmaceutical products. Thus, the CCI was afraid that this common shareholding that ChrysCapital held in the same business might lead the deal to cause an anti-competitive effect. The CCI rejected ChrysCapital's contention that their acquisition being less than 10% had minority investment protection rights and was thus exempt. The CCI pointed that until the deal allows active participation of the acquirer in the day-to-day affairs, ability to materially influence those affairs or other corporate actions of the target, the deal cannot be said to be "*solely an investment*". The CCI, however, approved this acquisition deal as ChrysCapital agreed to remove their director on the board of Mankind

[81] *Canary Investment Limited, Link Investment Trust II and Intas Pharmaceuticals Limited* (Combination Registration No. C-2020/04/741 dated 30 April 2020).

Pharma, to restrict using information that concern these companies. and not to exercise their veto rights in Mankind Pharma, except in some exemptions in order to protect their investment's value.

The CCI has taken also taken another approach while approving combinations through merger and acquisition in competing firms, based on the individual and combined market share that the parties hold in the relevant market and the presence of other significant players in the relevant market.[82] The CCI approved Tiger Midco's 100% shareholding acquisition in Tech Data Corporation which has a market of hardware and software products, distribution of cloud solutions, to name a few.[83] The investment funds affiliated to Apollo Management, which is known to be in the market of application services, provision of cloud solutions and professional sources, manage Tiger Midco. Even though, the markets of Apollo Management and Tech Data compete both horizontally and vertically, the CCI did not go into defining the relevant market due to the insignificant market share that the parties held in the market and also because there were other major players like Microsoft, Google, Ingram India, etc. in the market. Thus, the CCI was not apprehensive that this acquisition would have an anti-competitive effect. It also approved Nuvoco Vistas' acquisition of 100% shareholding in Emami Cement. The former manufactured clinkers for captive consumption while the latter sold clinkers to other cement manufacturers and both were involved in the manufacture and sale of grey cement, among

[82]*Tiger Midco LLC and Tech Data Corporation* (Combination Registration No. C-2020/03/737 dated 30 April 2020); *Mylan N.V. and Upjohn Inc.* (Combination Registration No. C-2020/01/720 dated 23 March 2020); *JSW Energy Limited, GMR Energy Limited, GMR Kamalanga Energy Limited* (Ccombination Registration No. C-2020/03/731 dated 7 April 2020); *Nuvoco Vistas Corporation Limited and Emami Cement Limited* (Combination Registration No. C-2020/03/734 dated May 202020).

[83]*Tiger Midco LLC and Tech Data Corporation* (Combination Registration No. C-2020/03/737 dated 30 April 2020).

others.[84] The combined market share of both the parties was 15-20% based on their installed capacity and sales volume in the relevant market i.e manufacture and sale of grey cement which had other important competitors like Shree Cement, Holcim, Ultratech, Dalmia and the Herfindahl Hirchman Index. Thus, due to the low market share, other players in the relevant market, and the insignificant portion of revenue from sale of grey cement and clinkers to third parties by Emami Cement, the CCI disregarded the likelihood of appreciable adverse effect on competition.

The problem arising out of a common investor of two competing companies is at the heart of the interaction between company law and competition law. Whether such a scenario is anti-competitive would depend on the shareholding pattern and subsequently, the board rights, which have been obtained by the common investor.[85] If the investor has enough powers and shareholding pattern of above 25%, he may be able to practice activities, which might be anti-competitive and indirectly start colluding. In the case of *Meru Travel Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd*,[86] Meru had alleged anti-competitive conduct against Uber and Ola where they had a common private equity investor, SoftBank. Meru alleged that Ola and Uber entered into anti-competitive agreements and were indulging in predatory pricing. It alleged that Ola and Uber enjoyed a dominant position as a group because of the shareholding position of Softbank in Ola and Uber. The CCI observed that anti-competitive practice can be seen in the form of price increase or quality reduction which might

[84] *Nuvoco Vistas Corporation Limited and Emami Cement Limited* (Combination Registration No. C-2020/03/734 dated May 20 2020).

[85] Arihant Agarwal and Aditya Mukherjee, 'Interlocking Directorates and its Relevance to Competition in India', (*The Indian Review of Corporate and Commercial Laws*, 22 January 2020) <https://www.irccl.in/single-post/2020/01/22/Interlocking-Directorate-and-its-Relevance-to-Competition-in-India> accessed 20 April 2020.

[86] *Meru Travel Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd*. Case no. 81 of 2015.

be unprofitable for the firm but benefits the common investors, and may soften competition. However, the CCI had ruled that there is no collusion between the parties due to their common investor as there was lack of evidence to show that there was an appreciable adverse effect on competition or that it harms the stakeholders.

It is imperative to focus on the fact that it is difficult to prove information exchange with lack of proper evidence. Even though the CCI had intel that the persons were in an agreement to increase prices or control the production and supply, the CCI did not find it to be in contravention of the Act as there was lack of proof to substantiate the implementation of the price according to the agreement or the limitation of supply.[87] In the *Flashlights Case*,[88] despite having the proof of information exchange with respect to price and sales production, the CCI said that this exchange of data only indicates a possibility of collusion and can be considered as a "*plus factor*" as it has to be in conjunction with other evidences provided, to prove violation. The evidence in the case showed that even though there was proof of information exchange on the price among the parties, the same was not implemented and thus mere discussion of it does not amount to price fixing. However, it is observed that, the CCI has taken an opposed view regarding the availability of evidence for implementation of the agreement in a recent order.[89] In the *Bearing's* case, the CCI noted a coordinated action amongst competing firms to uniformly increase prices in the automotive and industrial original equipment manufacturer customers and in the distribution segment of the market when the steel prices started to rise from the year 2009. The CCI had evidence of consensus amongst the suppliers for writing

[87] *Nirmal Kumar Manhsani v. Ruchi Soya Industries Ltd & Ors* Case No. 76/2012; *In re: Alleged Cartelisation in Flashlights Market in India* (Suo Moto Case No. 1 of 2017).

[88] *In re: Alleged Cartelisation in Flashlights Market in India* (Suo Moto Case No. 1 of 2017).

[89] *In re: Cartelisation in Industrial and Automotive Bearings* (Suo Moto Case No. 05 of 2017).

price increase letters to the OEM customers including evidences of emails, telephonic conversations and meetings where commercially sensitive price related information was shared. Based on these evidences, the CCI concluded that there was information exchange and collusion among key competitors for pricing strategies. The CCI said that even though the price revisions quoted by the parties to the OEMs does not align with their agreement, the statutory presumption of appreciable adverse effect under Section 3(3) cannot be rebutted because the parties, met each other and decided the price revisions to be quoted to the OEMs, compromised their independence. Though, interestingly, the CCI held the agreement to violate Section 3(3), it did not impose any monetary penalty on the competitors and directed them to cease and desist from such cartel like activities in the future. Two questions arise from the contrary views taken by the CCI regarding the availability of evidence for implementation of the agreement i.e first, if the parties are required to show that they acted upon the agreement and second whether the CCI can assume that the parties implemented the agreement and hold parties in contravention of the Act solely based on the information exchange and the presumption approach?

The regulator, thus, is not blind to the problem since it has been a repetitive observation in the aforementioned orders, as well as orders dealing with acquisitions which are either made in the ordinary course of business or for solely investment purposes as they are not likely to cause appreciable adverse effect on the competition.[90]

A. Changes and reform in Indian Competition law

It is interesting to note that the preceding law, the Monopolistic and Restrictive Trade Practices Act[91] (**"MRTP Act"**), had a specific provision against one director being appointed as director in a

[90]Indian Competition Act, 2002, Item 1, Schedule 1.

[91]Monopolistic and Restrictive Trade Practices Act, 1969, s 25.

competing firm; however, this provision is not included in the Act. The goal of the MRTP Act was along the lines of the Act – ensuring that the operation of the economic system does not result in the concentration of economic power in hands of few, control of monopolies, and prohibition of monopolistic and restrictive trade practices.[92] The then Chapter III of the MRTP Act specifically related to the concentration of economic power and had provisions dealing with interconnected undertakings. The basis for having such provisions was the findings of the Monopolies Inquiry Commission which was set up to inquire into the extent and effect of concentration of economic power.[93] One of the causes of such concentration was found to be cross-investments and interconnections between companies. Thus, it can be seen that such indirect influence and effects thereof are not novel problems faced by the Indian legal regime. Such findings of a decades-old commission only support the claim for having greater regulation of interlocks.

It is disheartening to see that though the issue of interlock directorates within companies, especially those that are in the same horizontal line, has been discussed on various occasions by the CCI, the regulators have still failed to provide legislative guidance on this front in the recent Draft Competition (Amendment) Bill, 2020, which was released in public domain on 20 February, 2020. This bill was released after a cumulative process of discussions that started in October 2018 by the Competition Law Review Committee set up by the MCA, to examine the Act and its rules and regulations in the "wake of changing business landscape" and a decade of enforcement by the CCI.[94] One of the relevant amendments prescribed in the draft

[92]Monopolistic and Restrictive Trade Practices Act, 1969, Statement of Object and Reasons.

[93]V. D. Kulshreshtha, 'Report of the Monopolies Inquiry Commission: An Evaluation' (1966) 8(3) Journal of the Indian Law Institute 413.

[94]Karan Chadnhiok and Deeksha Manchanda 'A look at the Draft (Competition Amendment Bill, 2020 - Clarity, transparency, robustness and bit more to be

bill is the amended definition of "*control*" under Section 5 of the Act to include "*material influence*" over the management or affairs or strategic commercial decisions of one or more enterprise/group by another. The Committee opined that this addition of material influence will serve as a double-edged benefit. It would bring more certainty to the meaning of control while retaining the power of the CCI to assess a wide range of combinations that may have an appreciable adverse effect on competition.

Referring to the *Ultratech-Jail*[95] case, the CCI discussed how having "material influence" over the management of affairs of the companies could be a deterrent towards the competition in market. In the case, the CCI defined material influence as the lowest level of control, which implies presence of factors like giving an enterprise the ability to influence affairs and management of the other enterprise including factors like, shareholding, special rights, status and expertise of an enterprise or person, Board representation, structural/financial arrangements, etc. Yet it is important to point out that, no guidelines have been given to define what constitutes "*material influence"* that would amount to "*control*" in the Act. There should be some quantifiable yard-stick that amounts to material influence, as the same cannot be assessed based on the quantum of shareholding, availability of special/veto rights but further requires deeper analysis of the market realities and in exceptional cases, lifting of the corporate veil as well.

B. Policy Recommendation

desired' 01 March 2020, Bar and Bench <https://www.barandbench.com/columns/a-look-at-the-draft-competition-amendment-bill-2020-clarity-transparency-robustness-and-bit-more-to-be-desired> accessed 13 May 2020.

[95] *Ultratech-JAL* (Combination registration number C-2015/02/246, Order dated 12 March 2018).

Though the present competition law regime in India does not expressly prohibit the practice of interlock directorates in India, the practices indulged in by these directors or the subsequent actions are subject to the checks mentioned in the Act, especially in cases of mergers and acquisitions and combinations. For effective mechanism and in the interest of the economy as a whole, it is suggested that a specific provision prohibiting interlock directorates with *de-minimus* thresholds should be introduced in the Act. This means that the practice of interlocking directorates would be prohibited with a clear set of threshold exceptions carved out.

It is important to question the construction of the exceptions both, from the lens of efficiency as well as discrimination. Any policy that is enacted, must be capable of being implemented without unreasonable burden on the regulators. An approach similar to that adopted by the EU, which monitors and detects anticompetitive behaviour, has higher costs and relies on a robust institutional structure making it unsuitable for India. A prohibition with clear exceptions is more suited, and capable of implementation. The second and more important question is – what will the threshold be that makes the same act legal for some and illegal for others? And why not a complete prohibition for every actor?

A complete prohibition is itself anti-competitive in the sense that it impedes competition between mid-sized firms. Interlocks serve a number of pro-competitive effects like exchange of technical know-how and efficiency. Medium and small enterprises with low market share, could greatly improve their knowledge of technology, practices of inventory management and distribution strategies. A complete prohibition would deny these firms the ability to take advantage of highly skilled personnel. Having a *de-minimus* threshold thus allows positive effects of interlocks, but prevents them from becoming coordinated large-scale anticompetitive effects. The rationale for such a distinction flows from the basis of our competition law – to protect

the interests of the consumer. It is in consumer interest that small and medium enterprises exchange information to compete relentlessly in order to reduce prices of commodities and increase innovation. Similar exchange of information at the scale of large conglomerates only serves to exploit the consumer.

On the point of the substance of the threshold, it is proposed that 'market share' be used as the determinative factor in determining the threshold. The percentage of combined market share of competing firms must determine the interlock as valid or invalid. The reason 'annual turnover' or 'net profit' are rejected by the authors as metrics to determine validity of interlocks, is due to the fact that firms having large combined market shares may not necessarily have very high turnovers or profits. Further, the censure of this prohibition is not against highly profitable firms, but against highly dominant ones. The percentage of combined market share over which interlocks are prohibited can only be determined via an empirical study and is not the objective of this paper. The criticism however of this approach is clear. Any two firms with a large combined market share would be hit by the prohibition regardless of their actual effect on the market. Regardless of the reduction in price, increased innovation and efficiency, an offence would be made out. A blanket ban would then be counter-productive in those selective cases.

There is however a way where this criticism is constructively utilised by including a further qualification and room to the regulator to exercise discretion in limited cases. The following is a broad structure of the potential provision, by way of an example:

1. *Complete prohibition on interlocks between competing firms/companies subject to point 2 and 3.*

2. *The prohibition on interlocks must not apply to competing firms with a combined market share of less than 30%.*

3. *The prohibition on interlocks must not apply to competing firms with a combined market share of more than 30%, if the competing firms can show no adverse effect on competition.*

A provision with such a structure seeks to:

a. Allow without undue scrutiny the practice of interlocks up to a certain threshold.

b. Disallow those interlocks which *prima facie* show anti-competitive effects on the basis of combined market domination.

c. Allow interlocks in those few firms with combined market share greater than the threshold, if the firms can show that they pose no harm or risk to competition. Further limits to discretion may be inserted as determined by the legislature to limit the scope of this leeway.

This paper, in addition to providing evidence to support the need for legislative intervention in the grey area of interlocks, tries to provide a concrete metric to deal with the issue of interlocks in India. Further, in addition to the modifications in substantive law, there is a requirement for regulatory collaboration between the SEBI, MCA and CCI where information and case particulars can be shared and acted upon. To increase oversight while not increasing regulatory hurdles for corporates, a joint approval mechanism can be set up where submission of documents is done once, and relevant approvals are sought together. Such administrative steps have the ability to combine efficiency and greater checks and balances on underhand collusion in the market.

VI. CONCLUSION

Though the concept of interlocked directors is one that is not explored enough in India, it can be seen that there are numerous negative effects on competition law and the economy. The paper first seeks to demonstrate the actual effects of having interlocked directors. Citing studies conducted with a large sample of companies, it is seen that interlocks contribute to economic efficiency as it takes advantage of interconnections to be able to oppose adverse market forces.

It also becomes important to contextualise the Indian position in light of the global trends and how other developing economies are dealing with the problem. Brazil, China and Japan have a substantive assessment criterion, specifically for interlocks. The EU, while it lacks a specific provision prohibiting or regulating the practice, has evolved certain criteria by virtue of the cases before the ECJ. It also requires a minimum threshold to be met. Although semantically different, the threshold is that of significantly effecting competition. In sharp contrast, the United States has a *per se* prohibition once the *de-minimus* thresholds are met. It is submitted that a middle path can be taken which provides enough room for the regulator to assess the situation rather than a simple addition of regulations to the detriment of corporates in India and the economy as a whole.

In light of the evidence and legal positions, the paper makes three recommendations. First, that the concept of interlocks must be seen as a credible threat to competition, and there must be legislative intervention to avoid any vague or unpredictable actions by the regulator. Second, that the provision so made should have certain thresholds which can be borrowed from Section 19 of the Act, which would allow for substantive assessment of facts and circumstances, and only after crossing the threshold would the interlocks be prohibited. Third, that the current disclosure requirements of directors as well as the filing requirements of minutes, etc., should be used by

the MCA and SEBI in tandem with the analysis by the CCI. More mutual coordination and collaboration of different corporate regulators is important for dealing with the issue in a comprehensive manner.

With greater cohesion of the Indian market with global players and increase in foreign involvement in the economy, greater controls must also be applied so as to allow for businesses to flourish. The law must not permit the concentration of economic power in the hands of a few and having a specific provision would be a step towards this objective of the Indian competition law regime**.**

THE ASSAM NRC: ON THE TOUCHSTONE OF THE CONSTITUTION

Devansh Kaushik [*]

Abstract

Recently, there have been multiple political indications of the controversial National Register of Citizens (NRC), being implemented nationwide. The presumed objective of such an exercise would be to prepare a list of bona-fide citizens, identify, detain and deport 'illegal immigrants'. This issue came into public prominence after the passage of the Citizenship Amendment Act, 2019 which sparked off nation-wide protests. The government on the other hand repeatedly affirms the legitimacy of such a policy.

This essay aims to examine the only available precedent – the Assam NRC. It seeks to address the dearth of academic literature on the legality of the exercise, by analysing the substantive and procedural laws in question, relevant judicial opinions and their implications, through a constitutional law perspective.

In this essay, relevant provisions and rules of the Citizenship Act, 1955 and the Foreigners Act, 1946 are summarized, along with the

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historical context of their origins. The NRC process and the Foreigner's Tribunals' proceedings are then critically examined in light of the 'right to equality' under Article 14 and 'right to life and personal liberty' under Article 21 (as expanded across landmark judicial precedents).

The author concludes by emphasizing on the need to reconcile the existing regime with constitutional rights and suggests relying on the erstwhile IMDT Act as a foundation, in the event a similar exercise is implemented in the future.

I. INTRODUCTION

"*Citizenship is the right to have rights.*"[1]

'Citizenship' is the legally recognized membership of a political community. It signifies the relationship between a state and an individual. Citizenship acts as a foundational principle of a legal system by conferring by default, rights on individuals and obligations on the state. Individuals owe allegiance to the state, obey its laws and in turn are entitled to its protection and other benefits. Citizenship is accompanied by 'rights' such as right to vote and hold political office; and 'responsibilities' such as taxation and military service. Such 'rights and 'responsibilities' are either denied or only granted in part, to aliens and other non-citizens residing in a nation. The concept of citizenship thus determines the populace to which the government is

[1] *Perez v. Brownell* [1958] 356 US 54.

accountable to and responsible for, and for whose benefit it must shape its policies.[2]

The importance of citizenship to modern democracies is underscored by its prominence in international human rights jurisprudence. 'Statelessness' has been widely observed to be a precursor to human rights violations and persecution.[3] Article 15 of the Universal Declaration of Human Rights, 1948, states that "*everyone has the right to a nationality*", and that "*no one shall be arbitrarily deprived of his nationality*".[4] India is a signatory to this convention, which affirms the commitment of the international community to ensure a legal link of nationality of each person to a state.

However, the Indian state has always been doubtful about its capacity to enforce international law obligations concerning the rights of immigrants and refugees, having witnessed some of the greatest human exoduses in history.[5] The Indian government has thus till date consciously refrained from signing the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, nor does it have an express refugee policy.[6]

Thus, while international law obligations are legitimate constraints on state policy, it would be more appropriate in the Indian context to turn to applicable constitutional rights of 'non-citizens', which may more readily be enforced by the courts and the state. These obligations, as interpreted by the courts, extend basic rights protection to all persons

[2]Richard Bellamy, *Citizenship – A Very Short Introduction* (Oxford University Press, 2008).

[3]Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press, 2012).

[4]Universal Declaration of Human Rights 1948, art.15.

[5]Niraja Gopal Jayal, *Citizenship and Its Discontents-An Indian History* (Permanent Black, 2013) 146.

[6]Working Environment: India, UNHCR (2011), <https://www.unhcr.org/4cd96e919.pdf> accessed Dec 7, 2020.

including non-citizens, and incidentally, closely mirror India's international law obligations in spirit.[7]

It is in this light, that this essay analyses the recently concluded National Register of Citizens ("**NRC**") exercise in Assam. In the pending challenge to the Constitutional validity of the Citizenship (Amendment) Act, 2019 - *Indian Union Muslim League v. Union of India*,[8] the Centre government in its counter-affidavit expressly declared that that NRC is a necessary exercise for any sovereign country and claimed that its implementation was not contrary to fundamental rights. If political indications are interpreted, then the Assam NRC is a pre-cursor to a nation-wide rollout of the scheme. The present Home Minister has gone to the extent of setting a 2024 deadline for conducting this exercise nationwide.[9] There are also indications that the government intends to rely on the same procedure as the Assam NRC, as created under the Foreigners (Tribunals) Order, 1964.[10]

At the outset, it is clarified that this essay does not intend to go into the widely analyzed and contested issue of the Constitutionality of CAA or speculate on the policy aspects of nation-wide NRC. Rather, this essay aims to test the claim whether NRC implementation was or can be consistent with the constitutional rights of stakeholders, by

[7]V. Vijayakumar, 'Developments. Judicial Responses to Refugee Protection in India' (2000) 12 International Journal of Refugee Law 235–243.

[8]WP (C) 1470/2019.

[9]Amit shah sets 2024 deadline for NRC, says all infiltrators to be expelled by then', *Times of India*, <https://timesofindia.indiatimes.com/india/amit-shah-sets-2024-deadline-for-nrc-says-all-infiltrators-to-be-expelled-by-then/articleshow/72333248.cms> accessed July 3, 2020.

[10]District Magistrates across the country now have been authorized to constitute Foreigner Tribunals, as they exist in Assam. This power was earlier only vested with the Central Government. Vijaita Singh, 'All States can now constitute Foreigners Tribunals', *The Hindu* (2019), <https://www.thehindu.com/news/national/all-states-can-now-constitute-foreigners-tribunals/article27706366.ece> accessed Dec 7, 2020.

analyzing the only available precedent– the Assam NRC. For sound public policy to be made, it is pertinent that the government and administration take note from past precedents, weight its success and detriments, and mold future laws and policy accordingly. The Constitutional limitations as highlighted by this article must be considered before any move towards a 'national' NRC is made.

The Assam NRC has stripped 1.9 million people off their citizenship.[11] Three thousand people have already been detained across the state. Deportation is not feasible as Bangladesh has refused to accept such persons in categorical terms.[12] The result is that the affected persons are facing prospects of indefinite detention, statelessness and deprivation of rights. These sanctions are being applied retrospectively on these residents for being unable to disprove the allegation of illegally immigrating at some indefinite point in the past.

This essay shall analyse the manner in which the Assam NRC was conceptualized and implemented, and whether it was consistent with the Constitution. First, relevant provisions and rules of The Citizenship Act of 1955 and the Foreigners Act of 1946 are summarized, along with their historical context. Then, the NRC exercise and the Foreigner's Tribunals' proceedings are then critically examined in light of 'right to equality' under Article 14 and 'right to life and personal liberty' under Article 21, as expanded interpreted by the judiciary. Finally, various policy reforms to reconcile the NRC

[11]Assam NRC: What next for 1.9 million 'stateless' Indians?, *BBC News* available at https://www.bbc.com/news/world-asia-india-49520593 (accessed on June 4, 2020).

[12]Nayanima Basu, 'Bangladesh wants 'written' assurance from India that it won't send immigrants after CAA', *The Print*, <https://theprint.in/diplomacy/bangladesh-wants-written-assurance-from-india-that-it-wont-send-immigrants-after-caa/342579/> accessed July 3, 2020.; 'No Relation to Us, Says Bangladesh On Illegal Immigration Amid Assam Row*'* *NDTV* (2018) <https://www.ndtv.com/india-news/no-relation-with-us-bangladesh-on-illegal-immigrants-inassam-1893131> accessed on May 3, 2020.

regime with constitutional stipulations are posited, followed by the conclusion.

II. LOCATING THE NRC IN CONTEXT

The National Register of Citizens is essentially a government record detailing the names, addresses and photographs of those residents in Assam legally recognized as Indian citizens. As of now, Assam is the only state in India with such a record.[13]

The NRC is best understood in the context of its political beginnings. The state of Assam since colonial times, has had a steady influx of migrants from other regions of the sub-continent, primarily from the modern-day Bangladesh region. The influx continued post-partition and intensified during the 1971 Bangladesh War.[14]

As this new populace settled in the border state of Assam, an unfortunate consequence emerged in the form of widespread discontentment among the native populace fearful or their land and culture being subverted by these 'foreigners'. They began to express fears of becoming 'a minority in their own land'. The resulting socio-political friction resulted in the 'Assam Agitation' in 1979. State-wide protests were organized by the All-Assam Students Union ("**AASU**") and the All Assam Gana Sangram Parishad ("**AAGSP**"). More than 800 people were killed during this agitation which lasted 6 years. The movement ended on August 15, 1985 after a Memorandum of

[13]Office of the State Coordinator of National Registration (NRC), *What is NRC?* available at <http://www.nrcassam.nic.in/what-nrc.html> accessed on April 11, 2020.

[14]Amit Ranjan, National register of citizen update: history and its impact, (2019) Asian Ethnicity 1–17.

Understanding, known as the 'Assam Accord' was signed between the aforementioned groups and the Government of India.[15]

The terms of the agreement provided for steps to be taken to detect and deport *illegal immigrants*. Foreigners who entered into India after 25th March 1971 were to be identified, their names deleted from the electoral rolls and be deported. Accordingly, the Citizenship Act of 1955 was amended by Act 65 of 1985 which inserted Section 6-A, titled- "*Special provisions as to citizenship of persons covered by the Assam Accord*".[16] This introduced a sixth category of citizenship in India, which was to apply exclusively to Assam.

This Provision classified the illegal 'Indian origin Immigrants', (i.e., those whose parents or grand-parents were born in undivided India) into three categories:[17]

1. Those who entered Assam before 1966 were deemed to be citizens of India.
2. Those who entered into the State between 1966 to 25th March 1971 (the date of commencement of the Bangladesh war) were also deemed to be citizens but their names were deleted from the electoral rolls for 10 years.
3. Those who entered into the State after 25th March 1971 were declared as 'foreigners' and were to be deported in accordance with the law.

Such specification derogated from the original Article 6 of the Constitution. That article granted citizenship for any person who has

[15]Ahmed Shahiuz, 'Identity issue, foreigner's deportation movement and erstwhile east Bengal (Present Bangladesh) origin people of Assam' (2006) Proceedings of the Indian History Congress 67.

[16]Government of Assam, *Assam Accord and Its Clauses | Implementation of Assam Accord*, 2019, <https://assamaccord.assam.gov.in/portlets/assam-accord-and-its-clauses> accessed on July 25, 2020.

[17]ibid.

migrated to India from the territory now included in Pakistan, if he, or either of his parents or any of his grandparents, was born in undivided India and if he had migrated to India before 19th July, 1948.[18] While the original Constitution had made migration as a means of passage to citizenship, the amendment turned it on its head to make it a condition of illegality.[19]

In 1997, the Election Commission of India marked thousands of persons as "D voters" or doubtful voters. While these persons remained on electoral rolls, their electoral participation was effectively suspended until their cases were decided by the Foreigner Tribunals.[20]

The recent history of the Assam NRC can be traced to 2009, when a PIL was filed in the Supreme Court in *Assam Public Works v. Union of India*,[21] seeking the removal of 'illegal migrants' from the electoral rolls of Assam and the implementation of the NRC as per the Citizenship Act, 1955. A division bench consisting of then Justices Ranjan Gogoi and Rohinton Nariman subsequently (from 2014) began to supervise the implementation of NRC in Assam, demanding regular updates from the government on its progress and issuing various orders to this effect. This special bench was later dissolved upon Justice Gogoi's retirement.[22]

[18]The Constitution of India 1950, art.6.

[19]Anupama Roy, *Mapping Citizenship in India* (OUP 2010) 124.

[20]This order was subsequently upheld by the Guwahati High Court in 2011. Nazimuddin Siddique, *Discourse of Doubt: Understanding the Crisis of Citizenship in Assam*, 54 Economic and Political Weekly 10 (March 9, 2019). Incidentally the Election Commission is now set to review its 1997 order. *See*, Bharti Jain, 'EC set to take fresh look at 1997 order on 'D' voters', *The Times of India* (2019), <https://timesofindia.indiatimes.com/india/ec-set-to-take-fresh-look-at-1997-order-on-d-voters/articleshow/71366765.cms> accessed December 7, 2020.

[21]*Assam Public Works v. Union of India* (2018) 9 SCC 229.

[22]Murali Krishnan, 'After Ranjan Gogoi's retirement, special bench on NRC case dissolved', *Hindustan Times* (2019), <https://www.hindustantimes.com/india-

III. THE LAW 'GOVERNING' THE NRC

The Law on Citizenship in India can be traced to Articles 5-11 of the Constitution and the Citizenship Act, 1955 and the Foreigners Act, 1946. While, these laws cover the conditions for Indian citizenship and the state's power to regulate it, they do not expressly deal with the rights of the 'stateless'. All non-citizens are broadly categorised as 'foreigners', with no special provisions made for special classes like refugees, asylum seekers and stateless persons.[23]

The Assam NRC exercise is governed by Section 6A of The Citizenship Act, 1955,[24] and Rule 4A of The Citizenship (Registration of Citizens and Issue of National Identity cards) Rules, 2003. It was implemented under the supervision of the Supreme Court.[25] It was first prepared in 1951 by the Home Ministry after the first census of independent India. The objective of the ongoing exercise is to update the NRC to

"…*include the names of those persons (or their descendants) who appear in the NRC, 1951, or in any of the Electoral Rolls up to the midnight of 24th March, 1971 or in any one of the other admissible documents issued up to midnight of 24th March, 1971, which would prove their presence in Assam or in any part of India on or before 24th March, 1971*".[26]

All the names appearing in the NRC, 1951, or in any Electoral Roll (up to the midnight of 24th March 1971) are called *Legacy Data.* In order to prove citizenship, an individual either needs to be included in

news/after-ranjan-gogoi-s-retirement-special-bench-on-nrc-case-dissolved/story-7P5TMKNOb64Wk05dW3shdK.html> accessed December 6, 2020.

[23]Neeraj Gopal Jayal, 'Citizenship', in *The Oxford Handbook of the Indian Constitution* Chaudhary S, Khosla M and Mehta P ed. (OUP 2016).

[24]Inserted by the Citizenship (Amendment) Act, 1985.

[25]*Assam Public Works v Union of India* (2018) 9 SCC 229.

[26]Office of the State Coordinator of National Registration (NRC), *What is NRC?*, available at http://www.nrcassam.nic.in/what-nrc.html accessed on Apr 11, 2020.

this legacy data *or* be able to prove direct lineage to any person on it.[27] Residents were required to submit family-wise application forms along with requisite documents. After the particulars are verified, a draft NRC was prepared and the general public was then allowed to submit claims, objections or corrections. After the verification of these claims, the updated NRC was published on 31st August 2019.[28]

Concurrently, proceedings were initiated in the 'Foreigner Tribunals' against those being excluded from the NRC, who are given another opportunity to prove their citizenship. These tribunals are quasi-judicial authorities set up through executive order under the Foreigners Act, 1946 and Foreigners (Tribunals) Order, 1964.[29] Cases are referred to the tribunals by the Election Commission or the Border Police. After August 31, 2019, the tribunals also act as the appellate authority for those excluded from the final draft of the NRC. Nearly 200 such tribunals are being set up after the publication of the final list.[30]

IV. ON THE TOUCHSTONE OF THE CONSTITUTION

The first question that needs to be addressed is whether the people being excluded in the NRC exercise are protected by the rights contained in Part III of the Constitution. The government has repeatedly contended in respect of those excluded from NRC that

[27]Office of the State Coordinator of National Registration (NRC), *What are the admissible documents*, available at <http://nrcassam.nic.in/admindocuments.html accessed on April 11, 2020.

[28]Office of the State Coordinator of National Registration (NRC), *NRC in a Nutshell*, available at http://www.nrcassam.nic.in/what-nrc.html accessed on April 11, 2020.

[29]Foreigners (Tribunals) Order, 1964 – issued under S.3 of the Foreigners Act, 1946.

[30]ibid (n 11).

fundamental rights are not available to these 'foreigners' or 'non-citizens'.[31]

However, until tried and declared as a 'foreigner', those excluded from NRC remain Indian citizens and are entitled to fair procedure and just treatment, by right. Even assuming that these persons are 'foreigners', it is an incorrect presumption that fundamental rights will be rendered inapplicable. The Constitution specifies which rights are applicable only to 'citizens'. Within Part III, Articles 15 (prohibition of discrimination), Article 16 (equality of opportunity in matters of public employment), Article 19 (six basic freedoms), Articles 29 and 30 (rights of minorities), specifically restrict their applicability to 'citizens' as per their text.[32]

However, the remaining fundamental rights refer to 'persons' in their text and thus remain applicable to citizens and foreigners alike. These include wide-ranging rights such as equality before law and equal protection of laws (Article 14), protection in respect of conviction for offences (Article 20), protection of life and personal liberty (Article 21) and protection against arrest and detention in certain cases (Article 22).[33]

This has also been affirmed by judicial precedent. In *Louis De Raedt v. Union of India*,[34] the Supreme Court held that foreigners are also entitled to fundamental rights, including right to life and liberty under Article 21. This ratio was also re-iterated in *Chairman, Railway Board v. Chandrima Das*,[35] wherein the Supreme Court observed that

[31]Illegal immigrants can't claim fundamental rights: Govt to Apex court, *The Hindu Business Line*, available at <https://www.thehindubusinessline.com/economy/policy/illegal-immigrants-cant-claim-fundamental-rights-govt-to-apex-court/article9885514.ece> accessed June 11, 2020.

[32]The Constitution of India 1950.

[33]ibid.

[34]*Louis De Raedt v. Union of India* (1991) 3 SCC 554.

[35]*Chairman, Railway Board v. Chandrima Das* (2000) AIR SC 988.

the rights contained in International Human Rights Law, like the Universal Declaration of Human Rights, 1948, overlapped with the scheme of fundamental rights outlined in the Indian Constitution.[36] Applicability of Article 21 in the context of refugees was again reaffirmed in *National Human Rights Commission v. State of Arunachal Pradesh*,[37] wherein the Supreme Court held that eligible stateless individuals (the Chakmas in this case), have a right to be considered for Indian citizenship.

The following critique of the NRC exercise is thus based on violation of fundamental rights guaranteed under Part III of the Constitution. It is based on 2 prongs - first is the *substantive illegality* of the exercise, argued based on violation of 'right to equality' under Article 14. The second prong of criticism is directed at the *arbitrariness and unfairness of the procedure* employed, which contravenes 'right to life and personal liberty' under Article 21, as expanded by the Supreme Court across various landmark judgements.

A. Right to Equality

The most apparent paradox of the Assam NRC is that there is a pending challenge to constitutionality to the very law on which it is based, before the Supreme Court- in *Assam Sanmilita Mahasangha v. Union of India*,[38] to decide the Constitutional validity of Section 6A of Citizenship Act, 1955. Yet the Supreme Court, rather than deciding the plea first and settling the legality of the law, gave directions to implement the NRC nonetheless, at great cost to the state and the people. Hypothetically, it is very well possible, that the section is declared unconstitutional by a future court, rendering the entire

[36] V. Vijayakumar, 'Developments. Judicial Responses to Refugee Protection in India' (2012) International Journal of Refugee Law 235–243.
[37] *National Human Rights Commission v. State of Arunachal Pradesh* (1996) SCC 1 742.
[38] *Assam Sanmilita Mahasangha v. Union of India* (2015) SCC 31.

exercise redundant and illegal. Though at this point, gauging the current stance of the court, the possibility is minimal at best.

The issues before the court are whether Section 6A violates Article 14 by singling out Assam, whether the separate cutoff date is justified, and whether unchecked immigration constitutes external aggression under Article 355.

A pertinent question is why Assam has been singled out from all the border states, by Section 6-A of the Citizenship Act. Prima facie, this arrangement does not treat Assamese residents on par with the residents of other states, by imposing a higher standard for them to claim citizenship and thus is violative of Article 14. It is also questionable whether it was valid for Parliament to carve out an exception for the state of Assam through an amendment to the Citizenship Act, with respect to the cut-off date for grant of default citizenship, without passing a formal constitutional amendment amending Article 6 of the Constitution, which expressly prescribes an earlier date.[39]

Ever since the NRC began, reports indicate that it has disproportionally affected the Muslim community, with the majority of the cases before the tribunals being of Muslims. Persons living below the poverty line are also disproportionally affected.[40]

In terms of government policy, a bias is apparent in light of the Citizenship (Amendment) Act, 2019. The bill expedited the process of acquiring citizenship for individuals from Hindu Christian, Sikh and Buddhist communities who migrated from neighboring

[39]The Constitution of India 1950.

[40]USCIRF, *Issue Brief: India – The Religious Freedom Implications of the National Register of Citizens*, November, 2019; Praveen Donthi, 'How Assam's Supreme Court-mandated NRC Project Is Targeting and Detaining Bengali Muslims, Breaking Families', *Caravan* (July 2, 2018) <https://caravanmagazine.in/politics/assam-supreme-court-nrc-muslim-families-breaking-detention> accessed December 7, 2020.

countries.[41] By thus disadvantaging Muslims, this act has been challenged for violating the fundamental right to equality as per Article 14 of the Constitution.[42] Specifically, in the context of Assam, as affirmed by the state government, the act would enable five lakh Bengali Hindus who entered the state between 1971 and 2014 to claim citizenship, while seven lakh Bengali Muslims will have to face the foreigner's tribunals. [43] This amounts to a violation of the right to be treated equally before law. This bias already seems to be taking effect, with the Central government instructing the Assam government to release 'non-muslims' from the detention centers.[44]

The 2019 amendment has incidentally, also been opposed by the native populace on the charge that it undermines the entire point of the NRC exercise, which was to identify and deport all immigrants irrespective of religion. The Assam accord was meant to protect the ethnolinguistic identity of the native Assamese, religion was not a factor. [45]

B. Right to a Fair Trial

Article 21 of the Constitution of India states that "*no person shall be deprived of his life or personal liberty except according to procedure*

[41]Citizenship (Amendment) Act 2019, s 3 and 5.

[42]*Indian Union Muslim League v. Union of India* (2019) WP (C) 1470.

[43]'NRC Bill: Five lakh Bengali Hindu NRC rejects will get citizenship', *The Times of India*, available at <https://timesofindia.indiatimes.com/india/five-lakh-bengali-hindu-nrc-rejects-will-get-citizenship/articleshow/72465093.cms> accessed June 11, 2020.

[44]Prabin Kalita, 'Assam told to free non-Muslims from detention camps: MoS in Lok Sabha', *The Times of India* (2020), <https://timesofindia.indiatimes.com/city/guwahati/assam-told-to-free-non-muslims-from-detention-camps-mos-in-lok-sabha/articleshow/73958268.cms> accessed December 7, 2020.

[45]Chandan Kumar Sarma and Obja Borah Hazarika, *Anti-CAA Protests and State Response in Assam: Identity Issues Challenge Hindutva-based Politics*, Economic and Political Weekly (2020), available at https://www.epw.in/engage/article/anti-caa-protests-and-state-response-assam (accessed on December 10, 2020).

established by law." [46] In the landmark judgement of *Maneka Gandhi v. Union of India*,[47] a procedural due process requirement was read into this article by the Supreme Court. A person's life and personal liberty can thus be deprived only as long as the procedure by which such deprivation takes place is 'just, fair and reasonable'. This single right has been progressively expanded to include other substantive rights, which by the language of the original wording itself, apply to *all persons*, regardless of status of citizenship.[48]

However, as empirical studies of the NRC process and the tribunal proceedings have indicated, there are ample instances of disregard of procedural due process in the case of the Assam NRC.

The sheer scale of the exercise, the predisposed bias in the administration and the vulnerability of the affected population resulted in the application of the law varying widely from what is posited. The border police are required to conduct due investigation before referring cases to the tribunals, which they overwhelmingly fail to do. Verification forms are submitted empty and no grounds are furnished in most cases. Notices to appear before tribunals are to be served in person, however in several cases, delivery is forged or large omnibus notices are put up instead. As a result, a large number of the tribunal proceedings are conducted *ex-parte*.[49]

[46] The Constitution of India 1950, art. 21.

[47] *Maneka Gandhi v. Union of India* (1978) 1 SCC 248; *Ranjan Dwivedi v. Union of India* (1983) SCC 3 307

[48] Abhinav Chandrachud, 'Due Process' in *The Oxford Handbook of the Indian Constitution*, (OUP 2016).

[49] Harsh Mander, Draft Report of the NHRC Mission to Assam Detention Centers (2018) https://drive.google.com/file/d/1skGrqF6L8XnW8nsYbw2oruAi5yKsuxUx/view (accessed June 26, 2020). Mr. Mander is the former Special Monitor for the National Human Rights Commission on Minorities in India. He was appointed to report on the conditions in the detention centers of Assam. He later resigned after his report was not accepted and published it on his own.

The law governing procedure before these tribunals is not clear and consistent, neither the Civil Procedure Code nor the Criminal Procedure Code is applicable. The law authorizes each tribunal to set its procedure.[50] Even in such circumstances, tribunals and the state authorities are obligated to adhere to the *principles of natural justice*.[51] However, this discretion is exercised arbitrarily by each of the 100 or so tribunals to the disadvantage of the appellants. The tribunals thus have different standards regarding time accorded to file replies, admissibility of documents, methods to establish family trees etc. There is extensive use of closed-door hearings and 'sealed covers' by the tribunals which allows for non-uniform application of law and leaves scope for bias and contradiction.[52]

For instance- while considering citizenship of different family members, the law extends deprivation of citizenship from a declared foreigner to his family i.e. – the tribunals can initiate proceedings against persons based on any member of their immediate family being declared a 'foreigner'. This does not apply in reverse, i.e., a person cannot claim the benefit of his immediate family having been declared as citizens.[53] This results in contradictory outcomes, in which members of the same family are being differently classified as 'foreigners' and 'citizens'.[54] The procedural law, therefore, is

[50]ibid (n 17).

[51]*Maneka Gandhi v. Union of India* (1978) 1 SCC 248.

[52]Citizens for Justice and Peace, *Contested Citizenship in Assam: People's Tribunal on Constitutional Processes and Human Cost*, 2019, available at <https://cjp.org.in/nrc-has-spawned-a-humanitarian-crisis-interim-jury-report/> accessed March 26, 2020.

[53]Amnesty International India, *Designed to Exclude: How India's courts are allowing foreigners tribunals to render people stateless in Assam,* (2019) available at <https://amnesty.org.in/wp-content/uploads/2019/11/Assam-Foreigners-Tribunals-Report-1.pdf> accessed on March 25, 2020.

[54]Human rights Law Network, *The Citizenship Amendment Bill and the National Register of Citizens: Report of the Public Hearing of February 2019 at Guwahati Assam,* (May 2019) available at <https://hrln.org/wp-content/uploads/2019/06/Report-of-Public-Hearing-on-NRC-and-CAB.pdf>

completely removed from reality, unclear and variable, hindering compliance. Several high-profile cases have also emerged in which prominent citizens, veterans of the armed forces, freedom fighters, their descendants and in one case, even an NRC field inspector have been declared as 'foreigners', which casts doubt on the credibility of these proceedings itself and are testaments to the inherent arbitrariness.[55]

The tribunals have also been accused of pre-disposed bias against marginalized communities, in terms of subjecting them to stricter scrutiny and dismissing appeals on flimsy technical grounds.[56] Tribunals function in routine contravention of the directions issued by the High Court. They regularly refuse to provide the parties with a copy of the inquiry report based on which their citizenship is being questioned.[57]

This arbitrariness can be partly attributed to the fact that despite being declared as quasi-judicial bodies by the Supreme Court,[58] the state government exercises substantial influence on these tribunals in terms of procedure and, appointments and terms of service of the members. In such a political charged exercise, as apparent from the historical context, this is a serious flaw the process. There are limited prescribed qualifications for judges. The sole criteria for appointment is 'judicial experience' as the Government deems fit.[59] The number of individuals declared as 'foreigners', has been regarded as a performance indicator for the members on these tribunals. Members have even been terminated on account of low 'performance'. This is a

accessed on May 2, 2020. The Panel included Justice Gopala Gowda (Chairperson), Prof. Monirul Hussain (Co-Chairperson), Harsh Mander, Sanjoy Hazarika and Colin Gonsalves.

[55] ibid.

[56] ibid (n 53).

[57] Mander, (n 49).

[58] *Abdul Kuddus vs. Union of India* (2019) AIR SC 2834.

[59] Foreigners (Tribunals) Order 1964, Rule 2(2).

de-facto conflict of interest as the adjudicating members have a vested interest in the conviction of the accused.[60]

These issues are further compounded by lack of an appellate mechanism.[61] Even approaching the High Court under writ jurisdictions has proven ineffective, as the court refuses to go into questions of 'fact'. This problem was further exacerbated when the Supreme Court refused to establish a competent appellate forum to hear such cases.[62] There have also been allegations of bias at the highest level of the Supreme Court itself, with the then presiding judge – Justice Gogoi who directed the implementation of the exercise being an indigenous Assam resident himself, which raised questions regarding his motives. His conduct and the ultimate stances he took only served to cement these concerns.[63]

By not providing for a fair hearing and transparent procedure in these crucial proceedings which have the potential to result in disenfranchisement, detention and eventual deportation of those tried under it, this process violates the right to a fair trial under Article 21.

C. Right to Legal Representation

'Right to life' under Article 21, includes the 'right to legal aid'. The same expressly posited by the Supreme Court in the landmark case of *Hussainara Khatoon v. State of Bihar.*[64] This right originates as a Directive Principle of State Policy as per Article 39-A of the

[60]<http://ghconline.gov.in/Recruitment/Notification-10-06-2019.pdf> accessed on June 27, 2020.
[61]Foreigners (Tribunal) Order, 1964, Clause 3A (8).
[62]*Abdul Kuddus v. Union of India* AIR 2019 SC 2834.
[63]Alok P Kumar, National Register of Citizens and the Supreme Court, 53 Economic and Political Weekly July 21, 2018; *Harsh Mander v. UOI* WP (C) No.1045/2018.
[64]*Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 98.

Constitution. In *Suk Das v. Union Territory of Arunachal Pradesh*,[65] the Court further clarified that the onus is not on the accused to ask for free legal representation, but the judge instead must inform the accused of such a right. The right to legal aid is further affirmed by Section 304 of the Criminal Procedure Code,[66] Order 33 of the Civil Procedure Code[67] and The Legal Services Authority Act, 1987.[68]

Several empirical reports by human rights activists indicate that several persons deemed to be 'foreigners' and detained, had lacked proper legal representation and had not been heard fairly by the tribunals.[69] Several were detained on '*ex-parte* orders', because they allegedly failed to appear before the tribunals, despite being served legal notices.[70]

The procedure of serving notices itself is to blame for this. Many of those summoned are migrant workers working away from their native places. Many people are not personally served notices, or their names are just included in long omnibus notices addressed to the public.[71] In reality, people are unlikely to evade notices, as that just increases doubt and reduces the chances they have for proving citizenship.

The evidentiary burden is exclusively on the accused,[72] the tribunals are not even legally required to first establish sufficient grounds to initiate proceedings, which make arguing a case even more difficult

[65] *Suk Das v. Union Territory of Arunachal Pradesh* (1986) 2 SCC 401.

[66] The Code of Criminal Procedure 1973.

[67] The Code of Civil Procedure 1908.

[68] The Legal Services Authority Act, 1987; Sushant Chandra & Nityash Solanki, *Legal Aid in India: Retuning Philosophical Chords*, 2 BRICS L.J. 68 (2015). Pooja Vardhan, *Right to Legal Aid; A Constitutional Commitment*, PIB, available at https://pib.gov.in/newsite/mbErel.aspx?relid=118011> accessed June 11, 2020.

[69] Amnesty International India, *supra*, note 53.

[70] ibid.

[71] Mander, (n 49).

[72] The Foreigners Act 1946, s.9.

for the accused.[73] The major shortcoming of the entire exercise, is the assumption that those excluded from the NRC, have the resources to discharge the heavy burden imposed on them by the state, i.e.- proving their citizenship. The discharge of this burden is not an easy task itself. There is excess reliance on documentary evidence and oral testimony is disregarded by these tribunals. The process involves gathering relevant and valid government identification and other documents, to prove residence and direct lineage going back three generations of one's family. It is important to consider the impoverished and illiterate state of the populace and also the state's flood-prone terrain, which only add on to the difficulties.[74]

The persons who fail to prove their citizenship, are more often among the poor and the marginalised, who lack the resources to gather such documentary evidence, let alone be able to successfully defend themselves before a belligerent tribunal. Thus, the foreigner's tribunals working in conjunction with NRC violate this fundamental right on a routine basis, by failing to provide requisite legal aid to those who are summoned before them.[75]

It is only after much public outcry, that the state government in Assam began to take active steps to secure this fundamental right. In late August 2019, it offered to sponsor legal expenses of those excluded from the NRC and appealing to Foreigner Tribunals, who

[73] *Sarbananda Sonowal (II) v Union of India* (2007) AIR SC SUPP 1372.

[74] Akhil Ranjan Dutta, *Political Destiny of Immigrants in Assam: National Register of Citizens*, 53 Economic and Political Weekly (February 24, 2018).

[75] Rebecca Ratcliffe, 'A nightmarish mess: millions in Assam brace for loss of citizenship', *The Guardian* (2019), available at <https://www.theguardian.com/global-development/2019/aug/30/nightmarish-mess-millions-assam-brace-for-loss-of-citizenship-india> accessed June 11 2020.

have an annual income of below 3 lakh rupees.[76] Yet, how it would be implemented, remains to be seen.

D. Rights of Detainees

In conformity with Article 21, the state is obliged to respect the right to a life of dignity of its citizens, even in detention, as held in *Sunil Batra v. Delhi Administration.*[77] As of March 2020, more than 3,331 'declared' foreigners were detained in 6 detention centers across Assam.[78]

In theory, those declared as 'foreigners' are to be detained in these centers till arrangements are made for their deportation to their supposed 'original' country. However, the Government of Bangladesh has repeatedly stated that it will not accept these expelled people numbering in millions, and views it as India's internal problem.[79] It is reiterated at this point that such persons have merely been unable to prove their Indian nationality, which is not the same as having being proved to possess another nation's citizenship. Such persons are thus rendered 'stateless'. Thus, the detention of these 'declared foreigners' is *de-facto* indefinite. Such detention is inherently arbitrary and disproportionate, and violative of right to life and personal liberty under Article 21. The number of 'declared

[76]Prabin Kalita & Tnn, *Poor to get free govt legal aid on NRC, The Times of India*, <https://timesofindia.indiatimes.com/india/poor-to-get-free-govt-legal-aid-on-nrc/articleshow/70867275.cms> accessed June 11, 2020.

[77]*Sunil Batra v. Delhi Administration* AIR 1978 SC 1675.

[78]Lok Sabha, *Unstarred question no. 3880*, (2020), available at <https://mha.gov.in/MHA1/Par2017/pdfs/par2020-pdfs/ls-17032020/3880.pdf> accessed on Dec 7, 2020.

[79]Basu, (n 12). As per the Assam government, only 6 foreigners identified under the NRC have been successfully deported. *Supreme Court Legal Services Committee v Union of India* (2018) W.P. (C) 1045/2018.

foreigners' has increased to 1,29,009 persons, who are now facing the risk of such detention.[80]

However, when the matter of indefinite detention and its conditions were brought before the Supreme Court,[81] it took an opposite stand by deprecating the government for being slow in the deportation process, ignoring the government's prudent contention that deportation is impractical unless the host country is willing to receive the detainees, which is certainly not the case with Bangladesh.

Apart from the arbitrary manner in which these persons were detained in the first place, the conditions of their detention are another violation of their fundamental rights.

These detention centers have been carved out of existing jails, but have even worse conditions than those afforded to convicted criminals, with cramped, confined living quarters and little prospects of bail or recreation. [82] This can be attributed to the non-existence of any concrete legal regime governing the rights and entitlements of detainees.[83]

There are no official guidelines from the Central or the state government about the rights of the detainees. The detention centers are *de facto* administered under the Assam Jail Manual. Thus, for all practical purposes, the state makes no distinction between jails and these detention centers, and by extension, between convicted felons and the detainees. In the absence of a clear regime, authorities selectively apply the Assam Jail Manual to these detention centers, applying all the restrictions but denying benefits like waged work,

[80]Lok Sabha, *Unstarred question no. 3558,* (2019), available at <http://164.100.24.220/ loksabhaquestions/annex/172/AU3558.pdf> accessed on Dec 7, 2020.
[81]*Harsh Mander vs Union of India* WP (C) No.1045/2018.
[82]*Supreme Court Legal Services Committee v. Union of India* WP No. 1045/2018.
[83]Mander, (n 49).

communication facilities and parole, that prisoners are entitled to under jail rules.[84] Such a manner of detention is violative of right to life under Article 21.

V. THE WAY AHEAD: A POLICY PERSPECTIVE

The entire NRC exercise was based on the retrospective application of a 1985 law, penalizing conduct 14 years before, which was then implemented 34 years later, that too as per the procedure of a pre-constitutional law – the Foreigners Act. It is also pertinent to note that when the migration did take place in the impugned period, particularly in the leadup to the 1971 Indo-Pak war and the refugee crisis that preceded it, it happened in full knowledge and even with the facilitation of the state along the porous border.[85] There was a failure of the state to provide uniform documentation and official channels for migration in the past.[86] That has been apparent in the NRC exercise, in which many applicants who submitted Refugee Registration Certificates to back their residency claims, faced rejections as the government was more often than not (in nearly 60% of such cases) unable to locate corresponding records.[87]

[84] ibid.

[85] Madhumita Sarma, *A Study of Migration from Bangladesh to Assam, India*, University of Adelaide, available at <https://digital.library.adelaide.edu.au/dspace/bitstream/2440/97379/3/02whole.pdf > accessed on July 2, 2020.

[86] India till date lacks an official refugee policy. *Working Environment: India*, UNHCR (2011) <https://www.unhcr.org/4cd96e919.pdf> accessed Dec 7, 2020.

[87] Naresh Mitra, 'NRC Applicants hit by lack of government records', *Times of India* (August 26, 2019) < https://timesofindia.indiatimes.com/india/nrc-applicants-hit-by-lack-of-government-records/articleshow/70834076.cms> accessed Dec 7, 2020.

Application of such a 1971 cut-off date now is unfeasible, it may have been possible to implement it in the 1980s,[88] but not in 2015 when the court began to enforce it.[89] By this time, the supposed "illegal immigrants burdening the state" that the law targets, have been residing in this country as bona-fide citizens for decades, established themselves and have extended families. It would be inhuman to deport not just these immigrants but also their descendants who lack any genuine link to their country of origin. Adhering to the old cut-off date, only renders the entire process irrational and impractical from a policy perspective

The most pertinent argument against the NRC law is that it is simply impossible for most to comply with, i.e., to establish genealogy and proving the residence of oneself or one's ancestors (up to three generations) in the country, prior to 1971, through documentary evidence. This burden is impossible for many to discharge in a state whose one-third population is below the poverty line, one-fourth is illiterate and two-thirds of whose area is prone to chronic floods.[90] The evidentiary requirements are strict, tribunals insist on certification of even original documents by issuing authorities, impose strict deadlines unmindful of practical constraints and hold non-appearance and delays against appellants.[91] In spite of these problematic aspects, the government is expanding this legal regime to the rest of the country.[92] The lack of a statutory, rights-oriented regime also invests significant authority in the executive to dictate the procedure of such an exercise, allows for manifestation of bias, at the

[88]When the Assam Accord was signed (1985).

[89]*Assam Public Works v. Union of India* WP (C) 274/2009.

[90]Government of Assam, *State Profile of Assam | Directorate of Economics and Statistics*, 2019 available at <https://des.assam.gov.in/information-services/state-profile-of-assam> accessed June 26, 2020.

[91]Amnesty *supra* note 53.

[92]Vijaita Singh, (n 10).

expense of citizens. Such a discretionary, bureaucratic process is bound to result in bias and exclusion.

The worst affected strata of the population are illiterate, impoverished daily wage workers. They lack documentary evidence such as land deeds, birth certificates and school records needed for inclusion in NRC. They have often moved away from their original homes for work and thus fail to reply to notices on time. In the proceedings, they lack the resources to engage good counsel and if detained, to meet the stringent bail requirements. The burden is more so on women, who usually married underage, hardly have any property documents or educational record, and usually have documents to prove relationship to their husbands, but not their parents and natal family tree.

Apart from these human costs, any government considering extending NRC to the rest of the country, should also consider the disproportionate costs in relation to the uncertain outcome of deportation. From an administrative perspective, the NRC updating exercise was a massive undertaking, costing around ₹1,600 crores over 10 years and involving around 52,000 staff. It also had a severe impact on the development and economic activities of the state.[93]

In the interim, the NRC legal regime in Assam should be reconciled with the fundamental rights under Articles 14 and 21 of the Constitution, by the means of an appropriate legislation. An exception cannot be created. A uniform procedure should be laid down to bind all tribunal proceedings. Hearings should be open; documentary criteria should be relaxed. It should be the duty of the state to ensure adequate legal representation of all accused. Sufficient notice should be provided, orders should not be *ex-parte* and should be reasoned. The state must also establish a separate legal regime governing the rights and conditions of these detainees.

[93]Does Amit Shah even understand what NRC will cost?', *National Herald*, <https://www.nationalheraldindia.com/opinion/does-amit-shah-even-understand-what-nrc-will-cost> accessed on June 1, 2020.

As a first step to reconciling the legal regime with the Constitution, the author suggests relying on the provisions of the erstwhile Illegal Migrants (Determination by Tribunal) Act (IMDT), 1983,[94] as a basis for amending the current law governing the NRC and making it compatible with fundamental rights.

The IMDT Act required a 'prescribed authority' to prove non-citizenship of an individual.[95] Thus, by shifting the burden of proof onto the state, rather than the accused person, the IMDT Act was more protective of immigrant interests. The procedure for referring a case to the Tribunal involved verification at multiple levels.[96] Only a serving or retired District Judge or Additional District Judge was eligible for being a tribunal member,[97] and an appellate tribunal also existed to ensure oversight.[98]

Regarding the substantial provisions, appropriate legislation should be introduced re-examining the feasibility of the cut-off date and the sanctions being imposed. Communal identity should not be used as a criterion for citizenship. Such legislation should be consistent with fundamental rights and international law obligations of the state.

VI. CONCLUSION

In conclusion, the NRC legal regime as it exists, is violative of fundamental rights. Rights under Articles 14 and 21 of millions of persons have been violated by this exercise with the complicity of both the state and the judiciary. It is a matter of great concern that

[94] *Sarbananda Sonowal v. Union of India* (2005) 5 SCC 665; *Assam Sanmilita Mahasangha v. Union of India* (2015) SCC 31.
[95] IMDT Act 1983, s 12.
[96] IMDT Rules 1984, Rule 4.
[97] IMDT Act 1983, s.5(2).
[98] IMDT Act 1983, s.15.

millions of people resident in this country for decades are facing disenfranchisement, detention and eventual deportation, in such an arbitrary and unjust manner, in clear violation of constitutional provisions and judicial precedents.

By a perusal of the relevant judicial opinions, it is apparent that the Supreme Court played a paradoxical role. On multiple occasions, it was the state pleading before the court for granting bail to detainees, extending deadlines, while it is the court which questioned the state for being lax, questioning the low number of detentions, ordered deportations. There can be no greater irony than innocents being deprived of their fundamental rights through a Supreme Court directed process itself. Yet, number of the issues identified by this paper still remain pending before the court in various petitions, with a new bench in place, the court still has the time to shed its earlier role as a 'Executive Court' and perform its duty to protect the vulnerable.

Finally, it is essential to keep in mind the impact of the National Register of Citizens in Assam has had on fundamental rights as highlighted in this paper, in light of the recent indications by the present government, that the exercise will be extended to the whole of India in the future. The ramifications such a step will have on the social fabric of the country and our civil rights will be significant. The manner of the Assam NRC is thus certainly not a model to follow, the underlying legal regime requires a significant overhaul, to conform to constitutional rights.

Keeping in mind the social and administrative costs of the Assam NRC, in a post-COVID economy, a wiser policy choice would be to invest these resources in healthcare and infrastructure, rather than in such an unproductive political gimmick, with an uncertain outcome. The state should instead adopt a more human attitude towards vulnerable immigrants and address the social friction created by their presence, rather than uproot these persons themselves. The state

should focus its efforts on integrating these migrants with the local community, while protecting the interests of the native populace.

EVALUATING THE CONSTITUTIONALITY OF A DEFICIENT TRANSITION: THE ANTI-PROFITEERING LAW IN INDIA

Himangini Mishra[*] *& Arunima Phadke*[**]

Abstract

The anti-profiteering mechanism was introduced with an aim to ensure that the benefit of transitioning from the VAT system of taxation to a much simpler Goods and Services Taxation system, reaches the aimed beneficiaries. The concept of anti-profiteering was introduced for the first time in India after taking inspiration from the countries with the existing GST system. Thereby, for the greater part, it is dependent on the legislature for guidance as to the procedure and powers. The anti-profiteering mechanism even though, introduced to benefit the consumers, presents an immaculate example of legislative negligence vide rules and regulations; bestowing power within the three-tier Anti-profiteering monitoring system. The constitutionality of the Section 171 CGST, 2017 and Rule 126, CGST Rules, 2017 has been challenged several times in the High Courts across the country, until the Supreme

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Court transferred all the petitions in front of the Delhi High Court in February, 2020. The present paper examines the vires of Anti-Profiteering laws, along with that of the National Anti-Profiteering Authority.

I. INTRODUCTION

The government introduced the Goods and Services Tax ("**GST**") regime in the year 2017, with an aim to simplify the Indirect Taxation system in India. Within the system of GST, the government also introduced Anti-Profiteering measures for the first time, upon the recommendation of the Select Committee. It was introduced to ensure that the consumer is benefitted from the reduction in the tax, as the new system of taxation is expected to eliminate the intermediate taxes. Thus, Anti-Profiteering measures were introduced as part of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as CGST Act, 2017) and Central Goods and Services Rules, 2017 (hereinafter referred to as CGST Rules, 2017).[1]

Under GST, the profiteering measures are monitored by a three-tier Anti-Profiteering mechanism. Section 171 of CGST Act, 2017 provides for the establishment of 'National Anti-Profiteering Authority ("**NAA**")' as the final authority to take action against profiteering.[2] The section and its analogous rules are often charted to be arbitrary and easy-handed, thus highlighting a fallacious aspect of law. It is also said to be propounding excessive delegation to the

[1]Select Committee Report, *THE CONSTITUTION (ONE HUNDRED & TWENTY-SECOND AMENDMENT) BILL, 2014* (RS 2014) paras 3.32-3.34, <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Select%20Committee%20on%20the%20Constitution%20(One%20Hundred%20and%20Twenty%20Second%20Amendment)%20Bill,%202014/1.pdf>.

[2]Central Goods and Services Tax Act 2017, § 171(2).

NAA by virtue of the unclear mandate under Rule 126 of the CGST Rules, 2017. Lastly, the provision is said to be violative of Article 19(1)(g) of the Constitution, as it preludes and erases the right to earn profits and is heavy-handed and restrictive in its application.

The absence of any provisions for the appointment of judicial members in the authority and other concerns pertaining to Anti-profiteering has led to the filling of 23 writ petitions, challenging the constitutionality of NAA in High Courts of Delhi, Mumbai and Punjab & Haryana since its very promulgation.[3] The Supreme Court for uniformity in the position of law, vide its order on 19th February, 2020 has transferred all the petitions to the High Court of Delhi to adjudge upon the constitutional validity of Section 171 CGST, 2017 read with Rule 126, CGST Rules, 2017.[4]

As these judgments shall be decided and set precedents, there are a lot of points that need to be smoothened out. The Anti-profiteering provisions were brought in by studying the models of the same regime from other countries. Its intent is consumer-centric, wherein it wants the commensurate reduction in taxes by way of input tax credit ("**ITC**") to be passed down to the consumer. However, its implementation with a special focus to the procedure, methodology and organization of the pivotal authority has attracted lots of disparity.

This paper analyses the nature and constitutionality of the Antiprofiteering legislation, the rules thereunder, its backdrop and its mechanism of functioning. It studies in detail, the nature and constitutionality of the designated authority and its constitution. It concludes with suggestions and key adherences that must be rectified within an indirect tax regime that was structured to the benefit of the primary stakeholders but remains ensnared within its arbitrariness.

[3] *The National Anti-Profiteering Authority v Hardcastle Restaurants Private Limited & Ors* [2020] SC, Transfer Petition (Civil) Nos 290-292 of 2020.
[4] ibid.

II. THE FOREIGN REGIMES

The GST ruling was made in April 2015 for Malaysia. It is said to be introduced because of the observed inflation in the prices despite the benefits of the CGST rulings. Since then, however, the anti-profiteering rules are applicable over fewer goods, like food and beverages and household supplies. The rules that supplemented the law in Malaysia also supplemented the problems that arise out of profiteering and the detriment that the government is trying to avoid. In 2018, the GST regime was scraped off.[5]

A major point of learning from the Malaysian regime is that micro-level management and overregulation of the market, result in increasing the cost of compliance with laws and the growth is stifled. It was discovered that an aggressive assertion of laws relating to anti-profiteering becomes difficult to implement and follow.[6]

On the other hand, the Australian model is more similar to the measures that have been adopted in the Indian context. The law was adopted during the transition period that lasted for about three years. (July 1, 1999 to June 30, 2002).[7]

The Australian Competition and Consumer Commission was entrusted to look after the smooth and relevant functioning of the GST implementations. They also created price rules. ACCC 2000a and 2000d read that the prices charged to the customers must not rise

[5]'Malaysia Scraps GST, Would It Really Impact Indian GST Regime?' (*https://www.taxmann.com*, 2018) <https://www.taxmann.com/blogpost/2000000388/malaysia-scraps-gst-would-it-really-impact-indian-gst-regime.aspx>.

[6]Payaswini Upadhyaya, 'GST: How Australia And Malaysia Disciplined Profiteeringconduct' (*BloombergQuint*, 2017) <https://www.bloombergquint.com/gst/gst-how-australia-and-malaysia-disciplined-profiteering-conduct>.

[7]Sthanu Nair, Leena Eapen, 'Price Monitoring and Control under GST' (*Economical and Political Weekly*, 2017) <https://www.epw.in/journal/2017/25-26/web-exclusives/price-monitoring-and-control-under-gst.html>.

by more than 10% because the net cost of raw materials was not expecting a surge at the time of implementation of laws and since an input tax credit lease was given to the people.[8] However, the prices could still be regulated upon certain margin costs. It is also necessary to note that the ACCC took it upon themselves to educate businesses and their consumers, via various mechanisms, about the GST rule, almost twelve months before it was implemented.[9]

As per the FAQ on Anti-profiteering provisions by the Central Board of Indirect Taxes and Customs, the report released by the Comptroller and Auditor General of India in June 2010 was referred to. However, the report only discussed how the commensurate benefit arising from reduction in VAT was not transferred to the consumers within the first three months of its implementation. It has been stated that the background to the law was thus to remediate an issue prevalent within a former-tax regime, but has not supplemented with sufficient contemporary field study data, as was done in foreign jurisdictions when there was a marked increase in inflation after the implementation of GST laws.[10] The Australian and Malaysian models were keenly studied to draft the anti-profiteering laws in India. However, the Indian law on anti-profiteering with its skeletal provisions and rules thereunder, did not provide for a specific methodology or procedure for determining if a commensurate reduction has been endowed with the consumer; making it difficult to analyze or identify the factors taken into consideration while it was

[8]Vedant Agarwal, 'Anti-Profiteering Under GST: Analysis of Recent Decisions And Comparison With Other Jurisdictions' (*TaxGuru*, 2020) <https://taxguru.in/goods-and-service-tax/anti-profiteering-gst-analysis-decisions-comparison-jurisdictions.html>.

[9](n 7).

[10]Adithya Reddy, 'The anti-profiteering concept is flawed' (Hindu Business Line 2018) <https://www.thehindubusinessline.com/opinion/the-anti-profitering-concept-is-flawed/article22858653.ece#>.

drafted.[11] Further the 'tight monitoring' advocated by the report was not followed through, within the anti-profiteering legislation.

III. CONSTITUTIONALITY OF THE ANTIPROFITEERING LAW

The constitutionality of the statutory provision on Anti-profiteering has been challenged to be violative of Articles 14 and 19(1)(g). This core provision is said to be supplemented by Section 164 of the CGST Act, 2017. Section 164, CGST Act 2017 supplies to the relevant authorities the ungirded power to make rules, and apply them even retrospectively with regards to any provision in the former Act. Further, although the rules of the CGST Rules 2017 were added to reduce the arbitrary ambit of the law, it is severely defeated on various grounds of the Constitution.

Section 171, CGST Act 2017 is the only provision in the CGST Act that deals with anti-profiteering. Although it is supplemented by the rules, they lay down an indecisive power and duty over the authority.

Post amendment in 2019,[12] Rule 127 of the CGST Rules, 2017 read that the duty of the DGAP[13] shall include determination of whether there has been any viable and accountable reduction in the tax rate or whether a direct benefit of the availment of the input tax credit has been passed down to the recipient by a reduction in the prices, to identify a) if the same has not been complied with ; b) order a

[11]Shubhang Setlur, 'Behind GST's Anti-Profiteering Provisions, a Legacy of Indian Socialism' (*Thewire.in*, 2017) https://thewire.in/business/gsts-anti-profiteering-provisions-lndian-socialism.

[12]Vishwasai Rajendra, 'Anti-Profiteering Measures Under GST - Constitutionality and Limitations (*Gstsutra.com*, 2020) <http://gstsutra.com/experts/column?sid=683>.

[13]'Director General of Anti-profiteering'.

reduction in the price of the product or payment to the customer that is equal to the monetary benefit not justly received by them; and c) impose a penalty or even cancel the registration of the business. They have to present a performance report to the Council by the tenth day of the close of each quarter.

The question that arise thus, is, whether there is an excessive delegation of powers provided to the Council that is furthered by Section 164, CGST Act, 2017 as the provisions challenged are the emulate examples of delegated legislation. The scope of delegated legislation is discussed below.

A. Principle of Delegated Legislation

Salmond defined the delegated legislation as "*that which proceeds from any other authority other than the sovereign power and is therefore dependent for its continued existence and validity on some superior authority or power*".[14] Thus, in the ever-growing complex society, the legislators can delegate certain legislative powers to the extent that it supplements but not supplant the enabling Act.[15]

The delegate then, to supplement the Act passes such rules, regulations and orders that are necessary to implement the object and purpose of the Act. Often the legislators provide the legislative policy and leave it to the delegate to fill in the details. Such legislations are called '*Skeletal Legislations'.* In *Hamdard Dawakhan lal v. UOI,* skeletal legislations have been defined as the legislations empowering the executives to provide the regulations required to achieve the purpose of the enabling Act.[16]

Though the legislature cannot delegate all or auxiliary functions, the notion propounded in *Re Delhi Laws Act,* the apex court held that

[14]Salmond, *Jurisprudence* (12th edn. London, Sweet & Maxwell 1966).
[15]D.D. BASU, *Shorter Constitution of India* (15 edn. Lexis Nexis 2017).
[16]*Hamdard Dawakhana (Wakf) Lal v. Union of India* [1960] AIR SC 671.

the legislature cannot delegate anything that has been not vested in it by the Constitution, and can only delegate the power to fill in the details, in order to supplement the skeletal provisions of the Act.[17] Further, the court also observed that the legislature has to create a 'sphere' within which actions of the delegate can be held valid, so that it can freely legislate within this very sphere.

Transgression of this sphere at one's discretion would result in exercise of excessive delegation. The Apex court through a plethora of judgments has set out a test to determine whether the legislature has disseminated essential functions or not. In *Harishankar Bagla v. Madhya Pradesh,* essential legislative functions were depicted as "*the legislature must declare a policy of law and legal principles which are to control any given cases and must provide a standard to guide officials or the body in power to execute the law.*"[18] Lord Cardozo in the landmark case of *Panama Refining v. Ryan*[19] opined "*To uphold the delegation there is a need to discover in terms of the Act, a standard reasonably clear whereby discretion may be governed.*" In conclusion, it is prescribed that a clear 'standard' and 'policy' should be laid down in the legislative Act to guide the delegated authority.

Even if the legislature is of the view that the provisions of the Act are clear cases of excessive legislation, the same shall not be repealed as the Act provides for an authority to oversee such legislation. Countering the above justification of excessive legislation Justice Khanna in *Gwalior Ryan Silk v. The Assistant Commissioner of Sales Tax,* observed "*The vice of such an enactment cannot, in our opinion, be ignored or lost sight of on the ground that if the Parliament does*

[17] *In Re: The Delhi Laws Act* 1912, [1951] AIR SC 332.
[18] *Harishankar Bagla v. Madhya Pradesh* [1954] AIR SC 313.
[19] *Panama Refining Co. v Ryan* [1935] 293 US 388, 434.

not approve the law made by the officer concerned, it can repeal the enactment by which that officer was authorised to make the law".[20]

The nine-judge bench in *Delhi Municipal Corporation v. Birla Cotton Spinning and Spinning Mills* held that only subordinate legislation necessary for the fulfilment of the objectives of the Act can be held valid. It added that the guidance offered by the legislature can only be ascertained upon an analysis of the statute in question.

In the case of *Consumer Action Group and Anr. v. State of Tamil Nadu*,[21] the Supreme Court analysed the preamble, background, sections, etc. of the Act to ascertain if the delegation was excessive.

B. Applying the Principles to Anti-Profiteering Measures

The Preamble of CGST Act 2017 reads as "*An Act to make a provision for levy and collection of tax on intra-state supply of goods or services or both by the Central Government and matters connected therewith or incidental thereto*".[22] Upon reading the preamble, the legislative policy can clearly be ascertained that the Act has been enacted to make provisions for levy and collection of tax; now to determine the objective of the Act, it is imperative to examine its background. The background of the Act can be ascertained via the Task Force Report on Implementation of the Fiscal Responsibility and Budget Management Act, 2003 by the Department of Economic Affairs.[23] Chapter 5 of the same reads how a tax regime must be streamlined via decisions by tax administrators and the mission of the administration is said to be that of collecting revenues for the Government in a legally defined taxation system in a manner that is

[20] *Gwalior Ryan Silk v. The Assistant. Commissioner of Sales Tax & Ors.* [1947] AIR SCR 2 879.

[21] *Consumer Action Group and Anr. v State of Tamil Nadu* (2000) 7 SCC 425.

[22] The Central Goods and Services Tax Act 2017.

[23] Ministry of Finance, Government of India 2004, 'Chapter 5- Policy Proposals' <https://dea.gov.in/task-force-report-implementation-fiscal-responsibility-and-budget-management-act-2003>.

effective, equitable and efficient.[24] The independence of such an administrator is vital.

The second report is the Implementation of Value Added Tax in India- Lesson for transition to Goods and Services Tax[25] that was created by the CAG, India. It details out the excise duties of the Union integrated with the service tax, and provides for a brief mechanism of the CGST Act as proposed by the task force.

The Government provided their rationale for introducing this mechanism in the CGST Act, 2017. The online pamphlet reads that in several other countries wherein analogous rules were implemented, the cost of products observed a rise, despite the aforementioned benefits. This clearly exhibited that the business would pocket the entire profit towards themselves, making it detrimental to the customers.

This so-called inflation of prices was observed in two other models, namely Australia and Malaysia, who responded to the same by introducing anti-profiteering laws; although, these laws are drastically different from the ones implemented in India.[26] The ones in Australia are more complex and minutely laid down, while the ones in Malaysia are resolutely clear by what they consider anti-profiteering. They determine the same by comparing the net profit margin of the business on the products, before and after the implementation of the GST tax regime.

[24]Adithya Reddy, 'Legality Of GST'S Anti-Profiteering Provision' (*Livemint*, 2018) <https://www.livemint.com/Opinion/IbZ1gNXgywVhtqpSvNGRzK/Legality-of-GSTs-antiprofiteering-provision.html>.

[25]'Value Added Tax In India- Lesson For Transition To Goods And Services Tax' (*CAG*, India 2009) <https://cag.gov.in/sites/default/files/publication_files/SRA-value-added-tax.pdf>.

[26](n 7).

Section 171 of the CGST Act, 2017[27] deals with the anti-profiteering measure of the Act. It comprises of three main provisions, a proviso and an explanation to the section. It mandates that the benefit of input tax credit reigned in must be depicted by a supplementary reduction of the prices of the product; empowers the Central government to either create a new authority or ordain the power to an existing authority to examine a complaint with regards to non-compliance with the aforementioned section; and defines that the functions of the authority shall be as may be prescribed.

Section 171(3A) of the CGST Act, 2017 specifies that upon determination of profiteering by the agency empowered under subsection (2) of the Act, a penalty of about ten percent of the amount profiteered can be made due as penalty. The profiteering narrows down on the determination of '*Commensurate reduction of the prices*', which has not been specified by the government and has been left to the discretion of the Authority to adjudge the same. The section is further complemented by the Anti-Profiteering Rules that are furnished within Chapter XV of the CGST Rules, 2017.[28] They range from Rule 122 to 137. These rules specify the constitution of the authorities, screening committees, the duties, powers and procedures that the authority has to partake, the conduct of the authority, validation to the order and the compliance with the same. Rule 126 of the CGST Rules, 2017 is a supplement to Section 171 of the CGST Act, 2017. However, the section makes no cross-reference to the rules. The aforementioned rule designates the power to determine the methodology and procedure of profiteering investigation upon the NAA. The question that thus, stems out is whether there is an excessive and unfettered delegation of power to the NAA by virtue of this Rule.

[27]Central Goods and Services Act 2017, § 171.
[28]Central Goods and Services Rules 2017.

There are certain functions of eminence that are termed as legislative policy or legislative function. The delegation of these functions results in a bestowment of excessive nature. Such duties cannot be delegated by the legislature. For the delegation of any legislative function, broad guidelines must always be issued, so as to guide the delegated authority.[29] The effective execution of law requires extensive and elaborate rules of procedure, that the authority must follow.[30] Further, the executive can only be given the task of regulation and implementation of the legislative and procedural mandate to upkeep the doctrine of separation of power. Thus, Rule 126, CGST Rules 2017 patently bestows an eminent legislative function upon the NAA. The rule clearly travels beyond the central legislation itself.

Additionally, its supplementary section is squarely missing any policy guidelines. They are even silent on the calculation of the factor of 'profiteering' amidst the circular for Procedure and Methodology on the NAA website, that claim to curb the arbitrary and discretionary power of the authority. It has been left upon the sole discretion of the executive, which has been operating on a myriad of stances, ever since.

It has also been observed that the Respondents have often contended that the formula determined to calculate profiteering by the NAA is neither prescribed by any authority nor has been established via the Methodology and Procedure, 2018 circular created by virtue of the powers vested by Rule 126.[31] Such contentions are often supported by precedents that highlight the unfettered power in the hands of NAA, as there are different determinants each time.

[29]Lipika Vinjamuri, 'Does The National Anti-Profiteering Authority Suffer From The Vice Of Excessive Delegation?' <http://kluwertaxblog.com/2020/01/23/does-the-national-anti-profiteering-authority-suffer-from-the-vice-of-excessive-delegation/?print=print>.

[30]*Namit Sharma v. UOI* (2013) 1 SCC 745.

[31]*Shri C. P. Rao v. M/s Unicharm India Pvt. Ltd.* 43/2019 (NAA).

The excessive delegation, further, is extremely uncanny and arbitrary by virtue of there being extremely no intrinsic guidelines, streamlining the procedural and methodical functions of the authority. Thus, even though the circulars and the rules provided therein supplements the Act, it has been left upon the authority to exercise discretion and execute essential legislative functions.

C. Scope of Article 14

In the case of *NAA v. Hardcastle Restaurants Pvt. Ltd. & Ors*.,[32] a writ was filed challenging the constitutional validity of Section 171, CGST Act, coupled with Rule 126 of the CGST Rules, 2017.[33]

The statute can further be investigated against the claim if Section 171 and the requisite Anti-profiteering rules are arbitrary in their mandate. In doing so, the statutory provision would have to be held up against Article 14 of the Indian Constitution.

The expression 'arbitrary' is defined as done in an unreasonable manner; fixed or done capriciously or at pleasure; without an adequate determining principle; not founded in the nature of things; non-rational; not done or acting according to reason or judgment, and; depending on the will alone. Article 14 strikes off arbitrariness within state action. The recent judgment[34] by the Supreme Court has refreshed the scope of the doctrine of arbitrariness, that was propounded in the *Royappa* case.[35] The reasonable differentia that is often considered to be the first limb of the Reasonable Classification is that a legislation "*should not be arbitrary, artificial or evasive*."

[32] *Ravi Charaya and Ors.v.Hardcastle Restaurants Pvt. Ltd* [2019] 71 GST 85.

[33] Prapti Raut, 'Hardcastle Restaurants- SC Transfers All Writ Petitions To Delhi HC Related To Anti Profiteering' (TaxGuru, 2020) <https://taxguru.in/goods-and-service-tax/hardcastle-restaurants-sc-transfers-all-writ-petitions-delhi-hc-related-anti-profiteering.html>.

[34] *Rajbala v. State of Haryana* [2016] 2 SCC.

[35] *E.P. Royappa v. State of Tamil Nadu* [1974] 4 SCC 3.

It is well established that no enactment can be struck down by merely implying that it is arbitrary or unreasonable; some other constitutional infirmity has to be found before invalidating an Act.[36] However, the arbitrariness test now enjoys the stature of a standalone test whilst testing the Constitutionality of primary or subordinate sections of a given law.[37] Thus, for an Act to be constitutional under the ambit of Section 14, it must be non-arbitrary as a primary requirement.

In a Supreme Court case, dissent of Bhagwati, J. read that- "*As a result of Maneka Gandhi judgment, Article 14 is a safeguard against State Action that suffers from the vice of arbitrariness. It was pointed out in the Maneka Gandhi*[38] *case that the doctrine of classification developed as a subsidiary rule for ascertaining whether the action of a State can be classified as arbitrary or not*."

Arbitrariness grew as a standalone yardstick test when propounded in the Royappa case, on the basis of application of the Wednesbury Test[39] and the test laid by Lord Diplock.[40] In a case,[41] Lord Diplock reiterated that any administrative action can be challenged on four grounds i.e., (1) Illegality (2) Irrationality (3) Procedural impropriety (4) Proportionality of delegation.

It can be patently observed that although Section 171(1) of the CGST Act, 2017 is clear on its policy implication, the commensurate reduction in prices has not been clearly defined. Unlike models adopted in other countries, there is no clear demarcation of how profiteering should be decided. The Anti-Profiteering Rules, 2017

[36] *A.P. v. McDowell* [1996] 3 SCC 709.
[37] *A.D.M. Jabalpur v. Shivkant Shukla* (1976) 2 SCC 521
[38] *Maneka Gandhi v. Union of India* [1978] 2 SCR 621.
[39] *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223.
[40] *Om Kumar v. UOI* [2001] 2 SCC 386.
[41] *Council of Civil Services Union v Minister of Civil Services* [1984] 3 ALL ER 935 (HL).

does not lead to any clarifications on this point and the presence of Section 164, CGST Act 2017 furthers the non-determination of proportionate reduction of prices invariably.

The aforementioned rules are not even referenced by the main legislation. The determination of the commensurate reduction lies at the whim of the authority. In spite of the fact that the Indian model has been inspired from the Australian and Malaysian model of GST, the anti-profiteering laws did not adopt the same criterion for the determination of this supplementary benefit that needs to be passed down to the consumers. The present legislation is extremely vague in the sense of determination of folly.

Since the anti-profiteering laws revolve around the determination of whether the benefit has been passed down to the consumers or not, a lack of clarity in this regard coupled with the excessive delegation result in Section 171, CGST Act, 2017 not standing up to Article 14 of the Indian Constitution. Earlier the Act was also challenged for not having the provision of the penalty within the Act itself. However, post amendment in 2019, Section 171(3A) deems that a penalty of 10 percent shall be put through the parties that are found to engage in profiteering. The section also attempts to define profiteered, however is still not clear upon a concrete mode of ascertainment as the phrase "*commensurate reduction*" is still not defined.[42]

However, to its merit, the procedure that the DGAP has to adhere to is spelled out with clarity. The DGAP has the same power during the inquiry as provided to civil courts under the provision of the Code of Civil Procedure, 1908. The DGAP works in accordance with *the Procedure and Methodology* notification on their web-page in

[42]Sumit Jha, 'Anti-Profiteering Mechanism: Slew Of Stay Orders By High Courts Expose NAA Lacunae' (*The Financial Express*, 2019) <https://www.financialexpress.com/industry/anti-profiteering-mechanism-slew-of-stay-orders-by-high-courts-expose-naa-lacunae/1580706/>.

accordance with Rule 126 of the CGST Act, 2017.[43] But the method of calculation is not spelled out under any document or official notification.

The methodology and procedure are determined by the National Anti-Profiteering Authority, empowered by Rule 126 of the CGST Rules, 2017. This power, prima facie appears to be uncontrolled and an oppressive application of the law. The Central Board for Indirect Taxes has clarified that the procedure shall be ascertained on a case-to-case basis. This clearly leads to vesting an uncontrolled power to the authority. In the case of *Kunnathat Thathunni Moopil Nair*,[44] it was said that in absence of a principle to guide the authority, the law would stand violative of Article 14. There seems to be no clear projected principle that governs the determination of profiteering conveyed via the central legislation nor the supplementary rules.

In cases such as *State of Officer v. Cilantro Diners Pvt. Ltd.*[45] and *Kerala State Screening Committee on Anti-Profiteering v. M/s TTK Prestige Ltd.*[46] the NAA has convened that no reduction in prices shall be deemed to be considered profiteering and that every customer has the right to receive the benefit of endowed reduction in cost. In cases *like M/s. NP Foods*,[47] the NAA decreed that the commensurate reduction had not been passed to the customers on the basis of averaging the increase in the base price of all products together. In *M/s. Kunj Lab Marketing Pvt. Ltd.*,[48] it was convened that the benefit

[43]'Procedure and Methodology' (*Naa.gov.in*, 2018) <http://www.naa.gov.in/docs/procedure%20_methodology_18.pdf>.

[44]*Kunnathat Thathunni Moopil Nair v State of Kerala* [1961] AIR SC 552.

[45]*State of Officer v Cilantro Diners Pvt. Ltd.* [2020] MANU NT 0023.

[46]*Kerala State Screening Committee on Anti-Profiteering v M/s TTK Prestige Ltd* [2019] 74 GST 456.

[47]*Sh. Jijirushu N. Bhattacharya v M/s NP Foods (Franchisee M/s Subway India)* 9/2018.

[48]*Sh. Ankur Jain & Director General Anti Profiteering, Central Board of Indirect Taxes & Customs v. M/s Kunj Lab Marketing Pvt. Ltd.* [2018] 70 GST 486 (NAA).

has to be passed down separately by virtue of each product and cannot be clubbed. This clearly concludes that Rule 126, CGST Rules, 2017 lays no clear directive and thus leads to arbitrariness in practice.

The absence of any provision to determine the 'Reduction' leaves it to the discretion of the executives alone as the anti-profiteering mechanism does not have any provision for the appointment of a judicial member. There is no ascertainment on how will the profiteering be determined if there is a commensurate reduction that is not equivalent to the benefit being garnered by the seller themselves, by way of the Input Tax Credit and the GST regime.[49] The section and the rules thereunder, are overtly vague and contain ambiguity that has not been set aside, despite various judgments by the NAA.[50]

D. Scope of Article 19

In this regard, Section 171 must also be held against the threshold of Article 19(1)(g) of the Constitution of India. In cases like the *Shri C. P. Rao v. M/s Unicharm India Pvt. Ltd*.,[51] the constitutionality of Section 171, CGST Act, 2017 was challenged. Respondent contended that in the guise of ensuring commensurate reduction in prices but not following up with the criterion to determine it, the DGAP was trying to fix the price of products that curbs the right to earn profits. It can be said to be violative of Article 19(1)(g).

[49]'Writs pending before various HCs w.r.t constitutional validity of Anti-profiteering provision transferred to Delhi HC' 'Taxmann' (https://gst.taxmann.com/, 2020) https://gst.taxmann.com/topstories/101010000000193867/writs-pending-before-various-hcs-w-r-t-constitutional-validity-of-anti-profiteering-provision-transferred-to-delhi-hc.aspx.

[50]Adithya Reddy, 'Legality Of GST'S Anti-Profiteering Provision' (*Livemint*, 2018) <https://www.livemint.com/Opinion/IbZ1gNXgywVhtqpSvNGRzK/Legality-of-GSTs-antiprofiteering-provision.html>.

[51](n 29).

In the case of *Dharma Dutt v. UOI*,[52] it was held that Article 19(1)(g), provides us with a right to profession, trade, occupation or business. But these rights are in no way absolute or uncontrolled and each is liable to be curtailed by laws made by the State to the extent made in Clauses (2) to (6) of Article 19 of the Indian Constitution. Clauses (2) to (6) are different which indicates that the rights specified under Clause (1) have varying philosophies and dimensions, and thus cannot be adjudged to a common pedestal. Thus, it is understood that Article 19(6) gives the power of reasonable restriction to the Respondents. Further, in the case of *Bijoe Emmanuel v. State of Kerala*[53] it was reiterated that- only a guarantee sealed in law, under the contemplation of clause (2) to (6) of Article 19 can regulate the exercise of Article 19(1) from (a) to (e) and (g). A mere executive or departmental instruction shall not suffice.

The Anti-profiteering rules can also lay down reasonable restrictions upon the businesses. Rules are made under the Act, and they are to be of the same effect as if contained in the Act itself and are to be judicially noticed, must be treated for all purposes of construction or obligation or otherwise exactly as if they were in the Act. Thus, a rule under a statute must be taken as a part and parcel of the statute itself. In the case of *Bishambhar Dayal Chandra Mohan v. UOI*[54] the judgment convened that, "The factors that should enter the judicial verdict are the underlying purposes of the restrictions imposed, the extent and urgency of the evils sought to be remedied thereby, the proportion of the imposition, the prevailing conditions at the time, and the duration of the restriction." The same has been reiterated in *Indian*

[52] *Dharma Dutt v. UOI* (2004) 1 SCC 712,738.
[53] *Bijoe Emmanuel v. State of Kerala* (1986) 3 SCC.
[54] *Bishambhar Dayal Chandra Mohan v. State of UP* (1982) 1 SCC 39,62.

Express Newspapers v. UOI[55] and *Krishnan Kakkanth v. State of Kerala*.[56]

A taxing statute is not *per se* regarded as a restriction on the freedom of Article 19(1)(g) even if it imposes hardships in an individual's case. One of the major points that Section 171, CGST Act, 2017 is contended upon is that the violation of Article 19(1)(g) occurs because of the price fixation that the Statute does. However, the freedom of business might be interfered by the State by imposing reasonable restrictions in order that the State might discharge its duties under the Directive Principles- Articles 38 and 39(b)[57] i.e., to control the distribution of material goods for the common good and ensure that the articles in question are made available to the public at the lowest rate permissible. Where the commodity is not so vital to human needs, a greater consideration of profit may be given to the company.

Further, for taxing statutes, "*Tax laws impose taxes that is prima facie not a restriction. Mere excessiveness of the tax is not a ground for challenging it as a restriction on any right*." The same fact has been stated in *Nazeria Motor Service v. State of AP*,[58] where it says that mere reduction of profits does not render the Statute as unreasonable and violative.

The procedure of the calculation is not specified within the Act. It acts as a mode of contention while deciphering the question of legality. As there is an absence of worded law under the Act, as to the calculation, the NAA's response to the Respondent's claim in *Shri Pawan Sharma and Ors. v. M/s Sharma Trading Company*[59] was that

[55] *Indian Express Newspapers v. UOI* (1985) 1 SCC 641,691.
[56] *Krishnan Kakkanth v. Govt of Kerala* (1997) 9 SCC 495.
[57] *ONGC v. Assocn., N.G.C.* (1990) SUPP. SCC 397.
[58] *Nazeria Motor Service v. State of A.P.* [1970] AIR SC 1864.
[59] *Shri Pawan Sharma And Ors. v. M/s Sharma Trading Company* [2018] 70 GST 156 (NAA).

the supplier needs to determine the amount by which the tax has been reduced and subtract the same from the existing product's MRP. Otherwise, a generalized understanding of the calculation cannot be ascertained across different CGST taxations and shall depend on the factual background of the case. The Authority has further already notified *"the Procedure and the Methodology"* through the notification dated March 28, 2018[60] under Rule 126 of the CGST Act, 2017, available on their website. Thus, the section cannot be fully challenged on the grounds of being violative of Article 19(1)(g).

In *Sh. Ravi Charaya & Ors. v. M/s Hardcastle Restaurants Ltd.*,[61] it was held that any reduction in the rate of the tax or the benefit received through ITC by a supplier should be passed down to the consumer. The supplier is not entitled to encroach upon the benefits. Since the aforementioned point is the basis of the law, it cannot be said to be fallacious in its functioning. The NAA has also not curbed the right of profit-making possessed by the businesses. The background of this legislation clarifies that the buyers and consumers must be at the receiving end of the passed-down benefit that the GST regime ushers in. The NAA, through some of its decisions, has deemed that a reduction in the prices of products upon claiming input tax credit forms the primary determination of non-profiteering. In some cases, a legitimate increase in the base price was considered as a valid and pressing defense against not reducing the prices of products despite claiming ITC. Thus, the anti-profiteering law cannot be said to be violative of Article 19(1)(g) of the Constitution, even though it stands violative of Article 14 of the Constitution of India.

[60](n 41).
[61](n 30).

IV. EXAMINING THE VIRES OF THE AUTHORITY

Section 171 CGST, 2017 also provides for the establishment of the National Anti-Profiteering Authority. The organization and composition of the NAA i.e., pivotal in monitoring the anti-profiteering regime, is questionable on the aspect that whether it is in coherence with the law of the land,. We will now proceed to examine the vires of the NAA.

A. Nature of The Authority

National Anti-Profiteering Authority is a statutory authority that has been established by virtue of the enactment of the CGST Act, 2017. The nature of the authority determines the function to be executed by the members of the body; in turn, determining the required qualifications needed for the execution of those functions. Therefore, it is important to determine the nature of NAA as provided in Section 171 of CGST Act, 2017.

Statutory authorities majorly execute either purely administrative functions or quasi-judicial functions. Professor Wade defined quasi-judicial function as *'quasi-judicial function lying somewhere in between is an administrative function which the law requires to be exercised in some respects as if it were judicial. A quasi-judicial decision is, therefore, a decision which is subject to a certain measure of judicial procedure'*[62] Further, the apex court has time and again followed the test given in the case of *Kihoto Hollohan v. Sri Zachillu*, to determine the nature of the functions exercised by an authority: "*There is lis- an affirmation by one party and denial by the other, the dispute involved decision on the rights and obligations of parties and the authority is called upon to decide it".*[63] It can be observed from

[62] H.W.R. WADE, *Administrative Law* (6th edn, Oxford University Press 1994) 46-47.
[63] *Kihoto Hollohan v. Sri Zachillu* [1992] AIR SCC 651.

the above scholarly definitions that the authorities which are entrusted the duty to decide disputes judicially are essentially Quasi-Judicial Authorities.

CGST Act, Section 171 of CGST Act, 2017 read with Chapter XV of GST Rules, 2017, both titled as 'Anti-Profiteering Measure', entails the structural mechanism and functions of the three-tier Anti-Profiteering Authorities. Section 171(2)[64] provides for the constitution of 'National Anti-Profiteering Authority (NAA)'. In consonance with the Act, the rules specify provisions regarding the composition of the authority inter alia, other functions imperative for its functioning.

In a case, the Supreme Court observed that the existence of *'lis inter parte'* indicates that any authority presiding upon the dispute has a duty to act judicially while adjudging the dispute between the two parties.[65] NAA, being empowered through the enactment of GST to decide upon the dispute regarding Anti-profiteering, incurred a duty to act judicially. NAA's duty to act judicially reflects the nature of disputes it is authorised to decide.

In *Lala Shri Bhagwan v. Ram Chand*, it was noted that the rights and obligations of parties are said to be affected if the actions of a body results in disadvantage for either of the parties.[66] Even if an authority is not called upon to decide upon a *lis* between two parties, but it results in affecting the rights or obligation of the parties, it shall be the duty of the authority to act judicially.[67]

Under GST rules, it is the duty of the authority to determine whether or not the benefit of reduction of tax or input credit has been passed

[64](n 2).
[65]Bombay v. Khushaldas Advani [1950] AIR SCR 621.
[66]*Lala Shri Bhagwan v. Ram Chand* [1965] AIR SC 218.
[67]*National Securities Depository Limited v. Securities and Exchange Board of India* [2017] AIR SC 1714.

on to the recipient.[68] It is also required to identify the person who has violated the Anti-profiteering measures.[69] The authority subsequently is duty bound to pass the following orders:

a) Reducing the prices.

b) Cancelling the registration under the Act of the person found violating anti-profiteering rules.

c) Returning to the person an amount equivalent to the amount not passed by way of commensurate reduction in prices. In doing so, it is at the liberty to impose interest of 18% on the amount as a penalty.

d) Imposing penalty in accordance with the Act.[70]

e) If the authority feels that there's a need for further investigation, it can, after noting the reasons in writing, refer the case to the DGAP.[71]

Passing of such orders by the authority results in detriment of either of the party, thereby requiring NAA to act judicially.

There is a specific mechanism of processing a complaint of profiteering provided by the statute. The trend in India has been to invoke Section 171 sparingly, in dominations of monopolistic or oligarchic market regimes. Any person who feels that a company is engaging in illegal profiteering can report the same to the relevant authority.

The tasks of the Anti-Profiteering Authorities are divided into the three stages; first, a State Screening committee shall, after being satisfied that the applications present a prima facie case of anti-

[68]Central Goods and Services Rule 2017, Rule 127 (i).
[69]Central Goods and Services Rule 2017, Rule 127 (ii).
[70]Central Goods and Services Rule 2017, Rule 127 (iii).
[71]Central Goods and Services Rule 2017, Rule 133 (4).

profiteering forward it to the Standing Committee.[72] The Standing committee on anti-profiteering consists of officers of both the state and central government as specified by Rule 123, CGST Rules, 2017. It confirms the patent evidence of profiteering engaged.

If the standing committee garners a view, that there has been a contravention of Section 171, CGST Act, 2017, it shall forward the case to the Director General of Anti-Profiteering (DGAP).[73] They have the responsibility to ascertain and examine the practices of the business and find evidence to support causation. Both the Committees are required to complete the investigation within a duration of two months.[74] In the second stage, DGAP after investigating the case submits the assessment report to the NAA within three months of receipt of the case from the Committees.[75]

After receiving the assessment report from the DGAP, the anti-profiteering authority is authorised to decide upon the dispute as to whether or not Input Tax Credit or the benefit of reduced tax has been passed on to the recipient.[76] In doing so, the authority is empowered to summon the interested parties, issue a notice to the parties[77] and presume the methodology and the procedures it considers necessary to determine the dispute between the two parties.[78] These functions are adjudicatory in nature. All the powers, duties and authorities of all the aforementioned agencies are spelled out via the CGST Rules of 2017. Thus, the decision of the NAA affects the rights and liabilities of the parties to the matter in front of the authority.

[72]Central Goods and Services Rule 2017, Rule 128 (2).
[73]Central Goods and Services Rule 2017, Rule 129 (1).
[74]Central Goods and Services Rule 2017, Rule 128 (1).
[75]Central Goods and Services Rule 2017, Rule 129 (6).
[76]Central Goods and Services Rule 2017, Rule 133 (1).
[77]Central Goods and Services Rule 2017, Rule 133 (4).
[78]Central Goods and Services Rule 2017, Rule 133 (2).

In light of the above analysis, it is evident that the NAA satisfies all the elements propounded by the Supreme Court to act judicially. Thus, in its capacity as a final authority of a three-tier Anti-profiteering system, it is a quasi-judicial body.

B. Is A Judicial Member Necessary for Performing Functions of a Quasi-Judicial Authority?

The Parliament, while exercising its power under Article 246A and 279A, has established the appellate tribunals, GST council and the anti-profiteering authorities.[79] The above articles inserted by the One hundred and One Constitutional Amendment Act, 2016 give the parliament and the state legislatures, the power to make laws regarding Goods and Services Tax. Thus, the parliament has legislative competence to enact CGST, 2017.

Indian courts, with regard to the tribunals established under Article 246 and Articles 323-A and 323-B, have time and again analysed the mandatory requirement of a judicial member in the tribunals. Although the provisions under the Article 246 and Articles 323-A and 323-B upon reading, seem to entail different constituents, the Apex Court has already held that the difference between the tribunals established under the Articles is merely of academic concern, as in *L Chandra Kumar case*,[80] the Articles 323A and 323B have been struck down to the extent that they bar the judicial review by the High Courts.[81]

In the case of *S Sampath Kumar v. UOI*,[82] it was held that if the eligibility criteria for members of the tribunal does not ensure that the members are capable enough to execute the judicial functions, then it

[79] *Revenue Bar Assn. v. Union of India* 2019 SCC OnLine Mad 8910.
[80] *L. Chandra Kumar v. Union of* India (1997) 3 SCC 261
[81] *Union of India v. R Gandhi* (2010) 6 S.C.R. 857.
[82] *S. P. Sampath Kumar v. Union of India* (1987) 1 SCC 124.

would result in invalidating the same provisions. Similarly, in *R.K. Jain v. UOI,* the court observed that in the tribunals set-up under statues, the members are called upon to discharge judicial and quasi-judicial functions. Thereby, it is necessary that the adjudicators have legal training to give legal input sufficient weightage.[83]

Affirming the above position, the apex court in *R Gandhi v. UOI* observed that *'judicial members act as a bulwark against any apprehensions of bias and ensures the compliance of principle of natural justice.'*[84] In observing so, the court held that when any jurisdiction is shifted to the tribunals on the grounds of *'pendency and delay in courts'*[85], the tribunal should have judicial members of the capacity and the rank equivalent to the adjudicators of the court from which the jurisdiction was transferred to the tribunal.

The established position of law regarding the composition of the tribunals has been adopted by the apex court. As it has time and again held that the tribunals shall have at least one judicial member, the court has gone to the extent of pronouncing that under no circumstances judicial members shall be outnumbered by the technical members. Upholding so, the court observed that appointments contrary to its decision would result in encroaching upon the independence of the courts and would violate the doctrine of separation of power.[86]

Uniformity can be observed in the Court's view, although for the appointment of the judicial members in the quasi-judicial bodies, the constitutional provisions for setting up of tribunals do not require mandatory appointment of a judicial member in the tribunal.

[83] *R.K. Jain v. Union of India* (1993) 4 SCC 119.
[84] (n 79).
[85] (n 80).
[86] (n 81).

Recently, Bombay High Court in the case of *Neelkamal Realtors Suburbans Ltd. v. UOI* also took the aforementioned view, while upholding the constitutionality of RERA authority. It observed, that *'Article 323 does not mandate appointment of a judicial member and Article 323A provides that the parliament may constitute tribunals as per requirement in each case*'.[87] Thereby the decision whether or not a judicial member shall be appointed should be left to the wisdom of the Legislature.

In furtherance of the same, the court observed that if the authority hasn't been transferred any existing jurisdiction, it is not required to appoint a judicial member merely because the authority exercises quasi-judicial powers. Therefore, the legal principles given in R Gandhi v. UOI cannot be applicable to the RERA Authority because the tribunal in question in the *R Gandhi* case was transferred the jurisdiction of the High Court.

As a result, the legal principles established in the cases of *Sampath Kumar, L Chandra Kumar* and *R Gandhi,* are not general principles of law and cannot be applied as blanket principles.

NAA, analogous to RERA authority hasn't been transferred the functions of any existing jurisdiction. It does not replace High Court in the exercise of its powers and is rather under the judicial control of the High Courts, as the Act provides for an appeal to High Court whenever there's any *'substantial question of law'* involved.[88] The Act also does not restrict the judicial review of the orders passed by NAA, and the same can be challenged under Article 226 and Article 227.[89]

Further, in *R Gandhi v. UOI,* the court held that when the jurisdiction of courts is transferred on the ground of '*Delay and Pendency'* and

[87] *Neelkamal Realtors v. Union of India* 2017 SCC OnLine Bom 9302.
[88] Central Goods and Services Act 2017, § 118.
[89] Central Goods and Services Act 2017.

not by the reason of adjudication of matter, it requires specialised technical expertise, and therefore, a judicial member must be appointed as a part of the composition of the tribunal.

This is not the case in the establishment of NAA, rather it was established on the recommendation of the Select Committee to curb profiteering after the promulgation of GST. As the Select Committee noted that the introduction of GST will eliminate the cascading effect of the tax and benefit the recipient. On the other hand, the committee cautioned the legislators that, to ensure that the benefits of GST are passed on to the consumers, it is necessary to monitor the profiteering. Thus, NAA was constituted with the sole purpose of curbing the profiteering measures and came into existence as a separate independent authority.

Rule 122 CGST, 2017 provides for the composition of NAA. It constitutes five members; one chairman and four technical members. Eligibility criteria set out for the Chairman is that he should at least hold or should've held a post equivalent to the rank of Secretary to the Government of India. Technical members are to be appointed by the GST Council, who should either have held the position of commissioners of sales tax or an equivalent post.[90]

Even though in the matters presented before the NAA, the government is either the Applicant or Respondent, NAA does not have a provision for the appointment of a judicial member as CGST Rules do not provide for the same. The authority is composed of government appointed highly ranked executives.

In this sense, the Anti-profiteering mechanism depicts the violation of the principle *nemo debet esse judex in causa propria sua*, as the government executives are appointed to adjudicate upon the matters where the government is one of the parties. Violation of this principle, according to Halsbury, "*precludes a justice from acting as a justice in*

[90]Central Goods and Services Rules 2017, Rule 122.

a matter, who is interested in the matter of the dispute".[91] The quasi-judicial bodies have the duty to act judicially and thus the same applies to NAA as well, requiring mandatory appointment of a judicial member.

The constitutionality of legislative provisions cannot be challenged for the violation of the basic structure of the Constitution. Traditionally, it can be challenged only on two grounds: legislative competence and violation of Part III of the Constitution.[92]

Article 14 of the Constitution guarantees the fundamental right of equality before the law and equal protection of laws. Right to equality entails the right to be adjudicated by an impartial and independent forum.[93] Evidently, the appointment of only technical members does not directly affect the fundamental rights granted by Article 14 but inevitably affects the access of the right forum for enforcement of such rights. Thus, the meaning of the word 'Law' used in Article 14 cannot be restricted to the principles employed to adjudge the matters before the court. In a broad sense, it also refers to the basic principles and fundamental doctrines from which these precepts are derived.[94]

Thus, the vires of a legislative Act can be challenged for the violation of separation of power and independence of the judiciary, if not for the violation of the basic structure of the Constitution.

C. Separation of Power and Independence of Judiciary

Appointments of the executives also lead to violation of an essential feature of the Constitution i.e., 'Separation of Power'. The doctrine of separation of power find its origin from Article 50 of the Constitution which states that *'State shall take steps to separate the judiciary from*

[91]Halsbury, *Halsbury's Law Of England* (4th edn. Lexis Nexis 2006).
[92](n 28).
[93](n 79).
[94]*The State of West Bengal v. Anwar Ali Sarkar* [1952] AIR SC 75.

the executive in the public services of the States.'[95] Thus, even though the Constitution does not explicitly provide for the separation of power, the insertion of the above Article has been confirmed to assert that the framers of the Constitution intended for there to be judicial services free of executives.[96]

In the case of *Indira Gandhi v. Raj Narain*, the apex court discussing the intention of the framers of the Constitution stated that "*it is not the intention that the powers of the Judiciary should be passed to or be shared by the Executive or the Legislature*".[97] The court further held that the separation of power among the three organs of the government is the basic structure of the Constitution. Thus, any of the organs cannot be allowed to take over the functions of the other organ.

The absence of judicial members in the quasi-judicial bodies negate the public confidence in the judiciary. Basis of the justice system, *that justice is not only done but seemed to be done*[98] requires that the adjudicator possesses the judicial mind and is free of any extraordinary influence such as that of the government.

Non-appointment of the judicial officers not only leads to the assumption that the adjudicating body does not have the acumen required for ensuring the justice but it also indicates that no effective remedy can be procured from the mechanism as the interference of the government in the judicial services leads to the assumption that the adjudicating authority is compromised.[99]

Violation of doctrine of separation of power subsequently results in threatening the independence of the judiciary, which is of a

[95] Constitution of India, art. 50.
[96] *Chandra Mohan v. State of UP* [1966] AIR SC 1987.
[97] *Indira Gandhi v. Raj* Narain [1975] Supp SCC 1.
[98] *R v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256.
[99] (n 95).

paramount and most fundamental value to the Constitution. The court in the case of *R Gandhi v. UOI* has already held that "*If impartiality is the soul of the Judiciary, Independence' is the lifeblood of Judiciary. Without independence, impartiality cannot thrive*". [100]

If the authority adjudging the matters will consists of the officials appointed by the government, wherein the government itself is one of the parties, the minds of the officials are bound to inspire biasness and partiality towards the government, violating the doctrine of separation of power and independence of judiciary. In *Namit Sharma*, the court held that "*The independence of judiciary stricto sensu applies to the Court system. Thus, by necessary implication, it would also apply to the tribunals*".[101] Thus, while creating adjudicating authorities akin to the courts, it becomes the duty of the government to ensure that the provisions enabling such authorities are in conformity with the basic constitutional principles of separation of power and independence of judiciary.[102]

Thus, even though the Constitution of India and the law laid down by the Supreme Court, does not require the appointment of a judicial member in the quasi-judicial bodies, not appointing the judicial members leads to dilution of the judiciary. Especially, in the matters of taxation where the body is to adjudge the matters of administrative interest, the presence of a judicial member should be made mandatory to uphold the fundamental values enshrined in the Constitution. Appointment of a judicial member also remains essential to ensure the regulated working of the institution.

[100](n 79).
[101](n 28).
[102]*Pareena Swarup v. UOI* (2008) 14 SCC 107.

V. CONCLUSION

In conclusion, Rule 126 of the CGST Rules, 2017 and Section 171, the CGST Act 2017 should lay extensively detailed guidelines to ensure that the investigative process is transparent and does not delegate excessively. The determination of guidelines and legislative policy is an extremely eminent function of the legislature and thus cannot be delegated. It should be taken up by the Parliament themselves. Further, the combination of the power under the authority via Section 164, CGST Act, 2017 and the arbitrariness surrounding the term *commensurate reduction in prices* does not set a definite picture of clarity and is violative of Article 14 of the Constitution.

The government should issue notifications and rules to supplement the commercially pertinent technicalities such as the mathematical formulae to determine the profiteering standards, market factors necessary to determine profiteering, the time period within which the benefit should reach to the consumer from the seller and lastly the aggravating and mitigating factors for the determination of the guilt. In doing so, the Indian anti-profiteering law should preferably seek inspiration from the Malaysian model of law and set up a clear demarcation of how the supplementary benefit passed onto the buyer, when the seller avails input tax credit shall be claimed.

In addition to the rules and regulations of the anti-profiteering authority, the composition of the NAA, a quasi-judicial body, also fails to inspire the confidence of the layman in its judgment owing to the absence of any judicial member in the authority. The parliament has left it to the judgment of the executives to adjudge the matters of taxation following an arbitrary and nascent law.

Although the anti-profiteering regime in India seeks inspiration from Malaysia and Australia, the statutory regulations in India seem to have been conceived with little care to secondary considerations. The law seems to presume that a seller does not have any further points to

take note of, except the tax rate and credit while fixing a price for the product he is marketing to the customer. No field study that relates reduction in indirect taxes to lower inflation was ever conducted before charting the laws. It has thus, invited challenges in the court of law, due to its unclear criterion of profiteering and procedure. In the present system of anti-profiteering, lack of judicial and legislative guidance has resulted in a crippled mechanism that is prone to biasness and can be struck down.

INTRODUCTION OF GROUP INSOLVENCY REGIME IN INDIA: IDENTIFYING THE CHALLENGES AND PROPOSING THE SOLUTIONS

Poorna Poovamma K. M[*]*. & Abhishek Wadhawan*[**]

Abstract

The Insolvency & Bankruptcy Code, 2016 is one of the most recent Indian legislations that deals with insolvency of companies in India. Originally, the Insolvency & Bankruptcy Code did not contain any provisions for group insolvencies as the legislation itself was at a nascent stage. However, over the years, the number of conglomerates, multi-national corporations, related party transactions etc., have exponentially risen in India due to which the interconnectedness between different corporate bodies has increased. The Insolvency & Bankruptcy Board of India constituted a Working Group on Group Insolvency under the chairmanship of U.K. Sinha to delve upon the mechanism for group insolvency regime in India. The Working Group submitted its report in September 2019. In light of the recommendations of the Working Group, the main aim of this paper is

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to identify the most concerning issues in relation to introduction of group insolvency in India and proposing solutions to these problems. Part 1 of the paper deals with the basic conceptual understanding of group insolvency. Part 2 discusses the current Indian jurisprudence in relation to group insolvency through judicial decisions, and also highlights the key provisions of the Report of the Working Group on Group Insolvency. Part 3 identifies the various challenges posed to the introduction of group insolvency regime in India related to the definition of corporate group, jurisdictional challenges, cross border insolvency issues, and the problem of extension of liability in group insolvency proceedings. Part 3 also highlights the probable solutions to the challenges so identified, followed by Part 4, which deals with the concluding remarks for the paper.

I. INTRODUCTION: A CONCEPTUAL UNDERSTANDING OF GROUP INSOLVENCY

The Insolvency & Bankruptcy Code, 2016 ("**IBC**") currently consists of a broad framework for initiating and resolving insolvency and liquidation processes of a single corporate entity. Only such single corporate entities were covered under the IBC in the initial phase as it was believed that sufficient infrastructure was not available in the Indian legal scenario to deal with group insolvencies.

While the success of the IBC in resolving various insolvency proceedings has been immense, the pertinent issue related to insolvency proceedings of group insolvent enterprises has been bothering the Adjudicating Authorities, Appellate Authority and the Courts alike. The increased competitive corporate world today has pushed the companies to engage in modern business strategies like expanding their businesses through subsidiary companies and entering into related party transactions. India has been ranked at the 20th position out of a total of 190 countries in the related party transaction index.[1]

Further, the current Code is based on the doctrine of separate legal entity as laid down in *Solomon v. A Solomon & Co. Ltd.*[2] The House of Lords had essentially created a corporate veil between the corporate entity and its owners and key personnel managers, and observed that an incorporated company has a separate legal entity.[3] Further, the Supreme Court in *Tata Engineering & Locomotive Co. Ltd. v. State of Bihar,* held that an incorporated company has a legal existence and identification of its own, having assets, liabilities and powers which are distinct from its members.[4] Due to the existence of the separate legal entity principle, a corporate veil is not only created between the corporate entity and the other stakeholders of the company, but also between the different corporate bodies within a single group company, though they all are working as a single economic entity.

[1]Dan Puchniak & Umakanth Varottil, 'Related Party Transactions in Commonwealth Asia: Complexity Revealed' (2018) NUS Law Working Paper Series 2018/014, <https://www.researchgate.net/publication/325332737_Related_Party_Transactions_in_Commonwealth_Asia_Complexity_Revealed> accessed 27 June 2020.

[2]*Solomon v A Solomon & Co. Ltd* (1897) A.C. 22.

[3]ibid.

[4]*Tata Engineering & Locomotive Co. Ltd. v State of Bihar* 1964 SCR (6) 885.

It is often argued that group insolvency cannot be initiated against group companies as the parent company and the subsidiaries have a separate legal existence.[5] However, this argument seems to be flawed as courts have often disregarded the principle laid down in the Solomon case[6] to lift the corporate veil between the group companies and considered them to be a part of a single economic entity. It was in *DHN Food Distributors Ltd. v. Tower Hamlets* wherein the Court of Appeal recognised a group of three companies as a single economic entity.[7]Further, the Supreme Court of India in *Life Insurance Corporation of India v. Escorts Ltd & Ors*. observed that the corporate veil can be lifted in cases where the associated companies are connected to each other in such a way that they are a single concern depending on the provisions of the law and the objects to be achieved.[8]The corporate veil may not be always lifted but has become more transparent in modern company jurisprudence.[9]

It is a common practice with the businesses to enter into related party transactions that indeed closely form the group companies as a single economic entity.[10] The UNCITRAL Legislative Guide on Insolvency Law on Treatment of Enterprise Groups in Insolvency ("**UNCITRAL Guide**") also suggests that such group corporate structures lead to various difficulties in insolvency proceedings such as expenditure of money and time to differentiate the layers of related transactions between the group companies, non-commercially viable transactions

[5]*Turner Morrision & Co. Ltd. v. Hungerford Investment Trust Ltd.* AIR 1969 Cal 238.

[6]*Solomon* (n 2).

[7]*DHN Food Distributors Ltd. v. Tower Hamlets* 1 WLR 852.

[8]*Life Insurance Corporation of India v. Escorts Ltd & Ors*. (1985) Suppl 3 SCR 909.

[9]*State of Uttar Pradesh v. Renusagar Power Co. & Ors*. 1988 AIR SC 1737.

[10]Vardaan Ahluwalia & Varsha Yogish, 'Staggered Lifting of the Corporate Veil: A Case for Group Insolvency Norms' (*India Corporate Law*, 21 October 2019) <https://corporate.cyrilamarchandblogs.com/2019/10/group-insolvency-norms/#_ftn7> accessed 21 June 2020.

outside the group companies, ignorance of high intra group transactions, etc.[11] With the increased presence of conglomerates and group companies in the Indian economic scenario, recognising the need for introducing group insolvency regime in India, the Insolvency and Bankruptcy Board of India constituted the Working Group on Group Insolvency under the chairmanship of U.K. Sinha, which submitted its report in September 2019.[12] This report proposed a draft procedure for the initiation of group insolvency proceedings in India so that the group can be restructured and the combined assets of the group company result into better value maximisation of the corporate group, as a whole.[13]

While the IBC does not contain any provisions for group insolvencies, the Companies Act, 2013 considers the group companies as a single economic entity and thus parent companies are mandated to prepare consolidated financial statements for its subsidiary companies.[14] Further, in *Exclusive Motors Pvt. Ltd. v. Automobil Lamborghini S.P.A.*, the Competition Commission of India accepted the single economic entity principle and observed that an internal agreement between subsidiaries of the same economic group cannot be challenged for anti-competitive practices under Section 3 of the Competition Act, 2002.[15] Thus, the changing notions within the Companies Act, 2013 and the Competition Act, 2002 show the positive attitude of the tribunals and the Courts in India to recognise the single economic entity principle in India in situations where the subsidiary companies are so closely linked to each other that they

[11]UNCITRAL, *UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency* (2012), para 92-94, 54-55.
[12]Insolvency and Bankruptcy Board of India, *Report of the Working Group on Group Insolvency* (2019) 3 <https://www.ibbi.gov.in/uploads/whatsnew/2019-10-12-004043-ep0vq-d2b41342411e65d9558a8c0d8bb6c666.pdf>.
[13]ibid.
[14]Companies Act 2013, s 129 (3) (India).
[15]Competition Act 2002, s 3 (India).

affect each other's economic activities. This further strengthens the need to introduce the single economic entity principle in IBC through the initiation of the group insolvency regime in India.

II. UNDERSTANDING THE CURRENT INDIAN JURISPRUDENCE

A. ASSESSING THE INTENTION OF THE NCLT, NCLAT AND THE SUPREME COURT

In a general context, the Indian courts have often noted that the concept of lifting of the corporate veil should be used cautiously and sparingly. The Supreme Court in *Vodafone International Holdings BV v. Union of India* observed that for considering the group companies as a single entity, it must be shown that the core activities of the company are controlled by the parent company.[16] Only when this necessary condition is satisfied, the corporate veil between the group companies should be lifted.[17] Interestingly, the High Court of Andhra Pradesh in *Walnut Packaging Private Limited v. The Sirpur Paper Mills Ltd. & Anr.* noted that the principle of piercing the corporate veil cannot be applied in cases of winding up of holding companies when a default in payment is made by any of its subsidiaries.[18] Thus, in essence, the pre-IBC era did not appreciate the practice of lifting the corporate veil and considering the group entities as a single economic entity for the purpose of restructuring and winding up of the companies.

[16] *Vodafone International Holdings BV v. Union of India* (2012) 6 SCC 613.
[17] ibid.
[18] *Walnut Packaging Private Limited v. The Sirpur Paper Mills Ltd. & Anr* 2008 SCC OnLine AP 840.

The IBC does not contain any provision for group insolvency, however, there have been many instances before the National Company Law Tribunal ("**NCLT**") that created an impetus for the Tribunal to pave way for initiation of group insolvency regime in India. The order of the Principal Bench of NCLT in *Venugopal Dhoot v. State Bank of India & Ors.* is a landmark order as it directed the hearing of insolvency proceedings for various different group companies of the Videocon group to be heard by the same Adjudicating Authority to avoid any conflict of orders at the request of the parties in the matter.[19] In yet another landmark order in *State Bank of India v. Videocon Industries Ltd. & Ors.*, the Adjudicating Authority ordered the substantive consolidation of the assets of the thirteen Videocon companies in pursuance of the common directors, common assets and the singleness of the economics of units.[20] This ruling, in essence, laid the building blocks for introduction of group insolvency regime in India, and the introduction of the single economic entity principle in the IBC.

While the decision in Videocon Industries led to the initiation of group insolvency process at a very nascent stage in India, the order of the National Company Law Appellate Tribunal("**NCLAT**") in the matter of *Edelweiss Asset Reconstruction Company Limited v. Sachet Infrastructure Pvt. Ltd. & Ors*,[21] is yet another development in this field. In this matter, the Appellate Authority ordered for a simultaneous Corporate Insolvency Resolution Process("**CIRP**") to be initiated for a group of five companies through a single Resolution Professional and explicitly identified the need to initiate group

[19]*Venugopal Dhoot v. State Bank of India & Ors*. (2018) SCC OnLine NCLT 29551.
[20]*State Bank of India v. Videocon Industries Ltd. & Ors* M.A 1306/ 2018 & Ors. in CP No. 02/2018 & Ors- decision dated 08.08.2019.
[21]*Edelweiss Asset Reconstruction Company Limited v. Sachet Infrastructure Pvt. Ltd. & Ors* 2019 SCC OnLine NCLAT 592.

insolvency proceedings in the matter.[22] The insolvency proceedings against these five different companies were consolidated by the Appellate Authority as these companies had common assets in a town planning scheme, and unless all the companies were recovered from their insolvency proceedings, the township would not be fully completed and the creditors would suffer. Thus, this order shows that group insolvency proceedings may be beneficial in cases where companies have common assets, and such consolidation of the proceedings will result into better asset maximisation and satisfaction of the creditors.

While these orders show the positive attitude of the NCLTs and the Appellate Authority towards introduction of the group insolvency regime in India, the Supreme Court has also signalled towards the need for such a structure in the Indian insolvency laws. The Supreme Court in *Chitra Sharma &Ors. v. Union of India*[23] ordered the Jaypee Group to deposit a hefty amount for the insolvency proceedings initiated against its group companies. Further, in the matter of *Bikram Chatterji & Ors. v. Union of India*,[24] the Court ordered the parent company's assets to be attached in view of the insolvency proceedings initiated against the different companies under the Amrapali Group.

These judicial decisions and Tribunal orders indicate that even though the IBC contains no provision for initiating group insolvency in India, the Adjudicating Authority, the Appellate Authority and even the Supreme Court have shown a positive attitude towards induction of the single economic entity principle in the Indian insolvency laws and towards initiating group insolvency in India. In *Walnut Packaging Private Limited v. The Sirpur Paper Mills Ltd. & Anr.*, the Court had observed that in situations where the statute provides for considering

[22] ibid.

[23] *Chitra Sharma & Ors. v. Union of India* (2018) 18 SCC 575.

[24] *Bikram Chatterji & Ors. v. Union of India* 2019 SCC OnLine SC 901.

a group entity to be a single economic entity, the corporate veil can be lifted and all the companies in the company can be treated to be a single entity.[25]

Therefore, in essence, even before the Working Group was constituted to assess the viability for introduction of group insolvency regime in India, the intention of the Adjudicating Authority and the Appellate Authority under the IBC seems to be in favour of introduction of a group insolvency regime in India.

B. REPORT OF THE WORKING GROUP ON GROUP INSOLVENCY

A Working Group ("**WG**") constituted by the Insolvency and Bankruptcy Board of India ("**IBBI**") came out with a report in September 2019, whereby it attempted to provide a comprehensive structure regarding Group Insolvency.[26] This part of the paper focusses on the particulars of the report and the reasons behind the recommendations included in it.

The WG primarily considered three elements which, according to them, governed the intricacies of the insolvency of companies in a group. They were- procedural coordination mechanisms, substantive consolidation mechanisms and rules for perverse action behaviour of companies in a corporate group.[27] However, considering the fact that the development of 'group insolvency' as a concept is at a very nascent stage, the WG as a mode of trial has recommended the implementation of the framework in phases, with reforms in the procedural mechanisms constituting the first wave.[28]

[25] *Walnut Packaging Private Limited* (n 18).
[26] Insolvency and Bankruptcy Board of India (n 12) 2.
[27] Irit Mevorach, 'Appropriate Treatment of Corporate Groups in Insolvency: A Universal View' (2007) 8 European Business Organisation L. REV.179.
[28] Insolvency and Bankruptcy Board of India (n 12) 2.

The WG also recommended that the framework should initially be applied only to companies in a domestic group, and based on its impact should be tried in cases of cross-border group insolvency.[29] The reason for this is that the provisions regarding cross- border insolvency are at a developing stage themselves and introducing mechanisms of group insolvency in the cross-border perspective might only hinder the process of development.[30]

The WG noted many advantages of adopting the Framework on Group Insolvency. One of them is the exchange of information between various stakeholders to increase the possibility of resolution;[31] one dilemma arising out of this is whether it is viable for small stakeholders to invest on *promotion of information symmetry,* when they have so little to lose.

In order to minimise the recurrence of work in various Adjudicating Authorities due to the insolvency of companies that are interlinked, the WG considers the framework on Group Insolvency which recommends a single Adjudicating Authority to overlook the insolvency of a group of companies to be more suitable and convenient by reducing costs and de- clogging the judiciary in the long run.[32] But, this in turn might result in jurisdictional problems and also companies situated outside the jurisdiction of the Adjudicating Authority may be affected by this mechanism.

The WG has provided the Framework for dealing with Group Insolvency in three phases as mentioned earlier and only the procedural mechanisms are to be applied at the initial stage. In

[29] Insolvency and Bankruptcy Board of India (n 12) 25.
[30] ibid.
[31] Vidhi Centre for Legal Policy & EY, 'Insolvency and Bankruptcy Code: The Journey So Far and the Road Ahead' (2018) 20 <https://vidhilegalpolicy.in/wp-content/uploads/2019/05/IBC_Thejourneysofarandtheroadahead_Dec18.pdf> accessed 27 June 2020.
[32] ibid.

drafting the Framework, the WG has taken into consideration the UNCITRAL Guidewith the aim of designing a comprehensive and wholesome framework.[33]

a) Definition of corporate group

Before starting off with the three phases of implementation, the WG aimed at defining the term 'corporate group'. While determining the definition, some stakeholders were of the opinion that the Adjudicating Authority should be given the discretion of deciding when the framework would be applicable on a case to case basis.[34] But the WG seems to have dismissed this claim by opining that a 'corporate group' should be defined such that stakeholders can determine if the framework is applicable to them, so that a case by case analysis is not necessary by the Adjudicating Authority.[35] In furtherance of this, the WG recommended that *"a 'corporate group' be defined to include holding, subsidiary and associate companies"*.[36] The WG also considered a situation whereby this definition may not include all cases where group insolvency might be apt.[37] In such cases, it recommended that an application be made to the Adjudicating Authority to include companies that are intrinsically linked but do not fall under the definition of 'corporate group' so as to maximise the value of the insolvent company without harming the assets of the company being included.[38]

b) Procedural coordination mechanisms

[33]UNCITRAL, *UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency*, (2012) <https://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-E.pdf>.
[34]Insolvency and Bankruptcy Board of India (n 12) 28.
[35]ibid 29.
[36]ibid.
[37]*Edelweiss Asset Reconstruction Company Limited* (n 21).
[38]Insolvency and Bankruptcy Board of India (n 12) 29.

Procedural coordination mechanisms are rules which coordinate the 'procedure' of insolvency keeping the assets of the group separate.[39] This includes coordination and cooperation between courts, appointment of single insolvency representative, information- sharing negotiations, etc.[40] The adoption of procedural coordination mechanisms is recommended by the UNCITRAL Guide and World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, 2016 ("**WB Principles**").[41]

Given the fact that there are a number of procedural coordination mechanisms and also taking into consideration that mandating all the mechanisms would be a herculean task, the WG has recommended that procedural coordination mechanisms such as cooperation, coordination and information- sharing should be mandatory; whereas, an option may be given to not opt for certain procedural mechanisms when they do not result in optimisation or maximisation of the assets or when it results in low cost of proceedings.[42]Further, the WG was very clear that insolvency professionals, Committee of Creditors ("**CoC**") and Adjudicating Authorities should be mandated to cooperate, communicate and share information with one another for better time management, lower costs and promote information symmetry; and the discretion of the extent of cooperation, communication and information sharing lies with the shareholders.[43]

Other procedural mechanisms which were included as a part of the framework include- joint application process for insolvency of multiple companies, single Adjudicating Authority to administer

[39]Insolvency and Bankruptcy Board of India (n 12) 31.

[40]UNCITRAL, *UNCITRAL Legislative Guide on Insolvency Law* (n 33).

[41]World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) Principle C 16 <http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf>.

[42]Insolvency and Bankruptcy Board of India (n 12) 40.

[43]ibid 41.

insolvency proceedings, single insolvency professional for companies in a corporate group, formation of group creditors' committee, enabling of group coordination proceedings, and extension of timeframe (180 days, extendable by 90 days).[44]

These are the procedural mechanisms that the WG recommended to be included in the Framework.

c) Perverse behaviour of companies in a corporate group

As a mechanism to protect the rights and interests of external creditors of a group, the WG noted that there is a need to have rules to avoid perverse behaviour by group companies in order to reduce undue risks. These rules would be applicable even if a single company in a group is insolvent so as to comprehensively address issues that a company in a corporate group might face while undergoing insolvency.[45] The rules recommended to prevent perverse behaviour are- subordination claims, extension of liability, contribution orders and, avoidance of certain transactions.[46] It is to be noted that the WG considered the UNCITRAL Guide as well as the practices adopted in different countries, during the adoption of the rules.

d) Substantive consolidation

Substantive consolidation is the consolidation of the assets and liabilities of different group companies so that they are considered as a single part during liquidation.[47] This has already been allowed in *State Bank of India & Anr. v. Videocon Industries Ltd. & Ors*.[48] As

[44]ibid 42- 48.
[45]ibid 49.
[46]ibid 50- 58.
[47]ibid 60.
[48]*State Bank of India v. Videocon Industries Ltd. &Ors* M.A 1306/ 2018 & Ors. in CP No. 02/2018 & Ors- decision dated 08.08.2019.

per the WG, substantive consolidation would result in lower costs of insolvency process, maximise the value of estates collectively for the satisfaction of creditors and stakeholders, and act as a check against fraudulent acts.[49] For substantive consolidation to be adopted, there is a requirement of an authority which determines the need for substantive consolidation. On drawing from international practice, the WG noted that any type of substantive consolidation- full, partial or deemed may be adopted.[50]

The phases of prevention of perverse behaviour and substantive consolidation have been dealt in brief in this article owing to the fact that the WG has only recommended the adoption of procedural mechanisms into the framework for the time being.

On that note, the report of the WG seems to be a comprehensive one, encompassing most aspects of group insolvency. Nevertheless, there are certain challenges or concerns that arise. A few challenges which addressed in the article are: the concern arising from the definition of the term 'corporate group', the jurisdictional difficulties arising from the appointment of a single adjudicating authority, the non-applicability to cross- border group insolvency with the primary concern being that development of provisions related to cross- border insolvency of debtors themselves are at a very nascent stage, and the issue related to the application of principle of extension of liability in cases of group insolvency. These are quite pressing issues that need to be addressed if a comprehensive framework for Group Insolvency is sought to be adopted.

[49] Insolvency and Bankruptcy Board of India (n 12) 60.
[50] ibid 66.

III. CHALLENGES TO THE INTRODUCTION OF GROUP INSOLVENCY REGIME IN INDIA AND IDENTIFYING THE PROBABLE SOLUTIONS

A. Concerns arising from the definition of 'Corporate Group' recommended by the WG

One of the biggest challenges in adopting the framework on group insolvency would arise from the definition of the term 'corporate group'. The WG considered the definition of 'group' in various acts and legislations in India and noted that all the definitions were made in reference to ownership and control, defined in a specific context which may not be ideal for the insolvency of group companies. In furtherance of this observation, the WG came out with a definition for the term 'corporate group' exclusively for the purposes of insolvency of companies in a group so as to *include holding, subsidiary and associate companies*.[51] Additionally, the WG also recommended that in certain cases which do not fall under the ambit of this definition, but where application of group insolvency framework is beneficial, an application can be made to the Adjudicating Authority, who will have the power to decide if the companies in question do form a 'group', as long as it is shown that it will result in the maximisation of value of the insolvent company without the destruction of the value of the company being included.[52]

The problem with the definition offered by the WG on 'corporate group' is that itis very vague and in essence fails to be inclusive. It also leaves a thread hanging by providing an option of approaching the Adjudicating Authority to determine to *include companies that are so intrinsically linked as to form part of a 'group'* in cases where

[51] ibid 29.
[52] ibid.

the definition fails to apply to a particular entity.[53] Consequently, there is a plausibility of the Adjudicating Authority being bombarded with cases seeking the inclusion of companies within the definition of 'corporate group'. This is a situation that the WG precisely wanted to avoid, and mentioned in the report that '*corporate group should be defined so that stakeholders can assess ex ante if any elements of this framework could be applicable to them, without attracting litigation to determine the applicability of the framework in the first place'*.[54] It is thus necessary that a comprehensive and inclusive definition be adopted so as to ensure that there is no burden of unnecessary litigation, on the insolvent company as well as the Adjudicating Authority. Adopting a wholesome definition will also save time and be beneficial in easing the insolvency procedure.

The UNCITRAL Guide has adopted a definition on the lines of companies being interconnected on the basis of control and significant ownership; with control as "*the capacity to determine, ..., the operating and financial policies of an enterprise*". It is to be noted that this definition considers companies having cross ownership as well as those with parents and subsidiary companies i.e., horizontal and vertical integration among companies.[55] As mentioned earlier, the definition of 'corporate group' provided by the WG is quite vague and doesn't specify the inclusion of horizontally and vertically integrated companies. Only subsidiary and associate companies are mentioned in the definition- the common knowledge being that a subsidiary company is an entity separate from its holding company- thus creating a novel set of concerns in the definition recommended. One can draw a parallel from the US where the framework on group insolvency is applicable to *affiliated companies.*[56] Such a term would

[53]ibid.
[54]ibid.
[55]UNCITRAL, *UNCITRAL Legislative Guide on Insolvency Law* (n 33) para 4 Glossary.
[56]Federal Rules of Bankruptcy Procedure, rule 1015 (United States).

be more inclusive in nature, widening the scope of the framework, instead of individually naming entities such as "*...associate, subsidiary and holding companies*". Hence, it is essential that a definition encompassing the vertical and horizontal interconnection among companies be adopted so as to have higher inclusivity and reduce litigation in terms of whether a company forms a part of a group or not.

Another pressing issue arising from the definition recommended by the WG is the interpretation of the term 'commercial understanding'. This term, not having been accorded with clarity as to its meaning, may prove troublesome to the Adjudicating Authority in terms of its exposition. In addition to deciding if a company- which does not fall under the scope of the current definition- is to be included in a group, the Adjudicating Authority will have the onus of interpretation of 'commercial understanding'. The ambiguity of the term may also result in frivolous litigation, thus hindering the insolvency process. Hence, it is suggested that a clear interpretation must be accorded to the term 'commercial understanding'.

Lastly, certain countries such as Germany, have defined 'corporate group' with respect to the Centre of Main Interests ("**CoMI**"). A 'group' is defined on the grounds of CoMI in domestic territory along with the affiliation of companies with one another on the basis of control and common management.[57] Adopting CoMI as one of the parameters to determine the inclusion of a company in a 'corporate group' for the purposes of group insolvency would help in easing procedural aspects of insolvency. Additionally, it would also be beneficial in jurisdictional problems such as determining which Adjudicating Authority to approach in cases of group insolvency.

[57]'Insolvency and Restructuring in Germany – Yearbook 2019' translated by Schultze & Braun GmbH & Co. KG, s 3e <https://www.schultzebraun.de/fileadmin/de/Fachbuecher/Insolvenzjahrbuecher/Insolvenzjahrbuch2019/Insolvency_and_Restructuring_2019_rz.pdf?_=1547820263>.

These suggestions are some ways to combat the vagueness and ambiguity projected by the definition of 'corporate group' recommended by the WG as it is undeniable that a more comprehensive and wholesome definition is necessary to address this concern.

B. Jurisdictional Challenges

The WG recommended that under the procedural mechanisms to be adopted in the group insolvency framework, a single Adjudicating Authority may be appointed to administer group insolvency proceedings.[58]It further opined that the Adjudicating Authority to administer the proceedings would be the one at the place where the application for insolvency was first admitted. The rationale behind this was the lowering of litigation costs, conservation of judicial resources, reduction in time for admission of proceedings and to minimize forum shopping.[59] The WG has also provided a solution in cases where an application has already been made for initiation of CIRP against group companies; where the applications need to be transferred to the Adjudicating Authority first approached.[60]

The proposal to appoint a single Adjudicating Authority to administer proceedings was met with criticism by stakeholders. Some stakeholders, although being on board with the appointment of a single Adjudicating Authority, were of the opinion that the Adjudicating Authority should be the one having jurisdiction over the place where the CoMI of the corporate group lies.[61] A few stakeholders were of the opinion that it would unfairly affect their interests if the insolvency applications were transferred between Adjudicating Authorities. While noting that this would indeed be

[58]Insolvency and Bankruptcy Board of India (n 12) 42.
[59]ibid.
[60]ibid 43.
[61]ibid 42.

depreciating for the interests of the stakeholders, the WG seemingly allowed the function of more than one Adjudicating Authority with the prerequisite of exchange of information and cooperation between the Adjudicating Authorities.[62]However, this is questionable as the WG mandates the transfer of application of proceedings, if a Committee of Creditors formed *applies for the proceedings to be administered by the first Adjudicating Authority*.[63] This leaves the whole process vague as on one hand the appointment of a single Adjudicating Authority seems to be mandatory, on the other hand, the stakeholders are provided with certain liberty to have different Adjudicating Authorities. Further, this freedom is nullified if the CoC formed makes an application contrary to the latter, resulting in the application of the former recommendation of having a single Adjudicating Authority.

This recommendation poses the problem of complicating the process of insolvency for various stakeholders, especially with their interests being adversely affected during the process of transfer of applications from one Adjudicating Authority to another. Though it is accepted that there is a necessity of a single Adjudicating Authority, the parameter to determine the Adjudicating Authority that administers the proceedings needs reform. Additionally, in certain cases, there must be a provision for more than one Adjudicating Authority to administer proceedings.

As mentioned earlier, a few stakeholders who were consulted opined that the Adjudicating Authority to administer proceedings be the one having jurisdiction over the place where the CoMI of the 'corporate group' lies.[64] Adopting CoMI as a parameter for the determination of the Adjudicating Authority, would help in easing the process as most of the applications for insolvency would be with the Adjudicating

[62]ibid 43.
[63]ibid.
[64]ibid 42.

Authority having jurisdiction at the place of CoMI of the Corporate Group. This proposition can be explained with an illustration.

Illustration: Consider a 'corporate group' having companies A, B, C, D and E. Assuming that the CoMI of companies A, B and C is at place X, for D it is place Y and, for E it is place Z. A, B and C would hence file applications for insolvency with the Adjudicating Authority at place X.

Situation 1: Assuming that company D filed the first application for insolvency at place Y. Going by the recommendation of the WG that the Adjudicating Authority should be the one where an application was first administered, in this hypothetical situation, the Adjudicating Authority at place Y would be the Adjudicating Authority for the 'corporate group'. This would mean that there must be transfer of applications of companies A, B, C and E to the Adjudicating Authority at Y. The only hope of the Adjudicating Authority at place X being the Adjudicating Authority for the 'corporate group' would be with a precondition of one of the companies- A, B or C filing the first insolvency application.

Situation 2: Assuming that the Adjudicating Authority is determined on the basis of CoMI of the corporate group. This would mean that the Adjudicating Authority at place X would be the Adjudicating Authority for the 'corporate group'. This would result in transfer of applications of only company D and E to the Adjudicating Authority at X.

The two hypothetical situations clearly show that the adoption of CoMI as the basis for determination of Adjudicating Authority of the 'corporate group' would be better suited in terms of easing procedural mechanisms for both the stakeholders as well as the different Adjudicating Authorities in terms of exchange of information and cooperation. This would also help in reducing the time involved in transfer of applications as the majority of the application will already

have been filed in or will have to be filed in the Adjudicating Authority situated in the place where the CoMI of the 'corporate group' lies. In addition to this, the adoption of CoMI as a parameter would help in accommodating a more comprehensive definition as well as help in resolving cross- border challenges,

Another suggestion would be to adopt a mechanism for the determination of Adjudicating Authority on the lines of the German system. The German legislation mandates a single court to administer insolvency proceedings, the court being the one where the first application of insolvency was filed by one of the companies of the group. However, the provision allows for the concentration of proceedings in more than one court in cases where the company that first filed the insolvency application employs less than *'15% of the group's employees and its revenue is either 15% less than the revenue of the group or its worth is less than 15% of the balance sheet of the group'*.[65] This is another solution of easing the procedural process for both the stakeholders as well as the Adjudicating Authorities if the WG is adamant on the parameter of the place where the application is first filed being the basis for the determination of the Adjudicating Authority.

It is thus suggested that reforms along the lines of either adopting CoMI for the adoption of Adjudicating Authority or the provision to have more than one Adjudicating Authority in certain cases as provided in the German system would be an efficacious mechanism in easing the procedural coordination mechanisms to be adopted in the Framework recommended by the WG.

C. Cross Border Insolvency and Group Proceedings

With increased globalisation, the presence of multinational corporations and Foreign Direct Investment has exponentially risen in

[65] Insolvency and Restructuring in Germany- Yearbook 2019 (n 57).

India over the past few years. Due to the presence of these corporations over various jurisdictions, a major problem arises when such multinational corporates turn insolvent, and such circumstances warrant the need for an efficient cross border insolvency regime. Further, most of these multinational companies carry out their operations through various subsidiary companies and hence they are generally present as cross border group companies. Thus, cumulatively, group insolvency proceedings are highly related to the cross-border insolvency provisions and surprisingly, the Indian jurisprudence on both these aspects of insolvency law is still uncertain.

Cross border insolvency refers to the situations and circumstances in which a corporate debtor has its assets and/or the creditors in more than one country. This definition of cross border insolvency essentially highlights three situations involved in cross border insolvency:

a. Foreign creditors willing to file insolvency proceedings against Indian corporate debtors[66]

b. The corporate debtor may have its operations in more than one country[67] or

c. Insolvency proceedings are initiated against the same corporate debtor in other jurisdictions.[68]

In context of Indian jurisprudence in relation to cross border insolvency, the first situation as abovementioned is properly settled as the definition of 'person' under the IBC, 2016 includes residents

[66] Aparna Ravi, 'Filling in the Gaps in the Insolvency and Bankruptcy Code – Cross Border Insolvency' (*India Corp Law*, 17 May 2016) <https://indiacorplaw.in/2016/05/filling-in-gaps-in-insolvency-and.html> accessed 27 June 2020.
[67] ibid.
[68] ibid.

outside India.[69] Since no discrimination is made between resident and foreign creditors under the Code, foreign creditors can approach the Indian Adjudicating Authorities for initiation of insolvency proceedings. In relation to the other two situations, Section 234 of the IBC, 2016 provides the Central Government the right to enter into an agreement with foreign countries for enforcement of the provisions of the IBC.[70] Further, Section 235 of IBC, 2016 provides that the Adjudicatory Authority may issue a letter of request to other foreign authorities if any reciprocal agreement is made with the respective foreign governments under Section 234 of IBC, 2016.[71]

IBC, 2016 is still in a nascent stage and is evolving extensively. The Insolvency Law Committee on Cross Border Insolvency in reference to Sections 234 and 235 of the IBC, 2016 observed that these provisions were inefficient, time consuming and uncertain for the creditors.[72] Thus, there was a dire need to revamp the cross-border insolvency provisions in India. Taking into consideration the increasing number of multi-national companies in India along with exponential rise of Foreign Direct Investment in India, the Insolvency Law Committee on Cross Border Insolvency proposed to implement the UNICTRAL Model Law on Cross-Border Insolvency (Model Law) with a few modifications in specific implementation of the Model Law in relation to IBC, 2016.[73]

One of the major issues related to cross border insolvency is the determination of the CoMI. As per the Model Law, the main insolvency proceedings against a corporate debtor can be started only in the jurisdiction in which the debtor has its CoMI and non-main proceedings may be started at any jurisdiction, even if the debtor's

[69] Insolvency & Bankruptcy Code 2016, s 3(23) (India).
[70] ibid s 234.
[71] ibid s 235.
[72] Insolvency and Bankruptcy Board of India (n 12) 12- 13.
[73] ibid.

CoMI does not lie therein.[74] The definition and meaning of CoMI is not present in the Model Law which has led to various debates in foreign jurisdictions in reference to initiation of cross border insolvencies. The importance of CoMI lies in the purpose of the Model Law itself wherein it is observed that the proceeding pending in the debtor's CoMI is of prime importance for managing the insolvency irrespective of its presence in the other States.[75] The need to identify the proper jurisdiction and CoMI for the enterprises increases in cases of group insolvencies altogether as it involves various companies which may tend to have their CoMI in different jurisdictions.

In specific reference to India, Clause 14 of the Draft Part Z of the Report of Insolvency Law Committee on Cross Border Insolvency provides that CoMI of a corporate debtor lies at the place of its registered office unless a proof to the contrary is provided.[76] At the same time, the Adjudicating Authority may also conduct an assessment to ensure that the debtor's central administration takes place at the CoMI and is easily identified by the creditors and the other third parties[77], and if the CoMI is still not determined, it may be done through an assessment as laid down by the Central Government.[78] Prima facie, the exercise of finding the CoMI of a single corporate debtor seems to be feasible and practical in light of

[74]United Nations Conference on International Trade Law, *UNICTRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, Article 17 (Vienna: United Nations, 2014) 9 < https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> accessed June 23 2020.

[75]ibid.

[76]Minisry of Corporate Affairs, Government of India, 'Report of Insolvency Law Committee on Cross Border Insolvency' (16 October 2018) 57 Draft Part Z, Clause 14 <https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf>.

[77]ibid.

[78]ibid.

the aforementioned draft provisions. However, in cases of group insolvencies, each company within the group may have its own registered office in different jurisdictions and thus in such cases, the exercise of finding CoMI for the group enterprise will not be feasible in the manner provided for in Draft Part Z.

Though initiation of insolvency proceedings in various states against each corporate debtor is possible, it must be noted that it is beneficial for the different proceedings of the same group company to be supervised and coordinated from as single jurisdiction.[79] This supervision ensures faster resolution, non-opposing decisions and easy implementation of foreign decisions within the domestic territory.

Three major issues arise in the light of identifying the CoMI for group insolvency matters based on the 'registered office test'. Firstly, not all group companies can be expected to have their registered offices within the same jurisdiction as it would defeat the purpose of expansion of the group companies. Secondly, it becomes extremely difficult for the creditors to ascertain the CoMI of various enterprises within a group of companies as it is itself uncertain in nature. Lastly, the jurisdictional arguments for group companies and their CoMI may lead to the issue of forum shopping.

Instead of the 'registered office test', the 'head office test' should be relied upon for identifying the CoMI for a group insolvency proceeding. Indeed, the company's main place of business is the one wherein the major decisions regarding the general management of the parent company as well as its subsidiaries are taken and central administration is exercised.[80] This test is an efficient one to identify the CoMI for the group insolvency matters as it can match creditor's

[79] I Mevorach, 'The road to a suitable and comprehensive global approach to insolvencies within multinational corporate groups' [2006] 15 JBLP 455, 463-64.
[80] *Planzer Luxemborg Sarl v. Bundeszentralamt fur Steuern* [2007] ECJ, C-73/06.

legitimate expectations, provided that disclosure of such information is made available by the companies.[81]

However, in cases where such 'head office test' cannot be applied to find the CoMI for group insolvency due to the absence of a single head and brain of the entire group of companies, greater consideration may be given to the place where more assets of the group companies are placed, the legitimate expectations of the creditors, the place of registered office etc. so as to find the CoMI for the group insolvency proceedings.

D. Extension of Liability and Group Insolvency

As a general practice, the subsidiary companies and the parent company are considered to be a separate legal entity and at the same time, the directors and the other key personnel managers of the company are also considered to be separate from the corporate entity. However, in *Life Insurance Corporation Limited v. Escorts Ltd. & Ors*,.[82] the Supreme Court observed that the corporate veil between a subsidiary company and a parent company can be lifted in cases of fraud, improper conduct, evasion of tax or any other wrong committed as per a statute. The Courts generally pierce the corporate veils of the parent company as well as the subsidiary company so as to see as to whether the parent company and the subsidiary company are guided by the same head and brain, that is, if the persons in charge of the parent company and the subsidiary company are same or not.[83]

The abovementioned judicial decisions, point towards the established principle of law that in cases where the parent company and the subsidiary company are intrinsically connected with each other, the

[81]Irit Mevorarach, 'The 'Home Country' of a Multinational Enterprise Group Facing Insolvency' (2008) 57(2) ICLQ 427, 435.

[82]*Life Insurance Corporation Limited v. Escorts Ltd. & Ors* AIR 1986 SC 1370.

[83]*Hackridge-Hewettic & Esaun Ltd. v. G.E.C. Distribution Transformers Ltd.* (1992) 74 Comp Cas 543 (Mad).

corporate veil can be lifted and the parent company can be held liable for the illegal act of the subsidiary company. On similar lines, in circumstances where the directors of a parent company have a high level of control over the subsidiary companies and indeed act as *de facto* directors for the subsidiary company, then the Courts may lift the corporate veil of a subsidiary company and also hold the directors personally liable for the illegal acts of a subsidiary company. In essence, this is known as the principle of extension of liability as the liability of a subsidiary company is extended to the parent company as well as the key personnel of the parent company.

The application of the principle of extension of liability is not settled as far as the Indian group insolvency jurisprudence is concerned. The WG in its Report mentioned that there was no need to introduce any provision in IBC, 2016 for the purpose of extending liability to the parent companies and the directors.[84] The WG noted that Section 2(60) of the Companies Act, 2013 defines an officer in default as "*any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity*."[85] Thus, the WG observed that this definition of an officer in default provides sufficient scope to include *de facto* or shadow directors of parent companies to be held responsible for fraudulent acts related to the insolvency of a subsidiary company.

However, by making the aforementioned observation, the WG has not provided sufficient clarity to the Adjudicating Authority so as to deal with cases related to shadow or *de facto* directors' default in relation to the group insolvency proceedings involving a subsidiary company. While arriving at this recommendation, the WG seems to have overlooked a few of observations which necessitate the need for

[84] Insolvency and Bankruptcy Board of India (n 12) 60.
[85] Companies Act 2013, s 2(30) (India).

having explicit provisions in the IBC for the purpose of application of the principle of extension of liability. Firstly, the WG itself noted the intention of the stakeholders to extend liability on the shadow directors in a few circumstances wherein the fraud conducted by the shadow directors and the parent company are apparent.[86] Secondly, the UNICTRAL Guide itself recommends a few factors to be taken into consideration while dealing with cases related to certain transactions between group companies such as relationship between the parties, integration of the two transacting parties, purpose of transaction, etc.[87]

Having a provision punishing a *de facto* or a shadow director personally for his wrongdoings through a subsidiary company should not create a fear within the corporates. The application of this principle has to be limited in nature with a proper note of caution. The liability should be extended only on the basis of duties that a parent company and the directors of the parent company have with the subsidiary company.[88] The application of the principle is to be based on certain factors which are generally identified by the statute that governs the insolvency proceeding between the group companies.

The factors on the basis of which the liability may be extended upon the parent company or the shadow or *de facto* directors, unless identified and given explicit recognition in the IBC, 2016 would create a dilemma within the Adjudicating Authorities and may lead to contradictory decisions in different matters. To avoid any unwelcoming consequences in the Indian jurisprudence related to

[86]Insolvency and Bankruptcy Board of India (n 12) 56.

[87]United Nations Conference on International Trade Law, *UNICTRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (n 74).

[88]Gwynne Skinner, 'Parent Company Accountability Ensuring Justice for Human Rights Violations' (The International Corporate Accountability Roundtable, 01 November 2015) <http://www.bhrinlaw.org/documents/pcap-report-2015.pdf> accessed 30 June 2020.

principle of extension of liability in group insolvency proceedings, there is a dire need to provide explicit provisions in IBC, 2016 in this regard, contrary to the recommendation made by the WG in its report in reference to the need for a provision in relation to the extension of liability.

IV. CONCLUSION: THE FINAL REMARKS

Being a relatively young legislation, the IBC has seen a number of amendments in recent years. The current recommendation to include a framework on group insolvency has given rise to a few grappling questions which the authors have highlighted in the article.

The WG set by the IBBI has come up with a number of recommendations and suggestions in the furtherance of adaptation of such a framework. It recommended that the framework on group insolvency ideally deals with three areas namely, procedural coordination mechanisms, substantive consolidation and rules against perverse behaviour. Out of these three, the WG suggested only the adoption of procedural coordination mechanisms as a trial mechanism. From a number of procedural mechanisms suggested, only cooperation, coordination and sharing of information has been mandated by the WG to be adopted. In addition to these recommendations, it has also provided a definition for the term 'corporate group' for the purposes of application of the framework.

Analysing the recommendations of the WG, the authors have identified certain concerns in the framework which are, i) concerns due to the vagueness surrounding the definition of 'corporate group', ii) jurisdictional issues arising due to the recommendation of a single Adjudicating Authority to monitor the group insolvency process, iii) with respect to the cross- border aspects of group insolvency and, iv) extension of liability in the group proceedings. In addition to

highlighting the concerns revolving around these challenges, the authors have suggested plausible solutions for the same.

First, for the problems that may arise due to the ambiguity in definition of corporate group, it is suggested that the definition inclusive of the vertical and horizontal interconnection among companies or a definition on the grounds of CoMI should be adopted to make the definition comprehensive and wholesome. Second, considering CoMI of the 'corporate group' for the determination of Adjudicating Authority or, the provision to have more than one Adjudicating Authority in certain cases as provided in certain foreign legislations would be an effective method to protect the interests of the stakeholders of the 'corporate group. Third, the 'head office test' instead of the 'registered office test', should be adopted to identify the CoMI for a group insolvency proceeding as it is more effectual in equalling the legitimate expectations of a creditor. Lastly, there is a pressing requirement of provisions with respect to principle of extension of liability in group insolvency proceedings in order to protect corporates from unwarranted outcomes.

After contemplating on the above concerns and attempting to offer certain propositions to the same, the authors have embraced the view that the framework suggested by the WG is comprehensive and inclusive to a large extent. However, it needs reform in order to holistically supplement group insolvency proceedings as well as the IBC in general.

MORIBUND STATE OF TRANSPARENCY AND ACCOUNTABILITY IN THE INDIAN ELECTORAL FUNDING REGIME

Akshat Bhushan[*] *& Avishek Mehrotra*[**]

Abstract

The electoral competition in India comprises millions of voters, thousands of candidates and parties, making it a costly affair. The latest development in this regard is the incorporation of the electoral bonds scheme and the corresponding amendments through the Finance Act, 2017. Although the amendments were subject to criticism by the Election Commission of India, the Reserve Bank of India, and several intellectuals, yet it did not receive much public attention. Even the Apex Court exercised judicial evasion by passing an interim order and postponing the hearing of the matter sine die. The authors in this paper aim to present an in-depth analysis of the Indian system of political funding, with a primary focus on the electoral bond scheme, which has drawn the exiguous attention of the general masses. The authors first elucidate upon the two basic postulates of political

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funding (a) contributors and (b) disclosures. They then explain the anomalies underlying the political funding regimes prior to the Finance Act, 2017, followed by an analytical account of the electoral bond scheme along with the amendments made to the laws regulating party funding. The authors further delve into the constitutional validity of the electoral bond scheme and its corresponding amendments. In the concluding remarks, the authors have acknowledged the fact that despite the brazen misuse of the provisions as they stood before the amendment, there existed some accountability on part of the parties. However, merely scraping down the amendments made would not suffice and there is an ardent need to come up with a transparent system, ensuring accountability on the part of the parties as well as its contributors.

I. INTRODUCTION

Money plays a critical role in the Indian elections. Attributable to this, is the fact that political parties tend to allocate tickets to rich candidates. This tendency poses barriers to entry for political aspirants who come from humble financial backgrounds. Politics becomes a breeding ground for corruption and unethical collusion between politicians and high net worth individuals, which also has a bearing upon the policy decisions of the Government. In the 2019 Indian General Elections, a total of Rs. 6 trillion was spent, making it

the costliest election amongst all democratic nations.[1] The primary reason for such a disproportionate influence of money power in our politics is the skewed political funding regime in India. In the 70-year history of independent India, no Government has shown the political will to cleanse the system of campaign finance. The political class of this country are not ready to expose themselves to greater scrutiny.

Even before 2017, the loopholes in our political funding regime were due to inadequate laws and non-compliance with the existing regulatory mechanisms. However, with the passage of the Finance Act, 2017, the rules of campaign financing have become excessively opaque and also advantageous for the ruling party.[2] The Association for Democratic Reforms filed a Public Interest Litigation challenging the amendment made in 2017.[3] However, the Apex Court did not show the urgency that this pressing issue demanded and resorted to judicial evasion by passing an interim order.[4] At a time when such an important issue has been brushed under the carpet, there is a greater need to look at flaws in the funding system of our politics. Therefore, an attempt has been made to bring into focus the various issues regarding campaign financing and provide solutions to those problems.

[1]See 'Poll Expenditure, The 2019 Elections', Centre for Media Studies < http://cmsindia.org/sites/default/files/2019-05/Poll-Expenditure-the-2019-elections-cms-report.pdf> accessed 6 May 2020.

[2]Rakesh Dubbudu, '95% of Electoral Bonds Purchased in 2017-18 Went to BJP' *The Quin* (30 November 2018) <https://www.thequint.com/news/politics/95-percent-electoral-bonds-purchased-in-2017-18-bjp#read-more> accessed 26 November 2020.

[3]*Association Democratic Reforms and Anr. v. Union of India and Ors.* 2019 SCC OnLine SC 1878.

[4]ibid.

II. HISTORY OF POLITICAL FUNDING IN INDIA

Party funding, revolves around two primary facets (a) contributors – who donate funds to parties and (b) disclosure requisites – revealing the transactions and to whom such disclosures are to be made.

A. Contributors

In the initial days, no restriction was placed upon donations from any person, whether natural or juristic. The companies could, however, donate to the extent permitted under its Memorandum of Association ("**MOA**").[5] The contributions made by companies to political parties first came under scrutiny before the Bombay High Court.[6] The dispute arose when a company altered its MOA to incorporate political contributions with alleged disregard for statutory requirements.[7] The Court, however, ruled in favor of the Corporation maintaining that, '*axiomatic to what an individual can lawfully do, can also be done by a joint-stock corporation.*'[8] This was the first instance where the threat of influence in government policies through corporate donations was realised.

The Santhanam Committee, set up by the Indian Government, recommended a total ban on corporate donations.[9] Following the recommendations, the Indira Gandhi Government imposed a ban on corporate donations through an amendment to the Companies Act.[10] One might think that this move led to democratisation in political

[5]Companies Act 1956, s 293(1) (e).

[6]*Jayantilal Ranchchoddas Koticha v. Tata Iron and Steel Co Ltd* [1958] AIR Bom 155.

[7]Companies Act 1956, s 17(1)(a); Companies Act 1956, s 17(1)(b).

[8]*Jayantilal Ranchchoddas Koticha v. Tata Iron and Steel Co Ltd,* AIR 1958 Bom 155.

[9]Report of the Committee on Prevention of Corruption (1962) 104 (Santhanam Committee Report) <http://cvc.nin.in/scr_rpt_cpc.pdf> accessed 2 May 2020.

[10]Companies (Amendment) Act 1969, s 293 A.

funding as the parties now had to resort to individual donors for contributions. Instead, it culminated in 'briefcase practice,' i.e., pricing that the government permits, as per the number of briefcases of cash supplied.[11] Therefore, despite the ban, the corporate donations continued, the only difference being that they became underground. Corporate advertisements became a legitimate source of receiving funds by labelling them as payments made for a 'service' and not donations.[12]

The soaring costs of an election campaign in the absence of corporate donations prompted the candidates to depend more upon their wealth; this resulted in the proliferation of rich and those with criminal antecedents into politics. Taking note of the practical anomalies underlying the 1969 Amendment, the Rajiv Gandhi Government in 1985 re-introduced corporate funding allowing all companies besides Government companies to make political donations.[13] Further relaxations were made through the Companies Act, 2013, increasing the limits of the political donation, from 5% to 7.5% of the net profit in the last three years.[14]

B. Disclosure Requisites

Corresponding to the contributions is another critical aspect of political funding, the disclosures. The first prominent step in disclosures was brought in 1979. The legislature amended the Income Tax Act, 1961, providing for exemption in tax returns to political parties provided that they file income tax returns disclosing the amount, name and address of the donors, with contributions beyond

[11]Stanley A. Kochanek, 'Briefcase Politics in India: The Congress Party and the Business Elite' (1987) 27(12) Asian Survey 1278, 1280.
[12]*Graphite India Limited v. Dalpat Rai Mehta* [1978] 48 Comp Cas 683 (Cal).
[13]Companies (Amendment) Act 1985, s 293 A.
[14]Companies Act 2013, s 182.

Rs. 20,000.[15] The provision was immensely misused by the major donors who would break their donations into multiple smaller donations, thus keeping themselves anonymous. The said practice is also prevalent in the present times.[16] Even after making the donations 100% deducible, the companies refrained from making disclosures.[17]

The TATA Group devised a system of Electoral Trust. Under this system, all the Tata Companies, instead of donating to the political parties, could donate to the Electoral Trust, a separate entity. The sole purpose of these trusts was to facilitate political donations.[18] The companies could autonomously decide the parties to which their donations would go; the Electoral Trust was only there to channel the donations to the political parties as per the direction of the companies.[19] The companies only disclosed the name of the electoral trust in their balance sheet, thereby creating anonymity in political donations through which money could be channeled to the political parties. Thus, this system was an effective way to evade coercion from opposing parties, challenges from shareholders, and quid pro quo allegations.[20] However, they are not amenable to tax deductions as it can only be availed when companies donate directly to political parties.

[15]Income Tax Act 1961, s 13 A.

[16]Devesh Kapur and Milan Vaishnav, *Costs of Democracy, Political Finance in India* (OUP 2018) 18, 19.

[17]Income Tax Act, 1961 s 80 GGC.

[18]Samya Chaterjee and Niranjan Sahoo, 'Corporate Funding of Elections: The Strengths and Flaws' (Observer Research Foundation Issue Brief no. 69, 4 Feb 2014) <http://www.orfonline.org/research/cororate-funding-of -elections-the-strengths-and-flaws/> accessed 11 May 2020.

[19]P. Visvaksen, 'Trust in Law' *The Hindu Business Line* (15 Aug 2016) <http://www.thehindubusinessline.com/specials/india-file/trust-in-the-law/article8991299.ece> accessed 9 May 2020.

[20]Aradhya Sethia, 'Where's the Money?: Paths and Pathologies of the Law of Party Funding', (2019) 1 NJLS <https://nludelhi.ac.in/download/publication/2019/Journal%20of%20Legal%20Studies%202019%20Volume%201.pdf> accessed 4 May 2020.

Through an amendment to the Income Tax Act, the tax deductions were extended to contributions made by electoral trusts and also their income.[21] However, in 2013, certain conditions were listed for availing these tax deductions. There was complete prohibition imposed upon the donations in cash;[22] further, the Electoral Trusts were also to maintain records of donors and donees.[23] In 2014, the E.C. took notice of the lack of transparency involving Electoral Trusts and issued transparency guidelines for the Electoral Trust. Though these guidelines have brought in some transparency, the donations still evade the public gaze.

III. ANOMALIES IN POLITICAL FUNDING PRIOR TO FINANCE ACT, 2017

A. No Effective Limit on Expenditures

The amount a candidate can spend during elections is limited[24] and is calculated from the day he files his nomination.[25] A lacuna in this provision is that the candidates usually delay the filing of their nomination. However, they start campaigning much before the nomination is filed. Therefore, the candidate is not required to record the expenditure incurred by them in campaigning prior to filing the nomination. Thus, the candidates officially spend a small percentage

[21]Income Tax Act 1961, amendment to s 80GGB, 13B.
[22]Income Tax Rules, 2013 rule 17CA (5).
[23]Income Tax Rules, 2013 rule 17CA (11).
[24]Election Rules, 1961 Rule 90 as amended by Conduct of Elections (Amendment) Rules, 2014.
[25]Representation of People Act 1951 s 77(1).

of their total expenditure limit[26] because a large chunk of the expenditure is hidden by delaying the filing of nomination. Moreover, there is no limit on the amount of spending that can be incurred by a political party for general party propaganda. However, if the party specifically campaigns for one of its candidates, only that amount has to be included in that candidate's expenditure. This provision is being misused by the parties to further the interest of their candidates in the name of general party propaganda, thereby, in effect, spending much more than the prescribed limit of candidate expenditure.[27] Even the electoral reforms brought about by the Finance Act, 2017, left this issue unaddressed.

B. Striving for Anonymity

Under Section 29C of Representation of People Act, 1951, the political parties were under an obligation to prepare a report maintaining records of all political contributions above Rs. 20,000. This report was to be submitted to the Election Commission if the political party wants to avail the benefits of tax exemptions under Section 13A of Income Tax Act. The anomaly herein can be seen by way of this illustration - company A may donate Rs. 19,999 making it an approximate total amount of Rs. 2,00,000. However, as this donation of Rs. 2 lakhs have been broken up into separate donations of less than Rs. 20,000, the parties can lawfully show this whole donation coming from an anonymous source.[28]

[26]Association for Democratic Reforms, '129 (30%) MPs declared Election Expenses of less than 50% during Lok Sabha, 2009' (*Association for Democratic Reforms*, 4 March 2014) <https://adrindia.org/content/129-30-mps-declared-election-expenses-less-50-during-lok-sabha-2009> accessed 6 May 2020.

[27]Law Commission of India, Electoral Reforms (Report 255 2015) <http://lawcommissionofindia.nic.in/reports/Report255.pdf> accessed 5 May 2020.

[28]Law Commission of India, Electoral Reforms, (Report No. 255 2015) para 2.27.12; <http://lawcommissionofindia.nic.in/reports/Report255.pdf> accessed 3 May 2020.

The rampant misuse of this provision is also apparent from the data collected by the Association for Democratic Reforms. It shows that between 2004-05 to 2014-15, all national and regional political parties have received 69 per cent of the donation from anonymous sources.[29] For the said period, 83 per cent of the total income of the Indian National Congress and 65 per cent of the total income of the Bhartiya Janata Party was from unknown sources. The income of national political parties from unknown sources during the said period increased by 313 per cent, whereas the revenue of regional parties increased by 652 per cent.[30] The Bahujan Samaj Party is the only national party which has consistently maintained that all its income came from donations below Rs. 20,000, and therefore its total income has come from anonymous sources.[31]

C. Indirect Funding by Corporates

Section 182(3) of the Companies Act, 2013 mandates companies to maintain records of all the contributions made by it to political parties in its profit and loss account. In case of non-compliance, the Company is liable for imprisonment and fine under Section 182(4) of the Companies Act, 2013.[32] Section 80 GGC of the Income Tax Act, 1961,[33] also provides income tax exemptions from corporate contributions. Nevertheless, corporates do not want to reveal the political party to which the money has been donated because they fear

[29] *Association Democratic Reforms and Anr. v. Union of India and Ors.* 2019 SCC OnLine SC 1878.

[30] Devesh K Pandey, '69% of political funds were from unknown sources', *The Hindu* (24 Jan 2017) <https://www.thehindu.com/news/national/69-of-political-funds-was-from-unknown-sources/article17089815.ece> accessed 26 November 2020.

[31] *Association Democratic Reforms and Anr. v. Union of India and Ors*. 2019 SCC OnLine SC 1878.

[32] Companies Act, 2013 s. 182(4).

[33] Income Tax Act 1961 (n 15).

that other parties may become vindictive and harass them. Therefore, they bypassed these requirements under Section 182(3) by not giving the money directly to the political parties. The money for political contributions is given to a person who goes and donates it to the political party.[34] In this way, the companies do not have to mention the names of any political parties.

D. Ousting the Shareholders Authorisation

Before making a political donation, the company has to get an approval from the Board of Directors.[35] This means that the people who invest in that company, i.e., the shareholders, are entirely kept out of this process. Therefore, the shareholders who invest their money into the company have no say in the manner in which their money is spent.[36] Also, it must be noted that most shareholders do not intend to invest money in a company to make political contributions. The laws in India make sure that a few people take the decision regarding how much money is to be donated to political parties by a company. There is a lack of transparency and accountability of the directors. It would have been much better if a large number of people were included in this process to make it more democratic.

Some argue that corporations need not take approval before making political donations, as the business judgment rule protects them.[37] However, applying that logic, the Board of Directors would have to

[34]Shubham Batra, 'New Companies Act: India Inc. avoids naming political parties it funds', *Economic Times* (28 November 2013) <https://economictimes.indiatimes.com/news/company/corporate-trends/new-companies-act-india-inc-avoids-naming-political-parties-it-funds/articleshow/26487159.cms?from=mdr> accessed 3 May 2020.

[35]Companies Act, 2013, s 182(1).

[36]Ciarra Torres-Spellicsy, 'Corporate Campaign Spending: Giving Shareholders a Voice', Brennan Centre for Justice, 13 <https://www.brennancenter.org/sites/default/files/2019-08/Report_Corporate-Campaign-Spending-Giving-Shareholders-Voice.pdf> accessed 3 May 2020.

[37]*Citizens United v. Federal Election Commission* [2010] U.S LEXIS 766.

show how the decision taken by them to fund a political party would increase the profits of that company.

The approval of shareholders does not mean that the shareholders take every decision regarding which party should be funded and how much money should be spent from time to time. However, the very least that can be done is that the companies take the approval of the shareholders regarding the question of whether they are amenable to the money invested by them, to be used for political spending? If yes, how much amount are they willing to set aside for this purpose for a particular period. Subsequently, the directors can decide the sum that is to be contributed from time to time. This is subject to the condition that the overall spending for that particular duration does not exceed the authorized sum.[38]

a) UK: Requirement of Shareholder's Authorisation in Political Funding

In the United Kingdom, before 2000, companies were not required to take permission from the shareholders on the question of political funding.[39] There was a loss in confidence of the pubic in politicians, due to their murky connections with businesses and corporations. Several scandals contributed to this loss of public trust.[40] In pursuance, the Fifth Report of the Committee on Standards in Public Life was released. The Report remarked that there was growing suspicion among the public that corporate houses were using political

[38]Explanatory Notes to the Political Parties, Elections and Referendums Act, 2000, c 41, para 11; Companies Act, 2006, s 366.

[39]Corruption and Funding of U.K Political Parties, Transparency International 2006, 6-7.

[40]Patrick Hennessy, 'The Ecclestone Affair: Labour's First Funding Scandal', *The Telegraph* (Delhi, 12 October 2008), <http://www.telegraph.co.uk/news/politics/labour/3179722/The-Ecclestone-Affair-Labours-first-funding-scandal.html > accessed 3 May 2020.

funding as a tool to get favourable policies and access to Ministers in the Government.[41] Therefore there was a need for increased accountability and transparency in political spending.

An amendment was made to the Companies Act in 2000, which made it compulsory for companies to take the prior authorization of the shareholders before making political donations.[42] Though most of the time, shareholders indeed approve the resolution for political donations, it certainly leads to more accountability and transparency. The shareholders approve a certain amount that can be allocated for donations to political parties, and the company has to fall in line with the limits set by the shareholders. If the company spends more than the sum authorized by the shareholders, then the directors are personally liable to the extent of the excess amount that has been spent along with interest.[43] They are also required to pay damages for any loss that the company had to incur as a result of the unauthorized spending.

Notably, there have been some instances where the resolution of political contributions has been rejected by the shareholders. In 2004, a resolution for authorization of political spending of 1.25 million pounds was rejected by the shareholders of BAA PLC.[44] Moreover, even if they accept the resolution, they continue to exercise control over the directors and see to it that they don't spend more than the authorized amount. This leads to greater transparency and also limits

[41]Committee on Standards in Public Life, Fifth Report, Standards in Public Life, Fifth Report, The Funding of Political Parties in the United Kingdom, 1998.

[42]Political Parties, Elections and Referendums Act, 2000 s 139, 140, sch 19; see also Explanatory Notes to Political Parties, Election and Referendums Act, 2000 <http://www.opsi.gov.uk/ACTS/acts2000/en/ukpgaen_20000041_en_1> accessed 4 May 2020; Companies Act, 2006 s 369. <http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060046_en.pdf> accessed 4 May 2020.

[43]ibid.

[44]Ciarra Torres-Spelliscy and Kathy Fogel, 'Corporate Political Spending In The United Kingdom', (2010) 46 USF. L. Rev. 575.

the amount that can be given as corporate donations. For this reason, the U.K has seen a dip in these corporate political donations since the 2000s.[45]

To ensure transparency in corporate funding without banning corporate donations, it is imperative to make the process for authorizing corporate donations more inclusive.

IV. FINANCE ACT, 2017: A WATERSHED MOMENT IN INDIAN POLITICAL FUNDING SYSTEM

The Finance Act, 2017, made amendments to the Representation of People's Act 1951, the Income Tax Act 1961, and the Reserve Bank of India Act 1934. The amendments made to the Income Tax Act, 1961 and Representation of People's Act, 1951 aimed to remove the requirement of disclosing the amounts received and donated by political parties and companies, respectively.[46] The political parties are no longer required to disclose the contributions that have been made through electoral bonds, even if they are beyond the value of Rs. 20,000.[47]

A. The Scheme of Electoral Bonds

The electoral bond scheme has emanated from the amendment made to the Reserve Bank of India Act, 1934, which gave the Central Government the authority to allow some banks to issue electoral bonds.[48] Electoral bonds are in the form of Promissory Notes. These

[45] Torres-Spelliscy (n 32) 18.

[46] Representation of the People Act, 1951 s 29C; Income Tax Act ,1961 s 13-A as respectively amended by s 137 and s 11, Finance Act, 2017.

[47] ibid.

[48] Reserve Bank of India Act, 1934 s 31 as amended by Finance Act, 2017 s 137.

bonds are issued at 29 specified branches of State Bank of India ("**SBI**"). They are in the denomination of Rs. 1000, Rs. 10,000, Rs. 1,00,000, Rs. 10,00,000 and Rs. 1 crore.[49] Any individual or company can purchase these bonds within 15 days of being issued.[50] The bond is issued and is available for 10 days at the beginning of every quarter, i.e., in January, April, July, and October.[51] The electoral bonds ensure anonymity as they do not reveal the name of the donor or the payee. However, the bonds can only be purchased after the donor meets the Know Your Customer ("**KYC**") requirements.[52] Even though it is not made public, the bank knows the identity of the donor and also the political party to which the donation is made.

B. Restrictions on Cash Transactions

There always has been a demand to limit the role of cash transactions to curb the growth of the black economy. The Finance Act, 2017 made certain amendments according to which the permissible limit for cash transactions in the electoral space is Rs. 2,000.[53] Any cash donations above that limit would result in the loss of tax exemption status that is granted on the income of political parties. However, these amendments do not guarantee the end of unaccounted money in political donations. This provision can be easily subverted by breaking down the cash donations into multiple contributions of less than Rs. 2,000. It must also be kept in mind that India being a cash-based economy, the cash to check ratio in the Indian economy is 9:1.[54] Therefore there are various underground mechanisms by which the cash transactions can be carried out. Many such donations are

[49]Electoral Bonds Scheme, 2018 s 5.

[50]Electoral Bonds Scheme, 2018 s 6(1).

[51]Electoral Bonds Scheme, 2018 s 8(1).

[52]Electoral Bonds Scheme, 2018 s 4(1).

[53]Income Tax Act, 1961 s. 13-A as amended by Finance Act, 2017, s 11.

[54]Aradhya Sethia, 'Where's the Money?: Paths and Pathologies of the Law of Party Funding' (2019) 1 NJLS 114.

received by the political parties when they allow corporates to forego the payment of excise and other duties. In return of that, the party receives cash through elaborate money-laundering mechanisms like hawala.[55]

C. Unrestricted Corporate Funding: A Pandora's Box for Illicit Transactions

The amount of corporate donations has been on the rise. In the year 2004-05, corporate donations amounted to merely Rs 26 crore.[56] In 2017-18, the amount given as corporate donations had risen to Rs. 422 crores.[57] Most of these went to the six national political parties- Bhartiya Janata Party, Indian National Congress, Bahujan Samaj Party, Nationalist Congress Party, Communist Party of India (Marxist) and Communist party of India.

These corporate donations have always been viewed from a skeptical viewpoint because of the apprehensions that the corporates donate money to particular political parties to solicit favours from them, on account of the greater access they have to those sitting in power.[58] The Government in 1967 sought to rally public opinion in its favour by banning corporate donations.[59] However, as mentioned above in *2.1*, it did not serve the purpose of eradicating black money because, in the absence of state funding in the Indian elections, a ban on

[55] ibid 115.

[56] Niranjan Sahoo, Niraj Tiwari, 'Financing elections in India: A scrutiny of corporate donations' (*Observer Research Foundation,* 9 April 2019) <https://www.orfonline.org/expert-speak/financing-elections-india-scrutiny-corporate-donation-49750/?amp> accessed 6 May 2020.

[57] ibid.

[58] *Kanwar Lal Gupta v. Amar Nath Chawla* (1975) 3 SCC 646; See also *McConnell v. Federal Election Commission* 540 US 93.

[59] Companies Act 1956, s 293-A as inserted by the Companies (Amendment) Act 1969.

corporate donations led to an increase in the under the table cash donations. Therefore, what is required is that limits should be placed on the amounts that can be donated by corporates to political parties. Strict requirements of the disclosure should be imposed on corporates making political contributions to political parties. However, the Finance Act, 2017, did exactly the opposite by making extensive amendments to Section 182 of Companies Act, 2013. Before the passage of the Finance Act, 2017, companies were not allowed to make political donations above 7.5 per cent of the average net profits.[60] However, after the amendments Section 182, the cap on corporate spending has been completely removed.

Moreover, previously corporations were under an obligation to report the corporate contributions that were made to political parties in their balance sheet.[61] Indeed these rules were flouted by corporates, and they were let off the hook. With the 2017 Finance Act, this statutory requirement has been removed, thereby placing greater power in the hands of the corporates in influencing government policies and creating an environment conducive to the growth of crony capitalism.

a) The Dominance of Corporate Donations in Political Funding

The data released by SBI for electoral bonds purchased in May 2018 cycle, in response to an RTI filed by Factly, showed that not even a single bond of the denomination 1,000, 10,000 was purchased.[62] In July 2018, it indicated that about 99.7 % of the electoral bonds purchased were of Rs. 10,00,000 and Rs 1 crore denominations.[63]

[60]Companies Act, 2013, s 182(1).

[61]Companies Act, 2013, s 182(3).

[62]Rakesh Dubbudu, 'Even in May no demand for electoral bonds worth Rs 1000 and Rs. 10,000' (*Factly*, 15 June 2018) <https://factly.in/even-in-may-no-demand-for-electoral-bonds-worth-rs-1000-and-rs-10000/> accessed 8 May 2020.

[63]Rakesh Dubbudu, 'Electoral Bonds: Not a single bond of Rs. 1000 and Rs 10000 sold even in July' (*Factly*, 28 August 2018) <https://factly.in/electoral-bonds-not-a-single-bond-of-rs-1000-rs-10000-sold-even-in-july/> accessed 3 May 2020.

This implies that these bonds are not being bought by the ordinary public who are willing to contribute to the healthy functioning of our democracy. Instead, these are largely being brought by big corporates who are donating huge chunks of their profit with the expectation of influencing political parties to pass favourable legislation.[64]

The Election Commission was against the amendment to Section 182 of the Companies Act, 2013, even before the Finance Act, 2017, was passed. In its letter to the Ministry of Finance, the Election Commission advocated for retaining the provision which mandated companies to disclose their political donations in their profit and loss account to ensure greater transparency.[65] The former Chief Election Commissioner of India, S.Y Qureshi expressed his concern over how the anonymity of corporate donors will lead to complete opacity and hide the prospective quid pro quo arrangements of corporates with the political parties.[66] The removal of any limit for political contributions made by companies coupled with the requirement to show the political contributions in their balance sheet has now made it easy and, more importantly, lawful for companies to make unlimited contributions. It is not a hidden fact that these contributions are

[64]Warwick Smith, 'Political Donations corrupt democracy in ways you might not realize' *The Guardian* (1 September 2014) <https://amp.theguardian.com/commentisfree/2014/sep/11/political-donations-corrupt-democracy-in-ways-you-might-not-realise> accessed 1 May 2020.

[65]Gaurav Vivek Bhatnagar, 'Centre Overlooked EC's Concern on Changes to Laws on Political Funding' *The Wire* (8 May 2018) <https://thewire.in/politics/centre-overlooked-ecs-concerns-on-changes-to-laws-on-political-funding> accessed 4 May 2020.

[66]Poonam Agarwal, 'Experts Slam Modi Govt's Reply to Electoral Bond Challenge in SC' *Bloomberg Quint* (22 March 2019) <https://www.bloombergquint.com/politics/lok-sabha-election-political-donation-govt-sc-on-electoral-bonds-sham-experts> accessed 8 May 2020.

usually made in return of favours from the Government in the form of Government contracts and licenses.[67]

These amendments have cleared the path for dubious loss-making shell companies to divert black money to political parties without being disclosed to the public. The Election Commission besides the disclosure requirements, also favored the limit of 7.5 per cent of average net profit in the last three years that are imposed on corporate donations, to ensure that such donations come from companies that are profitable and with a proven track record. The same will be discussed in greater detail in the subsequent section, where we discuss how the amendments to Section 2(1)(j)(vi) of the Foreign Contributions (Regulation) Act, 2010 and Section 182 of the Companies Act, 2013 have opened doors to money laundering through shell companies.

b) Amendments Made to the Foreign Contributions (Regulation) Act, 2010

The two biggest national political parties in India- the Indian National Congress and the Bhartiya Janata Party had received political donations from the Indian subsidiary of a London based foreign corporation. The Delhi High Court held that the two national parties were guilty of violating Section 4 of the Foreign Contribution (Regulation) Act, 1976, by accepting political donations from a foreign source.[68] Both parties filed an appeal in the Supreme Court of India against the Delhi High Court judgment. The Foreign Contribution (Regulation) Act, 1976,[69] as well as the Foreign

[67] *PUCL v. Union of India* (2003) 4 SCC 399.
[68] *Association for Democratic Reforms v. Union of India* [2014] 209 DLT 607.
[69] Foreign Contribution (Regulation) Act 1976, s 4.

Contribution (Regulation) Act, 2010[70] prohibit Indian subsidiaries from making political donations in India. An amendment was passed by the Parliament in 2016 to allow Indian subsidiaries of foreign corporations to make political funding with retrospective effect from 2010.[71] However, the donation made to the parties was before 2010, which means that it was governed by the Foreign Contributions (Regulation) Act, 1976. Therefore, an amendment was passed in 2018 to extend the retrospective effect of the 2016 amendment back to 1976.[72] As the amendment had a retrospective effect, the two national parties could no longer be held guilty. Thus, they withdrew their appeal from the Supreme Court of India. [73]

(i) Rise in the Flow of Unaccounted Money

The amendments to the Foreign Contributions (Regulation) Act, 2010 in 2016 has the potential of opening doors to foreign shell companies for diverting black money as political donations in the Indian elections. There exist many such tax havens like the Cayman Islands and Seychelles, where it is easy to establish corporations due to the lenient norms.[74] However, many of these corporations are used for the sole purpose of funneling black money to political parties in other countries as donations. In the USA, 501(c)(4) organisations are those

[70]Foreign Contribution (Regulation) Act 2010, s 3.

[71]Foreign Contribution (Regulation) Act 2010, s 2(1)(j)(vi) as amended by Finance Act, 2016 s. 236. This amendment was given a retrospective effect from 20 September 2010.

[72]Finance Act 2018, Clause 217. The Finance Act, 2018 extended the retrospective effect of Section 236 of Finance Act, 2016 to 5 August 1976.

[73]Press Trust of India, 'Foreign Funding: BJP, Congress withdraw appeals from SC' *The Indian Express* (29 November 2016) <https://indianexpress.com/article/india/india-news-india/foreign-funding-bjp-congress-withdraw-appeals-from-sc/> accessed 9 May 2020.

[74]Francesco Guarascio, 'EU adds Cayman Islands, Seychelles and Panama to tax haven blacklist' *Business Insider* (18 February 2019) <https://www.businessinsider.com/eu-adds-seychelles-cayman-islands-panama-to-tax-haven-blacklist-spares-turkey-2020-2?IR=T> accessed 9 May 2020.

that are exempted from paying taxes.[75] Those organisations are not required to disclose the source of funds while making donations. Therefore, if they receive funds from foreign entities and this money is then donated to Political Action Committees ("**PAC**"), there is no requirement of disclosure of the foreign source of the funds.[76] Making use of these loopholes, shell companies have been donating black money as political donations. Foreign companies can also very easily establish Limited Liability Companies in the U.S.A and funnel black money as corporate donations because the identity of these shell companies remain anonymous.[77]

The Indian Parliament made amendments to Foreign Contribution (Regulation) Act, 2010, in 2016, after which foreign corporate entities can make political donations in Indian elections. This coupled with the amendment of Section 182 of the Companies Act, 2013 wherein there is no more a limit upon corporate donations, has made it very easy for shell companies both in India and outside to divert black money as political donations. The earlier provision ensured that loss-making companies established solely for laundering black money as political donations was not allowed. There exist many dummy or shell companies in India that have facilitated the movement of black money from one entity to another.[78] However, now, due to the amendment to Section 182 of the Companies Act 2013, several loss-making dummy

[75]Michael Luo and Stephanie Strom, 'Donor Names Remain Secret as Rules Shift', *The New York Times* (20 September 2010) <https://www.nytimes.com/2010/09/21/us/politics/21money.html> accessed 13 May 2020.

[76]Joseph Biden and Michael Carpenter, 'Foreign Dark Money is Threatening American Democracy' *Politico* (27 November 2018) <https://www.politico.com/magazine/amp/story/2018/11/27/foreign-dark-money-joe-biden-222690> accessed 3 May 2020.

[77]ibid.

[78]Avinash Celestine, 'How shell companies are used to channel black money' *Economic Times* (2 November 2014) <https://m.economictimes.com/news/politics-and-nation/how-shell-companies-are-used-to-channel-black-money/articleshow/45007325.cms> accessed 4 May 2020.

companies have found another route and perhaps a more rewarding route to funnel black money in the form of political donations. Moreover, even foreign shell companies will be able to funnel black money because the 2016 amendment to Foreign Contribution (Regulation) Act, 2010, allows foreign entities to make political donations.[79]

(ii) The threat to Sovereignty of the country

Referring to the Parliamentary debates during the passage of the Foreign Contribution (Regulation) Act,1976, the Delhi High Court referred to the remarks made by Khurshid Alam Khan as to how that Act was passed to defend the country from the influence of foreign intelligence agencies like CIA and others, which could use foreign entities to threaten the Sovereignty of India.[80] There was also a reference to how the CIA was trying to establish hegemony in the developing nations by crippling these countries economically. It was in these circumstances that the Foreign Contribution (Regulation) Act, 1976, was passed. It was indeed a different world in 1976 as compared to the present times. A pertinent question that arises is – Can foreign funding in elections of a particular country threaten the sovereignty of that country? To answer this question, we must look at how other countries have coped with the phenomenon of foreign funding in elections.

A. Canada

The electoral laws of Canada allowed only those people who were citizens of Canada or who came within the ambit of 'permanent

[79]Letter from Election Commission of India to Ministry of Law and Justice, (15 March 2017).

[80]Prashant Reddy, 'Foreign Funding of NGOs' (*Open*, 22 February, 2013) <https://openthemagazine.com/features/business/foreign-funding-of-ngos/> accessed 8 June, 2020.

residents' under Section 2(1) of Immigration and Refugee Protection Act, were allowed to induce the voters to vote in a particular way.[81] This meant that foreign entities were prohibited from indulging in any activity, including donating to political parties that could in any way interfere in Canadian elections. However, this restriction had not been very effective. The Chief Electoral Officer in a 2017 report, pointed out that the provision mentioned above was comprehensive and vague, and the Commission received several complaints regarding foreign residents giving interviews and expressing their opinions on Canadian Politics.[82]

There was a lack of clarity regarding the enforcement of this provision, both among the law enforcement agencies and the electorate. The Standing Senate Committee on Legal and Constitutional Affairs was of the view that there was a need to ban foreign funding in Canadian elections without affecting the free discussions on political matters by foreign residents.[83]

There was considerable controversy in 2017 wherein, the Canadian Prime Minister Justin Trudeau attended a cash-for-access fundraiser that was held in the mansion of a Chinese billionaire Zhan Bin, who had a pending request before the Canadian Government to start a bank for the Canadian Chinese community.[84] He was quite an

[81]Canadian Elections Act (S.C. 2000, c. 9) s. 331, (repealed, 2018).

[82]Office of the Chief Electoral Officer of Canada, 'An Electoral Framework for the 21st Century: Recommendations from the Chief Electoral Officer of Canada Following the 42nd General Election', (September 2016) 78.

[83]Standing Senate Committee on Legal and Constitutional Affairs, *Controlling Foreign Influence in Canadian Elections,* (Senate of Canada June 2017) 4.

[84]Robert Fife, Steven Chase, 'Trudeau attended cash-for-access fundraiser with Chinese Billionaires' (*The Globe and Mail*, 22 November 2016) <https://www.theglobeandmail.com/amp/news/politics/trudeau-attended-cash-for-access-fundraiser-with-chinese-billionaires/article32971362/> accessed 10 May 2020; See also Peter Zimonjic, 'Trudeau defends fundraiser with a Chinese businessman who later donated 2000 in father's foundation, Canadian Broadcasting Corporation' (*Canadian Broadcasting Corporation,* 25 November 2016)

influential figure who had been known to be working very closely as a political adviser to the Chinese Government. Trudeau came under intense criticism from many opposition leaders because such fundraisers with links to foreigners could have serious effects on the political decisions taken by the government, in turn also threatening the sovereignty of Canada. Therefore Section 331 was repealed and a more comprehensive and specific statute named the Election Modernization Act was passed to regulate foreign funding in the Canadian election in 2018.

B. Australia

In 2016, an Australian Labor Senator Dastyari took a stand, which was very different from the position taken by his party and the Australian Government. In a press conference with his Chinese political donor sitting by his side, he said that he would support China's stand on the South-China sea issue. This was in absolute opposition to the stand taken by the Labor party, which had been fiercely critical of China's role in the South-China sea conflict. After it came to light that the Labor senator had made such comments, there were concerns in the political establishment as to how foreign political donations in elections might influence the views of elected representatives on critical strategic issues that could jeopardise the country's sovereignty.[85]

In 2017, the Joint Committee on Electoral Reforms came up with a report that was in favour of restricting foreign donations, as it could

<https://www.cbc.ca/news/politics/chinese-fundraiser-trudeau-statue-1.3863266> accessed 5 May 2020.

[85]Fergus Hunter, 'Sam Dastyari contradicted labor policy backed China's position in sea dispute at event with donor' *The Sydney Morning Herald* (1 September 2016) <https://www.smh.com.au/politics/federal/sam-dastyari-contradicted-labor-policy-backed-chinas-position-in-sea-dispute-at-event-with-donor-20160901-gr60hv.html> accessed 7 May 2020.

influence Australian elections.[86] It arrived at this conclusion after referring to some submissions made by legal experts. Dr Martin Drum submitted that political funding by foreign entities could affect national interests.[87] Prof. Anne Twomey stated in his submissions before the Committee that it is desirable to restrict or completely prohibit the inflow of money from overseas, in campaign financing, to avert any chances of manipulation of Australian elections.[88] This would also be in consonance with Article 44(i) of the Australian Constitution. In November 2018, the Australian Parliament passed the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act, 2018, which placed a limit on funding from foreign entities to political parties.[89]

Therefore, interference of foreign entities in the elections of a particular country remains to be a problem. Keeping in view the experiences of other countries, it must be said that the amendment made to Section 2 of the Foreign Contributions (Regulation) Act, 2010 can cause a serious threat to the sovereignty of a country.

V. CONSTITUTIONAL VALIDITY OF THE ELECTORAL BOND SCHEME

[86]Joint Standing Committee on Electoral Reforms, *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations*, (March 2017) 19.
[87]ibid 20.
[88]ibid 21.
[89]'Regulation of Foreign Involvement in Elections' Law Library of Congress Global Legal Research Directorate (2019) 2 <https://www.loc.gov/law/help/elections/foreign-involvement/foreign-involvement-in-elections.pdf > accessed 3 May 2020.

A. Introduction as a Money Bill

Even before the Finance Bill, 2017 was tabled before the Lok Sabha, concerns were raised by the Election Commission and the Reserve Bank of India regarding the scheme of electoral bonds and the anomalies associated with it.[90] This new scheme of political funding was considered a retrograde step to transparency, as it encourages money laundering, and has the potential to be used as currency. Despite the apprehensions raised, the Bill was introduced in the Lok Sabha as a Money Bill, thereby eliminating the only impediment the Government had in its way, i.e., the Rajya Sabha.

a) An Exception to Bicameralism

The Indian Constitution advocates bicameralism, i.e., the system of two legislative chambers, to act as a check on the powers of each other and encourages due deliberation on the Bills brought before it. While this scenario is a general rule, the Money Bill is an exception to the general procedure as it effectively neutralizes the requirement of the Rajya Sabha's approval.[91]

Considering the disabling nature of the Article, the framers of our Constitution, restricted the classification of a Bill as a Money Bill to specific parameters.[92] However, the power to categorise the Bill was

[90]Nitin Sethi, 'Electoral Bonds: Confidential EC Meeting Exposes Modi Govt's Lies To Parliament' *Huffpost* (27 November 2019) <https://www.huffingtonpost.in/entry/electoral-bonds-narendra-modi-election-commission-opposition-arun-jaitley_in_5dce3cd1e4b01f982eff5c62?utm_hp_ref=in-rti> accessed May 5 2020.

[91]Pratik Datta, 'A Judicial Review of The Speaker's Certificate on the Aadhaar Bill' *BloombergQuintOpinion,* (5 March 2017) <https://www.bloombergquint.com/opinion/a-judicial-review-of-the-speakers-certificate-on-the-aadhaar-bill> accessed May 7, 2020.

[92]Gautam Bhatia, 'The Tribunals Judgment – I: A Course Correction on the Money' (*Indian Constitutional Law and Philosophy,* 14 November 2019) <https://indconlawphil.wordpress.com/2019/11/14/the-tribunals-judgment-i-a-

vested with the speaker.[93] The anomaly arises because the speaker has time and again been a member of the ruling party. Vesting judicial authority to a person, affiliated to a particular political party makes the obligation of fairness and impartiality an illusion. Over the years, there have been a catena of instances where the speaker has categorised a particular bill as money bill, although it was prima facie beyond the scope of Article 110. Paying heed to the constitutional text, it is evident that the bills falling beyond the circumscribed limits of the said Article should be categorized as a financial bill.[94]

b) Extent of Speakers' Power and Judicial Review.

Under Article 110(3) of the Constitution, the Speaker has been vested with the authority to decide whether a particular bill is a money bill or not.[95] On a plain reading of the constitutional text, there seems to be finality in the decision taken by the speaker in this regard. The same has been a topic of avid discussion amongst judicial authorities regarding whether such power can be made subject to judicial review.

The Court has expressed differing viewpoints in several judgments, the latest being expressed in the *Rojer Mathews Case* wherein, the Apex Court held the speaker's discretion to be subject to judicial review.[96] The Court, in this case, has sought to give a balanced rationale for its viewpoint. The Court emphasised on the word 'only' as it appears under Article 110(1). The Court propounded that clause (g) cannot be treated as a *'residuary provision'*, which incorporates

course-correction-on-the-moneybill/#:~:text=The%20Tribunals%20Judgment%20%E2%80%93%20I%3A%20A%20Course%20Correction%20on%20the%20Money%20Bill,November%2014%2C%202019&text=Yesterday%2C%20a%20Constitution%20Bench%20of,the%20Finance%20Act%20of%202017> accessed 24 April 2020.

[93] The Constitution of India 1950, art 110(3).

[94] The Constitution of India 1950, art 117.

[95] The Constitution of India 1950, art 110(3).

[96] *Mohd. Saeed Siddiqui v. State of Uttar Pradesh* (2014) 11 SCC 415; *Yogendra Kumar Jaiswal v. State of Bihar* (2016) 3 SCC 183.

all that is not included under clauses (a) to (f). If this were to be true then, '*the distinction between an ordinary bill and money bill will vanish*'. Accordingly, the Court opined that what Clause (g) contemplates are only matters incidental to those specified under clause (a) to (f) and not otherwise.[97]

For any action to be outside the scope of judicial scrutiny, it must align with the Constitutional limits.[98] However, there have been numerous instances that have surfaced where one must be skeptical about the speaker's discretionary power.

Although numerous acts and amendments under the finance bills were not related to tax or Government expenditure, they were passed as money bills during the 16th Lok Sabha. For instance, The finance bill of the year 2015 contained provisions dealing with the merger of commodity exchanges with the SEBI. The Bill of 2016 discussed amendments pertaining to donations to non-profits in the Foreign Contribution (Regulation) Act. The Bill of 2017 dealt with compositions of various quasi-judicial bodies like NGT, TDSAT, etc. The finance bill 2018 also contained majority clauses which were not related to tax in any manner. Moreover, the recent Bill of 2019, which was presented along with the interim budget, dealt with the attachment of property in the money laundering law.[99]

c) *Can Electoral Bonds Be Introduced Via A Money Bill?*

The scheme of electoral bonds was also incorporated through bringing several amendments in different Acts via the Finance Act,

[97] *Roger Mathews v. South Indian Bank Limited and Ors.* 2018 SCC OnLine SC 500.
[98] *United States v. Munoz-Flores* [1990] 495 U.S. 385.
[99] M.R. Madhavan, 'How the 16th Lok Sabha fared' *The Hindu* (17 Feb 2019) <https://www.thehindu.com/opinion/op-ed/how-the-16th-lok-sabha-fared/article26298209.ece> accessed 8 May 2020.

2017. The scheme of electoral bonds was nowhere related to taxes or Government expenditures. Therefore, it was an ultra-vires exercise of the Constitutional Powers as elucidated above. Thus, there can be no merit in the scheme when it has itself propounded through an unauthorised exercise of legislative power. This Act of the Parliament is a case of 'Constitutional fraud,' i.e., effectuated through a colourable exercise of legislation.

Even if one believes that the scheme could be brought in through a money bill, the scheme so brought will have an adverse impact on the rights of people and accountability of the political class.

B. Constitutional Validity: Right To Know

The scheme of electoral bonds, as introduced by the Finance Act, 2017, is apparently violative of Articles 19 and 14 of the Indian Constitution. The provisions of the Act blatantly promote an opaque system of political funding, while evading all accountability on the part of the political parties. Further, the system promotes inequity in political donations besides depriving independent candidates of receiving any donations. While this part deals with the former contention, the next part will deal with the latter.

a) Right to Know Under Article 19

Even before the formulation of a legislative enactment to ensure the right to information,[100] the Higher Judiciary has been instrumental in providing the same to the public. In *Bennet Coleman & Co. v Union of India and Ors.*,[101] the petitioner had challenged the Newsprint Control Order, 1962, which imposed certain restrictions upon the import of newsprint. The Court, while repealing the Order, observed, "*The constitutional guarantee of the freedom of speech is not so much for the benefit of the press as it is for the benefit of the people. The*

[100] Right to Information Act 2005.

[101] Bennet Coleman & Co. v. Union of India and Ors [1973] SCR (2) 757.

freedom of speech includes within its ambit the Right of all citizens to read and be informed."

However, it was in *State of Uttar Pradesh v. Raj Narain and ors.***,** wherein the Apex Court had expressly opined that the citizens of the country had a right to know. The right extended to all Acts done in a public nature by the public functionaries.[102] The objective of the same was best propounded in *S.P. Gupta v. Union of India*, wherein the Court observed that the surest means to a clean and healthy administration is exposure to public gaze and scrutiny.[103] The Government, in this case, had declined to disclose a file which contained details of the appointment to the Higher Judiciary. Placing reliance upon the concept of right to know propounded in the *Raj Narain Case*, the Court held that the right to know of a person is couched under Article 19(1) (a) of the Constitution and lays the foundation of an open Government.[104]

Further in *Dinesh Trivedi v Union of India*,[105] the Court was poised with the question as to whether the investigatory report of the Vohra Committee, dealing with political corruption, could be made public. Reiterating the concept of right to know, Ahmadi CJ, observed, "*In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government*."

Thus, through a long jurisprudential history, the Courts have unequivocally held the right to know to be a fundamental right, emanating from the constitutional freedom of speech. The same has also been reiterated in several judicial pronouncements.[106] However,

[102]State of Uttar Pradesh v. Raj Narain and Ors (1975) 4 SCC 428.
[103]S.P. Gupta v. Union of India [1981] Supp. SCC 87.
[104]ibid.
[105]Dinesh Trivedi v. Union of India [1997] 3 SCR 93.
[106]*ADR v. Union of India* [2002] 3 SCR 696; *People's Union of Civil Liberties and Ors. v. Union of India and Ors* [2003] AIR SC 2363.

it is imperative to pay heed to the extent to which this right can be observed.

b) Extent of the Right

The framers had unanimously agreed to include the right to vote in any part of the Constitution besides Part III.[107] However, the position of the right to vote has always been a topic of avid deliberation amongst the judicial fraternity. Traditionally, the right has been neither recognised as a constitutional right nor a common law right, but a statutory right.[108] The Courts have reiterated this viewpoint in several pronouncements, including in *PUCL v Union of India*,[109] where the majority opined that the right to vote *per se* is a statutory right. However, PV Reddy J., in his otherwise concurring judgment, held the right to vote to be a Constitutional Right guaranteed under Article 326 of the Constitution.[110]

Though there persists an ambiguity pertaining to the status of the right to vote, the exercise of this right has time and again been recognised as a Fundamental Right.[111] Thus, voting has been equated to a formal expression, thereby rendering it with constitutional protection under Article 19 of the Constitution.[112] However, merely providing constitutional status to voting does not confer upon the voters a right to know about the prospective legislators, i.e., a right to an informed vote. This aspect can be dealt with by looking into the concept of the right to receive information.

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[107] Constituent Assembly Debates, 2nd May 1947, speech by B.K. Sidhwa, 3.21.137 <https://www.constitutionofindia.net/constitution_assembly_debates/volume/3/1947-05-02>.

[108] *N.P. Ponnuswami v Returning Officer* [1952] SCR 218.

[109] *PUCL v. UOI* [2003] AIR SC 2363.

[110] The Constitution of India 1950, art. 326.

[111] *Lily Thomas v. Speaker of Lok Sabha* [1993] 4 SCC 234.

[112] *PUCL v. UOI* [2003] AIR SC 2363; *Shaligram Shrivastava v. Naresh Singh Patel* (2003) 2 SCC 176.

(i) Does Right to know extend to Receiving Information?

From the aforementioned series of cases, it can be deduced that the Courts, while iterating the concept of the right to know, only emphasised upon the right to know readily available information. There is no implicit right to receive information that is not available. To further elaborate upon this point, the right to know is an inherent part under Article 19 (1) (a) of the Constitution. Being a fundamental right, it imposes a negative obligation upon the State to restrict such rights.[113] Further, the Article also imposes a consequent right to receive readily available information. However, the traditional conceptualisation of fundamental rights only advocates against abstinence from receiving available information; there is no affirmative right to acquire such information. Going by this rationale, the voters have a right to know only about the information of a candidate that is readily available.

The aforementioned concept being the general rule, the Courts have drawn an exception when it comes to gaining knowledge about candidates, who might become their prospective representatives. In *ADR v UOI*, the Court while dealing with the petition for disclosure of certain information about the candidates held that, "*There is no reason to that freedom of speech and expression would not cover a right to get material information with regard to a candidate who is contesting elections for a post which is of utmost importance in the country*." [114]

The Court, in this case, expanded the contours of the right to know by directing the Election Commission to call for specific information from the candidates in the absence of a statutory provision.[115] This

[113] *Maneka Gandhi v. Union of India* [1978] AIR SC 597.
[114] *ADR v. Union of India* [2002] 3 SCR 696.
[115] ibid.

precedent was reiterated by the Court when it recognised the right of the voters to know, full particulars of the candidates who were to represent them in the Parliament.[116] After these decisions, the legislature stepped in, formulating an amendment to the Representation of People Act, 1951 to incorporate the directions rendered by the Court, in the legislative text.[117] The Amended Act, unlike the decision, conveniently omitted certain disclosure requirements. Thus, the Act was challenged in *PUCL v. UOI*,[118] wherein the Court struck down the provision which exempted the candidates from disclosing their educational qualifications, assets, and liabilities.[119] Through these precedents, the Courts have devised a positive right to know about electoral candidates and advocated that the voters must receive information that would enable them to make an informed decision in the subject matter that will affect them.[120] This right to an informed vote has been recognised as quintessential for a democratic republican state like ours. In a recent pronouncement, the Court further expanded the horizons of this right.[121]

The Courts have not failed to draw an apt demarcation between the right to know and the right to an informed vote. While the former governs state functionaries, the latter can be enforced against any individual who intends to become a public figure.[122] This view purported by PV Reddy J., in his concurring opinion in *PUCL v. UOI*, is of much significance in distinguishing a candidate and a legislator, which was previously overlooked.

[116] *Shaligram Shrivastava v. Naresh Singh Patel* (2003) 2 SCC 176.
[117] Representation of People (Amendment) Act, 2002.
[118] *PUCL v. Union of India* [2003] AIR SC 2363.
[119] Representation of People's Act 1951, s 33B.
[120] *Romesh Thappar v. State of Madras* [1950] SCR 594.
[121] *Lok Prahari v. Union of India* (2018) 4 SCC 699.
[122] *PUCL v. Union of India* [2003] AIR SC 2363.

c) Why it Must be Extended to Party Funding?

The Courts have acknowledged the importance of informed vote; the same is said to be instrumental in facilitating free and fair elections, which is considered as the foundation of democracy. The idea of including political funding in the right to informed vote remains elusive. The same can only be ascertained by establishing that political funding would play an indispensable role in facilitating the Right to an informed vote. This will be established in a two-fold manner, firstly by showing that the republican and democratic Government requires an informed citizenry and secondly by highlighting the importance of funding disclosures and donor identities by political parties in achieving this purpose.

(i) Basic Structure & informed citizenry

The most widely accepted and fundamental meaning of democracy is that it is a Government of the people, by the people and for the people. It is through the process of elections that the people elect their representatives, and it is only through the means of a free and fair election, that a democracy can exist in a real sense. A republican and democratic form of Government forms a part of the basic structure of our Constitution.[123] Thus, all feasible measures must be taken to aid a democratic Government.

The Bombay High Court in *M/s. Shonkh Technologies Ltd. v. the State Information Commission, Maharashtra and Ors*.[124] made a vital observation in this regard, stating, "*democracy requires an informed citizenry and transparency of information which are vital to its functioning.*" Thus, transparency in all stages of election is

[123] *Vineet Narain v. Union of* India (1998) 1 SCC 226; *Kihoto Hollohan v. Zachillhu* [1992] SCR (1) 686.
[124] *M/s. Shonkh Technologies Ltd. v the State Information Commission, Maharashtra and Ors,* WP No. 2912 of 2011.

indubitably an essential requisite to aid democracy. This would also include the funds received as political donations along with the details of the donor. The principles of accountability and democracy must be extended to political parties by introducing practices of internal democracy and financial transparency.[125] This observation made by the Law Commission of India has also been reiterated by the judiciary.[126] The actions of the legislature and the executive can only be accessed by an informed citizen; it is by having access to matters of public concern that the 'ideal of Government of the People' can be fulfilled.[127]

(ii) How Funding & Identity Disclosures Aid to this Right?

A. Disclosures of Funds Received

When it comes to the source of funding of the political parties, two significant questions arise; By whom? and How much? While the former has always been in an oblivious state, the latter has been disclosed to some extent. This was primarily done by legislative checks and active judicial participation. The only source of information that the citizens could retrieve was through the income tax returns filed by these parties (this was prior to the electoral bond scheme). The formulation of the electoral bond scheme has introduced such opacity in the system of political funding through certain amendments to the governing laws, which has almost made the parties unaccountable.

B. Disclosure of funds & Identity of Contributors

The revelation of individuals donating to political parties has never received an affirmative response from the legislature. Every system of

[125]Law Commission of India, Electoral Reforms (Report 255 2015) <http://lawcommissionofindia.nic.in/reports/Report255.pdf> accessed 5 May 2020.
[126]*Mr. Anil Bairwal v. Parliament of India* [2013] CIC/SM/C/2011/001386.
[127]*Reserve Bank of India v. Jayantilal N.* Mistry (2016) 3 SCC 525.

political funding had either placed complete opacity upon the identity of the donors or placed a threshold beyond which their identity would be revealed. The electoral bond has made the system even more impervious by eradicating any disclosure requirements either on the part of the individual donors or the companies.

When we talk about a system of party funding involving private donations, there is intrinsic public interest involved in knowing the identity of the donors. The contributors will donate to the candidate who supports their idea or the party whose ideology he believes in. It is mostly the latter, which has a significant bearing on the mind of the contributors. The Apex Court observed, "*A person who gets elected as a candidate set up by a political party is so elected on the basis of the programme of that political party*."[128] The Law Commission of India and National Committee for Reviewing the Working of the Constitution[129] had also recommended that owing to the influence which the political parties have, transparency in means of funding is indispensable. The Apex Court had also emphasized the voter's knowledge regarding the source of expenditure made by the political parties.[130] There are several pressing needs for disclosure of the contributors' identity and amount contributed:

B 1. Acts as a check upon the quid pro quo deal

There is a notorious practice prevalent among the political fraternity, in exchange for the money contributed by the contributors, the political party or their candidate votes for laws favourable to those

[128] *Kihoto Hollohan v. Zachillhu* [1992] SCR (1) 686.

[129] National Commission to Review The Working of The Constitution, 'Review Of Election Law, Process and Reform Options' (2002) 494 <http://legalaffairs.gov.in/sites/default/files/%28VII%29Review%20of%20Election%20Law%2C%20Processes%20and%20Reform%20Options.pdf> accessed May 6 2020.

[130] *Common Cause Registered Society v. Union of* India [1996] AIR SC 3081.

who make major contributions. This growing concern has been addressed by the U.S. Supreme Court by noting that the problems with political funding are not limited to bribery but have far-reaching consequences like *politicians* being *too compliant with the wishes of large contributors*.[131] Unless the system is made transparent by revealing the contributions made by each contributor, there is no reasonable method to determine when the politicians are 'too compliant' to their contributors. There is a fair possibility that the individuals might have conflict over their representative being 'too compliant'. However, after the disclosure, it is for each voter to decide whether the actions correspond to compliance with the will of significant contributors or not.

B 2. An aid to Right to informed vote

As has already been substantiated, the importance of informed vote for an effective democracy cannot be denied. The disclosure of campaign finances would also aid the purpose. While determining the question of the constitutionality of financial disclosures, the U.S. Supreme Court held that campaign finance disclosures help the voters to scrutinize those who seek the federal office.[132] The Supreme Court of India has observed that, "*exposure to the public gaze and scrutiny is one of the surest means to cleanse our democratic governing system and to have competent legislatures.*"[133] By denying this information, the voters are deprived of making two important observations. Firstly, when the legislature is being too complaint to its large contributors. Secondly, knowing the position of the politicians/parties on some issues which might receive huge money as donations from interest groups.

[131] *Nixon v. Shrink Missouri Government* PAC, 528 U.S. 377 (2000).
[132] *Buckley v. Valeo* 424 U.S. 1 (1976).
[133] *PUCL v. Union of India* [2003] AIR SC 2363.

The only rationale provided for by the legislator for non-disclosure of the source of income is to safeguard the privacy of the donors. Now it must be established that in a conflict between individual privacy and right to an informed vote which one will take precedence.

d) Conflict between Privacy and the Right to Know

There is a constant tussle between the voter's right to know and the right to privacy of a donor. The question that arises is that, which right should be prioritised over the other? Both being fundamental rights[134] are intrinsic to every individual, but alternatively, it is also true that no right can be absolute. The viability of any restriction imposed upon a fundamental right has to be in line with the precedence laid down by the Apex Court,[135] which laid down specific parameters to be fulfilled to justify such restriction:

(i) It must be made for a proper purpose; (ii) there must be a nexus between the purpose sought to be achieved and the limitation imposed; (iii) The measure so adopted is least restrictive, with no better alternatives available; and (iv) A balance must be struck between the achievement of purpose and the social importance of preventing the limitation on the constitutional right.[136]

Thus, for any limitation to be justifiable, it must conform to the considerations mentioned above. The right which is sought to be restricted here is the Right to privacy of a donor *vis a vis* the right to know that the voters possess. The purpose sought to be achieved through this restriction is the involved public interest in disclosures relating to the donors (as has been elucidated in Part *5.3.2.2*). Any alternative model in this regard would only cause hindrance in the

[134] *K.S. Puttuswami v. Union of* India (2017) 10 SCC 1.
[135] *Modern Dental College v. State of Madhya Pradesh* (2012) 4 SCC 707.
[136] ibid.

formation of a democratic Government. Ramana J. had also held that, "*the compelling requirement for upholding the democratic values is a valid limitation to privacy.*"[137] It is also settled jurisprudence that the Courts, while interpreting the constitutional provisions, should aim at strengthening the basic structure of the Constitution.[138]

It is for this reason that public interest (which is an essential postulate of democracy) is considered a valid constraint upon anonymity.[139] PV Reddy J. noted, in case of a conflict between the privacy of an individual and right to know of citizens, the latter will always supersede the former.[140] One might, however, observe that the rationale given by the Court therein was specifically with regards to the voter's right to know about the candidates and not the donors. But we have expounded upon the importance of knowing about the donor's details in furthering the citizen's right to know (see *5.3.2.2*)

C. Constitutional Validity: Equality Before Law

a) Encourages Inequity in Political Donations

Campaign finance reforms have their roots in corruption, increment in campaign costs, and equality of political participation.[141] The amendments brought through the Finance Act, 2017 have proved to be antithetical to this purpose. The amendment brought to Section 182 of the Companies Act, coupled with increased transparency, has resulted in an influx in political funding. The main problem associated with such increased contributions is that it translates economic inequality to political inequality. The inequality pertinent in the system is due to a two-fold reason. Firstly, the germ of money power embedded in politics and secondly, the undue advantage which

[137] K.S. Puttuswamy v. Union of India (2017) 10 SCC 1.
[138] P.V. Narasimha Rao v. State [1998] CriLJ 2930.
[139] PUCL v. Union of India [2003] AIR SC 2363.
[140] ibid.
[141] M.V Pylee, 'Emerging Trends of Indian Polity' (Regency Publication 1998) 43.

the scheme provides to the ruling party over other parties and independent candidates.

(i) Role of Money Power

The Supreme Court had hinted upon the disparity between the rich and poor candidates. It emphasised upon the need to ensure equality and equal footing between such candidates.[142] P.N. Bhagwati, J. in his judgment noted, money plays an indispensable role in the election campaign, besides aiding and facilitating in buying advertisements and '*canvassing facilities such as hoardings, posters, handbills, brochures, etc.*' It also acts as a substitute for energy by allowing the party to buy workers for campaigning where they have fewer volunteers.[143] Thus, there is an obvious advantage the richer parties have over those who lack such extravagant resources.

(ii) Provides Undue Advantage to Ruling Party.

The scheme of Electoral Bond aims at maintaining the complete anonymity of the donor. This essentially means that, only the donor knows the political party to whom he has donated. However, there have been instances that make the claims by the Government dubious. The Bond is alleged to have an alphanumeric code, which was not revealed by the Government. The presence of such code has also been confirmed by senior employees of SBI.[144] This might hint at the partial disclosure of donor information only accessible by the Government. Knowing about the identity of the major contributors to

[142]*Kanwar Lal Gupta v. Amar Nath Chawla* (1975) 3 SCC 646; see also, *Ashok Shankarao Chavan v. Union of India* (2014) 7 SCC 99.
[143]ibid.
[144]Poonam Agarwal, 'Secret Policing? The Quint Find Hidden Numbers on Electoral Bonds' *The Quint* (November 21 2019) <https://www.thequint.com/news/politics/hidden-number-on-election-electoral-bond> accessed May 10 2020.

other political parties allows the ruling party to coerce such contributors indirectly.

The data revealed by the Association of Democratic Reforms also makes one cynical concern on the genuineness of the anonymous nature of this scheme. According to the 2017- 2018 audit report, the ruling party, BJP, has received 95% of the total electoral Bonds sold. Precisely, bonds worth Rs. 222 crores were sold out of which the BJP received Rs. 210 Crore.[145] As per the analysis of income & expenditure of national political parties for FY 2018-19 published by ADR,[146] total declared income through Electoral Bonds stood at Rs.1931.43 cr. Out of which BJP had received 1450.89 cr. i.e., 75.11% of the total donations received through electoral bonds. Further, bonds worth 10 Lakhs and above were preferred over smaller amounts, thereby indicating the prevalence of corporate players in such contributions. Further, 93% of corporate donations went to the BJP,[147] thus, making the possibility of a quid pro quo engagement stronger.

(iii) Discriminatory Provisions

Section 3(3)[148] of the scheme provides that only those political parties which have secured a minimum of 1% vote in the Lok Sabha or the Legislative Assembly are entitled to secure donations through Electoral Bonds. This provision without any reasonable differentia

[145]Anubhuti Vishnoi, 'Electoral bonds: Ruling BJP bags 95% of funds' *Economic Times* (November 29 2018) <https://economictimes.indiatimes.com/news/politics-and-nation/electoral-bonds-ruling-bjp-bags-95-of-funds/articleshow/66858037.cms?from=mdr> accessed May 8 2020.

[146]'Analysis Of Income & Expenditure Of National Political Parties For FY 2018-19', ADR 8 <https://adrindia.org/download/file/fid/7554> accessed May 11 2020.

[147]Archis Chowdhury, '93% Of Corporate Donations To National Parties Between 2016 And 2018 Went To Bjp' (*Boom Live*, July 18 2019) <https://Www.Boomlive.In/93-Of-Corporate-Donations-To-National-Parties-Between-2016-And-2018-Went-To-Bjp/> accessed May 8 2020.

[148]Electoral Bond Scheme, 2018 s 3(3).

side-lines the parties with less than 1% votes and neglects independent candidates. This disparity renders them ineligible to gain any donations via the Electoral Bonds. The discriminatory nature of the provision was also highlighted by the Election Commission.[149]

VI. RECOMMENDATIONS

- A limit should be imposed on the income and expenditure by political parties during elections so that there is a level playing field, and smaller parties and independent candidates are not put at a disadvantage.

- It will lead to more transparency if the financial statements of political parties are scrutinized by the Chief Auditing Authority.[150] Therefore, the office of the Comptroller and Auditor General of India being independent, is most suited for scrutinizing the financial statements of political parties in India.

- The limit that has been imposed on candidate expenditure in elections should be calculated from the date of notification of the elections to the date of declaration of results.[151]

- The political parties should be obliged to reveal every source of income, and there should be no anonymous sources of contributions.

[149]Nitin Sethi, 'Electoral Bonds: Confidential EC Meeting Exposes Modi Govt's Lies to Parliament' *Huffpos*t (27 November 2019) <https://www.huffingtonpost.in/entry/electoral-bonds-narendra-modi-election-commission-opposition-arun-jaitley_in_5dce3cd1e4b01f982eff5c62?utm_hp_ref=in-rti> accessed 5 May 2020.
[150]Political Parties Act (Parteiengesetez-PartG) 1967, s 21.
[151]Law Commission of India (n 25) para 2.28.1.

- The amendments made by the Finance Act, 2017 to Section 31 of The Reserve Bank of India Act, 1934 should be repealed. The State Bank of India is a central bank with all the information of the donors who purchase electoral bonds from it. This information can be retrieved by the Central Government anytime, both illegally and legally, on the pretext of an investigation by enforcement agencies. Moreover, these bonds can be used as currency by people to launder money or foreign entities to influence legislation and policy. As the bond does not carry the name of the donor and payee, it is possible that a bond is bought by A, but it is deposited in the account of the political party by B in collusion with A.[152]

- There is a need to restrict corporate donations in elections without banning it completely. Therefore, it is desirable to put a cap on the permissible limit for corporate donations. The cap of 7.5 % of the average net profit in itself was too high. However, the amendments made by the Finance Act, 2017, have made it even worse. Therefore, the permissible limit for corporate contributions in elections should be 5% of the average net profit in the last 3 years.

- The amendments made by the Finance Act, 2016 and Finance Act, 2018 to the Foreign Contribution Regulation Act, 2010 should be reversed. No foreign entity should be allowed to make political donations to Indian political parties as it threatens the Sovereignty of India as well as contributes to the flow of unaccounted money in the Indian economy.

- It must be ensured that only profit-making companies are allowed to make donations to political parties, so as to prevent shell companies from funnelling black money as political donations.

- The decision regarding donations to political outfits should not be taken merely by a few people who comprise the Board of

[152]Letter from the Reserve Bank of India to the Ministry of Finance, Government of India, (30 January 2017).

Directors in a company. Instead, this process should also include the shareholders of the Company to increase accountability and transparency in corporate contributions in Indian politics.

- Every political party should be required to file the account of their expenditure once a month from the start of the year preceding the end of the tenure of the House or Assembly. After the Election Commission of India's notification of elections, the political parties should be obliged to file accounts of their expenditure once every week.[153]

- If a candidate does not comply with the expenditure limit and disclosure norms, his election should be set aside, and he should be barred from contesting elections for a certain period.[154]

- The Election Commission of India should deregister political parties that do not comply with the expenditure limit and disclosure norms.[155]

VII. CONCLUSION

The laws regarding political funding in India have always proved to be inadequate. The position in this regard was worrisome even before 2017. However, there were still a few checks to ensure that there was some kind of transparency and a level playing field. It is true that the major players found a way to circumvent this provision, but it was still illegal to do so. However, after the passage of the Finance Act,

[153]Political Parties, Elections and Referendums Act, 2000 s. 63.

[154]Recommendations on electoral and Political Reforms by National Election Watch (NEW) & Association for Democratic Reforms to the Parliamentary Standing Committee on Personnel Public Grievances, Law and Justice (26 May 2017).

[155]ibid.

2017, political parties and big donors can easily and brazenly indulge in mala fide practices, and such practices are not prohibited by law. Therefore, the amendments made to the Representation of the People's Act, 1951, the Income Tax Act, 1961, and the RBI Act, 1934, should be reversed at once. However, this in itself would not prove to be sufficient, and the legislature should also address the concerns that have existed prior to 2017 to create an effective and robust system of political funding that ensures fairness, transparency, equality, and accountability in Indian democracy.

FOR LAWS MAY COME AND LAWS MAY GO, BUT DEFECTIONS GO ON FOREVER: A CRITICAL ANALYSIS OF THE ROLE OF THE SPEAKER IN INDIAN ANTI-DEFECTION LAWS

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Abstract

Defections form an indispensable part of parliamentary democracy. However, contrary to the experience of other countries, India has sought to curb the practice by introducing anti-defection laws through the Tenth Schedule of the Indian Constitution. The legislation, however, has several drawbacks and has, consequently, been criticized on all fronts. The call for its repeal stands testament to the severity of the challenges to the effective realization of the law. The issue regarding the shortcomings of the law resurfaced due to widespread defections by Members of Legislative Assembly in Manipur in 2019. This political battle spilt over to the courts; the Supreme Court in the case of Keisham Meghachandra Singh vs. the Hon'ble Speaker Manipur Legislative Assembly & Ors. recommended that the role

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of the Speaker as the sole arbiter be reconsidered. The paper seeks to establish that any legal or legislative reform to remedy an inherently political issue such as that of defections would only be a piecemeal solution. In this context, this paper seeks to evaluate the role and function of the Speaker and highlights the paradoxical nature of the office of the Speaker as one of the leading causes for the ineffective realization of the anti-defection law. In light of the recent instances of rampant misuse of powers by the Speaker, the paper analyses the recommendation by the Supreme Court to replace the Speaker with an independent tribunal and other such recommendations that have come to the fore over the brief history of the anti-defection law in India. In this context, the paper then concludes by asserting that given the political environment shrouding the Indian polity, the anti-defection laws are to be retained, at least as an interim measure, while striving towards more holistic changes in the political culture in India.

I. INTRODUCTION

Defections are an indispensable part of parliamentary democracy; however, the levels of tolerance and the regulatory systems have varied greatly across jurisdictions. The wavering perception of defections as a great threat to the very spirit of democracy and the institutionalization of political parties has resulted in a multitude of

laws to regulate defections. Across a wide spectrum of countries-defections have been absolutely prohibited, qualifiedly permitted or given a free hand. Defections in India were marred by unprincipled, inconsistent and opportunistic movements across party lines that exhibited a shocking level of clientelism and democratic immaturity. This alarming trend forced the Indian legislature to come up with a regulatory system to curb this destabilizing movement across party lines. The efficacy of these anti-defection laws under the Tenth Schedule of the Constitution of India has been pondered upon time and again in light of a history of discontent with the laws itself. Recently, the apex court brought this issue to the forefront in *Keisham Meghachandra Singh vs. the Hon'ble Speaker Manipur Legislative Assembly & Ors*.[1] The latest in a long list of judgements criticizing defection laws, it highlighted the role played by the Speaker in the defection process while being critical about the abuse of powers and its adverse impact on the effective realization of the law. The court even suggested the Speaker be replaced by an apolitical and neutral tribunal.

This paper seeks to expound upon this suggestion, by evaluating the role of the Speaker and the importance of anti-defection laws for the Indian democracy. The first part of the paper will explain the anti-defection law and the history of its origin in India. The second part deals with the role of the Speaker, its importance in the parliamentary process, and the allegations of prejudice and partisanship that have been levelled against the role. The third part seeks to critically evaluate and analyse the alternatives to the role of the Speaker while drawing on and commenting upon recommendations from various committees. The paper finally argues that though there is no perfect solution to remedy the shortcoming of the role of the Speaker, there are alternatives that could potentially mitigate the chance for

[1] *Keisham Meghachandra Singh v. Hon'ble Speaker Manipur Legislative Assembly and Others* 2020 SCC OnLine SC 55.

partisanship and bias to creep into the defection proceedings. The paper also argues that the problem at hand is essentially political in nature and any legislative reform will be rather myopic and will fall short from its desired impact.

II. DEFECTION LAWS IN INDIA

India's fledgling multiparty democracy was threatened by political instability owing to large-scale defections - with almost 542 elected members defecting across party lines by the 4th Lok Sabha Elections in 1967.[2] This meant that the stability of the government at the national *and* local levels was completely at the mercy of those defecting individuals who moved across party lines at great ease. This political phenomenon gave birth to the infamous phrase "*Aaya Ram, Gaya Ram*" after an MLA from the state of Haryana defected 4 times within a fortnight in 1967.[3] The angst and anguish of the public was answered by the 52nd Constitutional Amendment in 1985 which inserted the Tenth Schedule containing anti-defection laws into the Indian Constitution.

The passing of the anti-defection laws in 1985, after repeated failures to do the same, can largely be attributed to the overwhelming majority of 426 seats controlled by the Indian National Congress in the Parliament. Given the circumstances, it was ideal for both the ruling government and the opposition to pass the anti-defection law. The elected members of the ruling party were motivated to pass the anti-defection amendment as it would ensure that members of the opposition would not cross-party lines to join the ruling party. This

[2]K.T. Thomas, 'Anti-Defection Law' (2009) 3 NUALS Law Journal 1.

[3]Ankur Bhardwaj, 'Return of Aaya Ram, Gaya Ram: How the Anti-Defection Law is Misinterpreted' (4 July 2019) *Business Standard* <www.business-standard.com/article/politics/return-of-aaya-ram-gaya-ram-how-the-anti-defection-law-is-misinterpreted-119070300387_1.html> accessed 3 July 2020.

would guarantee that the existing members of the party would stay content and not fear any dilution of their power or authority due to the entry of newcomers. This move concretized the loyalty of the existing members to the ruling Congress party.[4] These reasons for introducing the anti-defection laws are evident from Prime Minister Rajiv Gandhi's speech in the Lok Sabha before the passing of the amendment bill as he laid emphasis on the fact that *the defections are invariably to the Congress Party, and not from the Congress Party*[5] and that the bill would *help to keep the Congress Party intact, to strengthen the Congress Party.*[6] Similarly, for the opposition party, passing the anti-defection amendment would ensure that the already scarce power they control in the Parliament is not further diluted due to defections to the ruling government.[7] The justifications given for the passing of the anti-defection law in Parliament are a testament to the partisan origins of the law.

The primary aim of the anti-defection law was to strengthen political stability and to inculcate a sense of political responsibility.[8] Anti-defection laws are used to disincentivize, deter and punish members who defect. The decision to penalize defectors stemmed from a history of defections where the elected members moved between parties that were ideologically inconsistent. This unprincipled movement across party lines merely for wealth and power highlighted

[4]Csaba Nikolenyi & Shaul R. Shenhav, 'The Constitutionalisation of Party Unity: The Origins of Anti-Defection Laws in India and Israel' (2015) 21 Journal of Legislative Studies 390.

[5]Lok Sabha Debates (30 January, 1985) p. 183.

[6]ibid.

[7]Csaba Nikolenyi & Shaul R. Shenhav, 'The Constitutionalisation of Party Unity: The Origins of Anti-Defection Laws in India and Israel' (2015) 21 Journal of Legislative Studies 390.

[8]Valerian Rodrigues, 'Parliamentary Opposition and Government Backbenchers in India' in N. Ahmed (ed), *Inclusive Governance in South Asia* (2018).

the need for a legal regime to restrict such movement.[9] The rise of coalition governments accentuated the need for anti-defection laws to ensure stability and to maintain a majority in the government. Therefore, these laws were a necessity to ensure governmental, political and ideological stability in an era where free-flowing defections could topple governments.

The other reason that necessitated the need to introduce anti-defection laws was endemic to India - the political party was and is the locus of representation and not the individual candidate contesting with the party ticket.[10] Therefore, the votes garnered by a candidate are usually on account of their affiliation to the respective political party and not on the basis of the candidate's individual prowess. The Supreme Court in *Kihoto Hollohan v. Zachillu & Ors*[11] reiterated this by saying that "*A political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programme. A person who gets elected as a candidate set up by a political party is so elected on the basis of the programme of that political party.*"[12] This meant that any defection by the elected members in pursuit of power and wealth would be in utter disregard to the will of their constituents who would have "*voted for a particular ideology, some principles, (or) a programme*"[13] of the political party that the elected member represented. Any defections on ideologically inconsistent and unprincipled grounds would be an affront to the will of the people and in extension- the representative democracy. Therefore, this breach of trust by the elected members

[9]Paras Diwan, 'Aya Ram Gaya Ram: The Politics of Defection' (1979) 21 Journal of the Indian Law Institute 291.

[10]Udit Bhatia, 'Cracking the Whip: The Deliberative Costs of Strict Party Discipline' (2020) 23 Critical Review of International Social and Political Philosophy 254.

[11]*Kihoto Hollohan v. Zachillhu And Others* [1992] SCR (1) 686.

[12]Ibid.

[13]Ibid.

also prompted the urgent need for a stern and uncompromising anti-defection law to regain the faith of the people in the electoral system.

The provisions under the Tenth Schedule of the Constitution clearly exhibit these underlying ideologies and objectives. The quest for party discipline and political stability led to the expansive provision for disqualification under Paragraph 2 of the Tenth Schedule. This paragraph is the crux of the legislation and lays down the conditions for the disqualification of members. While the provision only lists out specific overt acts that could lead to disqualification, the Supreme Court in *Ravi Naik v. Union of India*[14] broadened the scope by interpreting that voluntary giving up of membership could also be *inferred* by the conduct or actions of the member. This led to various awkward scenarios where even the public criticism of the party president's orders and decisions were inferred as defections.[15] The Speaker is tasked with determining the questions of disqualification on the grounds of defection even in nebulous scenarios such as these. This often means that the biases and perceptions of the Speaker play a significant role in the determination of these questions.

The legislature was presented with the choice to either totally prohibit defection or to provide for a qualified freedom to defect.[16] The legislature chose the latter and listed out circumstances under which an elected member could defect without facing any repercussions. Paragraph 4 of the Tenth Schedule excludes party mergers from the ambit of defection disqualification if such merger was approved by at least two-thirds of the members. Under this exception, members joining the merged political party and those members who have disagreed to join the merged party and have opted to start a separate

[14] *Ravi S. Naik v. Union of India* [1994] AIR 1558.

[15] *Ram Chandra Prasad Singh v. Sharad Yadav,* Rajya Sabha Notification No. RS 46/2017-T.

[16] Nico Steytler, 'Parliamentary Democracy - The Anti-Defection Clause' (1997) 1 Law Democracy & Development 221.

political party will not be disqualified. Paragraph 3 of the Tenth Schedule enabled defection if at least one-third of the elected members from a political party wished to defect to another. This exception for *en bloc* defections was eventually omitted by the 91st Constitutional Amendment in 2003 as it had a deleterious impact on political stability.[17]

Paragraph 6 of the Tenth Schedule granted the Speaker of the House the power to decide upon the disqualification of members on grounds of defection. However, it does not lay down any procedural structures or temporal limits for the disqualification process.[18] For instance, the Tenth Schedule does not provide for a specific time within which the Speaker must determine the disqualification- it simply states that it needs to be done at the earliest. Speakers often take advantage of these legislative loopholes and have strayed from their constitutional duty.[19]

The anti-defection law has received flak from all corners - largely owing to the criticism that it is a black mark on the efforts to build a truly representative democracy as it impairs the deliberative nature of politics. This was further accentuated by the lack of concrete evidence to prove the efficacy of the law to realize the intended object of curbing political impropriety and the indiscriminate movement across party lines.[20] Owing to the above-mentioned reasons of redundancy

[17]Clemens Spieß and Malte Pehl, 'Floor Crossings and Nascent Democracies - A Neglected Aspect of Electoral Systems? The Current South African Debate in the Light of the Indian Experience' (2004) 37 Law and Politics in Africa, Asia and Latin America 195.

[18]Vijaya Bhaskar Reddy, 'Sabotage of Anti-Defection Law in Telangana' (2015) 50 Economic and Political Weekly.

[19]H.R. Saviprasad & Vinay Reddy, 'The Law on Anti-Defection: An Appraisal' (1999) 11 Student Advocate 116.

[20]Shoaib Daniyal, 'The Political Fix: Has the Anti-Defection Law Hollowed out India's Representative Democracy?' Scroll.in (22 July 2019) <https://scroll.in/article/931323/the-political-fix-has-the-anti-defection-law-hollowed-out-india-s-representative-democracy> accessed on 9 July 2020.

and ineffectiveness of the law there has been a rising demand to repeal the law in its entirety.[21] The challenges to the law have been centred around the argument that the usage of legal means to remedy a political concern will always remain ineffective. However, the calls for repealing the law on these grounds are rather radical and extreme. Although there is consensus on the ineffectiveness of legal means to remedy political concerns - there is also a need to acknowledge the immaturity and nascence of the Indian political culture. In a study involving 40 Commonwealth countries, it was observed that only the relatively newer democracies such as India and South Africa had established anti-defection laws. On the other hand, more developed political systems such as the United Kingdom, Canada and Australia did not require anti-defection laws owing to a development of practices and conventions that inhibited such defections across party lines.[22] In light of this argument, the need to retain the anti-defection laws in India, at least as an interim measure is established. Despite not being a perfect solution, given the political and social context in India, there is a need to retain the laws, at least until a culture of democratic responsibility is instilled in the elected members.

To examine the shortcomings of the law it is imperative to critically analyse the role and importance of the office of the Speaker as it is the most important functionary under the anti-defection law. Therefore, it is essential to understand the role of the Speaker to holistically comprehend the manner in which they deviate from the anti-defection laws and subvert the procedure.

[21]Chakshu Roy, 'What an Indian Law Can Do to MLAs Defecting in Karnataka & Goa - Nothing' (*The Print*, 12 July 2019) <https://theprint.in/opinion/what-an-indian-law-can-do-to-mlas-defecting-in-karnataka-goa-nothing/261920/> accessed 10 July 2020.

[22]GC Malhotra, 'Anti-Defection Law in India and the Commonwealth' (*Lok Sabha Secretariat*, 2005) <https://eparlib.nic.in/bitstream/123456789/58674/1/Anti_Defection_Law.pdf> accessed on 10 July 2020.

III. THE ROLE AND IMPORTANCE OF SPEAKER

The role of the Speaker is central to parliamentary democracy. In the Indian context, much like its counterparts such as Australia, Ireland and Canada, the position and functions of the Speaker are inspired by the Westminster model. Being the Chief Officer and the highest authority in the Lower House of the Parliament- the Speaker's office assumes great importance. They are generally elected in the first meeting of the House and their term lasts for five years.[23] Like in Canada, the name of the Speaker is put forth by the Prime Minister (a member of the ruling party) and seconded by another member of the cabinet.[24]

The Speaker is instrumental to the functioning of the House. The functions of the Speaker can be divided into three board categories.[25] *Firstly*, the Speakers facilitates the discussions and deliberations of the House. While doing so, they are expected to remain apolitical themselves and not actively participate in the business of the House. The Speaker decides upon the permissibility of different motions[26] and assists the House in holding the executive accountable.[27] By undertaking these tasks, the Speaker facilitates the parliamentary function of representing the electorate. *Secondly*, the Speaker adopts the role of a disciplinarian.[28] They are empowered to suspend

[23]Anurag Vaishnav, 'First session of 17th Lok Sabha: What to Expect' (*PRS Blog*, 29 May 2019) <https://www.prsindia.org/theprsblog/first-session-17th-lok-sabha-what-expect> accessed 10 July 2020.

[24]Hari Chand, 'Powers of the Speaker' (1974) 16(1) Journal of the Indian Law Institute 128, 128.

[25]Harsimran Kalra, 'Decisional Analysis and the Role of the Speaker' (2013) 1 The Hindu Centre for Politics and Public Policy <https://www.thehinducentre.com/publications/policy-report/article5137287.ece> accessed 10 July 2020.

[26]Rules of Procedure of the Lok Sabha, Rule 56 and Rule 193.

[27]ibid.

[28]Harsimran Kalra, 'Decisional Analysis and the Role of the Speaker' (2013) 1 The Hindu Centre for Politics and Public Policy

members,[29] and it is within their mandate to adjourn the House, in cases of gross misconduct.[30] To maintain the decorum of the House they are allowed to interrupt members and ask them to withdraw statements if they can be classified as un-parliamentary.[31] *Lastly,* they also perform quasi-judicial functions and are required to function as a tribunal. As per Paragraph 6 under the Tenth Schedule, the Presiding Officer alone is empowered to disqualify elected members on grounds of defection, based upon a petition by any other member of the House. Hence, as envisaged by the law, the Speaker must act like a neutral and unbiased party to determine the facts and establish if the members had in fact defected.

It should be noted that the Speaker while undertaking these tasks represents the House as a whole. Hence, maintaining a stance of impartiality is a key requisite for the role. This requirement of impartiality has not been codified in the text of the constitution but exists as a constitutional convention.[32] The Speaker must adhere to this convention out of a sense of public duty or simply out of fear of judicial intervention. Hence, neutrality and non-partisanship are key tenets of the Speaker's role.[33]

<https://www.thehinducentre.com/publications/policy-report/article5137287.ece> accessed 10 July 2020.

[29]Rules of Procedure of the Lok Sabha, Rule 374.

[30]Rules of Procedure of the Lok Sabha, Rule 375.

[31]Rules of Procedure of the Lok Sabha, Rule 352 and 378.

[32]Harsimran Kalra, 'Decisional Analysis and the Role of the Speaker' (2013) 1 The Hindu Centre for Politics and Public Policy <https://www.thehinducentre.com/publications/policy-report/article5137287.ece> accessed 10 July 2020.

[33]Matthew Laban, 'More Westminster than Westminster? The Office of Speaker across the Commonwealth' (2014) 20(2) The Journal of Legislative Studies 143, 143.

IV. ROLE OF THE SPEAKER – INHERENT PARADOX

While the Speaker can technically hail from any party, a rather troubling trend has developed in the recent past wherein the Speaker is elected from the ruling party and the Deputy Speaker from the opposition party.[34] These affiliations to the ruling party have resulted in several instances wherein the Speaker had acted in a manner that was beneficial to the ruling party. For example, in several instances, the Speakers have taken an inordinate amount of time to decide on the disqualification of elected members for defecting as it benefited the ruling party.[35] The Speakers often torn between their party loyalties and a sense of duty towards the Constitution have often given paramountcy to their partisan ties. Herein lies the paradox - the Speaker, elected by a particular political party, is expected to adjudicate disputes in a neutral fashion.

Developed democracies have taken steps to ensure the position of a Speaker remains apolitical, and untouched by the desire of political gain or fear of loss of office. It is observed that even though commonwealth legislatures have attempted to emulate the Westminster model of Speakership - they have struggled to copy all elements or have clung to traditions discarded by the Westminster model as well.[36] For instance, due to well-established conventions, the Speakers in the United Kingdom shed all party affiliations upon election. However, this is not the case in most commonwealth nations, including India. An attempt was made to emulate this in

[34]Harsimran Kalra, 'Decisional Analysis and the Role of the Speaker' (2013) 1 The Hindu Centre for Politics and Public Policy <https://www.thehinducentre.com/publications/policy-report/article5137287.ece> accessed 10 July 2020.

[35]Vijaya Bhaskar Reddy, 'Sabotage of Anti-Defection Law in Telangana' (2015) 1 Economic and Political Weekly 50.

[36]Matthew Laban, 'More Westminster than Westminster? The Office of Speaker across the Commonwealth', (2014) 20(2) The Journal of Legislative Studies 143, 143.

Canada, however, it failed.[37] In the United Kingdom, the Speakers prove their neutrality by giving up party politics and resigning from their political party upon election.[38] Upon retirement, the former Speaker resigns as a Member of Parliament and is awarded the customary peerage.[39] Further, they never re-enter party politics and sit as independent crossbenchers in the House of Lords.[40] If a Speaker seeks re-election, major political parties do not field candidates in the Speaker's constituency. This too, has not been codified and is rather a constitutional convention which is religiously followed. Further, the Speaker does not contest by making any political promises and stands simply as the 'Speaker seeking re-election'.[41] However, the Speakers can deal with their own constituency's problems like a normal Member of Parliament.[42] This serves the dual purpose of ensuring that the Speaker remains accountable to the public and is given a free rein to preside over the House effectively.

Northern Ireland, which boasts of a parliamentary system akin to ours, also ensures that the Speaker renounces partisan life.[43] Speakership is given to individuals who relinquish their political ambitions, which is testamentary to their unbiased nature.

In sharp contrast to these practices, the Speakers in India are not mandated to give up party membership and neither does any such

[37] ibid 145.
[38] ibid.
[39] ibid.
[40] ibid.
[41] 'Election 2019, Your Questions Answered: What Happens to the Losers?' (*BBC News*, 11 December 2019) <https://www.bbc.com/news/election-2019-50523682> accessed 10 July 2020.
[42] Harsimran Kalra, 'Decisional Analysis and the Role of the Speaker' (2013) 1 The Hindu Centre for Politics and Public Policy <https://www.thehinducentre.com/publications/policy-report/article5137287.ece> accessed 10 July 2020.
[43] Stanley Bach, 'The Office of Speaker in Comparative Perspective' (1999) 5(3) The Journal of Legislative Studies 209.

convention exist. Furthermore, they are dependent on the party to get re-elected as well. They can even hold ministerial positions immediately before and after their appointments.[44] This reliance on a party for re-election and an incentive to hold ministerial positions plays a major role in presenting skewed incentives for Speakers. Hence, it is not surprising that there exists a rampant misuse of powers by the Speaker, especially under defection laws.

Questions regarding the proprietary of giving the Speaker unfettered powers have been raised time and again. The Apex court's decision in the case of *Kihoto Hollohan*[45] is important in this regard. The two questions which gain prominence with regards to the paper are, *firstly,* whether the Speaker, still affiliated with their political party, should be bestowed with this responsibility and *secondly,* whether Paragraph 6(1) which imparts a constitutional "*finality*" to the decision of the Speaker ousts the jurisdiction of the courts.

The petitioners argued that the political connections and affiliations of the Speaker to a political party coupled with the broad powers presented to the Speaker under the Constitution could invariably lead to a reasonable likelihood of bias.[46] However, the majority judgment in *Kihoto Hollohan* summarily dismissed these concerns. The judges exclaimed that it would be unfair to express such distrust in the office of the Speaker. However, the minority opinion was sceptical of this approach, and rightly so. The minority opinion buttressed its argument by relying on the Constitutional Assembly Debates, specifically the drafting history of Articles 102, 103, and 192. Article 102 lays down the criteria for disqualification for membership. It includes scenarios such as holding any office of profit under the

[44]Harsimran Kalra, 'Decisional Analysis and the Role of the Speaker' (2013) 1 The Hindu Centre for Politics and Public Policy <https://www.thehinducentre.com/publications/policy-report/article5137287.ece> accessed 10 July 2020.

[45]*Kihoto Hollohan v. Zachillhu And Others* **[**1992] SCR (1) 686.

[46]ibid.

Government of India, being an undischarged insolvent, not being a citizen of India or being of unsound mind. Articles 103 and 192 state that these disqualifications must be decided by the President or Governor respectively in accordance with the opinion of the Election Commission. The minority judgment highlighted how during the course of the debates it was suggested that the Speaker be given the power to decide on disqualifications, however, the drafters had specifically refrained from doing so.[47] Instead, the power was given to the President and the Governors. The minority decision also highlighted that since the tenure of the Speaker was dependent on the will of the majority, the suspicion of bias cannot be ruled out. Further, even the possibility of this bias sneaking into the decisions of the Speaker would potentially violate a basic feature of the constitution: free and fair trials.[48] Hence, Justice Nariman was right to state in *Keisham Meghachandra Singh* that the fears of the minority judgment in *Kihoto* have come home to roost.

With regard to the second question, it was held that the Speaker acts like a tribunal. The court relied upon its earlier judgments in *Indira Nehru Gandhi v. Raj Narain*[49] and *Brundaban Nayak v. Election Commission of India and Anr.*,[50] and stated that the finality clause does not oust the jurisdiction of the courts under Articles 136, 226 and 227. However, it was noted that the power of courts to intervene is limited to when the authority is acting ultra vires, their action is vitiated by mala fides or there is a colourable exercise of their power. Hence, the court stated that in light of the finality clause, judicial review cannot be availed at a stage prior to the making of a decision by the Speaker, or at an interlocutory stage of proceedings. Hence, the courts are barred from interfering into the matter before the Speaker

[47] ibid.
[48] *Indira Nehru Gandhi v. Shri Raj Narain* [1976] 2 SCR 347.
[49] ibid.
[50] *Brundaban Nayak v. Election Commission Of India* [1965] 3 SCR 53.

makes a decision with regard to the disqualification. Further, there exists no timeline within which a Speaker must take decisions on anti-defection matters. These loopholes have helped ruling parties on various occasions.[51]

In the recent past, several incongruous situations have arisen due to this position of the law. For instance, in Telangana, the Speaker did not comment on the obvious defection of a member for six months.[52] While maintaining an uncharacteristic silence on the matter of defection, the Speaker did his best to protect the defected members. Quite appallingly the Speaker even allocated a seat to one of the defected members in the Treasury benches. Similar situations have arisen in the past. In 1990's Keshari Nath Tripathi, the then Speaker of the Uttar Pradesh Assembly and member of the Bhartiya Janata Party ("**BJP**"), failed to comment on the defection of the 15 Bahujan Samaj Party MLAs to enable the BJP to survive the floor test.[53] Other than sitting on cases regarding defection, Speakers have been outrightly partisan in several cases as well. In the case of *Balachandra L. Jarkhioli v. B.S. Yeddyurappa*,[54] the Speaker was seen to have favoured a member of the parliament unabashedly. The Speaker failed to give members enough time to respond to show cause notices and conducted the enquiry in a hurried manner in

[51]Rakesh Mohan, 'Speakers not Time-Bound to Decide on Anti-Defection Cases' (*The Economic Times*,17 March 2018) <https://economictimes.indiatimes.com/news/politics-and-nation/speakers-not-time-bound-to-decide-on-anti-defection-cases/articleshow/64199077.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 10 July 2020.

[52]K. Vijaya Bhaskara Reddy, 'Sabotage of Anti-Defection Law in Telangana' (2015) 1(50) Economic & Political Weekly.

[53]Rakesh Mohan, 'Speakers Not Time-Bound to Decide on Anti-Defection Cases' *The Economic Times* (17 March 2018) <https://economictimes.indiatimes.com/news/politics-and-nation/speakers-not-time-bound-to-decide-on-anti-defection-cases/articleshow/64199077.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 10 July 2020.

[54]*Balachandra L. Jarkhioli v. B.S. Yeddyurappa* (2011) 7 SCC 1.

complete disregard to principles of a fair trial. This trend of the Speaker to act against the constitutional mandate of maintaining a neutral position was highlighted in the case of *Shrimanth Balasaheb Patil v. Hon'ble Speaker, Karnataka Legislative Assembly.*[55] This case dealt with the misuse of the discretion given to the Speaker to reject resignations. The court stated that while conferring discretion, the Speaker must decide upon the voluntariness or genuineness of the resignation based upon objective criteria.

Such cases call attention to the rampant misuse of the discretion accorded to the Speaker, indicating that any loophole in the law will be used to the advantage of the majority party. Such misuse is not only the result of the lacuna in the law but also of the structural deficiencies with the role of the Speaker. These deficiencies were also recently highlighted in a decision rendered by the Arunachal Pradesh High Court.[56] The court noted the paradox and suggested that either the Speaker be replaced by an independent tribunal or the office of the Speaker be made apolitical as is the case in the United Kingdom.

Unless some of these structural gaps are plugged - it is difficult to envisage the Speaker functioning as an efficient adjudicator for anti-defection laws. In light of this observation, the alternatives proposed by the Supreme Court gain great prominence.

[55] *Shrimanth Balasaheb Patil v. Hon'ble Speaker, Karnataka Legislative Assembly* 2019 SCC OnLine SC 1454.

[56] *Pema Khandu and Ors v. Speaker, Arunachal Pradesh Legislative Assembly and Ors* 2016 SCC OnLine Gau 284.

V. ANALYSIS AND CRITIQUE OF RECOMMENDATIONS

The Speakers have over time exploited the gaping holes in the defection laws and have created a pressing need to push for reforms to tackle the issues of partisanship and abuse of powers. Over time, a few viable recommendations have surfaced, however, none have been adopted.

In *Keisham Meghachandra Singh*[57] the Supreme Court did two things. *Firstly,* the court curtailed the powers of the Speaker to a great extent by allowing for judicial review prior to the stage of the Speaker having given their decision. The court lifted this bar by jointly reading *Kihoto Hollohan*[58] and *Rajendra Singh Rana*,[59] to conclude that the failure to exercise jurisdiction is not covered by the in-built restriction in Paragraph 6. *Secondly,* it implored the Parliament to explore the possibility of an independent tribunal to replace the Speaker.

The Supreme Court suggested an independent tribunal headed by a retired Supreme Court Judge at the national level and a retired Chief Justice of a High Court at the state level. The creation of such a quasi-judicial body headed by a judicial member would wreak havoc on the already debilitating separation of powers. This proposal would effectively approve judicial interference in matters that are inherently political.

Furthermore, there is a high probability that the proposed judicial members would be appointed to the tribunals through a system of appointments that could bear resemblance to the collegium system.[60]

[57] *Keisham Meghachandra Singh v. Hon'ble Speaker Manipur Legislative Assembly and Others* 2020 SCC OnLine SC 55.

[58] *Kihoto Hollohan v. Zachillhu And Others* **[**1992] SCR (1) 686.

[59] *Rajendra Singh Rana and Ors v. Swami Prasad Maurya and Ors* (2007) 4 SCC 270.

[60] Prarthana Kashinath, 'SC Urges Rethink of Speaker's Disqualification Powers: Why Plumping for 'Impartial Tribunal' to Deal with Political Turncoats is No Panacea' (*Firstpost* 26 January 2020) <https://www.firstpost.com/india/sc-urges-

The collegium has faced scathing attacks in the past for its opacity – a trait that could make the functioning of the tribunal shallow and raise questions of fairness. Similarly, the other possibility would be for the Central Government to have a say in the appointment of judicial members to the tribunal.[61] This could also topple the precarious relationship between the centre and state governments as it would give the central government the power to hold sway over the judicial members and in extension control the movement of elected members across party lines through them. This could lead to situations where the Central Government could potentially orchestrate the movement of candidates across party lines to consolidate power in the ruling party or coalition. Thus, the suggestion to replace the Speaker with an independent tribunal is rather short-sighted and far more dangerous to the constitutional fabric of separation of powers. The other alternative that gained some traction was to grant the role to the Election Commission – a quasi-judicial body consisting of three members. The attractiveness of this alternative can be attributed to the perceived neutrality and independence of the body.[62] The Election Commission is already tasked with determining the disqualification of members under Section 8A of the Representation of People Act, 1951. Under Section 8A, the Election Commission performs a judicial role as it hears and determines cases on the allegations of corruption which are *automatically referred* to it by the Governor or the President.[63] This exhibits the capabilities of the Election Commission to replace the role of the Speaker. However, the Commission, too, has recently been

rethink-of-speakers-disqualification-powers-why-plumping-for-impartial-tribunal-to-deal-with-political-turncoats-is-no-panacea-7958231.html> accessed April 29 2020.

[61]ibid.

[62]Pardeep Sachdeva, 'Combating Political Corruption: A Critique of Anti-Defection Legislation' (1989) 50 Indian Journal of Political Science 157.

[63]Bhavdeep Kang, 'We Can Rule on Defectors, Instead of the Speaker' (*Outlook*, 30 March 1998) <https://www.outlookindia.com/magazine/story/we-can-rule-on-defectors-instead-of-the-speaker/205283> accessed April 25 2020.

accused of partisan behaviour[64] when it declared Prime Minister Narendra Modi and Minister of Home Affairs Amit Shah as 'not guilty' in all five cases accusing them of violating the Model Code of Conduct.[65] There is an urgent need to insulate the members of the Commission from the influence of the executive branch in terms of the procedure for appointment and term of office. At present even though the Chief Election Commissioner enjoys protection at par with judges of the Supreme Court. This protection does not extend to the two Election Commissioners.[66] Furthermore, even though Article 324(5) states that the Election Commissioners can only be removed if recommended by the Chief Election Commissioner, the Supreme Court in the *S.S. Dhanoa v. Union of India*[67] carved an exception to this rule. The court upheld the removal of the Election Commissioner carried out through a presidential notification. Hence, the current framework does not guarantee sufficient safeguards to protect the autonomy and independence of the Election Commissioners from external influences.

With regards to the procedure for appointment of the Election Commissioners, currently, they are appointed by the President on the advice of the Cabinet.[68] However, this procedure was challenged in

[64]Monobina Gupta, 'The Legacy of a Different CEC: When J.M. Lyngdoh Stood up to Modi' (*The Wire*, 6 May 2019) <https://thewire.in/politics/election-commission-jm-lyngodh-modi-model-code> accessed 10 July 2020.

[65]Ritika Chopra, 'Election Commissioner Lavasa Opposed Five Clean Chits to Amit Shah PM Modi' (*The Indian Express*, 5 May 2019) <https://indianexpress.com/elections/lok-sabha-elections-lavasa-opposed-five-clean-chits-to-amit-shah-pm-modi-5710773/> accessed 10 July 2020.

[66]Snehil Kunwar Singh, 'How Can We Constitute a More Impartial, Non-Partisan Election Commission?' (*The Wire*, 9 May 2019) <https://thewire.in/government/election-commission-independence> accessed 10 July 2020.

[67]*S.S. Dhanoa v. Union of India* [1991] SCR (3) 159.

[68]Snehil Kunwar Singh, 'How Can We Constitute a More Impartial, Non-Partisan Election Commission?' (*The Wire*, 9 May 2019) <https://thewire.in/government/election-commission-independence> accessed 10 July 2020.

Anoop Baranwal v. Union of India,[69] which sought to replace it with a system resembling the collegium or an independent selection committee. This matter was referred to a five-judge bench and is pending before the court.[70] Hence, giving the Election Commission the power to determine matters of defection also poses its own set of challenges ranging from issues of bias to the interference of the executive. Thus, one can only conclusively determine the efficacy of replacing the Speaker with the Election Commission after the Supreme court decides on these issues.

Alternatives which envisage the Election Commission and executive working together have also been put forth. The 170th Law Commission Report on Electoral Reforms seemed to favour the role of the Election Commission in providing advisory assistance to the President and the Governors by giving them its independent advice.[71] It was proposed that the advice would be furnished by the Election Commission after adhering to all the principles of natural justice.[72] Finally, by leaving the final decision to the discretion of the President or Governor as the case may be, it would keep the matters of disqualification strictly within the realm of political actors. This was proposed to legitimize the opinions of the Election Commission. However, this recommendation, too, is problematic due to the interference of the executive with the legislature owing to the fact that the executive positions such as that of the Prime Minister and the Council of Ministers are filled by members of the legislature. The argument for separation between their functions finds support in the

[69]WP (C) 104/2015.

[70]Mehal Jain, 'SC Refers Plea to Make Independent Collegium to Recommend Names for Appointment of Election Commissioners to Constitution Bench' (*Live Law*, 23 October 2018) <https://www.livelaw.in/breaking-sc-refers-plea-to-make-independent-collegium-to-recommend-names-for-appointment-of-election-commissioners-to-constitution-bench/> accessed 10 July 2020.

[71]Law Commission, Reform of the Electoral Laws (Law Com No 170, 1999) para 1.3.3.1.

[72]Law Commission, Electoral Reforms (Law Com No 255, 2015) para 5.19.5.

debates held during the drafting of the Constitution as well. The members of the Constituent Assembly were reluctant to expose the executive to legislative influence. While drafting the Constitution, B.R. Ambedkar summarily rejected the proposal to let the Speaker give his resignation to the President instead of the Deputy Speaker on the grounds of separation of powers. He stated that the aim of the Constitution was to give the President "*as complete and independent a position of the executive as we possibly can*"[73] and to avoid any intermingling of the legislature and executive.[74] Although, India does not follow a strict separation of powers it has time and again been advised to keep the functioning of the two organs of government separate.[75] Especially in a sensitive political matter such as defection, the intermingling of the two should be avoided to the greatest possible extent. Therefore, the powers to disqualify members on grounds of defection should not be given to the President or Governor in order to protect the sanctity of their office.

Other countries with defection laws follow diverse practices. For example, in Bangladesh, the Speaker refers the case to the Election Commission and in Singapore, the Parliament decides on issues of defection.[76] However, these alternatives pose the same difficulties as have been discussed earlier. Hence, the least intrusive reform would be to promote neutrality and eradicate the element of bias in the role of the Speaker itself. As discussed previously, Indian Speakers find

[73]'Constituent Assembly of India Debates (Proceedings) - Volume VIII' (*Constitution of India*) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-06-14> accessed on 10 July 2020.

[74]ibid.

[75]Shashank Krishna, 'Separation of Powers in the Indian Constitution; Why the Supreme Court was Right in Intervening in the Jharkhand; Imbroglio' (2006) 18(2) Student Bar Review 13.

[76]Anirudh Burman, 'The Anti-Defection Law – Intent and Impact' (*PRS Blog*, 23 November 2009) <https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/1370583077_Anti-Defection%20Law.pdf> accessed 10 July 2020.

the positions of their counterparts in other countries to be safeguarded against partisan behaviour. Drawing from the best practices of these more developed democracies, the office of the Speaker demands an immediate overhaul. Drawing inspiration from the model of the United Kingdom and Ireland, the Speakers could be mandated to resign from their political parties to demonstrate their unbiased nature. Further, they could be barred from holding any political office post-retirement as well. While maintaining the position of a neutral arbiter of issues, the Speaker should also be allowed to function like a normal member of parliament, to deal with the issues of their constituency, as is the case in the United Kingdom. Adopting at least some of these measures would bring about a structural change in the role of the Speaker and make it more neutral and hence, an effective adjudicator. However, one must also be wary that mere rules cannot ensure neutrality. These rules would be effective to take the individual out of the party but would not ensure they are freed of ideologies and biases they subscribe to.[77] What is important is not whether the Speaker has political affiliations but whether they can distinguish them from their duty to the parliament.[78] Hence, requiring the Speaker to quit their political party or renounce politics is to emphasize form over substance. [79] These reforms cannot be implemented overnight and would require a holistic change in the political environment. These values of neutrality and non-partisanship can only be inculcated into the system through a change in the political practices themselves.

[77]Stanley Bach, 'The Office of Speaker in Comparative Perspective' (1999) 5(3) The Journal of Legislative Studies 209.
[78]ibid.
[79]Matthew Laban, 'More Westminster than Westminster? The Office of Speaker Across the Commonwealth', (2014) 20(2) The Journal of Legislative Studies 143, 244.

VI. CONCLUSION

The urgent need to overhaul and reform the role of the Speaker in the anti-defection laws is justified as it seeks to prevent the continuing mockery of the electoral mandate. The recent judgement by the apex court in *Keisham Meghachandra Singh*, wherein the Speaker resorted to the time-tested tactic of delaying the disqualification brought this issue to the forefront yet again. Many have suggested taking the rather radical route of doing away with defection laws, however, owing to the political culture in India only being in the nascent stages - it is imperative that we retain the anti-defection laws. Therefore, the usage of anti-defection laws by political parties in India plays the role of a coercive method to retain elected members within the confines of the party. This is however in stark contrast to the party cohesion that is often the defining feature in most advanced democracies in the world such as the United Kingdoms.[80] Party cohesion is built on a deep-rooted loyalty of the elected members towards the policies, programmes or ideologies of a political party. This is, however, severely lacking in India as is observed from the unprincipled and ideologically inconsistent defections that have been plaguing the Indian polity. Hence, the reliance on anti-defection law can only be reduced upon a successful venture by the Indian polity to inculcate a sense of party cohesion within the party cadre. In the unlikely situation that this succeeds - political parties could maintain party discipline through in-built principles and conventions rather than relying on coercive legislations such as the anti-defection law. Therefore, due to the absence of party cohesion and unwavering loyalty towards amassing riches and power over loyalty towards a political ideology or programme, India will have to pin its hopes on the defection laws to attain the same results.

[80]Kenneth Janda, 'Laws Against Party Switching, Defecting, or Floor Crossing in National Parliaments' (2009) Northwestern University 2/2009 <http://www.partylaw.leidenuniv.nl/uploads/wp0209.pdf> accessed 20 June 2020.

As discussed, every recommendation poses unique and significant problems that range from hindering the delicate and precarious separation of powers to the unwanted interference by other politically vested entities. However, while looking for alternatives it is important to grasp the complex nature of the problem which is essentially political. Hence, as reiterated earlier, resorting to legislative and legal reforms to remedy a political issue is often nothing but a piecemeal measure. However, given the difficulty and complexity of instilling the desired political culture, it is evident that it cannot happen overnight. Until such significant political changes take place, India will have to work within the confines of the anti-defection laws that are currently in use. As highlighted earlier the least intrusive method to do so would be to strengthen the role of the Speaker itself. To this end the initiative by the Supreme Court to curb the abuse of powers by the Speaker is to be lauded and is a welcome first step especially in the absence of other meaningful alternatives.