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DECODING THE BANNING OF UNREGULATED DEPOSIT SCHEMES ACT, 2019: A STEP TOWARDS PROTECTING THE INTEREST OF SMALL DEPOSITORS IN INDIA

Dr. Amit Bhaskar*

INTRODUCTION

Not long ago, the nation has witnessed the unfortunate incidents of Saradha chit fund and Rose Valley scams where in millions of depositors were defrauded of their hard earned monies by the fraudulent deposit taking companies. These companies took advantage of the unregulated nature of deposit taking schemes and also of the poor regulatory vigil. Further, there are multiple laws and regulators to regulate various deposits taking activities in the country. While Collective Investment Schemes (CIS) are regulated by the Securities and Exchange Board of India (SEBI) under SEBI (CIS) Regulations, the Reserve Bank of India (RBI) regulates deposits from Banking Companies and Non-Banking Financial Companies (NBFCs) under Banking Regulation Act, 1949. The Ministry of Corporate Affairs (MCA) regulates deposit taking activities of Non-Banking Non-Financial Companies under Companies Act, 2013. The Housing Finance companies also accept deposits which comes under the legal framework of National Housing Bank Act, 1987. There is no single comprehensive law to regulate various aspects of deposit taking activities in India. Taking advantage of this loophole, many fraudulent companies were operating in the market with the intent to defraud investors of their hard earned monies by offering them very high interest rates on deposits. The modus operandi used was to hire huge army of commissioning agents to aggressively target investors from rural, urban and semi urban areas of the country. The companies were paying very high amount of commission to these agents. With this process in place, these companies managed to raise huge amount of deposits and later on defrauded the depositors most of whom were from the lower strata of the society. In order to deal with this menace, the Indian Parliament has enacted The Banning of Unregulated Deposit Schemes Act, 2019 in the year 2019. The Act aims to ban deposit taking companies from promoting, operating, issuing advertisements or accepting deposits in any unregulated deposit schemes. The Act aims to completely ban Unregulated Deposits and makes it a punishable offence. The Act appears to be comprehensive in the sense that it covers different types of offences namely running of unregulated deposit schemes, fraudulent default in regulated deposit schemes and wrongful inducement in relation to unregulated deposit schemes.

* Associate Professor in Law, Alliance School of Law, Alliance University, Bangalore.

The Act is the culmination of what the then Finance Minister, Shri Arun Jaitely, had announced in his budget speech for the financial year 2016-2017 that a comprehensive Bill would be brought in to deal with the menace of illicit deposit taking schemes in India. The significance of the Act lies in the fact that there have been rising instances of poor investors being duped of their hard earned monies by fraudulent companies as evidenced in Saradha and Rose Valley chit fund scams.

In this paper, the author will discuss the main features of the Act in the light of the Parliamentary Standing Committee on Finance recommendation on the Bill. The author would also offer some suggestions to make the law and its implementation more robust to protect the interest of small investors and depositors in India.

BACKGROUND INFORMATION LEADING TO THE ENACTMENT OF THE BANNING OF UNREGULATED DEPOSIT SCHEMES ACT, 2019

The Saradha Group of Companies launched a financial scheme targeted at small investors in the early 2000s. The scheme became very popular due to its promise of high rate of return to the depositors. In order to sell the product, the Saradha also paid huge amount of commission in the range of 25%-40% to the commission agents so as to aggressively target the small depositors in far flung areas. With this modus operandi, Saradha managed to raise more than 2,000 crores of rupees from 1.7 million investors from West Bengal, Odisha and other neighbouring States. Later, it defaulted on its repayment. On investigation, it was found that the promoters of the company siphoned off the money by duping the depositors.¹ Another similar scam where investors were cheated through fraudulent deposit schemes was the scam by the Rose Valley Group of Companies.² The company, through a number of Ponzi schemes,³ cheated investors to

1 “What is Saradha Scam Case”; *available at*: <https://www.business-standard.com/about/what-is-saradha-scam> ; (Visited on July 1, 2021).

2 “Rose Valley Scam: All you need to know about the chit fund case”; *available at*: <https://www.businesstoday.in/latest/economy-politics/story/rose-valley-scam-all-you-need-to-know-about-the-chit-fund-case-167404-2019-02-04> ; (Visited on August 15, 2021).

3 A Ponzi scheme is an investment fraud in which clients are promised a large profit at little to no risk. Companies that engage in a Ponzi scheme focus all of their energy into attracting new clients to make investments. This new income is used to pay original investors their returns, marked as a profit from a legitimate transaction. Ponzi schemes rely on a constant flow of new investments to continue to provide returns to older investors. When this flow runs out, the scheme falls apart *available at*: [https://www.investopedia.com/terms/p/ponzischeme.asp#:~:text=A%20Ponzi%20scheme%20is%20a,to%20pay%20the%20earlier%20backers.](https://www.investopedia.com/terms/p/ponzischeme.asp#:~:text=A%20Ponzi%20scheme%20is%20a,to%20pay%20the%20earlier%20backers.;); (Visited on June 5, 2021).

the tune of crores of rupees on the fraudulent promise of higher return.⁴ The scam was committed by running illegal collective investment schemes in the state of West Bengal and in other neighbouring states. The modus operandi adopted in both the scams was almost similar. As per the estimate of Enforcement Directorate, the Rose Valley scam has been pegged at more than Rs 17,500 crore. However, as per another estimate by All India Small Depositors Association, the entire scam is more than Rs 40,000 crores. The Rose Valley is considered to be a bigger scam than Saradha scam. It was alleged that Rose Valley incorporated more than 27 group companies in order to run the illegal chit fund schemes. Another similarity between both the scam is the involvement of state political leadership of West Bengal. Both these scams speak volume of deep rooted nexus between politicians and fraudsters. Taking advantage of the loopholes in law and also deliberating devising these schemes in such a manner so as to escape regulatory jurisdictions, these companies were fraudulently operating in the market. Considering the larger public interest involved, the Supreme Court ordered Central Bureau of Investigation (CBI) investigation in Saradha scam.⁵ Later, the Rose Valley scam was also handed over to CBI.⁶ After taking over the investigation, the CBI, in its interim report before the Apex Court, has alleged that the West Bengal Police was not cooperating with the investigation.⁷ One of the unfortunate incidents noted in both the scam was the lapse on the part of regulatory authorities i.e. SEBI and RBI in detecting the fraud and failing to ensure effective monitoring over these schemes.⁸ In this context, it is to be noted that the Supreme Court has directed the CBI to expand the scope of investigation by looking into the dubious role of statutory auditors and the officials of regulatory authorities i.e. SEBI, RBI and Registrar of Companies (RoC). The objective is to find out whether the fraudulent act of Saradha was in collusion with the officials of regulatory authorities

4 “Rose Valley Scam: All you need to know about the chit fund case” Source by Business Today; available at: <https://www.businesstoday.in/current/economy-politics/Rose-Valley-Scam-all-you-need-to-know-about-the-chit-fund-case/story/316895.html>; (Visited on June 5, 2021).

5 The case in which investigation was transferred to CBI by the Supreme Court is *Subrata Chattoraj v. Union of India (UOI) and Ors.* (09.05.2014- SC).

6 “All you wanted to know about Rose Valley scam”; available at: <https://www.thehindubusinessline.com/opinion/columns/all-you-wanted-to-know-about-rose-valley-scam/article9468861.ece>; (Visited on July 7, 2021).

7 “Saradha Scam Probe: CBI moves Supreme Court, says Bengal police not sharing information”; available at: <https://economictimes.indiatimes.com/news/politics-and-nation/saradha-scam-probe-cbi-moves-supreme-court-says-bengal-police-not-sharing-information/articleshow/62110198.cms?from=mdr>; (Visited on June 5, 2020).

8 “Saradha Chit Fund Scam: CBI set to probe SEBI auditors”; available at: <https://www.deccanchronicle.com/140824/nation-current-affairs/article/Saradha-Chit-Fund-Scam-cbi-set-probe-sebi-auditors>; (Visited on June 18, 2021).

and whether they were aware of the ongoing deposit fraud. Since these deposit taking companies are Non-Banking Financial Companies (NBFCs), it comes under the regulatory jurisdiction of Reserve Bank of India as RBI is the regulatory body for NBFCs as per Banking Regulations Act, 1949. Since these companies are engaged in Collective Investment Schemes (CIS), they do also fall under the jurisdiction of Securities and Exchange Board of India (SEBI). Being a company, it also falls under the jurisdictional purview of Ministry of Corporate Affairs (MCA) through Registrar of Companies (RoC) and Regional Directors. However, as mentioned, these regulatory authorities failed to detect the fraudulent deposit taking activities. As a result, millions of investors' primarily small depositors were duped. The unearthing of the scam led to massive public uproar both inside and outside the Parliament. The sensitivity of the matter could be gauged from the fact that the Secretary, Department of Financial Services, Ministry of Finance, Government of India, while making oral presentation before the Standing Committee on Finance in September 2018, has given some data which is really astonishing.⁹

The Secretary said,

“Sir, the main features of the Bill and why it came up is that in the recent past there have been rising instances of people in the various parts of the country being defrauded by illicit deposit taking schemes. For instance, I will give you some data. In the past four years, 146 cases of this nature had been investigated by the CBI; 56 by ED; 32 cases involving 223 companies by the Ministry of Corporate Affairs and SIFO and 978 cases were referred to various investigating enforcement agencies by the State Coordination Committees. SEBI alone has passed 64 orders against unauthorised collective investment schemes in the last three years. That is the kind of the menace which unregulated deposit taking companies or the entities pose. The worst victims of these schemes are the poor and the financially not so fully aware population of the country...”

While highlighting the need of the Bill to deal with the menace, the Secretary further said, *“the Regulated Deposit Schemes are regulated by respective regulators which include SEBI, RBI, IRDI, NHB, PFRDA, EPFO etc. So, different companies get registered and regulated under the provisions of different Acts and schemes regulated by different regulators. The Bill essentially*

⁹ Seventieth Report of the Standing Committee on Finance (2018-2019) on the Banning of Unregulated Deposit Schemes Bill, 2019 available at: https://prsindia.org/files/bills_acts/bills_parliament/SCR-The%20Banning%20of%20Unregulated%20Deposit%20Schemes%20Bill,%202018.pdf (Visited on August 5, 2021).

seeks to ban those who are not registered anywhere and those who are not regulated anywhere. Those who are regulated entities continue to do the business but the unregulated ones do not....”

In the light of the above information, since there was no law in India banning unregulated deposit schemes, an Ordinance was brought in the Parliament banning such schemes completely. Later, the Ordinance was replaced by the Act. The Act is wider in its scope as it not only ban unregulated deposit but also make fraudulent acceptance of money under regulated deposit a punishable offence. Before going into the main features of the Act, it would be prudent to look into the Parliamentary Standing Committee observation on the Bill. But before that, it would be prudent to look into the plight of some of the small depositors who lost everything in the scam.

THE PLIGHT OF SOME OF THE SMALL DEPOSITORS WHO LOST EVERYTHING IN THE SCAM

The discussion in this research paper would be incomplete without narrating the plight of some of the depositors who lost everything in the scam. Nira Naskar, a poor villager from Bariuipur Puranadarpaa village of West Bengal, who survived on doing odd job, lost his Rs 2 Lakh saving in Saradha Chit Fund scam. The amount was deposited with the hope of getting attractive return which was promised. Now, with everything lost for him, he survives on his sons meagre earning.¹⁰ He sees no hope of recovering his money. Same is the story of Askar Mollaha who lost Rs 40,000 to Saradha Chit Fund scam which he had saved by selling vegetables. He is the resident of Jalalabad in Caning area of Bengal. Like others, he has also lost all hope of recovering the money back. As per one estimate, around 20 lakh people have lost their hard earned money in Saradha Chit Fund Scam. Another sad story is of Niranjana Sardar. He has a small stationary shop in South 24 Paraganas district of West Bengal. He lost around Rs 3600 in Saradha Chit fund scam.¹¹ Although the amount may appear to be small, but for the person like him who belongs to lower class, this amount hold importance in his life.¹² Another sad story is of Khaon Ali Sardar who had mortgaged his land for Rs 40,000 which he invested in Saradha Chit Fund with the hope of earning Rs 1 lakh in five years which was promised to him. He lost both

10 Article “Saradha Scam: The wait continues even after six long years” *available at:* <https://www.thehindu.com/news/national/other-states/saradha-scam-the-wait-continues-even-after-six-long-years/article61541440.ece>; (Visited on February 21, 2022).

11 *Ibid.*

12 Article, “A long way from Kolkata, Delhi...lies West Bengal’s Saradha chit fund country”; *available at:* <https://indianexpress.com/article/india/saradha-chit-fund-scam-west-bengal-lifes-savings-lost-to-scams-5576701/>; (Visited on February 21, 2022).

his land as well as the money of Rs 40,000 which he has raised by mortgaging his land.¹³ The fraud was not confined to the State of West Bengal but also spread to other neighboring States as well. For instance, around 95,000 depositors in Orissa also lost money to Saradha and other chit fund scams.¹⁴ There are countless and endless stories of the plight of millions of people especially those belonging to poor and lower middle class who lost everything in Saradha Chit Fund and Rose Valley scams.¹⁵

SEVENTIETH PARLIAMENTARY STANDING COMMITTEE ON FINANCE (2018-2019) (SIXTEENTH LOK SABHA) OBSERVATION ON THE BILL

While the Bill was presented in Parliament, it was sent to Standing Committee on Finance to make observations on the same. The Committee under the Chairmanship of Shri Veerappa Moily presented the Seventieth Report on Banning of Unregulated Deposit Schemes Bill, 2018. Some observations of the Standing Committee on the Bill were:¹⁶

Defining Unregulated: The Standing Committee recommended that the term “*Unregulated Scheme*” should be carefully defined so that the trade advances and vast informal banking sectors as well as other financial arrangements and channels of financing including startups and other entities in the informal sector do not, by default, fall under the definition of “*unregulated*”. The rural India depends upon informal banking sector where deposits are common features. The Committee said that the proper care should be taken that these informal financial channels do not fall under the definition of unregulated as any unregulated activities would be banned under the proposed law. Hence, there is a need for clear definition of “*unregulated*” so that innocent persons are not harassed at the hand of the enforcement authorities. The Committee further said that unregulated deposit scheme as defined in the Bill is to mean a scheme or an arrangement which is not a “*Regulated Deposit Scheme*”. Raising apprehension on the vague nature of definition, the Committee was of the view that the current definition leaves the scope for residual interpretation or extrapolation by default. The Committee felt that if this definition is accepted then wide and unfettered discretion would be available to the enforcement agencies. The Committee, therefore, recommended that unregulated schemes which is sought to be

13 *Ibid.*

14 Article, “95,000 in Odisha to get back money they lost to chit funds”; *available at*: <https://www.hindustantimes.com/india-news/95-000-in-odisha-to-get-back-money-they-lost-to-chit-funds/story-KmnK7M1UHQsaJh8mtOc4N.html>; (Visited on February 21, 2022).

15 Article “Saradha, Rose Valley scams hit small investors hard” *available at*: https://www.business-standard.com/article/news-ians/Saradha-Rose-Valley-Scams-Hit-Small-Investors-Hard-119020501581_1.html; (Visited on February 21, 2022).

16 *Supra* note 9 at 10.

banned should be coherently defined taking into account the ground realities and further it should leave no scope for misuse or vagueness.

Wider Scope of Wrongful Inducement with respect to Unregulated Deposit Scheme: The Committee was of the view that categories such as agents, sub- agents, intermediaries, brand ambassadors/ advertisers/media should be specifically included to give teeth to the provision which sought to prohibit and penalize wrongful inducement with respect to unregulated deposit schemes. The Committee was of the view that not only the company taking unregulated deposit but also those including brand ambassadors and agents should equally be liable and stringent punishment be imposed.

Adequate Market Intelligence: The Committee was further of the opinion that there should be robust market intelligence at the Central as well as State level to keep track on these companies. Further, there should be online data base accessible to the public through which they can ascertain as to whether a particular deposit scheme is regulated or not. There should be a mechanism through which public can file online complaint and can track it and also the response of the authority.¹⁷

Restitution to Deposit Holders Should be the first in Priority over claims of others: The Committee took note of glaring realities in which millions of people are cheated of their hard earned monies by these illegal deposit taking companies. The Committee observed that depositors should have payment in priority as against others if the assets of such companies are seized and also in case of winding up of these companies. The Committee said that the clause in the Bill which creates priority of any claim under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) 2002 and Insolvency and Bankruptcy Code, 2016 should be done away with and the deposit holders should rank in priority over all other debts including revenue and cess. The Committee also recommended that entire settlement/ repayment or restitution to the depositors should be done within a stipulated time frame. The disgorgement of assets of deposit takers should also include his benami assets, the Committee observed.

No Exclusive Jurisdiction to CBI: The Committee was of the view that since the matter may involve offences under various economic laws and also considering the huge workload of CBI, it would be prudent and practical to avoid exclusive jurisdiction to a single investigative agency.

17. Available at : <https://prsindia.org/billtrack/prs-products/prs-bill-summary-3286> ; (Visited on July 5, 2021).

Accordingly, the Committee recommended that “*or any other agency like SFIO depending upon the subject matter*” may be added after the CBI in the relevant provisions of the Bill. Since the fraud happens by alluring mostly poor and illiterate people, it would be not be prudent to exclude the jurisdictions of other law enforcement agencies.

Suo Motu Cognizance by Central Government: Since deposit taking activities have inter-state ramifications as witnessed in Saradha and Rose Valley Scams, the Committee recommended that Central Government shall have the power to take suomotu cognizance of the matter and refer it to investigative agencies for investigation.

SALIENT FEATURES OF THE BANNING OF UNREGULATED DEPOSIT SCHEMES ACT, 2019:

Banning of Unregulated Deposit Schemes: The Act completely ban unregulated deposit schemes.¹⁸ Section 3 of the Act says that on and from the date of commencement of this Act, unregulated deposit scheme shall be banned and no deposit taker, directly or indirectly, promote, operate, issue any advertisement, soliciting participation or enrolments in or accepts deposits in pursuance of *an unregulated deposit scheme*.¹⁹ The punishment for contravention is given in Section 21 of the Act which says that any deposit taker who solicits deposits in contravention of section 3 shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to five years and shall also be liable for fine which shall not be less than two lakh rupees but which may extend to ten lakh rupees. Sub-Section (2) of Section 21 says that any deposit taker who accepts deposits in contravention of section 3 shall be punishable with imprisonment for a term which shall not be less than two years but which may extend to seven years and with fine which shall not be less than three lakh rupees but which may extend to ten lakh rupees. Sub-Section (3) further says that any deposit taker who accepts deposits in contravention of section 3 and fraudulently commit default in repayment of such deposits or in rendering any specified service, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to ten years and shall also be liable for fine

¹⁸ The term “Deposit” is defined as Deposit’ means an amount of money received by way of an advance or loan or in any other form, by any deposit taker with a promise to return whether after a specified period or otherwise, either in cash or in-kind or in the form of a specified service, with or without any benefit in the form of interest, bonus, profit or in any other form”. In the definition itself, it excludes certain kinds of amounts received. For greater detail on the definition of Deposit, *available at:* <https://www.taxmann.com/post/blog/6831/banning-of-unregulated-deposits-definitions-relevant-for-the-purposes-of-the-banning-of-unregulated-deposit-schemes-act/> (Visited on July 18, 2021).

¹⁹ “The banning of Unregulated Deposit Schemes Ordinance 2019” *available at:* <https://www.khaitanco.com/thought-leadership/the-banning-of-unregulated-deposit-schemes-ordinance-2019> ; (Visited on March 5, 2021).

which shall not be less than five lakh rupees but which may extend to twice the amount of aggregate funds collected from the subscribers, members or participants in the unregulated deposit schemes.²⁰

Wrongful Inducement in Relation to Unregulated Deposit Schemes: The Act also prohibits wrongful inducement in relation to unregulated deposit scheme. Section 5 of the Act says that no person by whatever name called shall knowingly make any statement, promise or forecast which is false, deceptive or misleading in material facts or deliberately conceal any material facts, to induce another person to invest in, or become a member or participant of any unregulated deposit scheme. Under Section 23, the penal consequence is provided which says that any person who contravenes the provisions of section 5 shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to five years and with fine which may extend to ten lakh rupees.

Fraudulent Default in Regulated Deposit Schemes: Not only unregulated deposit scheme is banned but the Act also makes fraudulent default in regulated deposit scheme a punishable offence. Section 4 of the Act provides that no deposit taker, while accepting deposits pursuant to a regulated deposit scheme, shall commit any fraudulent default in the repayment or return of deposit on maturity or in rendering any specified service promised against such deposit. In section 4 of the Act, the law makers have used the word “Fraudulent” default. So, only those defaults which have been made with fraudulent intention will be liable under the Act. The word fraudulent is not defined in the Act. It should be given its natural ordinary meaning. The penal consequence for violation of section 4 is given in section 22 of the Act which says that any deposit taker who contravenes the provision of section 4 shall be punishable with imprisonment for a term which may extend to seven years, or with fine which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of the fraudulent default referred to in the said section, whichever is higher, or with both. Thus, the penal consequences for violation of section 4 are severe.

Competent Authority: Section 7 of the Act provides for Competent Authority. The Competent Authority has the power to provisionally attach the property if the deposit taker accepts deposit in contravention of Section 3. The Competent Authority shall have the same power as are vested

²⁰ “Unregulated deposit schemes to be banned”; available at: <https://www.thehindu.com/business/Economy/unregulated-deposit-schemes-to-be-banned/article26196968.ece> (Visited on July 15, 2021).

in the civil court under Civil Procedure Code, 1908 for the purpose of inquiry and investigation under the Act. When the provisional attachment is done by Competent Authority, the confirmation of attachment shall be done by the designated court under the Act after hearing the parties. The Competent Authority has a very important role to protect the interest of depositors under the Act. Under Section 10(2), if the Competent Authority has reason to believe that deposits are being accepted or solicited pursuant to unregulated deposit scheme, it may direct deposit taker to furnish such statements or information or particulars pertaining to deposit received by the deposit taker. Section 7 says that the appropriate government²¹ shall, by notification, appoint one or more officers, not below the rank of Secretary to the Government as a Competent Authority. Hence, successful implementation of the Act rests upon the efficiency of the Competent Authority.²²

Maintenance of Online Central Database: Section 9 of the Act provides for maintenance of Online Central Data base by the Central Government. It says that the Central Government may designate an authority which shall create, maintain and operate an online data base for information on deposit takers operating in the country. Section 10 (1) imposes obligations on the intimation of business by deposit takers to the Authority constituted under Section 9. It says that every deposit taker which commences or carries on its business as such on and after the commencement of this Act shall intimate all the requisite information pertaining to its business to the concerned Authority.

Constitution of Special Courts: Section 8 provides for constitution of Special Courts for such

21 The “Appropriate Government” is defined in Section 2 (1) of the Act which means in respect of matters relating to,— (i) the Union territory without legislature, the Central Government; (ii) the Union territory of Puducherry, the Government of that Union territory; (iii) the Union territory of Delhi, the Government of that Union territory; and (iv) the State, the State Government.

22 The Ministry of Finance has framed the Rule titled as Banning of Unregulated Deposit Schemes Rules, 2020. Rule 3 provides for the information to be taken into account in provisionally attaching the property by the competent authority. The factors are any complaint against the promotion or operation of Unregulated Deposit Scheme whether the complainant is a depositor in the said unregulated scheme or not. The language is wide enough for the competent authority to act on the complaint of any person who need not necessarily be the investor in such schemes. It could be any person or association which can make complaint to competent authority or any information received from the Central Government or any State Governments or Union territory Administrations or any law enforcement authority or agency or body under the charge of such Governments or Administrations regarding the promotion or operation of an Unregulated Deposit Scheme; information of any advertisement, whether in print or electronic media or both, inducing another person to invest in, or become a member or participant of any Unregulated Deposit Scheme; any other information that the Competent Authority has, that a deposit taker is soliciting or accepting deposits in contravention of the provisions of the Act. Rule 4 further provides for provisional attachment of both movable and immovable property. The Rule further provides that the Competent Authority shall prepare a list of depositors from whom the depositors have taken deposits. The Rule also provides for determining the assets and liabilities of unregulated deposit takers. For detail, please see the Rule.

area or areas or such case or cases, as may be notified in the notification by the Appropriate Government, in concurrence with the Chief Justice of the concerned High Court. Such Special Courts shall be presided over by a District Judge and shall have the jurisdiction in respect of any matter to which the provisions of this Act apply. Section 18 further lists out a number of powers of Designated Courts under the Act. One of the important powers of the Designated Court is to confirm the provisional attachment of the property of the deposit takers attached by the investigative authority.²³

Restitution to Depositors: Chapter V of the Act deals with the restitution of depositors. Section 12 under the said chapter provides for priority to be given to depositors' claims which shall be met out of the assets of the deposit taking companies in case the depositors suffer loss due to fraudulent conduct of these companies. It talks about payment in priority to deposit takers over all other taxes, debts and cess. Subject to the provisions of Securitization and Reconstruction of financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and Insolvency and Bankruptcy Code, 2016 (IBC), any amount due to the depositors from the deposit taker shall be paid in priority over all other debts including all revenues, taxes, cess and other rates payable to the appropriate government or local authority. Section 13 further provides that subject to SARFAESI Act and IBC, an order of provisional attachment passed by the Competent Authority shall have precedence and priority to the extent of the claims of depositors over any other attachment by any other authority competent to attach property for repayment of any debts, revenues, cess, taxes and other rates payable to the appropriate government or other local authority.²⁴

Overriding Nature of the Act: Section 34 of the Act provides that except as otherwise provided in the Act, the provisions of the Act shall have effect notwithstanding anything contained in any other law for the time being in force including any law made by any State or Union Territory. Section 35 further provides that provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Thus, application of other laws is not barred. However, in case of any inconsistency, the Act shall prevail except where exceptions have been provided under the Act itself.

²³ Available at : <https://legislative.gov.in/sites/default/files/A2019-21.pdf> (Visited on June 5, 2021).

²⁴ See Chapter V of the Act for more detail.

Offences to be Cognizable and Non-Bailable and Investigation to be conducted by CBI in certain cases: As far as the nature of offences prescribed under the Act is concerned, it says that every offence punishable under the Act, except under Section 22 (Punishment for contravention of section 4) and Section 26 (Punishment for contravention of section 10), shall be cognizable and non-bailable. As per Section 29, the police officer, on recording information about the commission of an offence under the Act, inform the same to the Competent Authority. Under Section 30, on the receipt of information under Section 29 or otherwise, if the Competent Authority has reason to believe that offence relate to a deposit scheme or schemes in which a) the depositors, deposit takers or properties involved are located in more than one State or Union Territory in India or outside India; and b) the total value of the amount involved is of such a magnitude so as to significantly affect the public interest, then the Competent Authority shall refer the matter to the Central Government for Investigation by the Central Bureau of Investigation (CBI). Under Section 30(2), the reference made by the Competent Authority shall be deemed to be with the consent of the State Government. On receipt of the reference, the Central Government may refer the matter to CBI. However, as noted, it is only in serious cases matter may be referred to CBI. Other than that, investigation into offences may be carried out by other investigative agencies including the state authorities. Thus, jurisdiction of the state investigative authorities is not barred and only in exceptional cases, the matter may be referred to CBI. This provision is in line with the Supreme Court order on transfer of investigation of Saradha Chit Fund scam to CBI due to its inter-state repercussions and larger public interest involved.

List of Regulated Deposit Schemes: Accepting the Parliamentary Standing Committee recommendation that a complete list of regulated deposit schemes should be provided in the Act itself so that left over deposit schemes could conveniently be categorized as “*Unregulated Deposit Schemes*”, the Act in its first schedule provides the list of regulated deposits and the respective regulators.²⁵

25 Please refer to First Schedule of the Act. Some of the regulators whose deposit schemes find mention in the First Schedule are those of SEBI, RBI, the Insurance Regulatory and Development Authority of India (IRDAI), the Pension Fund Regulatory and Development Authority (PFRDA), Employees Provident Fund Organization, National Housing Bank and Ministry of Corporate Affairs (MCA). Some other schemes which are put under the category of regulated deposit schemes are those of the State Governments and Union Territories and Central Registrar of Multi State Cooperative Societies. All the schemes of the above-mentioned regulators and of the State Government and Union Territory are regulated deposit schemes under the Act. Any deposit schemes outside Schedule 1 will automatically falls under the purview of Unregulated deposit schemes and hence liable for penal consequences.

SOME SUGGESTIONS FOR EFFECTIVE IMPLEMENTATION OF THE ACT

Use of Artificial Intelligence to keep track on Deposit Taking Companies in India: Artificial Intelligence (AI) is an important advancement in human technology. As most of the regulators all over the world are increasingly using AI to keep a close watch on the market to ensure regulatory compliance and also ensuring effective investors' disclosure norms, the same hold true for deposit taking companies in India. The Government should give it atop priority to have AI based monitoring over deposit taking companies in the country to protect the interest of depositors.

Increasing Manpower Strength of Reserve Bank of India (RBI) and Securities and Exchange Board of India (SEBI): The lack of manpower strength is one of the key issues baffling regulatory agencies in India. When the Saradha Chit Fund Scam was exposed, the stand taken by the regulatory agencies i.e. SEBI and RBI was that they do not have enough manpower strength to detect the fraudulent act of these companies in far flung areas of the country. However, it should not be the stand of SEBI and RBI (both headquartered in Mumbai) to adopt such escapist and evasive stand to leave the millions of small depositors in lurch. This is all the more so when millions of small depositors resides in rural and small towns. It is the solemn responsibility of the market regulators to protect the interest of small depositors by making active use of market intelligence. Further, the approach of the regulators must always be preventive rather than remedial (post damage scenario) in nature. It can never be the excuse of regulators in a mature capital market like India that it lacks manpower and intelligence strength to keep a close vigil on deposit taking companies. If the argument of manpower shortage is accepted, then India's deposit taking market will fell prey to unscrupulous elements and as a consequence deposit fraud would become unavoidable.

Mandatory Appointment of Independent Director in all Deposit Taking Companies: As per the Companies Act, 2013, there are only certain classes of companies which are mandated to appoint Independent Director. However, given the wide ranging impact these deposit taking companies have on the small investors and the larger public interest involved, the law should be amended to provide that every deposit taking company, irrespective of whether it falls under the threshold requirement for appointment of independent director, must appoint at least one Independent Director on its Board. This will go a long way in strengthening the corporate governance norms in these companies.

Appointment of Small Depositor Director in Deposit taking Companies: There should be a

mandatory provision for appointment of a director to be called Small Depositor Director on the Board of these deposit taking companies to further protect the interest of small depositors. This class of director should not be confused with Small Shareholder Director under the Companies Act. The MCA, in consultation with RBI and SEBI, can prescribe the terms and conditions for the appointment of Small Depositor Director. Generally, the director should be nominated by the recognized depositors associations in India.

Mandatory Forensic Audit of Deposit taking Companies: In addition to statutory audit, there should be forensic audit of the deposit taking companies once in every two or three years. In Saradha chit fund scam, it came to the notice of investigative agencies that statutory auditor connived with the company promoters in facilitating the deposit fraud. Hence, in such a scenario, completely relying on audit reports prepared by statutory auditors will not be a good idea considering the complicity of auditors in a number of corporate frauds in the country in the recent past. It goes without saying that the statutory and forensic auditors shall be different firms or entities.

Robust Market Intelligence: In order to prevent scams like Saradha in future, a strong market intelligence is the need of the hour. Apart from regional and zonal offices of regulators, the assistance of local agencies and organizations should also be taken. The target of these deposit taking companies are small and vulnerable investors in far flung areas of the country. In such a scenario, a strong local intelligence network with the provision of monetary award for those blowing the whistle would go a long way in preventing such scams. Had market intelligence been strong, the Saradha and Rose Valley scams could have been prevented or at least the gravity of fraud minimized.

Registration of Commissioning Agents: All commissioning agents working for the deposit taking companies shall be mandatorily registered with a Central database managed by the MCA with Aadhar Card number. This will go a long way in ensuring transparency in the working of these agents. In Saradha scam the commission agents were being paid commission between the ranges of 25%-40% to aggressively market and sell the company deposit schemes in far flung areas of the country. This was one of the reasons as to why Saradha managed to raise funds to the tune of crores of rupees from the small depositors. These commission agents are connecting link between the deposit taking companies and the retail investors and hence there must a specific regulation to deal with these commission agents. The regulations must define the Code of Conduct for these commissioning agents and penal consequences for non-compliance.

SOME MORE SUGGESTIONS AT THE GROUND LEVEL

Here, the author would like to make some more suggestions which need to be followed at the ground level for ensuring effective implementation of the Act.

- Use of Local Intelligence Network in the ground to keep a close scrutiny on deposit taking companies and their commissioning agents.
- Constitution of Deposit Grievance Redressal Machinery in every District under the direct monitoring of the District Magistrate to help the ordinary depositors for effective redressal of their day to day grievances against the companies and their agents.
- An effective procedure for prompt reporting of any fraudulent/suspicious activities in such companies by the employees/depositors/agents to the local police which shall be forwarded to the District magistrate who, in turn, shall conduct preliminary enquiry without delay.

CONCLUDING REMARKS

The Act brings a lot of promise and hope to protect the interest of millions of small depositors in India who constitute an integral part of the financial system of our country. The successful implementation of the Act will depend upon the effective functioning of the competent authority under the Act and also on the close coordination between all the regulators. It will also depend upon the strong and robust market intelligence infrastructure to obtain timely information about the activities of these companies so that the red signal could be raised at the earliest in case of any suspicion activities. The role of Ministry of Finance will also be equally significant as it is administering the implementation of the Act.

FANTASY LEAGUE AND ONLINE BETTING: LEGAL SCENARIO IN INDIA

Dr. Anand Pawar*

INTRODUCTION

The global online gaming market is anticipated to grow at a CAGR of 11.9% during next 4-5 years period. The growth of the market is attributed to the growing adoption of video games as a leisure activity among all age groups. In addition to this, the rising trend of professional gaming is also anticipated to aid the expansion of the market. Moreover, macro-economic factors such as increasing internet penetration, availability of low-cost game-centric smartphones, increasing disposable income, and further development of telecommunication infrastructure will also aid in the growth of the market.¹ The enormous popularity of fantasy sports can be attributed in part to the services offered on internet websites. The websites provide a platform for real-time statistical updates and tracking, message boards and expert analysis.

The insatiable appetite of the Indian consumer coupled with the emergence of affordable smart phones and improved internet speeds has seen an upsurge in the number of people partaking in fantasy sport. This is best represented by the success of IPL 2020 sponsor Dream 11, which hit 100 million users in March 2021.² Similarly, the newly established Mobile Premier League (MPL) has grown swiftly, becoming the shirt sponsor for the Indian cricket team and even expanding its reach overseas.³ To cap this all off India has overtaken the USA to become the largest fantasy sport user base,⁴ generating national revenue of 340 billion USD in 2020.⁵

* Professor of Law and Registrar, Rajiv Gandhi National University of Law, Punjab.

- 1 'Outlook on the Online Gaming Global Market to 2026 - by Game Type, Device Type and Revenue Model' (October 26, 2021), available at: <https://www.globenewswire.com/en/news-release/2021/05/31/2238707/28124/en/Outlook-on-the-Online-Gaming-Global-Market-to-2026-by-Game-Type-Device-Type-and-Revenue-Model.html>. (Visited on May 31, 2021).
- 2 Mishra Digbijay, 'Dream 11's valuation nears \$5 billion on \$400 million fund-raise', The Times of India (October 28, 2021), available at: <https://timesofindia.indiatimes.com/business/india-business/dream-11-valued-at-close-to-5-billion-after-400-million-fund-raise/articleshow/81668237.cms> (Visited on October 28, 2021).
- 3 Anne SalzPeggy, 'The New Playtime: The Secret To MPL's Massive Mobile Success', Forbes Magazine (October 28, 2021), available at: <https://www.forbes.com/sites/peggyannesalz/2020/04/09/the-new-playtime-the-secret-to-mpls-massive-mobile-success/?sh=45f275dc5513> (Visited on April 9, 2020).
- 4 Kathuria Gautam, Venkatesh Karthik, 'Online Fantasy Sports in India Need Uniform Legislation and Regulatory Certainty', The Bastion (October 27, 2021), available at: <https://thebastion.co.in/politics-and/sports/business-of-sports/online-fantasy-sports-in-india-need-uniform-legislation-and-regulatory-certainty/> (Visited on October 27, 2021).
- 5 India Brand Equity Foundation, available at: <https://www.ibef.org/research/newstrends/indian-fantasy-sports-platforms-report-three-fold-jump-in-fy20-revenue>

introduced in the 16th century by the Mughal emperors and called the game “Ganjifa”.⁶

The capitalist approach has developed multiple ways to convert and customized these games as per need of the market and provided on multiple platform as a means for not only entertainment but also to create chance to make money. How far the possibility of earning financial gain by playing these online/fantasy games have captured the substantial market as part of sports industry and still creating multiple opportunities so rapidly to flourish in next few years, is the main concern to evaluate within the existing legal norms.

One thing which is fundamental for any game is its unpredictability, and because of which people inclined towards making bets on various aspects of the game. In India, such activities are been made illegal by the Public Gambling Act of 1867. As with the growth of technologies, this betting tradition changes its shape and now many companies offer a very systematic and sophisticated system of making bets which is independent of final outcome of the game. Online Fantasy Sports Games is one such arena which facilitate such transactions where the individual user can participate in various contest, and use their skills to predict one set of teams, which can be the potential winner in terms of the marking fixtures provided by the organizers.

ONLINE FANTASY SPORTS GAMES

In the fantasy sports games the fantasy sports games providers provides scope to play live games on a given day where the users drafting fantasy teams based on certain conditions from a list of players to play that scheduled sports event. The users pay an entry fee to enter a contest and it is pooled in for distribution among the users (“Entry Pool”) after deduction of a service/administrative fee by fantasy sports games providers. Fantasy sports leagues allow participants to "manage" virtual teams of professional players in a given sport throughout a sport's season and to compete against other fantasy sports participants based upon the actual performance of those players in key statistical categories. Fantasy sports games would not have acquired the present status without the online platforms to be recognized as Online Fantasy Sports Platforms (OFSP),⁷ being the service providers as intermediaries how far their liabilities can be fixed is also a concern for the regulators of the market, precisely in relation to legislative norms.

6 Education World *available at*: <https://www.educationworld.in/popular-games-that-originated-in-ancient-india>. (Visited on October 27, 2021).

7 The Online Fantasy Sport Platform (OFSP) includes several players such as Dream 11, My 11 circle, My Team 11, Howzat Fantasy, etc.

Fantasy sports leagues allow fans to use their knowledge of players, statistics and strategy to manage their own virtual team based upon the actual performance of professional athletes through a full season of competition. In the early days of fantasy sports, participants compiled and updated the players' statistics manually. The technology also allows for automatic statistic updates for players and teams and access to expert fantasy sports analysis. As a result, fantasy sports have become much more accessible and popular throughout the country.

This aspect of entertainment has taken a leap towards gaining monetary benefits by means of betting or gambling. The basic criteria of evaluating a particular event of fantasy sports still roam around its nature as the game of skill or mere chance.

LEGISLATIVE RESPONSE

Stating a Claim under Qui Tam Laws

In USA the law classified as *Qui Tam Laws*⁸ have a specific application in reference to fantasy sports as the law empowers the family members/dependent to claim compensation against organisers of such games fall under the criteria of these legislations. Gambling *qui tam* statutes are applicable in various states in US like District of Columbia, Georgia, Illinois, Kentucky, Massachusetts, New Jersey, Ohio and South Carolina. Courts have long held that the *qui tam* statutes must be narrowly construed because they are penal in nature.

In 2018 when the US Supreme Court decided, in *Murphy v. National Collegiate Athletic Association*⁹ that the Professional and Amateur Sports Protection Act (PAPSA), the 1992 federal law that prohibited states from authorizing sports gambling, was unconstitutional. This opened the floodgates and before long a number of states enacted legislation legalizing various forms of sports gambling including DFS.¹⁰

Since then, both DraftKings and FanDuel have become publicly listed companies on the stock market and partnered up with a number of professional sports leagues. In 2019 DraftKings entered into a long-term partnership with the National football league (NFL), which saw it become the exclusive NFL sponsor for DFS and even obtain exclusive access to NFL branding.

8 The Qui Tam statutes derive from the 1710 Statute of Queen Anne, an English statute that authorized gambling losers and informers to sue to recover losses incurred "at any time or sitting by playing at cards, dice, tables or other game or games whatsoever or by betting on the sides or hands of such as do play at any of the games aforesaid."

9 *Murphy v. NCAA*, 138 S.Ct. 1461 (2018)

10 *Id.*

While it may be a step too far to expect the Supreme Court of India to legalize betting as a whole, it would certainly help operators if state laws banning OFSPs were declared illegal like in the US.¹¹

WHETHER PAYMENT OF AN ENTRY FEE IN FANTASY SPORTS LEAGUES IS GAMBLING?

Under New Jersey's *qui tam statute*, as a matter of law, the payment of an entry fee to participate in a fantasy sports league is not wagering, betting or staking money. New Jersey allows recovery only of "wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event."¹²

In any fantasy sports league participants pay a set fee for each team they enter in a fantasy sports league. This entry fee is paid at the beginning of a fantasy sports season and allows the participant to receive related support services and to compete against other teams in a league throughout the season. The purpose of which is to offer set prizes for each league winner and for the overall winners each season. These prizes guaranteed to be awarded at the end of the season, and the amount of the prize does not depend on the number of entrants. The organizers are neutral parties in the fantasy sports games — they do not compete for the prizes and are indifferent as to who wins the prizes. Defendants simply administer and provide internet-based information and related support services for the games. Plaintiff does not allege otherwise.

New Jersey courts have not addressed the three-factor scenario of (1) an entry fee paid unconditionally, (2) prizes guaranteed to be awarded and (3) prizes for which the game operator is not competing. Courts throughout the country, however, have long recognized that it would be "patently absurd" to hold that "the combination of an entry fee and a prize equals gambling," because if that were the case, countless contests engaged in every day would be unlawful gambling, including "golf tournaments, bridge tournaments, local and state rodeos or fair contests, . . . literary or essay competitions, . . . livestock, poultry and produce exhibitions, track meets, spelling bees, beauty contests and the like," and contest participants and sponsors could all be subject to criminal liability.

Courts have distinguished between *bona fide* entry fees and bets or wagers, holding that entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of

11 Weston Maureen, Daily fantasy sports and the law in the USA, Int Sports Law J (2021).

12 See N.J.S.A.2A:40-1.

participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize). Courts that have examined this issue have reasoned that when the entry fees and prizes are unconditional and guaranteed, the element of risk necessary to constitute betting or wagering is missing:

"A bet is a situation in which the money or prize belongs to the persons posting it, each of whom has a chance to win it. Prize money, on the other hand, is found where the money or other prize belongs to the person offering it, who has no chance to win it and who is unconditionally obligated to pay it to the successful contestant." Therefore, where the entry fees are unconditional and the prizes are guaranteed, "reasonable entrance fees charged by the sponsor of a contest to participants competing for prizes are not bets or wagers."¹³

Plaintiff incorrectly argues that the case law cited by Defendants is inapplicable because it applies only to games of skill. To the contrary, none of the decisions cited by Defendants turn on whether the activity in question is a game of skill or chance. Indeed, courts have made clear that the question whether the money awarded is a bona fide prize (as opposed to a bet or wager) can be determined without deciding whether the outcome of the game is determined by skill or chance.¹⁴

Plaintiff's argument that the distinction between "bets" and "entry fees" is meaningless in the context of a lottery is similarly unavailing. In his brief in opposition to Defendants' motions to dismiss, Plaintiff states that "Defendants operate an enterprise that has all of the necessary elements of gambling: 'prize, chance and consideration.'" In the very next line, Plaintiff states that those three elements are essential of a lottery, however a separate statutory scheme governs lotteries.

As a matter of law, the entry fees for fantasy sports leagues would not be considered as "bets" or "wagers" because (1) the entry fees are paid unconditionally; (2) the prizes offered to fantasy sports contestants are for amounts certain and are guaranteed to be awarded; and (3) Defendants do not compete for the prizes.

The United Kingdom (UK) has a significantly more settled position with regard to fantasy sport. In the UK, fantasy sport is considered as a form of betting or gambling under the Gambling Act

¹³ *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85, 86-87 (Nev. 1961). See also *Am. Holiday Ass'n*, 727 P.2d at 810.

¹⁴ See *Las Vegas Hacienda*, 359 P.2d at 87.

2005.¹⁵ The gambling commission further plays the role of an industry regulator. With regard to OFSP operators, they require not only a pool betting operating license but also a gambling software license before they can advertise their services to the public in any form. These two licenses are required for all OFSPs that are run as a business and generate profit. An OFSP that doesn't function in this way does not need the two aforementioned licenses.¹⁶ This licensing system, with an industry regulator watching over operators has proved effective in the UK and would certainly work in India as well. This can be seen from the success of the recent licensing regimes instituted in the some of the North Eastern states.

Australia has historically adopted a very liberal stance to betting and gambling. This has seen the growth of a large gambling industry within the country, with sports betting contributing a great deal to this billion-dollar industry. This exceedingly liberal approach has however caused some concern in recent years, over untraceable illegal betting activities.

However, while this may be the case, there has been active regulation within Australian states and territories to control and manage the majority of the gambling activities in the country. That is, every Australian state and territory has in place its own unique piece of legislation on gambling. While the Australian approach may be unsuitable to the Indian context, it nevertheless shows us the growth potential of OFSPs and the immense revenue that they bring in when allowed to thrive.¹⁷

In India the 276th recommendation of the Law Commission of India suggests that skill-based games may be exempted from the ambit of gambling. However, no specification was made with respect to fantasy games qualifying as a 'game of skill'. The sports being the concern of central and state government the constitutional scheme provide the scope to make appropriate regulations to both the legislators. While most States prohibit gambling in common houses, few States such as Sikkim, Nagaland etc., have regulated online gaming through respective State legislations. However, some States such as Telangana, introduced Gaming (Amendment) Act, 2017, with an object of zero – tolerance towards any form of gambling which has a serious impact on the financial status and well – being of common public. This amendment has widened

15 Public Gambling Act, 2005, United Kingdom.

16 Schollenberger David, 'Regulation of fantasy sports in the US and UK', iBG, *available at*: <https://igamingbusiness.com> (Visited on October 23, 2021).

17 Das Muralee, International Regulation of Fantasy Sports: Comparative Legal Analysis of United States, Australian, and Asian Laws, Vol 8, UNLV Gaming Law Journal, 104, 1, (2018), *available at*: <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1133&context=glj>

the scope of what constitutes wagering and betting. It also includes “any act of risking money on uncertain event, including on a game of skill”. This amendment has been challenged in the respective High Court. The status of which is still pending to the context of determining its scope.

The State of Tamil Nadu has also introduced an ordinance banning games which involve any kind of wagering or betting in cyberspace by using computers or any other communication device, common gaming houses and electronic transfer of funds to distribute winnings or prize money. The ordinance provide for punishment of imprisonment as well as fine up to the amount of rupees ten thousand.

OTHER REGULATORY MECHANISMS

"Federation of Indian Fantasy Sports" (FIFS) is a Section 8 Company incorporated under the Companies Act, 2013, for the purposes of self-regulation and promotion of best practices in online fantasy sports services and contests offered in India. It has issued a charter for OFSPs, which *inter alia imposes* certain conditions mentioned in Rule 1.3 with different sub-clauses.¹⁸

The charter ensures that the game run by its members is purely skill based and does not fall under the ambit of 'gambling'. The FIFS is regulated by an Ombudsman which mandates a retired Judge of the Supreme Court or a Chief Justice of any of the State High Courts, to preside and ensure that the disputes and gradiences related to OFSPs are redressed in a fair and just manner.

18 "1.3.6 Pay-to-play contest formats on an OFSP will not be offered by a Member to users who are less than eighteen (18) years of age.1.3.12 In contests on an OFSP, the skill component of such contests is predominantly determined via a manual team selection by users. As such, users will not be offered the opportunity or option to auto-select or auto-fill any part or portion of their fantasy sports teams.1.3.13 All users will be restricted from drafting or editing their fantasy team after the passing of a predetermined and pre-declared deadline. All contests on an OFSP will lock prior to the commencement of the underlying real-world competition to which the contest relates, and users will not be permitted to make any changes to their fantasy team during the course of a match or afterwards, which affects the tabulation of points with respect to such match.1.3.14 A team selection by a user will have to conform to the skill-set based combinations prescribed by a Member's rules and terms and conditions.1.3.15 A contest on an OFSP will require a user to draft a fantasy team composed of at least the number of athletes that would comprise a starting line-up of one (1) team in the real-world sports match; provided always that the minimum number of players in a fantasy team shall be five (5).1.3.16 At any given time, a user will be restricted from selecting more than seventy five percent (75%) of his/her fantasy players that constitute his/her fantasy team or squad from a single real-world team/squad in a single contest. Any fractional amounts shall be rounded down to the nearest whole number.1.3.17 Each Member will ensure that only real-world players and athletes are permitted to be drafted for fantasy sports teams.1.3.18 A winning outcome will not be based on the score, point-spread, or any performances or results or partial results of any single real-world team or any combination of real-world teams.1.3.19 A winning outcome will not be based on the score, point spread or performance of a single athlete in any single real-world sports match. 1.3.20 The winning outcome of a contest on an OFSP offered by a Member will not be based on E-sports contests or virtual, randomized, simulated or historical sports matches.1.3.27 Members will not offer gambling services"

Presently, the Ombudsman is Chaired by Hon'ble Mr. Justice A.K. Sikri (retired).

The FIFS has also issued Self-Regulation Guidelines on Advertising Online Gaming by adopting IMAI Guidelines, to ensure that the advertisements are fair, transparent and not misleading. The guidelines prohibit advertisements by members suggesting any gambling/betting activities, which in turn attracts penalties for violation. It is ensured that persons below 18 years of age are not allowed to participate. It also ensures that the public is not misled or cheated and there is transparency in prizes and other financial attributes.

INTERMEDIARY'S RESPONSIBILITIES FOR ONLINE PLATFORM

"Intermediary" is defined in Section 2(1) (w) of the Information and Technology Act 2000. "Intermediary" with respect to any particular electronic message means any person who on behalf of another person receives stores or transmits that message or provides any service with respect to that message. The liability of the intermediaries is lucidly explained in the section 79 of the Act.

Under the IT Act, 2000, intermediary was defined¹⁹ Furthermore, search engines, online payment sites, online-auction sites, online market places and cyber cafés are also included in the definition of the intermediary. The concept on which the liability of intermediaries may be determined is the concept of due diligence. This principle is a test to determine the liability whereby putting the responsibility on the intermediaries to take appropriate measure for scrutiny of contents and activities provided on the respective platform. Intermediaries have to restrict the unauthorized contents as well as misuse of the platform from any unlawful act. To save the intermediaries from being liable to compensation the Intermediaries would have to determine whether the content violates any provisions of the regulations.²⁰ In order to minimize the risk of liability, they may block more content than required. Hence the recently enforced regulations are still required to be tested on multiple criteria to frame the liabilities of the intermediaries in reference to online fantasy sports platform.

INDIAN LEGISLATIVE FRAMEWORK

In India, skill-based online games are permitted, but games of chance are prohibited under the

19 "Any person, who on behalf of another person, receives stores or transmits that message or provides any service with respect to that message. However, the Information Technology Amendment Act, 2008 has clarified the definition "Intermediary" by specifically including the telecom services providers, network providers, internet service providers, web-hosting service providers.

20 Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021.

Public Gambling Act, 1867. In a number of cases, Indian courts have ruled that games in which a candidate's success is contingent on the use of "substantial talent" are exempt from Indian gaming laws, even though they are games of chance. In *Junglee Games &ors. v. State of Tamil Nadu*,²¹ the Hon'ble Madras High Court completely struck down a Tamil Nadu Government law that put a blanket ban on all forms of online gaming, including games of skill. The Court was of the view that imposing a blanket ban fell afoul of Article 19(1)(g) of the Constitution of India and hence, completely quashed the amendment that brought about the ban on all forms of online game. Similarly, in *Games craft Pvt. Ltd. Technologies v. State of Kerala*²² the Hon'ble Kerala High Court quashed a Kerala government notification under the Kerala Gaming Act that put a ban on online Rummy.²³ Though it doesn't pertain to Fantasy Sports, per se, but the skill element in the game of Rummy cannot be ruled out. Rummy, in its physical form has been held to be a Game of Skill and hence, the Court was of the opinion that it was wrong to assume, on part of the state that a game played online loses its skill element. Several states have also passed legislation exempting "games of ability" from gambling regulations.²⁴ Since online gaming is a topic covered by the State List, states are free to enact regulations in this region.

The Indian Fantasy Sports Federation (FIFS) is the industry's self-regulatory body for fantasy sports in India. The FIFS was founded to protect the interests of customers and to provide best practices for the Indian Fantasy Sports industry. In addition, the FIFS publishes a Charter²⁵ for Online Fantasy Sports Sites, which lays out the ground rules for its members. As per the rules, the Operator must obtain and request an assessment and opinion from the FIFS Innovation Committee on the proposed competition as a "game of skill" for the online fantasy sports platform in order to be eligible for confirmation by the Board of Governors (OFSP).

“In December 2020, The NITI Aayog has recognized the various positive judgments on legality of fantasy sports, as well as the legislative void on the issue, noting that the platforms are

21 W.P.No.18022 of 2020, (February 08,2022) available at: https://www.livelaw.in/pdf_upload/junglee-games-india-private-limited-v-state-of-tamil-nadu-397904.pdf (Visited on February 08, 2022).

22 *Gamescraft Pvt. Ltd. Technologies v. State of Kerala* & connected matters Criminal Petition No. 2681 of 2019.

23 *Id.*

24 Several Indian states have legalized lotteries. These are Goa, Kerala, Arunachal Pradesh, Assam, Maharashtra, Madhya Pradesh, Mizoram, Manipur, Meghalaya, Punjab, Nagaland, West Bengal, and Sikkim. Online gambling and land-based casinos are legalized in Goa, Sikkim, Nagaland, and Daman under the Public Gambling Act, 1976. E-gaming (games of chance) has been legalized in Sikkim and Nagaland. Telangana and Arunachal Pradesh consider the game of skill as illegal as per the Telangana State Gaming Act, 1974.

25 Federation of Indian Fantasy Sports, Charter for Online Fantasy Sports Platforms, available at: <https://fifs.in/wp-content/uploads/2021/02/FIFS.Charter.wef-01Sep20201.pdf> (Visited on February 01, 2022).

“having to shelter under an undefined exception to the state gambling and public order laws”. A draft²⁶ for discussion has consequently been prepared for guiding principles to the Online Fantasy Sports Platforms (OFSPs). The draft points out the following impediments to the industry as a result of the legislative void-

- There is no objectively definable test to assess and determine whether a game will be characterized as a game of skill or chance. This puts the onus of assessment on the developer of the game itself. Without clarity, innovation and development may be stifled.²⁷
- The variance of regulation among states poses heavy compliance burden on the platforms.²⁸
- Differential regulation among states also results in burden for consumers with respect to penal compliance. For example, a user living normally in Delhi may face prosecution if using the app within Nagaland.²⁹

The draft has also put forth draft guiding principles, which include compliance with advertising guidelines, age limits, and communications to states for requests of immunity.”

With regards to advertisements of fantasy sports and online gaming, the Advertisement Standards Council of India (“ASCI”) had also released certain guidelines in December 2020.³⁰ Under these, all such advertisements should contain certain mandatory disclosures and statements (whether such advertisement are in print or audio/ video format) such as; (i) the game involves financial risk and may be addictive and that the players should play at their own risk; (ii) the advertisement should not present online gaming for real money winnings as an income opportunity or an alternative employment option; (iii) the advertisement should not suggest that a person engaged in gaming activity is more successful as compared to others; and (iv) the advertisements should not depict any person below the age of 18 years or who appears to be below 18 years of age, engaged in the game of online gaming for real money winnings or suggest that such persons can play these games.

26 Guiding Principles for the Uniform National-level Regulation of Online Fantasy Sports Platforms in India, available at: https://www.niti.gov.in/sites/default/files/2020-2/FantasySports_DraftForComments.pdf (Visited on January 08, 2022).

27 *Ibid.*

28 *Ibid.*

29 *Ibid.*

30 Advisory No. 4407/13/2019-CC-I, Ministry of Information and Broadcasting available at: <https://mib.gov.in/sites/default/files/Advisory.pdf> (Visited on January 22, 2022).

Moreover, online fantasy sports platforms are also required to follow the draft guidelines for Advertising on Digital Media (“Influencer Guidelines”)³¹ issued by the ASCI in February 2021. “Considering the impact of influencers on consumers, the Influencer Guidelines suggests certain standards to be followed by influencers. These standards include specific disclosures of the nature of posts by making a prominent labeling of each digital media posts, and also provides for the specifications of labeling or disclosures to be followed in picture posts, video posts and audio posts. These guidelines have been prescribed so that accurate or correct information regarding the financial and other risks associated with online games are portrayed to the consumers.”

JUDICIAL INTERPRETATION

The legality of such a business model have been questioned and Courts have held that a fantasy sport is predominantly a '*game of skill*' and not a '*game of chance*' hence does not qualify as gambling. The legality of fantasy sports has been discussed elaborately in the latter half of this article.

In the landmark case of *State of Bombay v. R.M.D. Chamarbaugwala v. Union of India*,³² the Court had laid down that the term 'mere skill' will include the games which are primarily games of skill and have interpreted that 'mere skill' will only be restricted to:

“Games which are preponderantly of skill and have laid down that: competitions where success depends on substantial degree of skill will not fall into category of gambling”; and; “Despite there being an element of chance, if a game is preponderantly a game of skill, it would nevertheless be a game of mere skill”.

A game may be of chance or of skill, or a combination of both elements. A game of chance is determined entirely or largely by luck, whereas a game of skill depends on the players superior knowledge, experience and adroitness. The Court concluded that though an element of chance exists in a skill game, the element of skill predominates over the element of chance.

The High Court of Punjab and Haryana in 2017 became the first Indian court to rule a fantasy

31 Press Release, ASCI issues final Guidelines for Influencer Advertising on Digital media, launches ASCI.Socialplatform, available at: <https://ascionline.in/images/pdf/press-release-influencer-guidelines-2021.pdf> (Visited on January 22, 2022).

32 AIR 1957 SC 628.

sports game to be a game predominantly based on skill.³³ The plaintiff in this matter was registered as a player on the platform Dream11.com, which was operated by the respondent company, Dream11 Fantasy Private Limited (“Dream11”). He lost while playing fantasy sports games tournaments offered on Dream11.com. The plaintiff moved the P&H High Court alleging that fantasy sports was not based on skill and that Dream11 was carrying on business covered within the definition of 'gambling' under the gambling legislation applicable to the state of Punjab.

The relevant part of the judgment to determine the nature of Dream11 the criteria to be considered as skill in comparison to just a chance is elaborated as:

“It has been found that horse racing like foot racing, boat racing, football and baseball is a game of skill and judgment and not a game of chance. The finding squarely applies to the present case. Even from the submissions and contentions of respondent-company and factual position admitted in writ petition, I am of the view that playing of fantasy game by any participant user involves virtual team by him which would certainly requires a considerable skill, judgment and discretion. The participant has to assess the relative worth of each athlete/sportsperson as against all athlete/sportspersons available for selection. He is required to study the rules and regulations of strength of athlete or player and weakness also. The several factors as indicated above submitted by the respondent-company would definitely affect the result of the game.

The P&H High Court relied on the Supreme Court's decision in the Lakshmanan case. The P&H High Court observed that playing fantasy sports games required the same level of skill, judgment and discretion as in case of horse racing. The P&H High Court relied on the following arguments put forth by Dream11 adjudicating the fantasy sports game offered by Dream11 to be a 'game of skill'

In deciding whether the game of rummy is a game of mere skill or mere chance. The Supreme court held that rummy is not entirely a game of chance and there is a considerable amount of skill required in it. Also, it allowed the establishment to collect a small fee for maintaining and running the games of skill.³⁴ Horse racing was excluded from gambling and it was held that it is a game of skill. Horse racing does not merely dependent on accident or chance but several other factors like training of the horse, training given to the rider, the pedigree of the animal, etc³⁵ The

33 *Shri Varun Gumber v. Union Territory of Chandigarh and others*, CWP No.7559 of 2017.

34 *State of Andhra Pradesh v. K Satyanarayana*, 1968 SCR (2) 387.

35 *K.R Lakshmanan v. The State of Tamil Nadu*, 1996 SCC (2) 226.

Bombay high court discussed the scope of services offered by Dream11 in light of the Central goods and services tax act, 2017. The money pooled in the dream11 escrow account would be deemed as an 'actionable claim' under Entry 6 of Schedule III referred to in Section 7(2). It was observed by the court that Dream11 fantasy sports is a game of skill as success depends upon the participant's skill based on superior knowledge, judgment, and attention. Thus, it is outside the purview of betting, gambling, or lottery.

Fantasy sports are not the game of chance but the game of skill where the team is formed based on the knowledge and experience of the participant and the outcome is not influenced by any selection made by the participant but on the performance of the real-life players. Therefore, they are not falling under the ambit of gambling and betting.³⁶

CONCLUSION

In order to let OFSPs continue to grow, we need to bridge the gap between participants and operators to ensure that the industry grows in a healthy manner without the continuous disruption that it has been subject to in recent times. We need uniform laws which explain what skill games are and how their differ from other forms of gaming. We also need an effective, tried and tested form of regulation that has little chance of failure. Most importantly we need to bridge the gap between participants and operators to ensure that the industry grows in a healthy manner without the continuous disruption that it has been subject to in recent times. NITI Aayog suggested the formal recognition of fantasy sport as an industry, with self-regulation as the ideal mode of governance.³⁷ The concept of self-regulation has been supported by lawyers in the industry as well,³⁸ however there is little to suggest that this formula might actually work. In fact, there are studies that suggest that industry self-regulation could result in a very watered-down system that focuses on obtaining maximum support rather than the best outcome. There is also the problem of compliance and oversight. In the absence of effective surveillance and monitoring industry participants will have little motivation to actually regulate. Considering the immense growth potential of fantasy sport in India, it is of utmost importance that it be regulated

³⁶ *Gurdeep Singh Sachar v. Union of India* SLP (crl.) Dairy no. 42282 of 2019

³⁷ NITI Aayog, Guiding Principles for the Uniform National-Level Regulation of Online Fantasy Sports Platforms in India, available at: https://niti.gov.in/sites/default/files/2020-12/FantasySports_DraftForComments.pdf, (Visited on October 28, 2021).

³⁸ Shroff Rishabh, 'Self Regulation – A Gamechanger for Online Fantasy Sport', Cyril AmarchandMangaldas Blog, available at: <https://corporate.cyrilamarchandblogs.com/2020/10/self-regulation-a-gamechanger-for-online-fantasy-sport/> (Visited on October 26, 2021).

effectively. This is why we need a regulatory body, it may be constituted by the concern ministry/department in consultation with all the stake-holders or alike of the Gambling Commission as constituted in the UK, to regulate and monitor OFSPs. This organization should ideally manage all forms of prospective licensing in the industry and issue warnings to operators when they do not comply with rules and regulations. Some of the states have dealt it with licensing regime for operators wishing to provide gaming services. This could be an option to be applied at national level to filter out dubious operators and ensure that there is transparency in the market. To maximize the scope of the fantasy sports in India we as nation have to accommodate global concerns while protecting local interest to the best of our ability.

The issue with legalizing online fantasy gaming platforms ultimately falls on the concept of what one may consider chance and to what degree it can be allowed within the purview of the Public Gambling Act. The SC had already given the green light, barring the appeal from the Bombay High Court, where the issue is more to do with taxability aspects rather than legality per se. It is the need of the hour to deem the age old Public Gambling Act nugatory – which is what even the 276th Law Commission had recommended to do. The Law Commission report mentions for a clear need for legislative interference in the issue rather than prohibiting the same altogether. Without clear guidelines as to what constitutes a game of skill or a game of chance, innovation in the field is seriously stifled. Unicorns like Dream11, though growing strong, are still left to the mercy of judicial interpretation, without strong precedents. Moreover, platforms like Paytm and MPL (Mobile Premier League) have recently involved prize monies and contests in fantasy sports, as well as iconic board games like Ludo – which are yet to test the boundaries of chance and skill.

The author believes and asserts with a number of reports that since self-regulation has proved to be very effective in the past for various industries, and the same could be applied to Fantasy Sports until a governmental legislation comes into play. It ensures the constant growth of the industry and creates a fair and safe environment for both the producers and the customers. The online fantasy sports industry is growing and evolving by the second. Self-regulation can also help overcome market failure and prevent harms such as those to the consumer, the environment, the organizations, and any other stakeholders in the industry. Therefore, self-regulation could be the way ahead for the online fantasy sports industry. In this context, a body such as the FIFS taking up the task of industry self-regulation has the potential to benefit the

fantasy sports industry and its various stakeholders in numerous ways, as further described above. The author also strongly agrees with the stance of the NITI Aayog that an independent body needs to be set up to monitor every such game and prepare strong guidelines as to the classification of skill-based and chance-based games. The sooner, the better!

BALANCING ECONOMIC GROWTH AND DEVELOPMENTAL OBJECTIVES UNDER INTERNATIONAL INVESTMENT LAW – CRITICAL ANALYSIS OF THE EMERGING TRENDS

Avnit Singh Arora*

Dr. Anuj Kumar Vaksha**

INTRODUCTION

The contemporary body of International Investment Law consists of hundreds of bilateral, regional and some of multilateral investment treaties between nation states, some of the established principles of customary international law, and the body of jurisprudence emanating out of arbitral decisions in legal disputes involving one or other principles of the International Investment Laws. One of the key questions of deliberation in academic, policy making and arbitral adjudication in the contemporary International Investment Law have been the issue of developmental imperatives of the host states vis-à-vis the rights of the foreign investors. Historically the present body of International Investment Law has evolved out of the concern for providing well defined rights and neutral and fair mechanisms for adjudication of disputes involving breaches of such rights. However, of late this investor-right centric evolution of International Investment Law has been halted to make become more inclusive to accommodate the developmental aspirations of the host state. This need to accommodate the developmental aspirations of the host state is best exemplified in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention). The very first paragraph of the preamble to this Convention notes the imperatives of international cooperation for economic development and around this, inter alia, it seeks to establish the International Centre for Settlement of Investment Disputes for the purpose to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The imperatives of economic development of the host states, though stated in the preamble of the ICSID Convention has failed to find similar significance in the arbitral decisions because of variety of reasons. The present seeks to analyse this aspect of contemporary International Investment Law from the perspectives of a balanced approach towards the developmental aspirations of the host state and the imperatives of

* Research Scholar, Guru Gobind Singh Indraprastha University, Delhi and Director (Arbitration and Conciliation), Department of Legal Affairs, Ministry of Law and Justice, New Delhi.

** Professor, University School of Law and Legal Studies, GGSIPU, Sector 16 C, Dwarka, New Delhi.

adequately and sufficiently protecting the legitimate interests of foreign investors. The present paper highlights

some imperatives of this balanced approach and makes some concrete suggestions as to how developmental imperatives can be institutionalized in the bilateral, regional and multilateral treaties and also in the arbitral decision making so as to secure balance between the two objectives of the modern day framework of the International Investment Law. The Research paper is divided in four parts. First part is the introduction of the research paper with construction of the research profile. The second part reflects on the genesis of international investment treaties and arbitrations which form the bedrock of modern day International Investment Laws. The third part considers the relationship between international investment treaties and development. The fourth part considers the meaning of investment from the perspective of developmental imperatives of host states. The fifth part outlines some of the suggestions as a future course of action. The last part concludes the research paper.

The Genesis of International Investment Treaties and Arbitrations

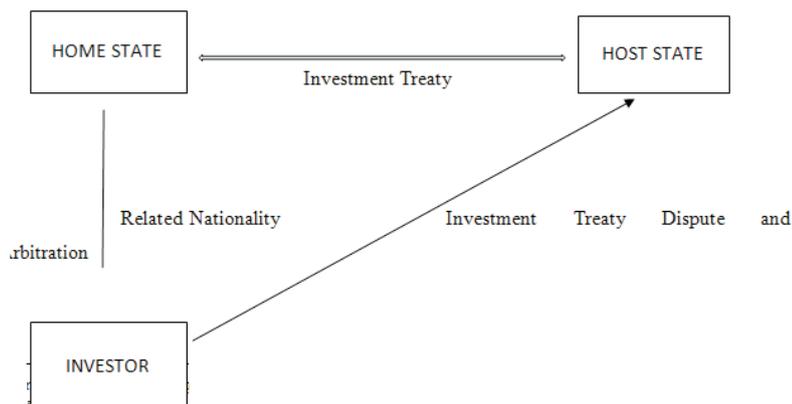
Investment treaties, in the context of cross border investments are intended to ensure the basic tenet of rule of law – access to unbiased justice. A domestic investor is expected to be well versed with the legal and judicial process existing in his country and further inherently believes that his business activities and domestic investments would be treated fairly under the domestic laws. However, when an investor goes overseas for investment in another nation, the said foreign investor is wary as to whether his investment would be treated fairly and given access to justice. To put it in perspective, any prospective investor who intends to invest in a foreign nation, wants a mechanism whereby his investment is protected from unlawful and proscribed infringement. The risks of future unfair treatment or prejudiced judicial processes and decisions in relation to the said investment in a foreign territory are attempted to be hedged by nations entering into bilateral or multilateral investment treaties, which inter-alia provide for special treatment for the said investor and adjudication mechanisms for the investor to invoke in case of any biased decisions, especially policy or regulatory decisions, effecting the business prospects or investment of the investor in the said foreign territory.

To delve further into the genesis of investment treaties, the very reason that an underdeveloped country or a developing country enters into bilateral investment treaties, which in turn contain provisions of investment arbitration and certain additional protective benefits for foreign investors, is to get more investment for the country and therefore expectantly more growth and

development¹. The provisions of the treaty are intended to reassure the prospective foreign investor that they shall be treated fairly and in fact would be kept at a pedestal even higher than domestic investors so that they come in and invest capital which should ultimately lead to growth and development of the host nation.

The entire regime of international investment law consists of more than 2500 active bilateral investment treaties², various regional and multilateral investment treaties and other frameworks for conducting arbitrations arising out of the said treaties. The adjudication mechanism, also referred to as the investor-state dispute settlement mechanism allows an investor to sue a host state, in cases where the investor has invested certain resources in the said host state, falling within the purview of investment, before an ad hoc arbitral tribunal or an arbitral tribunal appointed by a named institution, for violations of investment treaties or trade and investment agreements by the said host state. The tribunal, in case it reaches a conclusion that the host state has breached the provisions of the said treaty, can pass an award allowing monetary damages in favour of the investor and against the host state. The said award can then be enforced against the host state in courts, in case the payment of the awarded damages is not forthcoming despite the passing of the arbitral award. The inter se relationship between all the stakeholders can be depicted as herein below:

The majority of such investor state dispute arbitrations are being conducted by arbitral tribunals, either ad-hoc or under the aegis of the institutions such as the International Centre for the



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- 1 Dominic NpoanlariDagbanja, The paradox of international investment law: trivializing the development objective underlying international investment agreements in investor-state dispute settlement, *available at*: https://www.uncitral.org/pdf/english/congress/Papers_for_Programme/96-DAGBANJA-The_Paradox_of_International_Investment_Law.pdf, (Visited on March 10, 2021).
 - 2 *available at*: https://unctad.org/system/files/official-document/wir2021_en.pdf, (Visited on September 8, 2021).

Settlement of Investment Disputes (ICSID), The United Nations Commission on International Trade Law (UNCITRAL), the Energy Charter Treaty or North Atlantic Free Trade Agreement (NAFTA) etc. The major distinguishing factor of investment treaty arbitrations from traditional commercial arbitrations is the involvement of states and sovereign nations as against only private parties in traditional commercial arbitrations, due to which policy and public interest are of greater significance to investment treaty arbitrations.

INVESTMENT TREATIES AND DEVELOPMENT – THE RELATIONSHIP

Traditionally, the international trade law regime was structured around the goal of maximising economic value addition for the investor but with the growing need for sustainable growth, economic and policy driven governance for the host state have gained relevance. At first blush, to reiterate, it would seem that the investment treaties and the related laws are intended solely for the protection of the capital of the foreign investor but with the evident globalisation and the changing ecosystem, there has been greater support for ensuring equal benefits for the host state including development and economic growth, apart from ensuring equitable protection of capital of the foreign investor. The said economic growth and development is further expected to fulfil the environmental, social and governance norms to enable the economic growth to be viewed as sustainable and acceptable.

Conflicts and disputes arise between the investor and the host state when disparities show up in the expected financial benefits related to the investment accruing to the investor due to policy driven actions of the host state. There and then begins the insistence by the investor on treating the claims exclusively within the purview of the terms of the investment treaties and the consequent impact on the public rights, larger policy aspects and shared economic resources of the host state.

In fact, the legitimacy crisis that the whole system of investment treaty dispute resolution mechanism faces today due to certain inherent alleged biases has resulted in growing calls for making the system a more inclusive and sustainable one wherein there is equilibrium between protection of investment and the overall progress of the host state. In case the aspirations of the host state are ignored completely, it would make the entire investment treaty regime heavily skewed in favour of the foreign investor with nothing for the host state to look upto and make the dichotomy of existence of such a one dimensional system even more pronounced.

It has been suggested that failure to recognise investment law as governance based and ensure investment treaty based economic distributions in tandem with the concepts of fairness have largely contributed to the entire regime being questioned on its sustainability in the long run³.

This argument is not aimed at suggesting at all that a reasonable or promised return on the capital employed is unfair to be expected but that said legitimate expectation cannot be considered in isolation and has to be considered in all fairness in the context of whether it brings along development in the host state, which was avowed and committed as well.

When two sovereign states enter into a trade or investment treaty, the aim of the two said states is to ensure mutually beneficial terms of engagement whereby the interests of both the parties get advanced. The states would generally agree that either of them would bring in the capital and the know-how and the other one would provide the land, labour and the market for the employment of the capital.

But in case the terms of the investment treaty are biased in the favour of one of the states, which invariably happens in the case of a developed and underdeveloped state being on either side, is when the crisis begins to simmer. Can it then be said that the engagement is mutually beneficial or that upfront the treaty is consensual and not predatory? The claims that follow from the investor and the strict interpretation that is granted to the terms of the treaty favouring the investor deepen and reignite the legitimacy questions that are being faced by the investment treaty law regime.

The United Nations Conference on Trade and Development's (UNCTAD) World Investment Report 2015, in fact encapsulates the criticism of the investment treaty regime in the following words, which aptly concludes the existing ground realities of how investment treaty law in the present form is being perceived:

...the current mechanism exposed host States to additional legal and financial risks, often unforeseen at the point of entering into international investment agreements and in circumstances beyond clear cut infringements on private property, without necessarily bringing any benefits in terms of additional Foreign Direct Investment (FDI) inflows; that it grants foreign investors more rights as regards dispute settlement than

3 Frank J. Garcia, Lindito Ciko, Apurv Gaurav and Kirrin Hough, "Reforming the International Investment Regime: Lessons from International Trade Law" 18 *Journal of International Economic Law* 861-892, (2015).

domestic investors; that it can create the risk of “regulatory chill” on legitimate government policymaking; that it results in inconsistent arbitral awards; and that it is insufficient in terms of ensuring transparency, selecting independent arbitrators, and guaranteeing due process.⁴

THE CONCEPT OF INVESTMENT – IS ECONOMIC DEVELOPMENT A SINE QUA NON FOR INVESTMENT UNDER THE INVESTMENT TREATY LAW?

The concept of investment and what it means, being the fulcrum of the issues raised in the present paper has been considered by various arbitral tribunals constituted for deciding investment treaty related disputes, from time to time.

Since ICSID arbitrations contribute the maximum jurisprudence for investment treaty law, ICSID convention and the provisions are being referred to for the issue at hand i.e. how has the term “investment” been considered by various arbitral tribunals.

The issue whether development is a sine qua non for the purpose of investment as provided under the ICSID convention has been considered by various ICSID Arbitral Tribunals after deliberating upon Section 25 (1) of the ICSID Convention⁵ which reads as follows:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

From a perusal of the extracted Section 25 (1), it becomes evident that for an ICSID Arbitral Tribunal to have jurisdiction, there should exist a legal dispute arising directly out of an investment. The next question that arises for consideration is as to what is investment as referred to in Section 25 (1) as stated hereinabove? Whether economic development of the host state is quintessential for any investment by a foreign investor or an investment sans any prospective development of host state shall also fall within the purview of investment as stated in Section 25 (1)?

4 UNCTAD, World Investment Report, *Reforming International Investment Governance* 128 (2015).

5 *Id.*, at 5.

The ICSID Arbitral Tribunals have taken extremely divergent views on the issue. On the one hand certain Arbitral Tribunals led by the Salini's⁶ tribunal have held that the development is a sine qua non when it comes to investment and therefore is required to be duly considered when the issue of what is investment is decided; on the other hand certain ICSID Arbitral Tribunals have been dismissive of any such co-relation thereby concluding that the aspect of development is not necessary for the purpose of deciding whether any capital inflow is an investment for the purpose of Section 25 (1) of the ICSID convention⁷.

To elaborate further, the Salini Tribunal unequivocally, inter alia concluded the following regarding the meaning of investment under Article 25 (1):

- i. There is no specific definition of 'investment' provided for in the ICSID Convention.
- ii. The term 'investment' should consist of (a) contributions (b) a duration of performance of the contract (c) a participation in the risks of the transaction (d) contribution to the economic development of the host state of the investment.
- iii. Further, as regards the constituent elements of 'investment' as aforementioned, it was stated that these four elements may be interdependent and these various criteria should be assessed globally⁸.

The underlying emphasis that is intended to be highlighted here is with respect to the unequivocal finding that contribution to the economic development of the host state is at least an aspect that is required to be considered by the arbitral tribunal while deciding as to what constitutes investment for the purpose of the ICSID convention.

On the other hand the arbitral tribunal in the Biwater case⁹ held that when it comes to the scope and purview of investment, the test as provided for in the Salini case was an interpretation attached by the tribunal in the said fact specific case rather than the same being mandated anywhere in the ICSID convention per se. The tribunal inter-alia held that there was no specific or exact definition of investment provided for in the ICSID convention in the absence of which it

6 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (Case No.ARB/00/4), Decision on Jurisdiction of July 16, 2001 (129 Journal du Droit International 196 (2002), 42 ILM 606 (2003))

7 *Id.*, at 5.

8 *Id.*, at 8.

9 *BiwaterGauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) Award, July 24, 2008 (hereinafter Biwater award case) para. 312.

may not be appropriate that ad-hoc arbitral tribunals considering fact specific situations lay down one particular definition of investment which can be made applicable to subsequent cases and for all purposes. Further the tribunal concluded that the adoption of Salini test risks the arbitrary exclusion of certain types of transactions from the scope of the ICSID convention and that the definition of investment based on Salini test, could contradict individual agreements, as well as developing consensus as to the meaning of investment.

As against the objective and specific criteria laid down by the Salini test, the tribunal in this case merited adoption of a subjective approach to the meaning and scope of investment for the purposes of Article 25 as extracted hereinabove. The Biwater award¹⁰ disagreed to the proposition of having an objective, defined and mandatory criteria for investment, but as regards the criteria identified in the Salini case¹¹, the tribunal though found them relevant, but rather than making the definition inflexible, propagated an approach to investment, which takes notes of Salini criteria as well as all the circumstances of each factual case, including the instrument or treaty containing the consent of the parties to the instrument or treaty.

Further, there have been innumerable awards rendered by various arbitral tribunals¹², which have simply dismissed the contentions that the economic development of the host state had any relevance for deciding as to whether the capital employed is investment for the purpose of the ICSID convention. The major grounds adopted by the various tribunals while reaching this conclusion are firstly, it is extremely difficult to determine the contribution to economic development of the host state objectively or for that matter subjectively and secondly the economic development could be a desirable consequence but cannot be a sine qua non for investment as far as the jurisdiction question is concerned.

Accordingly, the trend that emerges from the divergent views expressed by the various arbitral tribunals when it comes to the co-relation between investment and economic development of the host state, it is evident that there is no unanimity on the issue. Some of the Arbitral Tribunals appointed to adjudicate upon disputes or conflicts arising under Investment Treaties have affirmed protection of the investments of the investor without considering the developmental and policy-governance goals of the host state thereby giving utmost primacy to economic

10 *Id.*, at 11.

11 *Id.*, at 8.

12 *Phoenix Action Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5) Award, April 15, para. 82, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability) November 30, 2012, para. 5.43.

growth while certain other tribunals have negated any such protection being sought keeping in mind the said developmental and policy-governance goals of the host state. This may inter-alia also be due to the terms of the Investment Treaties being drafted in a manner prejudicial to inclusive goals of development, economic growth and governance or the non-consideration of the contextual relationship between investment and the said goals by the arbitral tribunals.

However, the bottom line is the evident fact that the tribunals have taken diametrically opposite views thereby leading to inconclusive jurisprudence relating thereto.

It has been argued by a contemporary author that as the objective of attaining development is intimately and inherently embedded in investment treaties and trade agreements, a state that is party to the said treaties and agreements is entitled to assert that a particular investment or commercial capital employed is not entitled to any benefits under the treaty if it does not further the cause for economic development of the host state¹³.

The author contends that in theory and in practice, countries enter into investment treaties to promote their investment and not just to protect investment as an end in itself and further to promote their development by ensuring that foreign investors are protected from non-commercial risks associated with regulations etc.¹⁴

The author further states that development objective can no longer be treated as peripheral in investor-state dispute settlement: it is an integral part of the investment treaty regime and must be treated as such. The investment treaty ecosystem as reflected in recent backlash against the regime cannot be sustained unless competing objectives are all adequately respected and upheld. This means that there is the need for a sustainable investment disputes settlement approach: development is and must be treated as necessary for the attainment of the objective to provide a secure environment for investment under the applicable investment treaty.¹⁵

The objective to provide a secure legal environment for investment to flourish and gain profits must be pursued in a manner that does not compromise the overall development objective for which a state has undertaken the obligation to protect the investment. The development objective should prevail over the need to guarantee an investment secure protection and vice versa depending on the respective facts and circumstances. It cannot be that the investor's interests must always have its way and at all cost as has been the case. Development as an

13 *Id.*, at 1.

14 *Ibid.*

15 *Ibid.*

objective of investment treaties should correlate with the investors' responsibility of ensuring that their investments contribute to the development of the host state. This is the only way a balance of rights and corresponding obligations between investors and the host states can be attained.¹⁶

The critics of the investment treaty law regime have gone to the extent of arguing that certain investment treaty arbitral tribunals, in the course of rendering awards have interpreted the provisions of the investment treaties in a manner over and above sovereign supremacy of the host state and awarded damages for failing to adhere to the strict obligations under the investment treaty which circumscribe sovereign powers.¹⁷

The future course – improving and improvising the mechanism of investment treaty dispute resolution

Going forward, what could be the possible solutions to ensure that the investment treaty law regime becomes more balanced, fair and acceptable by the stakeholders thereby constructively responding to the legitimacy crises that it faces.

MULTILATERAL TREATIES

One of the possible solution that comes to mind is to have multilateral treaties instead of bilateral treaties since then the signatories of such multilateral treaties would ensure inherent checks and balances for all the parties to the said treaties rather than the undeveloped and developing countries being left to the fancies of developed nations. This could pave the way for doing away with bilateral investment treaties which are heavily skewed in favour of developed nations and foreign investors, replacing the said treaties with multilateral treaties which could be more comprehensive, balanced and multifarious. The Organisation of Economic Development (OECD) came up with a draft of Multilateral Agreement of Investment in the year 1995¹⁸, however due to lack of consensus amongst the nations, the same was shelved and never saw light of the day. It is possibly the time to revisit the said framework and attempt to mould it to contemporary requirements¹⁹.

16 *Ibid.*

17 Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford, UK: Oxford University Press, 2007).

18 Multilateral Agreement on Investment, OECD, available at: <https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm>, (Visited on September 8, 2021).

19 *Id.*, at 2.

INCORPORATING DEVELOPMENTAL IMPERATIVES IN THE PROVISIONS OF THE TREATIES

The other most important facet that merits consideration is the manner in which the development aspects are covered under the treaties, whether it be bilateral or multilateral treaties. In case the public policy and developmental aspects are explicitly engrained in the said treaties, the arbitral tribunals would have no choice but to give due weightage and take cognizance of the said terms. In case the said terms are not very explicit but at least find some references in the treaty provisions, there may still be a possibility of the tribunals taking a purposive interpretation. The major difficulty arises in case the treaty provisions are completely devoid of any references to the developmental goals of the host state, in which case there exists no occasion for the arbitral tribunals to even consider the said aspects when deciding claims arising out of investment treaties. Accordingly, the developmental goals and expectations of the host state should be explicitly included and the power of host state, in exceptional circumstances, should be allowed to be extended to implement sovereign policies meant for such developmental goals, though within the broad contours of the treaties.

PRECEDENTIAL BINDING

That apart, the most evident dichotomy that exists in investment treaty dispute resolution is the fact that there is no institutional jurisprudence which is of binding nature. The arbitral tribunals are not bound by precedent decisions, allowing divergent views to bring inconsistency in the system. The most relevant analogy for the purpose of the present discourse would be the divergent views of tribunals while dealing with the relationship of development and investment, i.e. the Salini decision school of thought and Phoenix case²⁰ school of thought, which are inherently and diametrically opposite views that exist.

A possible solution that can be considered is the judicialization of the institution by having a permanent court for investment treaty disputes presided by independent judges specialized in adjudicating investment treaty disputes with precedential binding.²¹ Another alternative possible solution that could be considered to overcome these divergences could be institution of

²⁰ *Id.*, at 5.

²¹ Michael Faure and Wanli Ma, "Investor State Arbitration – Economic and Empirical Perspectives" 41 (1) *Michigan Journal of International Law*.

a permanent Appellate Tribunal²² or body to consider appeals from ad-hoc investment treaty arbitral awards, wherein such appeals can be circumscribed to lie on restricted grounds to avoid lengthy post award litigation. The World Trade Organisation led Appellate Tribunal could be a starting point for further deliberation on the said proposition²³.

AMICUS SUBMISSIONS

Another step in the right direction to enable development aspects to have due weightage and relevance could be allowing amicus submissions in investment treaty arbitrations. In fact there has been this emerging trend of allowing third non-party amicus curiae to bring in submissions and argue for development aspects to be considered in an investment treaty arbitration. In the matter of *Piero Foresti, Laura De Carli and Ors. v Republic of South Africa*²⁴, since the dispute also involved aspects relating to apartheid etc., the arbitral tribunal had allowed submissions of amicus curiae being renowned human rights groups and organizations. Introduction of such amicus mechanism, even on a case to case basis can go a long way in legitimising the demands of a more inclusive growth for the system since then the proceedings would be further open to scrutiny of and by such amicus participation and public debate.

CONCLUSIONS

The most important conclusion that is intended to be drawn from this paper is that the treaty based economic law requires to transform itself into a more inclusive and purposive proponent of economic law, in tandem with the global developments. It has now been recognised that environmental, social and governance norms, which can be said to be the edifice for development have come to occupy a very prominent position when it comes to any investment. Therefore, it is important for international investment treaty regime as well, to give due weightage to these norms in order to ensure that the stakeholders perceive the system to be fair and unbiased rather than a mere tool of capital protection for the mighty with the money. The treaty provisions are also required to adopt inherent provisions reflecting the changing times. The arbitral tribunals constituted to adjudicate upon disputes arising out of investment treaties should also move on from the erstwhile sole agenda of only protection of capital thereby looking

22 Anna Joubin Bret, Why we need a Global Appellate Mechanism for International Investment Law, Columbia FDI Perspectives No. 146 1, 1 (27 April 2015).

23 Andreas R. Ziegler, Scope and Function of the WTO Appellate System: What future after the Millennium Round, 3 Max Plank UNYB 439 (1999).

24 ICSID Case No. ARB(AF)/07/1.

at creating a sustainable system where the objectives of protection of capital employed and the regulatory imperatives of economic development can co-exist. The factual distinction and decisions could be best left to be decided on a case to case basis but the broad principles that need to be recognised should be that economic development is an aspect which deserves due consideration as well when it comes to investment.

Investment Treaty Law and related arbitrations are facing questions of legitimacy crisis, specifically on the grounds of inter-alia alleged biases, lack of transparency and disregard for developmental objectives of the host state. The response requires concerted efforts on the part of all stakeholders enabling material alterations in the regime including the possible solutions highlighted in the present paper so that they can evolve dynamically and attempt to remove the basis of inter-alia, the alleged biases. The acceptance of the impending paradigm shift to inclusive and sustainable economic growth would go a long way in firming the existence and role of investment treaty law and the related arbitrations in the economic laws ecosystem.

A CRITICAL ANALYSIS OF THE CONSTITUTION (105th AMENDMENT) ACT, 2021

Dr. Bipin Kumar Thakur*

“There is equality only among equals. To equate unequals is to perpetuate inequality.”¹

~Report of the Backward Classes Commission(Mandal Commission, 1980)

“If the entire communities, with some exceptions, are treated to be backward, actual needy would lose in the mob and they seldom attract attention towards them and get sufficient help.

The intention of Article 340 of the Constitution will also not fulfill.”²

~ Kaka Kalelkar Committee Report, 1955

INTRODUCTION

The Constitution (105th Amendment) Act, 2021 received the assent of the President of India on 18th August and subsequently got notified in the Gazette of India on 19th August. It had started its journey in the national parliament as the Constitution (127th Amendment) Bill, 2021 by temporarily ending the ongoing prolonged logjam and continuous disruptions during its monsoon session since last three weeks for the said bill received the rare unanimous verdict during its passage from both the Houses. In the Lok Sabha, it was passed (on 10th August) with three hundred eighty six members in favour and not even a single member against the proposed bill. Similarly, in the Rajya Sabha, it got passed (on 11th August) with one hundred eighty seven members in favour³ and none against the said bill⁴. The main purpose of the enactment of this Act is giving back States, the power to make their own lists of Other Backward Classes (OBC) by identifying and notifying Socially and Educationally Backward Classes (SEBC) negating the recent Supreme Court verdict (05th May, 2021) in Maratha reservation ruling where it had

* Associate Professor, Department of Political Science, Shri Guru Tegh Bhadur Khalsa College Delhi.

1 Mandal Commission Report, Part 1, available at:

<https://www.ncbc.nic.in/writereaddata/Mandal%20Commission%20Report%20of%20the%201st%20part%20English635228715105764974.pdf>, (Visited on August 28, 2021).

2 Discussion of the Reports given by various Commissions and Committees for Reservation to Backward Classes/Special Backward Classes, available at:

https://www.sje.rajasthan.gov.in/orders/OBC_Report_Ch7.pdf, (Visited on August 28, 2021).

3 The Times of India, 11th August, 2021, New Delhi.

4 The Indian Express, 12th August, 2021, New Delhi.

upheld the Constitutional (102nd Amendment) Act. Regarding the significance of the above mentioned bill, the Prime Minister (PM) Shri Narendra Modi tweeted, “passage of Constitution (127th Amendment) Bill in both Houses is a landmark moment for our nation. This Bill furthers social empowerment. It also reflects over Government’s commitment to ensuring dignity, opportunity and justice to the marginalised sections.”⁵

CONSTITUTIONAL PROVISIONS AND PERCEPTION OF THE CONSTITUENT ASSEMBLY ABOUT RESERVATION FOR SOCIALLY AND EDUCATIONALLY BACKWARD CLASSES (SEBC)

The Constitution of India has provided special provisions for certain classes in quite details.⁶ These provisions ensure the policy of ‘protective discrimination’ and include reservation and special representation in the legislatures and reservation in matters of public employment and educational institutes. Apart from providing special provisions for the Scheduled Castes (SC) and Scheduled Tribes (ST), the Constitution of India has provided separate provisions for the improvement of Backward Classes (BC) too. Although the term ‘Backward Classes’ has not been defined, it comes in addition to the terms ‘Scheduled Castes’, ‘Scheduled Tribes’ and hence includes ‘Other Backward Classes (OBC)’ as well.

While framing the provisions related with the welfare of Backward Classes⁷, the Constituent Assembly had deliberated the same in quite details and many members notably H. V. Kamath, Dr. B. R. Ambedkar, Prof. Shibban Lal Saksena, Satyanarayan Sinha etc. had expressed their opinions. Pandit Thakur Das Bhargava, one of the prominent members of the Constituent Assembly had said, “I consider that Article 301 is one of the most important Articles of this Constitution. Left to myself, I would call it the soul of the Constitution. So far as the Depressed Classes are concerned, we have only reserved some seats for them. The rest we have not done, and this Article 301 seeks to complete the process of bringing them up to normal standards”⁸. He further said, “This Article places upon the entire nation the obligation of seeing that all the disabilities and difficulties of the depressed classes are removed and therefore, it is really a Charter of the liberties of the backward classes. We should provide in this Article that it shall

5 Ritika Chopra & Krishn Kaushik, “187-0: Bill to restore states’ power on OBC list proposed”, *The Indian Express*, (Visited on August 12, 2021), New Delhi.

6 The Constitution of India, Part XVI, Articles 330, 331, 332, 334, 335, 338, 338A, 338B, 340, 341, 342 and 342A.

7 Article 301 of the Draft Constitution which later became Article 341 of the Constitution of India.

8 Constituent Assembly Debates (CAD), Book No. 3, Vol. No. VIII, 16 May 1949 to 16 June 1949, Lok Sabha Secretariat, New Delhi, 943-948 (2014).

apply not only to the communities for whom reservation has been made but also to those for whom, no reservation has been made but who are all the same backward.”

The Constitution of India⁹ has detailed provisions regarding the ‘appointment of a Commission to investigate the conditions of backward classes’. It provides, “The President may by order appoint a Commission comprising of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.”¹⁰

It further provides, “A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.”¹¹ Another provision of the Constitution stipulates, “The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.”¹²

THE BACKWARD CLASSES COMMISSIONS APPOINTED SO FAR

Since Indian independence, two ‘Backward Classes Commission’ were set up under Article 340 of the Constitution. The first was the *Kaka Kalelkar Commission*¹³ which had suggested the following four criteria for identification of OBCs: i. low social position in the traditional caste hierarchy of Hindu Society; ii. lack of general educational advancement among the major section of a caste or community; iii. inadequate or no representation in government services; iv. inadequate representation in the field of trade, commerce and industry.

The Commission had selected 2399 castes for the benefit of reservation and had suggested important recommendations: i. undertaking caste-wise enumeration of population in the census

9 The Constitution of India, 1950, art. 340.

10 *Id.*, art. 340 (1).

11 *Id.*, art. 340 (2).

12 Article 340(3) of the Constitution of India. It may be noted that Dr. B. R. Ambedkar while deliberating on the Draft Constitution of India had moved the Amendment, “That in Clause (3) of the Article 301, for the word ‘Parliament’ the words ‘each House of Parliament’ be substituted”. This was adopted by the Constituent Assembly on June 16, 1949 (CAD, Vol. VIII, p. 945).

13 The Commission was appointed in 1953 and submitted its Report in 1955. Kaka Kalelkar was the Chairman.

of 1961; ii. relating social backwardness of a class to its low position in the traditional caste hierarchy of Hindu Society; iii. treating all women as a class as 'backward'; iv. Reservation of seventy per cent seats in all technical and professional institutions for qualified students of backward classes; v. minimum reservation of vacancies in all Government services and local bodies for OBCs on the following scales: a. Class I= 25 per cent; b. Class II= 33.5 per cent; c. Class III= 40 per cent and d. Class IV= 40 per cent.¹⁴

The *Kalelkar Commission Report* was placed before the Parliament along with an action plan which suggested that for removal of difficulties of socially and educationally backward classes, cogent and practical indications should be prescribed. However, the Report gone indebted.¹⁵

The Union Government's next initiative came in 1978 when the *Janata Party* Government appointed the second 'Backward Classes Commission' in 1978 under the chairpersonship of B. P. Mandal (former Chief Minister of Bihar) to find out how many backward classes there were in the country. The Commission was referred the following matters: i. to define social and educational backwardness of classes; ii. to make recommendations for taking measures for progress of socially and educationally backward classes of so defined citizens; iii. to examine desirability to make arrangement of reservation in appointment and on posts for those backward classes of citizens who do not have adequate representation on the posts in Union Government or any State Services; and iv. To submit the report to the President of India containing discussion of the facts and having recommendations on it.¹⁶

The Mandal Commission identified eleven indicators in the field of social, economic and educational backwardness and identified 3743 backward classes who needed the attention. The Report of the Commission remained shelved till 1990 when the V. P. Singh Government brought out the order for twenty seven per cent reservation in Central services for the OBCs. The matter was challenged in the Supreme Court of India in the *Indra Sawhney and Others v. Union of India* case.¹⁷

The Supreme Court in 1992 with a majority decision (6-3) upheld the validity of the

14 Discussion of the Reports given by various Commissions and Committees for Reservation to Backward Classes/Special Backward Classes, *Supra* note 2.

15 *Ibid.*

16 *Ibid.*

17 *Indra Sawhney and Others v. Union of India*, AIR 1993 SC 477.

Government's decision to reserve 27 per cent of Government jobs for backward classes provided that the advanced sections—the 'creamy layer'—were excluded and the total reservation for all the categories should not exceed 50 per cent. It said that the rule of 50 per cent should be applied to each year, it could not be related to the total strength of the class, service or cadre etc. In addition, the Supreme Court also directed the Government to set up a permanent Commission to consider the complaints regarding inclusion and exclusion in the list of backward classes for getting protection and benefits.¹⁸

NATIONAL COMMISSION FOR BACKWARD CLASSES (NCBC)

In the light of the direction of the Supreme Court, the Parliament enacted the National Commission for Backward Classes Act 1993 for setting up such a Commission at the Union level as a permanent body. The purpose of the Act was "to constitute a National Commission for Backward Classes (NCBC) other than the scheduled castes and the scheduled tribes and to provide for matters connected therewith or incidental thereto."¹⁹ The Act came into effect on April 2, 1993 and the Government constituted the NCBC on August 14, 1993. The NCBC Ordinance, 1993 (ordinance 23 of 1993) was also repealed by the enactment of the Act.²⁰

It may be noted that the NCBC so constituted was a statutory body only and not a constitutional body. It was supposed to have five members including the chairperson. The member secretary was to be appointed by the Union Government and the term of the Commission was to be of three years. The main function of the Commission was "to examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate."²¹ The Act provided that the advice of the Commission should ordinarily be binding upon the Central Government.²² The Act provided for the periodic revision of lists by the Central Government—the Central Government in consultation with NCBC may at any time, and shall, at the expiration of ten years from the coming into force of this Act and every

18 *Ibid.*

19 The National Commission for Backward Classes Act, 1993 (Act No. 27 of 1993), available at <https://legislative.gov.in/files.pdf>, (Visited on August 29, 2021). This is also available at <https://www.ncbc.nic.in/userview> and <https://www.socialjustice.nic.in/ncbc.pdf> (Visited on August 29, 2021).

20 The NCBC Act, 1993, s.19.

21 *Id.*, s. 9(1).

22 *Id.*, s. 9(2).

succeeding period of ten years thereafter, undertake revision of the lists with a view to excluding from such lists those classes who have ceased to be backward classes or for including in such lists new backward classes.²³ NCBC's annual report and audit reports were to be submitted to the Central Government, which should have, "caused the annual report, together with a memorandum of action taken on the advice tendered by the Commission under section 9 and the reason for the non-acceptance, if any such advice, and the audit report to be laid as soon as may be after they are received before each house of Parliament."²⁴

MAKING NCBC A CONSTITUTIONAL BODY

The Constitution (102nd Amendment) Act was enacted in 2018²⁵ and this accorded the constitutional status to NCBC, making it at par with National Commission for Scheduled Castes (NCSC) and National Commission for Scheduled Tribes (NCST). The Act inserted Articles 338B²⁶, 342A²⁷ and 366 (26C)²⁸ in the Constitution of India. Article 338B deals with nature, structure, composition, duties and powers of the NCBC; Article 342A deals with the power of the President to notify a particular caste as 'socially and educationally backward class' (SEBC) and the power of Parliament to include or exclude from the list so notified while Article 366 (26C) deals with the definition of 'socially and educationally backward classes (SEBC).

A separate Act named the National Commission for Backward Classes (Repeal) Act, 2018²⁹ was enacted by the Parliament to repeal the NCBC Act, 1993. The NCBC constituted under subsection (1) of section 3 of the said Act stood dissolved saving its previous proceedings and recommendations³⁰.

The NCBC [post Constitutional (102nd Amendment) Act] is to consist of a Chairperson, Vice Chairperson and three other members; all to be appointed by the President under his hand and seal.³¹ Article 338B (5) of the Constitution provides NCBC's main duties, some of them are: "i.

23 *Id.*, ss. 11(1), 11(2).

24 *Id.*, ss. 14, 15.

25 The Gazette of India, No. 34, August 11, 2018, New Delhi. The received the assent of the President on August 11, 2021.

26 The Constitution (102nd Amendment) Act, 2018, Section 3 (w.e.f. 15-8-2018 vide s. o. 3989 (E), dated August 14, 2018.

27 *Id.*, s. 4.

28 *Id.*, s. 5.

29 The Gazette of India, No. 37, August 14, 2018, New Delhi. The NCBC (Repeal) Act, 2018 received the assent of the President on August 14, 2018).

30 The NCBC (Repeal) Act, 2018, s. 2.

31 The Constitution of India, 1950, arts. 338 B (2), (3).

to investigate and monitor all matters relating to the safeguards provided for SEBC under this Constitution; ii. to inquire into specific complaints with respect to the deprivation of rights and safeguards of the SEBC; iii. to participate and advise on the socio-economic development of the SEBC and to evaluate their progress; iv. to present to the President annual reports upon the working of those safeguards; v. to make recommendations for the protection, welfare and socio-economic development of the socially and educationally backward classes, etc.”

Article 342A (1) (prior to the latest Amendment) provided, “the President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the socially and educationally backward classes which shall for the purposes of this Constitution be deemed to be socially and educationally backward classes in relation to that State or Union territory, as the case may be.” Similarly Article 342A (2) provided, “Parliament may by law include in or exclude from the Central List of socially and educationally backward classes specified in a notification issued under clause (1) any socially and educationally backward class, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.” Thus the Constitution (102nd Amendment) Act, 2018 accorded constitutional status to NCBC and provided that the President should notify the list of SEBC for any State or Union territory in the country.

THE CONSTITUTION (105TH AMENDMENT) ACT, 2021

The year 2021 has been quite eventful so far the issue of reservation for SEBC is concerned. In May 2021, a five-judge constitutional bench of the Supreme Court in its famous judgement of *Maratha reservation case*³² upheld the validity of the Constitution (102nd Amendment) Act. The apex Court maintained that the President based on the recommendations of the NCBC would determine which communities would be included in the OBC list both for the Centre and States. The Supreme Court unanimously held the above mentioned amendment Act as valid, saying it did not affect the federal polity and did not violate the basic structure of the Constitution. However, on another issue, the bench was divided. The 3:2 majority decision held

32 *Maratha reservation case (Jaishri Laxmanrao Patil v. The Chief Minister and Ors.)*, available at: https://www.main.sci.gov.in/supremecourt/2019/23618/23618_2019_35_1501_27992_Judgement_05-May-2021.pdf, (Visited on August 30, 2021). The SC bench was considering a group of writ petitions challenging the June 27, 2019 order of the Bombay High Court upholding the constitutional validity of the Maharashtra State Reservation for socially and educationally backward classes Act, 2018.

that the power to identify and notify SEBC at both the central and the state levels will now lie exclusively with the President of India.

Although the constitutional status accorded to NCBC was appreciated, there were concerns that the States were denied the power to notify the list containing the names of backward classes separately and independently of the Central/Union Government. Before this Amendment, there used to be separate lists of groups that constituted OBC who could avail the reservation in educational institutions and government jobs. The central list pertained to admission to educational institutions run by the Centre and to central government jobs. The state's lists were used for the respective States.

According to the Supreme Court judgement, "there will only be one list of backward classes to be notified by the President of India and this list can be amended only by the Parliament." The States just have the right, through their existing mechanisms or statutory commissions to make suggestions to the President on the NCBC, for inclusion, exclusion or modification of castes or communities in the list. The rationale for the majority decision was based on Article 342A inserted in the Constitution by the Constitution (102nd Amendment) Act. The Court said that after the insertion of Article 342A, it is the Union Government alone which has the power to identify SEBC and include/exclude them in a list to be published under Article 342 (1) specifying SEBC in relation to each State and Union territory.

One of the most important issue in the *Maratha* reservation case was whether the State legislature had lost the power to declare a particular class to be socially and educationally backward after the Constitution (102nd Amendment) Act?³³ The majority view of the judgement of the Court seems to have agreed with this contention while that of the minority view maintained that the above mentioned Amendment Act did not take away the power of the States to identify backward classes in their respective States. The Court however, clarified that the power of the States to make reservations in favour of particular communities or castes; and decide the quantum of reservations, the nature of benefits, and the kind of reservations, and all other matters falling within the ambit of Article 15 and 16 will not be affected.

The Union Government filed a review petition in the Supreme Court on May 13, 2021 for in its

³³ Supreme Court Observer- Maratha reservation, Case No. SLP(C) 15737/2019 [for www.sci.gov.in use Diary No. 23618/2019], available at: <https://www.scobserver.in/court-case/maratha-reservation>, (Visited on August 30, 2021).

opinion, the Constitution (102nd Amendment) Act was not intended to take away the power of States to specify the classes considered socially and educationally backward in relation to respective States. In July 2021, the request made by the Union Government was rejected by the Supreme Court.

According to Anuja, “the honourable Supreme Court judgement of 2021 categorically made central Government, the gatekeeper of OBC list. It put the Centre in an awkward position since it has been the States which are primarily responsible for the welfare of their domicile. Also through this judgement, by one estimation, around 671 communities were kept out of the ambit of OBC category keeping them away from the benefits that this reservation entails.”³⁴ Therefore, the affectivity of the Constitution (105th Amendment) Act, 2021 must be assessed against this background for the Amendment has given States the power to add communities to OBC list, it has given NCBC the power to be consulted by States in matters concerning OBC—making it a very important Constitutional Amendment.

MAIN PROVISIONS OF THE CONSTITUTION (105TH AMENDMENT) ACT

The Constitution (105th Amendment) Act, 2021³⁵ has restored the power of State Governments to make their own lists of OBC. The Union social justice and empowerment minister, Virender Kumar while introducing the bill in the *Lok Sabha* had said, “There was a need to amend Article 342A of the Constitution to sufficiently clarify that the State and Union territories administrations had been empowered to prepare and keep their own list of SEBC.”³⁶ The ministry had also noted that amendments had to be made to Articles 338B and 366 to maintain India’s federal system. Major provisions of the Constitution (105th Amendment) Act³⁷ are given below:

- Article 338B of the Constitution has been amended: In Article 338B, in clause (9), the following proviso shall be inserted, namely:-
“Provided that nothing in this clause shall apply for the purposes of clause (3) of

34 Anuja, “127th Amendment Bill, 2021: The path to inclusive development”, The Times of India, 16th August, 2021, *available at*: <https://www.timesofindia.indiatimes.com/blogs/voices/127th-amendment-bill-2021-the-path-to-inclusive-development>, (Visited on August 22, 2021).

35 It started its journey in Parliament as Constitution (127th Amendment) Bill, 2021.

36 Scroll.in, “President Kovind gives assent to Bill allowing states to make OBC lists”, 20th August, 2021, *available at*: <https://www.scroll.in/latest/1003312/ram-nath-kovind-gives-assent-to-bill-allowing-states-to-make-obc-list>, (Visited on August 23, 2021).

37 The Constitution (105th Amendment) Act, 2021, Available at <https://www.livelaw.in/pdf-upload/105-constitutional-amendment-act-398950.pdf>, (Visited on September 1, 2021).

Article 342A”.

- Article 342A of the Constitution has been amended: In Article 342A of the Constitution,--(a) in clause (1), for the words “socially and educationally backward classes which shall for the purposes of this Constitution”, the words *“the socially and educationally backward classes in the Central List which shall for the purposes of the Central Government”* shall be substituted.
(b) After clause 2, the following shall be inserted, namely:-
“Explanation. – For the purposes of clause (1) and (2), the expression “Central List” means the list of socially and educationally backward classes prepared and maintained by and for the Central Government.
(3) *Notwithstanding anything contained in clauses (1) and (2), every State or Union territory may, by law, prepare and maintain, for its own purposes, a list of socially and educationally backward classes, entries in which may be different from the Central List.”*
- Article 366 of the Constitution has been amended:
In Article 366, for clause (26C), the following clause shall be substituted, namely:-
(26C) *“socially and educationally backward classes” means such backward classes as are so deemed under Article 342A for the purposes of the Central Government or the State, or Union territory, as the case may be.”*

Thus it may clearly be said that the Parliament passed the Constitution (105th Amendment) Act to adequately clarify that the State Governments and Union territories are empowered to prepare and maintain their own respective lists of SEBC. Moreover, the new Act provides that the President of India would be able to notify the list of SEBC only for the purpose of the Centre. This list will be prepared and maintained by the Union Government. The States/Union territories will also prepare their own list of SEBC.

CRITICAL EVALUATION

The monsoon session 2021 of the Parliament was facing chaos and continuous logjam because

of the opposition's insistence on having discussion on the issues, viz. 'Pegasus spyware', 'agriculture and farm related Acts' etc. The Constitution (127th Amendment) Bill, which finally became the Constitution (105th Amendment) Act, 2021 had brought a unique and rare unanimity among the members of Parliament(MP) irrespective of their political affiliations. Since it was a Constitutional amendment, it required the special procedure. In the 'House of People', it got passed with the support of 386 members while in the 'Council of States', 187 members voted in favour and no member opposed the bill.

It happens rarely that a bill is not opposed by the members but the political reasons and electoral consequences involved in the 'OBC reservation' made the members conscious of their approach towards the passage of the bill in the Parliament. As has been rightly said by Shankhyaneel Sarkar,

"The bill was passed with bipartisan support but MPs from both sides during the discussion before the passage blamed each other's parties for not doing enough for the OBC communities."³⁸

Secondly, it is true that there was an impressive political consensus in the Parliament over the passage of this bill, there were series of trident demands on the ceiling (50 per cent cap on reservation) from the MPs barring the ruling party. They also demanded caste based census and maintained that the Government by restoring to the States the right to draw up State OBC lists, is "rectifying" through the proposed amendment, a "gross error" it committed earlier which resulted in an adverse Supreme Court ruling.³⁹

Thirdly, it may be said that the Constitution (105th Amendment) Act, 2021 is designed to negate Supreme Court's judgement (of 5 May 2021) and restore the power of States to identify and maintain State lists of OBC. The five-judge Constitution bench had unanimously upheld the constitutional validity of the Constitution (102nd Amendment) Act, 2018 and had set aside the *Maharashtra law granting quota to Marathas* and the bench had also refused to refer the 1992 *Mandal* verdict—which had put 50 per cent limit on quotas—to a bigger bench.

38 Shankhyaneel Sarkar and Poulomi Ghosh (Ed.), "OBC Bill passed: States can now maintain list of socially and educationally backward classes", *The Hindustan Times*, 10th August, 2021, available at: <https://www.hindustantimes.com/india-news/states-can-now-maintain-list-of-socially-and-educationally-backward-classes-101628615327528.html>, (Visited on September 2, 2021).

39 Swati Mathur, "Opposition: Government rectifying 'gross error' that led to SC setback", *The Times of India*, 11th August, 2021, New Delhi.

An analysis of the timing of the enactment of the Act, its social, political and electoral background and the legislative chronology since 2018 to 2021 in this regard vividly depicts that the Union Government is more conscious and convinced to successfully address its political & electoral stakes than making attempts to secure constitutional harmony by showing respect towards the verdicts and adjudications awarded by the Supreme court of India.

The Union Government justified the passage of the bill in the Parliament. Piloting the bill, social justice and empowerment minister, Virender Kumar said, “The bill is aimed at restoring the powers of States to have their own lists of OBC which was negated by the Supreme Court. By this consensus approach, we are moving towards creation of history for if the OBC lists of States were removed, nearly 671 communities which were included in their lists would not get the benefit of reservation in educational institutions and appointments of jobs. It would have effected one-fifth of the OBC communities.”⁴⁰

Fourthly, it is said that the enactment of the Constitution (105th Amendment) Act, 2021 has settled the doubts about the confusion about the ‘Central’ and ‘State’ OBC lists and the same will facilitate the empowerment of larger number of communities which faced the danger to be deprived from this benefit. But the reality has been pointed out by Trisha Jha, “Ambedkar would have nodded his head in disbelief had he been present in 21st century India. It is a mockery of the current reservation policy where a large chunk of sub categories within the socially and educationally backward castes is left out and pushed to the fringe by the dominant 10 castes of a total of 2,633 sub-castes within the larger OBC community.”⁴¹ She further says, “With flashy cars and kilos of gold, economically well-off continue to sabotage the reservation system for personal gains at the cost of over 900 sub-castes within the OBC.”

It may be noted that the Union Government constituted a four-member Commission under the Chairpersonship of Justice G. Rohini in 2017 to examine sub-categorization of OBC with the objective:- a). to examine the extent of inequitable distribution of benefits of reservation among the castes or communities included in the broad category of OBC with reference to such classes

40 The Hindu, “Rajya Sabha passes OBC Amendment Bill”, 11th August, 2021, *available at*: <https://www.thehindubusiness.com/news/national/rajya-sabha-passes-obc-amendment-bill/article35864219.ece>, (Visited on August 22, 2021).

41 Trisha Jha, “127th Constitution Amendment Bill: Current Reservation system will Benefit Politicians, Not Downtrodden”, *available at*: <https://www.news18.com/news/opinion/127-constitution-amendment-bill-reservation-system-will-benefit-politicians-not-downtrodden-4071092.html>, (Visited on August 22, 2021).

included in the Central list; b). to work out the mechanism, criteria, norms and parameters in a scientific approach for sub-categorization within such OBC; c). to take up exercise of identifying the respective castes or communities or sub-castes or synonyms in the Central list of OBC and classifying them into their respective sub-categories.⁴² The Union Government in July this year extended the term of J. Rohini Commission by six months beyond July 31 this year to January 31 next year. “The proposed extension of tenure and addition in its terms of reference shall enable the Commission to submit a comprehensive report on the issue of sub-categorization of OBC, after consultation with various stakeholders”, the statement issued after the cabinet meeting chaired by the PM Shri Narendra Modi said.⁴³ Ideally the Union Government should have waited for the *Rohini Commission* report before going for the enactment of the Constitution (105th Amendment) Act, 2021, however, it would be premature to comment about Union Government’s approach towards the *Report* which is yet to be submitted. Fifthly, it may be said that the purpose of reservation was supposed to be operational for initial ten years without creating a hierarchy within the OBC but the existing reservation policy seems to have done the same since the nature of politics in modern India has continued to revolve around caste politics for over the years more and more affluent castes have been demanding reservation at the cost of those who genuinely need it, for example, pending quota proposals of *Jats* in Haryana, *Patels* in Gujarat, *Gurjars* in Rajasthan and *Dhangars* in Maharashtra have the potential to affect the politics of contemporary India.

As has been rightly observed by the bench of C.J. Sanjib Banerjee and J. P.D. Audikesavalu of Madras High Court while dealing with the issue of reservation of medical seats under All India Quota (AIQ) category for economically weaker section among forward castes by declining the same, “The trend of reservation seems to perpetuate the caste system endlessly, rather than wiping it away, the present trend seems to perpetuate it by endlessly extending a measure that was to remain only for a short duration to cover the infancy and possibly, the adolescence of the republic. Though the life of a nation state may not be relatable to the human process of aging but

42 Government of India, Ministry of Social Justice and Empowerment, Lok Sabha, Un-starred Question No. 2879 on Categorization of OBC, Answered on 13.3.18, available at: <https://www.loksabha.nic.in/Members/QResult16.aspx?qref=64382>, (Visited on August 28, 2021).

43 P. M. Malvika, “OBC Sub-categorization commission’s term extended by 6 months”, The Hindustan Times, 14th July, 2021, available at: <https://www.hindustantimes.com/india-news/obc-sub-categorization-commission-s-term-extended-by-6-months-101626279420499.html>, (Visited on September 2, 2021).

at over seventy, it ought, probably, to be more mature.”⁴⁴

Even the Constituent Assembly while framing the Constitution of India debated in details the provisions regarding the appointment of a commission to investigate the conditions of backward classes. According to H.V.Kamath, one of the prominent members of the Constituent Assembly, “It may be that within the next ten years there may be no socially or educationally backward classes in our country. I look forward to that day even before the expiry of ten years. I trust that after the first ten-year period has expired, there will be no need for the President again to appoint a Commission of this nature to enquire into the conditions of the backward classes in our country.”⁴⁵

Sixthly, Article 341 of the Constitution allows the President, after consultation with the Governors of respective States/Union territories, to specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall be deemed to be Scheduled Castes. Article 342 provides similar provisions regarding to Scheduled Tribes. In both the cases, the Parliament has the power to include in or exclude from the lists to be so notified. For the first time, similar provisions were made for SEBC through the Constitution (102nd Amendment) Act. Surprisingly there had been no demand for amendments except in the case of the provisions related with SEBC. It may be because of larger size of SEBC and their increasing influence in the electoral dynamics of Indian politics. It is interesting to see how States handles the increasing demands by more and more new communities to get a place in the list of SEBC.

CONCLUSION

The Constitution of India has many provisions to make India an egalitarian society and our constitutional institutions over the years have been striving hard to achieve this goal by creating conditions for securing “justice, liberty and equality” to all its citizens. Idea of reservation for SEBC is one such measure and the Constitution (105th Amendment) Act, 2021 is an important step in that direction. It has brought the desired clarity on this prominent issue but this is high time, we must innovate and explore steps beyond reservations so that the cleavages created in our society on the basis of caste should not expand further and reaches a point which is beyond

44 The Times of India, “HC: Quota trend perpetuates caste system”, 27th August, 2021, New Delhi.

45 Constituent Assembly Debates, Book No. 3, Vol. VIII, Lok Sabha Secretariat, New Delhi, 945 (2014).

repairs. The political use of caste system for reservation must be stopped. We may agree with the opinion expressed by the Madras High Court bench of C.J. Sanjib Banerjee and J. P.D. Audikesavalu in a recent case, “It may, however, be observed that the entire concept of reservation...may have been turned on its head by repeated amendments and the veritable reinvigoration of the caste system—and even extending it to denominations where it does not exist—instead of empowering citizens so that merit may ultimately decide matters.”⁴⁶ We must try to fulfill the wishes and perceptions of our Constitution framers on the one hand and try to accommodate the emerging myriad aspirations of SEBC within the limitations of our parliamentary democracy on the another so that the chords of social harmony remains intact and conducive for all.

46 The Times of India, *Supra* note at 44.

CONFLUENCE OF DEVELOPMENT AND LAKSHADWEEP IN THE 21ST CENTURY: A SOCIO -LEGAL STUDY

Deepayan Malaviya*

Vijya Lakshmi**

INTRODUCTION

“Earth provides enough to satisfy every man’s need but not every man’s greed”

-Mahatma Gandhi

In the beginning Man lived in the natural order of things and the Government had absolutely no existence to regulate the affairs. This gave rise to problems in primitive society as the weak were oppressed. To meet the oppression, Man entered into agreement which gave birth to the concept of State and with it law started to develop. During this time there were two agreements in particular which strengthened the state, *Pactum Unionis* which formed the society whereby protection to life and property was ensured and *Pactum Subjectionis* under which Man agreed to surrender his rights either partially or wholly and pledged allegiance to the State whose aim was now to establish order and peace in the civilized society.¹ Thus, arose the concept of collective rights and the welfare of the public became paramount. This welfaristic approach is further supported by the doctrine of Eminent Domain which states that all property of the subjects is under the purview of the State and the State can at any time dispossess any person from private property and utilize that private property for “public use” and the State has frequently resorted to this practice for the common benefit.² At the start there was no such problem regarding the acquisition and development of land as firstly, there was enough land for everyone and secondly, nature was not in any kind of danger from anthropogenic activities.

But the interaction of human and nature increased with the increase in the human population and nature began to come under stress and strain owing to the increased anthropogenic activities. It was now the right time to strike a balance between environment and nature. This was the time when the report by the World Commission titled “Our Common Future” highlighted the need of sustainable development for the whole world and specified that actions today would have

* Research Scholar (Academic Tutor & TRIP Fellow), Jindal Global Law School, dmalaviya@jgu.edu.in.

** Student LL.B.(Hons.) 3 rd year, Faculty of Law, University of Lucknow, vijyalakshmi04@gmail.com.

1 Fredrick Pollock, “Hobbes and Locke: The Social Contract in English Political Philosophy,” 9 Cambridge University Press 107–12.

2 Matthew Caylor, “Eminent Domain and Economic Development: The Protection of Property Four Ways,” 36 *Arizona Journal of International & Comparative Law* (2019).

consequences tomorrow and if they are not curtailed or managed the future would be catastrophic.³ To further strengthen the concept of sustainable development and safeguard the volatility of sensitive areas the Government of India can impose “restrictions on the locations of an industry or the carrying on of processes and operations in an area”⁴ According to the document all development projects or activities pertaining to modernization and expansion would now be required to obtain an environmental clearance by the Central, State, or Union Territory level Environment Impact Assessment Authority.⁵

The proposed Lakshadweep Town and Country Planning Regulation, 2021 has brought topics like development, governance and tourism in the limelight once again. Since Lakshadweep is an ecologically rich area the proposed regulation and its effect become even more important when viewed with this angle. Because of the fact that the island is surrounded by water on all sides it faces an imminent danger from sea level rise and natural calamities and it remains to be seen what type of planning and development the proposed regulation brings forward to minimize the risk posed by climate change. Thus this becomes the primary objective of the research. Secondary objectives of the research include the implementation mechanism of the regulation since everything depends on the implementation.

THE ECOSYSTEM OF LAKSHADWEEP

Lakshadweep is one of the most unique ecosystems in the world consisting of immense marine diversity. This diversity can be directly attributed to the climatic condition in and around the coast but this very attribute makes it fragile and vulnerable. Since it is surrounded by water on all sides’ cyclones and heavy rains are frequent. Being surrounded by water, Lakshadweep faces imminent risk of submersion owing to sea level rise and the Lakshadweep Action Plan on Climate Change report suggests that a predictable rise of one meter sea level rise may wipe out around 16% of land mass of the island⁶

In the 1990s, India witnessed an era of liberalization, privatization and globalization wherein the economy was opened to foreign entities. This era witnessed unique things, on one hand there were flourishing businesses and on the other there was the fragile ecology, which necessitated

3 United Nation General Assembly, Report of the World Commission on Environment and Development 374 (United Nations, August 4, 1987).

4 Ministry of Environment and Forest, The Environment (Protection) Rules, 1986, 1986, 29/1986, s. 5(3).

5 Ministry of Environment and Forest, “Environment Impact Assessment Notification,” 1 (2006).

6 Union Territory of Lakshadweep, Lakshadweep Action Plan on Climate Change 251 (Lakshadweep, xvi (2012)).

the need of environmental litigation. Litigation helped in the development of environmental jurisprudence and the importance of ecology was recognized.

One such landmark decision of the Supreme Court of India was given in *India Council for Enviro-Legal Action v. Union of India*⁷ or the coastal zone case wherein the petitioner highlighted the “adverse direct impact of the development activities” in and around the coastline. Pursuant to the order of the Supreme Court the Ministry of Environment and Forest issued the Lakshadweep Coastal Zone Management Plan and Island Protection Zone to “regulate the developmental activities in the Islands of Andaman & Nicobar and Lakshadweep”⁸ To implement this plan the administration was tasked to prepare an integrated island management plan.

The sensitive ecology in and around the coast was also acknowledged and sought to be preserved by the R.V. Raveendran Committee which established a “No Development Zone” and highlighted the role of local self-government bodies in preserving the ecology of the island. The Committee also touched upon several relevant aspects like, preservation of ecosystems- corals and seagrass, modernization of agriculture and horticulture, deep sea fishing and overfishing, the encouragement of establishing non-polluting industries, beach erosion, energy generation from wind, promoting tourism although in a ‘restricted’ way so as to not harm the ecology.⁹

The matter of preservation of Lakshadweep is not a localized and unidirectional effort drawing its power only from the judiciary; instead consistent efforts have been put in by the Lakshadweep administration to combat climate change. The focus of this effort has largely been concentrated towards a “precautionary adaptation approach” which aims towards sustainable development, vulnerability of the local population and optimum utilization of natural resources.¹⁰ On a reading of the LAPCC, a cycle seems to be forming with climate change being the reason for the increased vulnerability. For instance, owing to climate change the sea level shall rise owing to which the sea waves shall go above the corals and erode the coastline. Once the coastline is eroded, the land mass of the region is also reduced, once the land mass is reduced, livelihood opportunities are reduced once this happens poverty increases and when poverty

7 *Indian Council For Enviro-Legal Action v. Union Of India*, 1996 AIR 1446, 1996.

8 Lakshadweep Administration, “The Lakshadweep Gazette,” (2016).

9 *Id.*, at 7–9.

10 Union Territory of Lakshadweep, Lakshadweep Action Plan on Climate Change 251 (Lakshadweep, 2012).

increases pollution increases which again reinforces the climatic irregularities.

Lakshadweep aims towards a tourism that is “low volume high value”¹¹ and recent trends suggest that the tourism sector contributes the lion’s share in the revenue generation.¹² But judging by the emerging ecological fragility this will not be so unless strong actions are taken. Natural calamities shall require additional emergency preparedness and the expenses of insurance, back-up power, and evacuation etc., shall increase the overall operating expenses. Not only this, the natural disasters shall also alter water availability and reduce the natural beauty of the place and also raise issues pertaining to security owing to transport and communication interruptions.¹³ As a result, the tourism industry shall suffer.

The uniqueness of the ecosystem at Lakshadweep can also be attributed to the fact that it has been untouched by the modern concept of development and also to the fact that it has been subjected to the control of the indigenous population. This means that the indigenous population and the unique ecosystem are part of one and the same system whereby each depends on the other for its preservation and survival. With this being said, the government, when it is attempting to legislate on a sensitive subject, must pay proper attention to both these factors since they play an important role in the tourism industry. Therefore, the participation of the indigenous population which mostly falls under the category of Schedule Tribe becomes very important for the well-being of the whole region.¹⁴

Thus, the scenario at Lakshadweep poses a unique problem as on one hand it is being considered a “no industry district”¹⁵ and on the other hand strategies need to be formulated to reduce poverty so that the local community can be made resilient against climate change. This has therefore highlighted the need for sustainable development so that the economy develops while preserving the natural beauty of the region. Thus, any new legislation with Lakshadweep as its jurisdiction must be viewed from the perspective of economy and ecology. The economic angle incorporates tourism and improvement and development of land along with facilities for tourism and allied activities, the ecological angle incorporates the ability of the environment to sustain the former. Thus the question boils down to the fact that whether the new regulation

11 *Id.*, at 88.

12 *Id.*, at 24, 196–7.

13 *Id.*, at 198.

14 Office of Registrar General, India, “Data Highlights: The Scheduled Tribes” (Government of India, 2011).

15 Union Territory of Lakshadweep, Lakshadweep Action Plan on Climate Change 251 (Lakshadweep, 2012).

proposes sustainable development in the Union Territory of Lakshadweep?

LAKSHADWEEP TOWN AND COUNTRY PLANNING REGULATION, 2021

Pertaining to land and its development, the Regulation mentions the development of land in urban and rural areas and seeks to improve and preserve amenities in both rural and urban areas. The regulation seeks to grant permissions so that land can be used and developed. Further, the power of land acquisition has also been specifically mentioned. Apart from recognizing the need for sound planning and good governance the regulation also emphasizes on promoting tourism and the general welfare of the people who reside there.¹⁶ This being said, it becomes important to understand the present situation regarding infrastructure and tourism at Lakshadweep.

Generally speaking the infrastructure largely “consists of houses, roads, buildings, ports and harbours, airports and helipads, boats, crafts and catamarans, automobiles and vehicles, communication facilities etc.”¹⁷ A unique thing about the infrastructure present at Lakshadweep is that it is situated around the coastline and beaches. This factor makes the infrastructure vulnerable because in case of calamity the infrastructure gets disrupted and with it the transportation thereby making the whole island an “isolated pocket” of calamity. But as per the Task Force Report, 2007, the criterion of “safe construction” has not been adhered to while building new residential and official buildings and a large number of housing units are stone walled which make them vulnerable to earthquakes. Judging by this it would be assumed that any new legislation would give effect to this lacunae, but the proposed regulation defines building operation as the erection or re-erection of a building, roofing or re-roofing of any open space, materially altering or enlarging the building where the alteration shall affect drainage or sanitary arrangements etc.¹⁸ There is no doubt in the fact that the definition is quite wide but the proposed regulation does not mention as to how it shall address the existing lacunae.

The livelihood of the natives of Lakshadweep depends mainly on land and surrounding water bodies. Economic activity on land mainly includes agriculture and the cultivation of coconut while fishing is the main economic activity which depends on the surrounding water bodies, though tourism is another upcoming economic avenue for the Union Territory. Coconut cultivation in the region has its own challenges and since pumping of water for irrigation was

16 The Lakshadweep Town and Country Planning Regulation, 2021.

17 Union Territory of Lakshadweep, Lakshadweep Action Plan on Climate Change 251 (Lakshadweep, 2012).

18 The Lakshadweep Town and Country Planning Regulation, 2021, s. 2(4).

stopped in 1995, the only option for irrigating the coconut crop is that of rain harvesting. The reducing coastline coupled with decreasing fertility also pose a challenge in coconut cultivation in the region.¹⁹ Coral reefs, coastal erosion and fishing are all interdependent activities and their well-being has a direct impact on the well-being of human beings. With damage to coral reefs, there shall be a reduction of the reef fish species and their reduction would decrease the number of fish higher-up in the food chain as a result of which the fishing as an economic avenue will suffer.²⁰

Considering the seriousness of the matter the regulation should have proceeded on the lines of development with a tinge of safeguarding the sensitive habitats. Instead the regulation has defined development as “the carrying out of building, engineering, mining, quarrying or other operations in, on, over or under, land, the cutting of a hill or any portion thereof or the making of any material change in any building or land, or in the use of any building or land, and includes sub-division of any land”²¹ The Regulation also provides terms like industry and industrial use.²² The Raveendran Committee placed immense responsibility on the local communities in the matter of development in the region,²³ but the proposed regulation calls for the drastic measure of relocating the population on grounds of obsolete development and the existence of slum areas.²⁴

The importance of tourism as an industry was recognized by the administration and therefore environment friendly water sports and other environment friendly activities have been promoted around various islands. The regulation therefore aims towards liberalizing tourism by providing an easier process to set up eco-tourist activities.²⁵ The LAPCC recognized that the traditional model of tourism will not be effective owing to the sensitivity of the environment therefore locations shall be developed as “cruise lines” which is ideal for eco-sensitive islands.²⁶ Likewise, the National Centre for Sustainable Coastal Management recognized the fact that the Union Territory administration must intervene and act to prevent coastal degradation while

19 Union Territory of Lakshadweep, Lakshadweep Action Plan on Climate Change 251 (Lakshadweep, 2012).

20 Valeriya Komyakova, Geoffrey P. Jones and Philip L. Munday, “Strong effects of coral species on the diversity and structure of reef fish communities: A multi-scale analysis,” 13 PLOS ONE (2018).

21 The Lakshadweep Town and Country Planning Regulation, 2021, s. 2(9).

22 *Id.*, at ss. 13, 14.

23 Lakshadweep Administration, “The Lakshadweep Gazette,” para. a (iii) (2016).

24 The Lakshadweep Town and Country Planning Regulation, 2021, s. 2(29).

25 *Id.*, at s. 34.

26 Union Territory of Lakshadweep, Lakshadweep Action Plan on Climate Change 251 (Lakshadweep, 2012).

promoting tourism.²⁷ However, the provision to set up eco-tourism, as the name suggests, allows for the setting up of tourist activities in the zones declared as eco sensitive zones under the Environment Protection Act, 1986. Not only shall the sensitive zones be damaged but also the purpose of declaring eco-sensitive zones to act as a “shock absorber” shall be diluted owing to the increased human presence²⁸.

Implementation of the Regulation

The Government declares areas as planning areas and then constitutes a planning and development authority to execute the said plan.²⁹ The planning and development authority then utilizes the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as RFCTLARR) to acquire land for public purpose and award compensation for such acquisition.³⁰ Thus, the doctrine of eminent domain comes into play wherein it is deemed that all land belongs to the State and the State can acquire the same for the larger good. Once the land is acquired and the development plan has been approved by the government the development plan comes into operation as soon as the notification is published.³¹

Such that all interested parties are given an opportunity to be heard the provision of appeal is provided in the regulation under which any person aggrieved by the development plan may go to the district court and challenge the validity of the development plan on the ground that the plan is not within the powers conferred by the regulation and any requirement of the regulation has not been complied with.³² The provision looks fair only until the constitution of the planning and development authority is understood and since the authority is the main executive body and plays the main role in implementing the provisions of the regulation this becomes even more important as all decisions of the planning and development authority are taken by the majority of members present and voting.³³

The regulation vests all power in the administrator and establishes that government and administrator of the Union Territory mean one and the same thing.³⁴ The planning and

27 Lakshadweep Administration, “The Lakshadweep Gazette,” 10 (2016).

28 Ministry of Environment and Forests, “Guidelines for Declaration of Eco-Sensitive Zones around National Parks and Wildlife Sanctuaries” (Government of India, 2011), at p. 5.

29 The Lakshadweep Town and Country Planning Regulation, 2021, ss. 5, 9.

30 *Id.*, at s. 29.

31 *Id.*, at s. 24.

32 *Id.*, at s. 26.

33 *Id.*, at s. 10.

34 *Id.*, at s. 2(12).

development authority shall have a chairman appointed by the government; it shall have a town planning officer who shall be *appointed by the government*, the authority shall also have representatives of local authorities and such other members not exceeding three who have special or practical knowledge in matters of town and country planning etc., in the opinion of the government and shall be *appointed by the government*. In case the local authority is appointed as the planning and development authority the chairman shall be *appointed by the government*, the town planning officer who “shall be the Member Secretary to the Committee” and five other members of whom two shall be *appointed by the government*.³⁵ In the former it can be clearly seen that the government representatives are in majority while in the latter the representatives of local authority and government stand in an equal deadlock like situation might arise. But the very fact that the presiding member’s vote acts like a casting vote tilts the balance in the favour of the government.³⁶

The appellate procedure enshrined by the regulation no doubt provides a relief from the lopsidedness but stands severely restricted when it comes to the grounds on which the district court can stay or quash the development plan. The regulation only provides for procedural infirmities which can be called into question by the district court. And judging by the aforementioned provisions not many procedural infirmities would be there in practicality. But since the Indian Constitution has recognized the doctrine of separation of powers the action of executive restricting the scope of appeal becomes interesting to note here.

The regulation at hand can be compared with the Indian Councils Act, 1909 wherein the principle of elections of members to the central and provincial legislative council was recognized but at the same time severely restricted the participation of the elected members in the democratic process.³⁷ Likewise, the regulation is also similar to the Simon Commission in the sense that the Commission consisted mainly of foreigners but the purpose was to report on the working of the Indian Constitution which it did and suggested that India was not ready for parliamentary responsibility and recommended just provincial autonomy.³⁸

³⁵ *Id.*, at s. 7.

³⁶ *Id.*, at s. 10(3).

³⁷ Centre for Law & Policy Research, “Constitution of India, 1950” Indian Councils Act, 1909 *available at*: https://www.constitutionofindia.net/historical_constitutions/indian_councils_act__1909__1st%20January%201909 (Visited on July 22, 2021).

³⁸ V. Venkatraman, “Simon Go Back!: Reflections of the Indian Press on the Boycott of Simon Commission in the Madras Presidency, 1928-1930” 14 *SSRN Electronic Journal* 10 (2019).

And just like the above documents had far reaching effects the consequences of which can be felt till date, the regulation might also have several foreseeable severe impacts on the integrity of India. Because of the fact that the regulation lays more emphasis on procedural matters rather than on the prevailing socio-legal conditions and also restricts the jurisdiction of the court it shall erode the confidence of the local population from both the established governmental machinery and the judiciary.

Public Works Department v/s Planning And Development Authority

The Lakshadweep Town and Country Planning Regulation, 2021 provides for town planning schemes and vests the execution of these schemes with the Planning and Development Authority which is an authority created under the regulation. The authority under the regulation is supposed to lay a plan in which land is laid and/or reclaimed, streets, roads are constructed/diversified/improved/alterd, buildings are constructed/removed/alterd, land is reserved for recreational and other like spaces, water supply is established along with drainage and lighting facilities, etc.³⁹ In short all functions of the public works department are entrusted with the planning and development authority. This being said, one must believe that there is complete absence of a public works department therefore a new body is being established to carry out the functions. But that is not the case as a Public works department is very much there in the Union Territory of Lakshadweep.⁴⁰ This raises a question that when a public works department is present then what is the need to establish another body which carries out similar functions? To answer this question, we will have to revisit the British era once again.

In the last years of the nineteenth century when the bubonic plague was at its nadir and the authorities were concerned over the unsanitary living conditions of the masses which threatened the public health of Bombay. Thus, the Improvement Trust Act, 1898 was born with its aim of “destroying slums, mitigating the abysmal living conditions of the urban poor and restoring the health of the city. The trust was entrusted with the work of making new streets, opening out crowded localities and carrying out land reclamations to provide room for the expansion of the city.”⁴¹ Interesting to note here is that the improvement trusts owes its existence to the English and Scottish Improvement Schemes which have two underlying features. The first feature is that

39 The Lakshadweep Town and Country Planning Regulation, 2021, s. 48.

40 U.T. Administration of Lakshadweep, “Lakshadweep Departments” (Government of India).

41 Prashant Kidambi, *The Making of an India Metropolis: Colonial Governance and Public Culture in Bombay 1890-1920* 71 (Ashgate Publishing Limited, Cornwall, 2007).

these schemes were aimed towards the usurpation of private property in the name of collective good and second is that, that the improvement schemes consisted of a “physical planning concept” and its central powers were “clearance powers” which implies a right to acquire property, demolish it and redevelop it.⁴² This is something which is present in the Lakshadweep Town and Country Planning Regulation, 2021.⁴³

Thus, it was to make the governance easy and simple that a separate body was created wherein specific officials could proceed “unencumbered by accountability to representatives of local self-governing institutions”⁴⁴ Thus, at that point of time it was public health which necessitated such departure from responsibility and today it is the welfare, promotion of tourism, good governance along with public health which makes the departure necessary.

Inherent Tendencies of the Regulation

As has been earlier discussed, the regulation reserves or designates land for public purpose within the meaning of RFCTLARR and for bringing this land acquisition into effect the planning and development authority has been granted certain powers. These powers include the power to evict any person not entitled to hold the land and the power to impose fine with or without punishment in case of breach the provisions of the regulation. Since, the power of execution is vested with the planning and development authority which functions on the basis of majority of votes by members present and voting and because of the flawed constitution of the authority owing to its inherent majority of numbers the proposed law becomes arbitrary.

Further, when the Constitution of India lays down under Article 300A that “no person shall be deprived of his property save by authority of law” it means that the State cannot utilize its strength to dispossess persons who own property in the garb of public purpose and that the right to property is a basic human right and that it “is the seed bed which must be conserved if other constitutional values are to flourish”⁴⁵ There is no doubt in the fact that the doctrine stands disproportionately in favour of the State but the State cannot use this indiscriminately and it must face absolute necessity furthermore, the individual whose property is acquired must be compensated. However, even with these checks the courts have frequently stated the urgent need of imposing limits on the use of this power and the Supreme Court has recently opined that

42 *Id.*, at 72.

43 The Lakshadweep Town and Country Planning Regulation, 2021, ss. 49, 52, 61, 71.

44 Prashant Kidambi, *The Making of an India Metropolis: Colonial Governance and Public Culture in Bombay 1890-1920* 72 (Ashgate Publishing Limited, Cornwall, 2007).

45 *M/s Delhi Airtech Services Pvt. Ltd. v State Of Uttar Pradesh*, Civil Appeal No. 24/209, 2011.

“a welfare State which is governed by the Rule of Law, cannot arrogate itself to a status beyond one that is provided by the Constitution... It is not permissible for any welfare State to uproot a person and deprive him of his fundamental/constitutional/human rights, under the garb of industrial development.”⁴⁶

The regulation shall reignite the debate of public purpose versus private interest and it shall subjugate Lakshadweep in the turmoil which India had to face during the struggle for independence and afterwards. Though the justice delivery mechanism is sound but the way the scope of judicial intervention has been restricted raises questions regarding the quality of justice delivery. On the basis of these things it can be said that the regulation shall not only violate the fundamental provisions of the law of the land but also prove to be a regressive regulation because it shall be raising questions already answered by the courts.

Reimagining ‘Public Purpose’

Law has limited the purposes for which the government can acquire the property of an individual and use for itself or transfer the acquired property to a third entity.⁴⁷ In most cases expropriation is allowed only when the government shows that the property is required for public purpose. But since the meaning of public purpose has been obscure it has been mostly interpreted by the State in the economic sense. This narrow interpretation of the term has led to a distorted perception such that the poor are dispossessed of their lands to “elevate the rich”⁴⁸ This dispossession and the elevation concept has frequently spiraled into conflict which ultimately clogged the wheels of economy.⁴⁹ This is not a local problem instead it is a global problem which has made the Food and Agriculture Organization to promulgate “Voluntary guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forest in the context of National Food Security” and it specifically suggests that the State must clearly define public purpose so that judicial review is not obstructed and that the planning process for expropriation is transparent and participatory at each step.⁵⁰

46 *Tukaram Kana Joshi v. M.I.D.C. & Ors*, Civil Appeal No. 7780/2012, 2012.

47 *Raja Suriya Pal Singh v. State of Uttar Pradesh and Others*, 1975 AIR 1083, 1952.

48 Björn Hoops and Nicholas K. Tagliarino, “The Legal Boundaries of ‘Public Purpose’ in India and South Africa: A Comparative Assessment in Light of the Voluntary Guidelines,” 8 *Land* (2019).

49 Namita Wahi, “Land conflict rampant in India because Constitution has made sparse reference to it” *The Print*, 28 February 2020.

50 Food and Agriculture Organization, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (United Nations, Rome, 2012).

This being said the approach of the Supreme Court of India must be remembered when it said that the scope of public purpose is flexible and should be interpreted as per the needs of the society-

*“The expression public purpose is not capable of a precise definition and has not a rigid meaning. It can only be defined by a process of judicial inclusion and exclusion. In other words, the definition of the expression is elastic and takes its colour from the statute in which it occurs, the concept varying with the time and state of society and its needs. The point to be determined in each case is whether the acquisition is in the general interest of the community as distinguished from the private interest of an individual.”*⁵¹

Thus, importance has been given to the elastic nature of the definition and the fact that it depends on the time and the society in which it seeks to operate. It is with this thought that the preamble of the regulation must be studied. After such study, it can be understood that since tourism is the bread and butter of Lakshadweep, all acquisition and development of land is being done for the sole purpose of promoting and giving a boost to the tourism sector. Thus, it is tourism and the general welfare of the people of Lakshadweep accruing from the tourism sector. Therefore, tourism is the “public purpose” within the definition and meaning of the regulation and it is only for this public purpose that any land acquisition and development take place after strict adherence to a participative process. This although has been recognized at many instances in the regulation but the implementation mechanism provides otherwise.⁵²

CONCLUSION

The modern day government is largely focused on maximum governance with minimum interference with the focus being on the common man’s benefit and this aspect of the modern day government was highlighted by the Indian Prime Minister very recently.⁵³ Some deviation is allowed but the very fact that the regulation channelizes all authority towards and through the government makes it absolutely contrary to the vision of the government and thus injurious to the democratic set-up of India.

In today’s time when the interaction of man and nature has given rise to zoonotic diseases the need of a progressive law is felt which reimagines public purpose as the natural development of

51 *Raja Suriya Pal Singh v. State of Uttar Pradesh and Others*, AIR 1975 Sc 1083.

52 Refer to section 3.1 Implementation Mechanism under the Regulation.

53 Mahesh Langa, “Minimum government, maximum governance: PM Modi’s mantra to IAS probationers” *The Hindu* (Ahmedabad, 31 October 2020).

things because the time has come when human intervention in the state of affairs will only increase the risks of zoonotic diseases. Since the beginning of the decade huge stress has been laid on sustainable development but the growing population which necessitates the development has not been given due importance. This can also be understood in the way that the 'sustainable' part in sustainable development is a fluid concept and it depends upon the need to satisfy human wants. This means that sustainability and population have an inverse relation and as the population increases the sustainability decreases and vice-versa. Thus, all efforts to make development sustainable must be aimed toward restricting the growing population which is being done countrywide by way of population control legislations.

Representation for the sake of representation is injurious not only for the welfare but also for the democracy. The regulation aims to promote the general welfare of the people living in Lakshadweep but the way in which the local authorities and their representatives are involved or rather excluded in the decision making process makes the situation comparable to that in the British period. Lakshadweep is a place where man and nature have coexisted and will coexist in the future as well if man does not interfere in natural affairs. In this regard the Raveendran Committee specifically mandated that the officials and natives be sensitized and educated about the sensitive ecology but the regulation with its English components make it a scenario far too distant.

Land, lagoon and reef are inextricably linked in Lakshadweep such that the slightest of actions affecting one can have long lasting and disastrous consequences. The regulation begins with the promotion of tourism and the common welfare but misses these objectives and lends its focus towards buildings, roads, buildings and a network of amenities to make the region immune against disaster and commercially viable. The thing to understand here is the tagline of Lakshadweep tourism is "99% fun 1% land" and the tagline signifies the richness of the surrounding water bodies and the fact that these water bodies form the heart and soul of Lakshadweep tourism. Along with this, Lakshadweep is known for its pristine and clear beaches and these along with the rich biodiversity attract tourists from all over the world. This being said, good connectivity, infrastructure and resistance towards disaster can only aid in the experience but sadly cannot replace the experience. In other words, people go to Lakshadweep to experience the natural beauty and the culture of Lakshadweep and not perfectly aligned roads and five star amenities. Convenience, no doubt, has a role to play here but not at the cost of sustainability, livelihood and welfare of the local population.

Since the population of Lakshadweep is mostly comprised of tribes and historical records suggest that tribes generally reject attempts of development and refrain from integrating into the mainstream society it remains to be seen what the government does this time to convince the tribes to accept the notion of development and whether the notion of development has undergone some change, a change that suits them? This being said, the survival of the ecosystem of Lakshadweep and its indigenous population remains in the hands of the government and on the fact that how 'skillfully' it implements the regulation to promote 'tourism'

TRAJECTORY OF COMBINATION CONTROL IN INDIA IN THE CONTEXT OF THE COMPETITION ACT, 2002: AN ANALYSIS

Dr. Geetika Walia*

INTRODUCTION

The engines of the economic development run on the firm ground of a well-functioning market. Existence of competition in the market makes the market perform better. Market is a place where the exchange of goods and services take place for some consideration. It is not only the place where the supply meets the demand but also the place where the trends of the industry are decided. Without a proper and independent market, the bubble of the economy can crash and have serious consequences in the overall development of a country. Therefore, it can be said that market is a place where the interaction takes place and if the interactions were right then this would lead to the establishment of competition in the market. Further it is important to mention that to tackle the market problem effective and fair competition has to be the order of the day.¹

The markets are generally differentiated on the basis of the control exercised by the government. When the markets are heavily intervened by the government, they are socialistic market. Here the government regulates the demand, supply and prices and the invisible hand of the market has no role to play. On the extreme end of this spectrum is the capitalistic market that in turn is not barged in by the government and the producers, sellers and consumers work in tandem to reach down a price. In such a market form, the will of the consumers balances out the greed of the producers and sellers. The final equilibrium is therefore maintained.

However, one common feature to all the forms of the market is the presence of a market regulator. This regulatory body acts as a watchman to the market so as to ensure that no player in the market gains an upper-hand. Every player in the market is given an equal opportunity to establish itself. That is the basis of free and fair competition. There are various kinds of activities that happen in the market that can cause a negative effect on the market. Some of the activities are when market player resort to anti-competitive activities such as cartels, abuse of dominance position etc. These practices, which these players resort to have a negative, impact on the

* Associate Professor, Rajiv Gandhi National Law University, Patiala.

1 Marshall Steinbaum and Maurice E. Stucke, "The Effective Competition Standard: A New Standard for Antitrust" 87 (2) *The University of Chicago Law Review* 595-623 (March 2020).

economy and affect the welfare of the consumer as well. To maximize profits, frequently the traders of one class come together and enter into illicit agreements to fix the prices, supply, geographic market or the distribution chain.² This eventually results in the formulation of a cartel. As the stakes and the penalties are high for cartels, more often than not these cartels are simply based on an understanding. The understanding would not be even in writings so as to protect them from the hands of justice. Therefore, a regulatory mechanism is essential for maintaining free and fair competition that exists against the background of a law.

One of the prerequisites to increase the efficiency of the market that would further lead to the growth of the economy and enhance the consumer welfare is to have a robust competition law in place. In the contemporary times, robust competition law and policy has assumed a centre stage in the Indian economic model as India is witnessing gains from an increasing influx for foreign investment which involves dynamic market structuring. It is important to mention here that the basis of the competition law is economic transactions or activities. The interpretation and the analogy to the law must be done on case- to- case basis keeping the goals of the law as the standards or keeping the provisions of the law as the basis.

Competition law is a paradoxical branch of law. It seems a series of complicated economical jargon while it is the most basic common sense codified for the regulation of market. The subject is constantly evolving to absorb even the minutest change in the market. India, which has always been ahead of its time with the legislative literature, realized the forthcoming change and made space for it. The Monopolies and Restrictive Trade Practices Act of 1969 (MRTP Act, 1969) was responsible for curbing the menace in the market and regulating the market. However, due to changing scenarios in the market and increasing globalization the Act was proving to be inefficient.³ As far as the present position is concerned the Competition Act, 2002 governs the markets in India. The aim of the Competition Act was to prevent the new- age practices, strategies and technologies from creating an appreciable adverse effect on the competition. But the Act is proving to be an old wine in a new bottle. There are different issues, which are cropping up on a regular basis and the Act is struggling to tackle them and keep the water under the bridge. The main reason for this is that market is not static but it is dynamic. The conditions of markets

2 B.S. Chauhan, "Indian Competition Law: Global Context" 54 (3) *Journal of the Indian Law Institute* 315-323 (July-September 2012).

3 Aditya Bhattacharjea, "Of Omissions and Commissions: India's Competition Laws" 45 (35) *Economic and Political Weekly* 31-37 (August 28-September 3, 2010).

keep on changing. So it is important that the policies of the regulators also keep on changing with the changing market conditions to bring all the activities within its ambit which cause or are likely to cause appreciable adverse effect on the market.

The author in this article is going to analyze in detail the concept of competition law and why is it important to have a law to regulate the competition in the market. The author would make a humble effort in this article to study the concept of combination as mentioned under the Competition Act, 2002 and what is the procedure followed to notify the same and also study the effects or orders which the CCI would pass in case there is a violation of the provision of the Act. This probe will eventually lead to initiation on a fruitful discussion on the concept of combinations and the evolving areas of combinations under the competition law.

DEFINITION AND IMPORTANCE OF COMPETITION LAW

The economy of India today is getting transformed into a new form of economy, which technically can be regulated under the competition law.⁴ Competition law ensures competition in the market which is fair and also checks all the harmful practices that are against fair competition and competitive processes. It was important to have such law because it could regulate the market. It is evident that the market would suffer from failures and distortions and the players existing in the market can enter into anti- competitive agreements, abuse of the dominant position they have in the market where in such activities would affect the economic efficiency of the market negatively.

It becomes important to define what competition is at this stage. Competition means to have an advantage over the others. The interpretation of this word in business arena would mean to have a control over the market and have maximum number of consumers to have maximum profits. Competition is a process where there exists fiscal conflicts that exist between the producers which are active in the market. Further the definition given by World Bank is “a situation in a market which firms or sellers independently strive for the buyers patronage in order to achieve a particular business objective for example, profits, sales or market share”. So it can be said that competition is when all the players in the market want to establish their existence and establish themselves in the market by doing activities that are fair and getting maximum profits by doing the transitions in the market.

4 T. C. A. Anant and Jaivir Singh, “Structuring Regulation: Constitutional and Legal Frame in India” 41 (2) *Economic and Political Weekly* 121-127 (Jan. 14-20, 2006).

In the case of *United States v. Philadelphia National Bank*⁵, competition was defined by the court “as a process that required numerous participants and decentralization”. Further in *United States v. Tapco Associates Inc*⁶. it was held that competition have been described as “*Magna Carta* of free enterprise and they are important to the preservation of economic freedom and free enterprise system”.

To regulate this competition we need laws and those are called the competition laws or are generally known as the Anti- Trust laws. These laws protect the competition in the market and see the ultimate beneficiary of this is the consumer. It was stated in the case of *United States v. Aluminum Corp. of America*⁷ that “competition law has a social purpose as well. Throughout the history of the statutes of competition law it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other”. *R. v. Nova Scotia Pharmaceutical Society*⁸, it was stated that “competition law is expected to play an important and ever larger role because of the trends towards globalization and increasing liberalization of the trading system”.

The underlining justification for having competition law is where different buyers can exist at the same time in the market and the buyer is given an option to choose from the various options that are available at a price that suits the buyer the most. As Adam Smith observed “there is an invisible hand at work to take care of this”. “The main aim of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences”. This was held in the case of *CCI v. SAIL*⁹.

Some of the advantages of fair competition which should be established in every economy are:

- a. Allocative efficiency
- b. Productive efficiency
- c. Dynamic efficiency
- d. Existence of competition gives options to the consumers to choose from variety

of products available.

5 (1962) 374 US 321.

6 (1972) 405 US 596.

7 148, 416 (1945).

8 1992 SCR 606 (Canada).

9 (2010) 10 SCC 744.

It was held in the case of *Subhash Yadav v. Force Motors Ltd*¹⁰ that “the purpose of the Act is to protect and promote fair competition in the market”. The objective of competition law is to prevent any activities that put a limitation on the competition which would have a negative impact on the market and affect the consumers as well.¹¹ Also in the case of *Northern Pacific Railway Company & Northwestern Improvement Company v. United States of America*¹², it was held that “the premise on which competition law is designed is to act as a comprehensive charter of economic liberty”. Further it was held in this case that the ultimate objective of the law is that free competition exists in the market. This free competition would result in all players getting an equal chance to make an entry into the market and try to exist in the market which would further lead to economic progress and development.

Therefore an analysis of this part of the paper one can come to the conclusion that how important competition law is for the fair regulation of certain types of behavior existing in the market. So when everyone is given an equal right to exist and function in the market it would lead to establishment of social justice and the market players would gradually become self-reliant. The competition law would result in liberalizing the economy but at the same time would provide a system of checks and balances. It tries to establish a situation that prevents the breakdown of the market and establishes that the rivals can also exist in the market with each other.

HISTORICAL ASPECT OF THE COMPETITION ACT

India gave to its people Constitution of India on 26th November 1949 which stated in its Preamble that “We the People of India having solemnly resolved to constitute India into a Sovereign, Democratic, Republic and, inter alia, to secure to all its citizens social, economic and political justice, adopted, enacted and gave to ourselves the Constitution of India”. After the incorporation of the Constitution there were several amendments but with the 42nd Amendment the word “Socialist” was added in the Constitution. Further through the 44th Amendment of 1978 Article 38 was amended which stated that the “State had to strive to promote the welfare of the people by securing and protecting, as effectively as possible, a social order in which justice, social, economic and political, was to be taken into consideration by all institutions of national

10 2012.

11 Aditya Bhattacharjee, “Of Omissions and Commission: India’s Competition Laws” *Economic and Political Weekly* (August 28-September 3, 2010).

12 356 US 1.

life". Article 39 was for the benefit of the citizens which enumerated that the policies of the government should be in the direction that it should ensure that there should be equitable distribution of the resources and everyone should have an equal chance of ownership of these resources. This would lead to the welfare of all. Both Article 38 and 39 were the Directive Principles of the State Policy included in Part IV of the Constitution.¹³

Relating these provisions of the Constitution to the competition one can state that even though the word "Socialist" has not been defined but the Supreme Court¹⁴ interpreted this concept as "the socialist state is to wipe out inequality in economic conditions, status and standards of life. The activities of state should not be uneconomical. In a democratic set-up the socialist pattern is of permanent importance". Further in the case of *Samasher v. State of A. P.*¹⁵, the court held that "the state is under an obligation to remove economic inequalities, to provide decent standard of living to the poor people and to protect the interests of the weaker section of the society".

THE MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, 1969

India adopted the policy of "Command and Control" after it attained independence. And the MRTP Act was based on this. Mahalanobis Committee was appointed by the Government of India with the object to see the proper allocation of income that would increase the level of living.¹⁶ The report of the Committee was submitted in 1960 explaining about the income inequalities. The Indian Government for the first and foremost time recognized the importance of regulating the market after 22 years of its independence by passing the MRTP, 1969 on the recommendations of Mahalanobis Inquiry Committee. The objective of the Act was to curb the economic concentration of wealth in few hands and at the same time have fair and ethical competition in the market and also to check the unfair trade practices affecting the market and competition. Further it put forth that healthy ethical competition should be established in the commercial market. To give effect to the objectives of the Act, a MRTP Commission was set up to take up the matters of investigation.

In the year 1984 a Committee was set up to review the provisions of the Act under the Chairmanship of Justice Rajinder Sachar. The Committee was popularly known as the Sachar Committee that suggested measures so that the Act could be made easily accepted in the era of

13 Justice Altamas Kabir, "Competition Laws and the Indian Economy" 23 (1) *National Law School of India Review* 1-8 (2011).

14 *D. S. Nakhara v. Union of India*, AIR 1983 SC 183.

15 AIR 1997 SC 3297.

16 Mahalanobis Committee Report on Distribution and Levels of Income, Government of India, New Delhi, 1964.

globalization. An amendment was brought in the MRTP Act in 1984. The Committee had examined the root cause of monopolistic trade practices, economic concentration and factors responsible for unfair competition. Further, collusive behavior amongst leading companies, tendency of predatory pricing of the commodities and also economic conditions prevalent in India, were reviewed and studied by the Committee. But the Government soon realized that with the changing times the Act was becoming obsolete. To review the situation a committee was established under the chairmanship of Mr. Raghavan. The Committee was popularly known as the Raghvan Committee.

ANALYSIS BY THE RAGHAVAN COMMITTEE

India witnessed a new era during the 1990 where in lot of economic reforms started taking place and it was realized that the MRTP Act was not sufficient to fulfill the new market conditions of growing economic liberalization and globalization that were been introduced in the economy. In order to tackle this problem the Central Government constituted a high powered expert committee under the Chairmanship of M. P. Sri. S. Raghavan in 1999. The Raghavan Committee after intense research finally submitted a reported giving three pronged suggestion-

- a) To repeal the existing the MRTP Act.
- b) To institute a new competition legislation.
- c) To dissolve the MRTP Commission.

It was put forth by the Committee that the MRTP Act was not able to address the basic issues relation to competition. It stated that:

“The MRTP Act, in comparison with the competition laws of many countries, is inadequate for fostering competition in the market and trade and for reducing, if not eliminating, anti- competitive practices in the country’s domestic and international trade.”

Its important to mention here that the reports and the recommendations were accepted by the Parliament and they passed the Competition Act, 2002 on 13th January 2003 and the Competition Commission of India, also known as CCI, was set up on 14th October 2003.

ENACTING THE COMPETITION ACT, 2002

As it has already been stated by the author that the Government soon came to the conclusion that the provisions of the MRTP Act were becoming abandoned and obsolete in the changing

economic scenario of the country. The Government in order to tackle this problem therefore enacted the Competition Act, 2002. The reason behind the passing of the Act was to introduce the system of checks and balances as far as the regulation of the market was concerned. It was a response of the Indian Government for opening of its market to the international world. The legislative intent behind the enactment of the Act was that India came to terms with the international laws dealing with the competition laws.

It was stated by the Finance Minister in February 1999,

“The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promising competition.”

The main objective of the Competition Act was preventing all those activities that would have a negative effect on the competition further also to encourage free and fair competition in the market and promote the consumers interests.¹⁷ The Act has three major provisions that form the fundamentals of the competition law in the country. All the offences, regulations come under these provisions-

- a) Anti- competitive Agreements (Section 3);
- b) Abuse of Dominant Position (Section 4);
- c) Combinations (Section 5 and 6).

ANALYSIS OF COMBINATIONS

Competition operates in a business environment and corporate restructuring is an integral part of the business environment. Corporate reorganizations are in line with dynamic competition and are capable of increasing the competitiveness of the market. Combinations often yield substantial economies of scale in production, research, distribution and management. These corporate restructuring includes activities like amalgamations, takeovers, mergers and acquisitions. These activities not only find a place in the Companies Act, 2013 but is also an integral part of the competition law because whenever corporate restructuring takes place it has a direct impact on the market. The effect of such an activity can be on the existence of players in the market, what are the shares of the players in the market after the restructuring, number of the

¹⁷ Preamble, Competition Act, 2002 “An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto”.

players and number of competitors.

Combination means when two entities combine together to form a single entity. A notable feature of combinations is the increasing complexity, size and geographical reach. Very large combinations have taken place where restructuring has taken place in an increasingly competitive global market or environment. An example of this can be the merger of Ciba- Geigy and Sandoz in 1996 to form a major pharmaceutical and chemical company called Novartis. Another example of this can be the merger of Glaxo Wellcome and SmithKline Beecham into GlaxoSmithKline. Pharmaceutical industry Pfizer and Warner- Lambert merged to become the largest pharmaceutical company in the world.¹⁸ In the car industry, the merger between Daimler- Benz and Chrysler¹⁹ between Ford and Volvo²⁰ and between Nissan and Renault²¹.

Its important to mention here that as far as competition laws are concerned there are around 130 nations that follow this law but as far as the provisions of combinations are concerned it differs from country to country. In some jurisdictions it is mandatory to notify to the regulatory authority if the limit of combinations crosses the threshold limit set by the regulatory authority whereas in other jurisdictions it is voluntary. It can be explained as under:

- a. **Mandatory Merger Control:** Under this it is mandatory to notify about the merger transaction to the regulatory authority. This kind of control mechanism is most common and convenient as the regulator can regulate all the merging transactions. But an important thing to be mentioned in this type of merger control is that not every transaction has to be notified to the regulating authority it is only those transactions that will pass the threshold limit set in the law that has to be notified. Some of the counties that follow mandatory merger control are China, India, South Korea, Japan, and Italy.
- b. **Voluntary Merger Control:** Under this kind of control mechanism there are no pre-requisite threshold criteria provided for filing of notifications and giving a notification to the regulatory authority. Under this mechanism it is not necessary to obtain a clearance from the regulating authority before actually

18 Case M 1878, decision of 22 May 2000.

19 Case M 1204, decision of 22 July 1998.

20 Case M 1452, decision of 26 March 1999.

21 Case M 1519, decision of 12 May 1999.

going forward with the merger. Some of the countries that follow this control mechanism are Singapore, New Zealand, and Australia.

TYPES OF COMBINATIONS

The basis of the Competition law is establishing that some kinds of combination will lead to the market being less competitive leading to the adverse effects to the consumers. The regulatory authority focuses on three types of combinations and analyzing its effects. The types of combinations are:

1. Horizontal combinations: This type of combination occurs when combination takes place between the similar product in the same market existing in the same geographical location and are at the same level of manufacture or delivery chain. It poses a much greater danger to the competition and are treated more strictly. As far as India is concerned the Raghavan Committee also suggested in its report that horizontal combinations are the matter of concern for the regulatory authority as it reduces competition.
2. Vertical combinations: This combination takes place between firms that are at different level of productions with regards to the same product. This type of combination does not lead to loss of competition and therefore not anti-competitive. It was stated by the European Commission, that these kinds of combinations cause no harm or danger to the competition. It would have a negative impact on the competition unless it combines with another entity and becomes dominant. In some cases vertical combinations may cause a problem to competition.
3. Conglomerate combinations: These combinations operate between firms that operate in different product markets. The firms produce different but related products.

There are many reasons why firms enter into combinations. Some of the reasons are that the combinations would be beneficial and not harmful to the economy. Some of the combinations might create problems in the market and the economy and require a more interventionist approach to combinations. A positive impact of some of the combinations is the achievements of efficiency in the economy.

REGULATION OF COMBINATIONS

The question that needs to be answered at this juncture is what is the need or purpose of combination control. Its pertinent to mention here that combinations may at times have distorted effect on the market structure and therefore legal structure should be in place to declare some combinations as void. The biggest factor driving the combination control regime is to prevent formation of a monopoly, cartel, trust or a monopolistic market. It is a possibility since some companies indulge in aggressively acquiring the small players of the market in order to lessen the competition and thereby increasing their dominance in the market. Notifying the Commission about the merger activity would lead to review and forecast the effect of the activity in the relevant market. If such a merger is going to cause anti- competitive effects in the market the regulating authority can rectify the defects by passing relevant orders.²² There are times when combinations can create ripple effect and damage the entire financial ecosystem. The guard has to be done against the entities that are formed through combinations that will too big to fail. These kinds of entities are very important because they exist and are operative in a market in such a complex manner that their extinction will bring down numerous other entities in a domino effect. Thus, there has to be in place, an effective combination control policy to ensure that there is no concentration and there is no entity which becomes too big to fail or too big to control the market.

A government may object to a combination on the grounds that it might not allow an international firm to combine with a national firm or if the combination does not fit in the industrial policy or where the combinations might lead to creating unemployment. It can be stated without any doubt that the regulation of combination is done not just to protect the abuse that occur in the market but also establishing a market where all producers are given a chance to exist in the market and further lead to the welfare of the consumer.²³ The outlook of the regulatory authority should always be “Forward- Looking” that is to consider the effect on competition in future.

COMBINATIONS UNDER THE COMPETITION ACT, 2002

Its important to mention here that when we talk about India as an economy we see that it is the fastest growing economy of the world today. Seeing the amount of development taking place in

²² Manish Agarwal and Aditya Bhattacharjea, “Are Merger Regulations Diluting Parliamentary Intent?” 43 (26/27) *Economic and Political Weekly* 10-13 (June 28 - July 11, 2008).

²³ *Gencor v. Commission* (1999) ECR II 753.

the business sector it is pertinent to mention that all kinds of combination transactions cannot be notified to the Competition Commission of India (CCI) because such transactions seldom have an appreciable adverse effect on the competition. That is why there is a threshold limit set under the law and only if a transaction crosses that limit it becomes mandatory to notify it to the CCI. The threshold limits that are set are very high because where the stakes are high only those transactions generally would have an appreciable adverse effect on the competition. The threshold limit is on the basis of the assets or turnovers of the enterprise.

For the purpose of the Competition law in India, the mergers and amalgamations, which are over a certain thresholds, are referred to as combination. Some of the relevant sections relating to combinations are given under section 5, 6, 20, 29 and 30. Further the Regulation dealing with combinations is the Competition Commission of India (Procedure in regard to the transaction of business relating to Combinations) Regulations, 2011 in the year 2019 which came into effect from 19 August 2019 and the latest amendment took place in 2021 that came into effect on 2nd March 2021.

Section 5 of the Competition Act, 2002 mentions three types of transactions covered under the combination and that are acquisitions, mergers or amalgamation. As provided under the section the below mentioned transaction can be combination and the threshold limit is as has been mentioned below:

1. Any acquisition as mentioned under section 5 (a)
2. Acquiring of control as mentioned under section 5 (b)
3. Any merger or amalgamation as mentioned under Section 5 (c)

The threshold limit vis- a- vis the above combinations are as mentioned below which were amended by 2016 amendment. It is also pertinent to mention here that according to section 20 (3) the threshold limit is increased or reduced by the Central Government in consultation with the Commission after every two years. The basis of this change is the wholesale price index or fluctuations in exchange rate of rupee or foreign currency.²⁴

²⁴ For further reference see: Tanaya Sanyal & Sohini Chatterjee, "Combination Control: Strengthening The Regulatory Framework Of Competition Law In India?" *5 NUJS Law Review* 425 (2012).

The table that deals with threshold limit is as under:

THRESHOLDS FOR FILING NOTICE				
		Assets		Turnover
Enterprise Level	India	>2000 INR crore	OR	>6000 INR crore
	Worldwide with India leg	>USD 1 bn with atleast >1000 INR crore in India		>USD 3bn with atleast 3000 INR crore in India
OR				
Group Level	India	>8000 INR crore	OR	>24000 INR crore
	Worldwide with India leg	>USD 4bn with atleast >1000 INR crore in India		>USD 12 bn with at least >3000 INR crore in India

Further section 6 talks about the regulation of combination under the Competition Act, 2002 and states that any combination that causes or is likely to cause an appreciable adverse effect on competition shall be void. The market in which we are analyzing the effect is a relevant market. The conditions to assess relevant market is provided under section 19 (5) which states a relevant market can be both a relevant product market and relevant geographical market.

The conditions, which the Commission is going to analyze while assessing the appreciable adverse effect, are mentioned under section 20 (4) of the Act. Therefore as mentioned in the Clayton Act, 1914 as well the basis is the harm or damage to the market or the market conditions. The Clayton Act uses the word “substantially”. At the time of enforcement the word used was “essentially.” Therefore it can be stated that the objective of the Act is not to prohibit the

merger taking place in the market. But these mergers are limited to only those which increase the trade and the trading activities.²⁵

Further section 6 of the Act elucidates the procedure to be followed and states that any person who wants to enter into a combination will have to give a notice to the Commission of the said combination. The time period within which the notice has to be given is 30 days from the day the merger or amalgamation is approved or the document of acquisition has been executed. The time limit given to the Commission within which the combination will not take effect is two hundred and ten days. After this period is over, the combination shall be deemed to be approved if no orders have been passed in this regard under Section 31. An inquiry has to be conducted once the Commission on its own knowledge or when the information is received by the Commission about the acquisition, merger or amalgamation that it has or is likely to cause appreciable adverse effect on the competition.

The procedure for the investigation is given under section 29 of the Act which states that if the Commission is prima facie of the opinion that the combination has or is likely to cause appreciable adverse effect on the competition then a notice would be sent to the parties entering into the combination. The reason for that is an opportunity of hearing is given to the parties as to why an investigation regarding the combination should not be initiated. The time period given to the parties to the combination to respond is thirty days from the day they received the notice. There are times when the Commission may refer the matter to the Director General to carry on the investigation and submit a report which the time stipulated after the Commission receives a response from the parties to the combination.

ORDERS UNDER SECTION 31

The Commission can pass the following orders for certain combinations-

1. If Commission is of the view combination will not cause AAEC, then it will approve the Combination.
2. If Commission is of the view combination will cause AAEC, then it will not approve the Combination.
3. If Commission is of the view that the AAEC being caused or likely to be caused can be eliminated by some suitable adjustment to the combination, then it will

²⁵ Sheldon Kimmel, "How Merger Regulation Became Unreasonable and How to Fix It" 22 (1) *Supreme Court Economic Review* 181-205 (January 2014).

propose such modifications to the parties.

4. The above-stated modifications to be carried out in certain period prescribed by the Commission.
5. If the parties to the combination do not accept the modification proposed by the Commission such parties may, within thirty working days of the modification proposed by the Commission, submit amendment to the modification proposed by the Commission.
6. If the Commission agrees with the amendment submitted by the parties under it shall, by order, approve the combination.
7. If the Commission does not accept the amendment submitted then, the parties shall be allowed a further period of thirty working days within which such parties shall accept the modification proposed by the Commission.

GREEN CHANNEL ROUTE

As a means to climb up on the ease of doing business, the Indian government has come out with several relaxations to enable the existing companies operate with profits and also to attract new business to the country. One such measure that has been taken is the introduction of the green channel route to the Combinations Regulations 2011. This measure was long awaited so as to make the process of mergers and acquisitions easier. It was first proposed in the Competition Law Review Committee where it was suggested to formulate a route for automatic approval of the Commission for certain Combinations which wouldn't hamper the competition in the market. The recommendation has been added to the Combination Regulations in the form of Regulation 5A vide amendment dated 13 August 2019.²⁶ It states that the certain class of parties can opt for giving notice in the prescribed format and by this notice the proposed combination will be deemed to be approved by the Commission. In order to qualify for the green channel, the parties are to deduce all the potential alternative market definitions and then lay down the criteria for eligibility as given in the Schedule III.

In this form of channel the parties venturing into combination are going to self assess themselves as to whether the combination will cause an appreciable adverse effect on the market. After the

²⁶ The Competition Commission of India, Notification dated 13th August, 2019, The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2019' *available at*: <http://egazette.nic.in/WriteReadData/2019/210553.pdf> (Visited on March 10, 2021).

assessment they are going to file a form with the Commission declaring that the combination will not cause an appreciable adverse effect. The Commission in such cases will issue an acknowledgment that would serve as a deemed approval on behalf of the CCI. One of the important effects of this amendment is that the parties to the combination do not have to wait for the expiry of two hundred and ten days taken by the Commission to review the effect of the combination. It is a self-assessment done by the parties themselves. The notification for Green Channel is to be filed in Form I and the fees for the same is two lakh rupees as given under the Competition Commission of India (Procedure in regard to transaction of business relating to Combinations) Regulation, 2011.

As on 14 September 2020, sixteen (16) combination notifications have been filed under the 'Green Channel' route (out of the total 84 combinations which have been notified in this period since the inception of the 'Green Channel' route, i.e., approximately 19%).²⁷

COMPOSITE COMBINATIONS IN INDIAN JURISDICTION

Even though the Competition Act regulates the combinations discussed by the author in the earlier part of the article but there are still some aspects, which are left out, with regards to which clarity is needed to regulate competition in the market. We know that under the Act there are trigger event that leads to consummation of the merger transaction and further notification to the CCI becomes mandatory. But one aspect left outside the scope of the Act is when there are series of transactions that take place in order to give effect to a combination. This essentially means that no one transaction is a trigger event and the varied transactions result in the scheme of proposed combination. Such acts can be called as Salami Transactions.

Salami transactions are those transactions when a business acquires some parts of a company or complementary businesses by the way of consecutive and mutually dependent transactions. These transactions, if taken separately and isolated then they would not meet the criteria for the merger notice. These are also termed as creeping, serial or staggered acquisitions.

A Composition transaction can be referred to as the composite transaction when its true effect is achieved through completing a series of individual transactions. In such kinds of combinations all the transactions have to be successfully completed for the combination to come into effect.

Regulation 9(4), Combination Regulations, 2011 states that,

²⁷ Available at: <https://www.mondaq.com/india/antitrust-eu-competition-/988168/one-year-of-the-cci39s-green-channel39-route-for-deemed-approval-ofcombinations#:~:text=Transactions%20which%20may%20avail%20of,do%20not%20have%20any%20horizontal%2C> (Visited on March 30, 2021).

“Where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected, one or more of which may amount to a combination, a single notice, covering all these transactions, shall be filed by the parties to the combination.”

When such a situation arises where there are transactions inter-connected to the transaction crossing the threshold levels and thus mandatory to notify, then the parties are required to:

1. File a composite notice with the Commission providing the details of every transaction. The transactions, which would be otherwise exempted, will also be included in the notice.
2. Hold the completion of the transaction even the exempted ones, till the approval of the Commission is obtained.

The first case where the CCI considered the concept of Composite Combination was *SIIL/MALCO*.²⁸ The Commission failed to clarify on the usage of the terms ‘inter-related’ and ‘inner-connected’ and whether both are required to achieve a composite combination or either one of them. Though it mandated that completion of all transactions is necessary for combination to come into effect. The combination of *Tech Mahindra/C&S*,²⁹ it held that the transactions need to be inter dependent or inter related. Thereby meaning that any one criteria is required to fulfill instead of both.

In the case of *Thomas Cook*³⁰ which was appealed before the Supreme Court the Court held that all the transactions entered into by Thomas Cook were inter connected to each other and held to be “intrinsicly connected and interdependent”. The facts of the case were that in February 2014 Thomas Cook India Limited and its subsidiary Thomas Cook Insurance Services Limited entered into a merger deal with Sterling Holiday Resort and this was to be done through series of transactions.

CONCLUSION

Central to the idea of market is the process of competition. Competition does have an effect on the economic performance of the players/ competitors existing in the market. Competition

28 *SIIL/MALCO*, Combination Registration No. C-2012/03/45, order dated 12th April 2012, available at: https://www.cci.gov.in/sites/default/files/C-2012-03-45_0.pdf (Visited on March 3, 2021).

29 *Tech Mahindra/C&S*, Combination Registration No. C-2012/03/48, order dated 26th April 2012, available at: https://www.cci.gov.in/sites/default/files/C-2012-03-48_0.pdf (Visited on March 7, 2021).

30 *Competition Commission of India v. Thomas Cook (India) Ltd.*, Civil Appeal No. 13578 of 2015, available at: <https://indiankanoon.org/doc/84791944/> (Visited on March 1, 2021).

connotes the idea that firms are subject to a reasonable degree of competitive restraint; from actual and potential competitors and from customers and that the role of a competition authority is to see that such constraints are present in the market. The combination regulations in India are at par with this approach and are in consonance with the concept of combinations in major competition jurisdictions. The Commission has successfully struck a balance between giving space to the young business to grow and also keeping an eye out for the anti-competitive effects that can disrupt the working of the market. It is also very interesting to note that the Commission till date has blocked no combination mentioned under the Act. Also there have been very few cases in which the Commission has suggested modifications and the remedies. This shows Commission's reluctance to hamper with the natural course, which is chosen by the parties. The introduction of the green route channel elucidates the intention of the Government to help the players to enter into the markets through the process of combinations.

However the composite combinations provide a new set of challenges to the Commission. There has been no clarification that provides what the inter-related transactions mean. Also due to several amendments along with different interpretations in the orders of the Commission, it only resulted in increasing the frenzy around the regulation. Since the regulation entails a technical filing, the Commission should come up with an explanation note or a clarification so as to shed light on which transactions will be termed as inter connected and thereby result in it being a composite combinations.

USE OF ARMED DRONES AGAINST THIRD WORLD AND ABUSE OF HUMANITARIAN LAWS AND HUMAN RIGHTS

Dr. Gurpreet Singh*

INTRODUCTION

Remotely piloted aircraft or drone was initially used for surveillance purposes after the Second World War. However, with the passage of time and advancement in technology, drones have been used to carry lethal weapons such as laser-guided missiles and ammunitions with the capability of precision strikes. Another hallmark of a drone strike is that it removes humans from the battlefield and helps to avoid causality of striking state.

The increasing use of warfare technology in form of armed drone strikes by the West has caused considerable alarm in the Third World countries. It has not only raised the question of the lawful use of armed drones but also questions the violation of space sovereignty of the states. The use of drone strikes against the Third World (Pakistan, Somalia, Afghanistan, Iraq, Syria, Libya, Palestine and Yemen) by the First World (USA and England) has generated considerable controversy and fear in the Third World states and again strengthens the West hegemony over the East. The killing of innocent civilians along with targets has put the question mark on the transparency and accountability of deploying the armed drone. The use of drone strikes is against the very tenant of criminal jurisprudence which considers man innocent till proven guilty besides being a violation of humanitarian laws. It is a free license to kill without trial, evidence and jury. More importantly, the states have been justifying the use of drone strikes on the basis of existing international norms such as consent of the state, self-defence and preemptive strike etc.

The present article examines these issues in the following sections. Section 1 gives a brief description of the international legal regime relating to the use of force and legal justifications in the context of the use of armed drones. Section 2 contends that International Humanitarian Law (IHL) governing the use of force is often violated by the West in order to achieve their vested interests. Section 3 examines the use of armed drones from the human rights perspective and asserts that the majority of drone strikes have resulted in blatant abuse of the human rights of people. In section 4, the conclusion is given in which it is argued that there is a need to have clear-cut international principles governing the use of armed drones.

* Assistant Professor, Law Centre 1, Faculty of Law, University of Delhi, Delhi.

BRIEF OVERVIEW OF INTERNATIONAL LEGAL REGIME GOVERNING THE USE OF ARMED DRONES:

There is no separate international legal regime that governs the use of armed drones. At present, the armed drones have been using under the existing international legal regime governing 'the use of force' which includes state' consent, self-defence, anticipatory or preemptory self-defence and unwilling/unable test etc.

The consent of the host state can be a solid ground for a drone strike. However, any valid defence preconceives the legitimate government in the host state. This government must truly represent the vast majority of the population of the state and enjoy their confidence and respect. Only the consent by the part of de jure government is valid consent under international law. According to Article 20 of the Draft Articles on State Responsibility of the International Law Commission, "Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent."¹ Thus 'valid' consent of a host state is *sine quo non* requirement before using the armed drones by another state.

Another rationale for the deployment of armed drones is Article 51 of the UN Charter, which guarantees the right to self-defence. It could be a lawful basis for drone strikes if such strikes fulfil the requirement of Article 51. Article 51 considers the "right of self-defence" as "the inherent right" and all states can avail it "individually" and "collectively". However, this right to a state is available till the Security Council takes necessary measures.² This right is not absolute. According to Article 51, there must be an "armed attack" first. "Unless the use of force crosses the threshold of an 'armed attack' another state does not have the right to self-defence. Mere frontier incidents do not constitute an armed attack."³ "States are supposed to refrain from using violent self-defence until an armed attack arises. As the Security Council has the pre-eminent position within the Charter system of collective security, the aggrieved state can simply request that the SC designate the violations of Article 2(4) as breaches of the peace and decide on actions under Article 41 or 42. Only if and when the prohibition of the use of force rises to an armed attack, the state concerned can resort to forcible measures for its defence."⁴ However, there are

1 International Law Commission Report, A/56/(August 10, 2001).

2 The UN Charter, art. 51.

3 *Nicaragua v. United States of America*, ICJ Report 1986.

4 UN Charter: Article 2.4 "prohibits all Member States to use of force or threat against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

two riders on this authority: first, “the principle of proportionality” must be observed by the state while using force in “self-defence” and secondly, that state must inform to the SC immediately regarding measures it has taken. This right comes to an end when the SC starts taking all necessary measures to maintain international peace and security.⁵

The “customary right of anticipatory self-defense” which can be traced back to the Caroline incident, is another basis for the deployment of armed drones. The anticipatory right of self-defence must be based on a “necessity of self-defence”, which must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation”.⁶ “Not only such conditions necessary before self-defence became legitimate, but the action taken in pursuance of it must not be unreasonable or excessive, ‘since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.’ These principles were accepted by the British government at that time and accepted as a part of customary international law.”⁷

Unwilling or/and unable is another doctrine that the First World uses to legitimise the deployment of armed drones in self-defence against non-state actors when the “host state” is unwilling or unable to act against them.⁸ Unwilling/unable doctrine can be described as “the right of a victim state to engage in extraterritorial self-defence where the host is either unwilling or unable to take measures to mitigate the threat posed by domestic non-state actors, thereby circumventing the need to obtain consent from the host state.”⁹ Whether the requirements of both elements, “unwilling” and “unable” are required to be fulfilled before using the force is a divisive question in international law.¹⁰ It may be a situation when a state may be “willing” to take action but “unable” to do so because of its limitations (like lack of resources or skills)

Article 41 “empowers the Security Council to apply necessary measures in order to give effect to its decision. These measures include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations”.

Article 42 “provides that the Security Council can take action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

5 Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, 663-664 (Oxford University Press, 1994).

6 *Ibid.*

7 Malcolm N. Shaw, *International Law*, 1131 (Cambridge University Press, 6th edn., 2008)

8 Madeline Holmqvist Skantz, *The Unwilling or Unable Doctrine - The Right to Use Extraterritorial Self-Defense Against Non-State Actors* (Thesis submitted to Stockholm University, Spring 2017).

9 Gareth D. Williams, *Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the “Unwilling or Unable” Test*, 36.2, 625, *University of New South Wales Law Journal* (2013).

10 Ashley Deeks, “Consent to the Use of Force and International Law Supremacy” (54, 1) *Harvard Law Journal* (2013).

whereas if a state is always “unwilling” to take an action *per se ipso facto* “unable” to take action as “willingness” is a necessary condition for making the state “able” to take an action. Thus, “willingness” on the part of the host state is a prior element to make a state “able” to take action.¹¹ It’s also worth noting that non-cooperation and non-consent on the part of the host state might be seen as “unwillingness”.

INTERNATIONAL HUMANITARIAN LAWS AND USE OF ARMED DRONES:

International Humanitarian Law governs methods of warfare. “IHL is a set of rules which seeks, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or no longer participating in the hostilities and restricts the means and methods of warfare.”¹²

IHL is based on ancient civilisations and religions’ precepts. Certain ideas and practices have always guided warfare. The concepts of “jus ad bellum” and “jus in bello” are the foundations of just war standards. The first is concerned with the justice of resorting to war, whereas the second is concerned with the justice of the war’s conduct. “Right authority, just cause, right aim, last resort, proportionality, reasonable hope, relative justice, and open declaration” are the eight principles of jus ad bellum whereas discrimination and proportionality are the two principles of *jus in bello*¹³. Many principles of IHL have been derived particularly from the second principle, jus in bello. In the majority of cases, drone strikes do not fulfil the criteria of customary just war principles. The use of indiscriminate drone strikes has resulted in more civilian casualties than the actual targets. Besides being patently disproportional, drone strikes have not been used as a last resort in many cases.

Recently, the strong Iranian commander, Major General Qassim Suleimani, was killed in an American drone assault near Baghdad’s airport. He had long been labelled a terrorist by the US and Israel, but many in Iran saw him as a hero.¹⁴ While justifying the killing of General Qassem Soleimani, President, Donald Trump on the third Jan. 2020 tweeted, “General Qassem Soleimani has killed or badly wounded thousands of Americans over an extended period of time, and was plotting to kill many more...but got caught! He was, directly and indirectly, responsible

11 Monica Hakimi, *Defensive Force Against Non-state actors: The State of Play*, Vol. 91, *International Law Studies*, 13, Stockton Center for the Study of International Law (2015).

12 What is international humanitarian law? ICRC, *available at*: <https://www.icrc.org/> (Visited on December 1, 2019).

13 Mona Fixdal and Dan Smith, “Humanitarian Intervention and Just War” 42 (2) *Mershon International Studies Review* 286 (1998).

14 What to Know About the Death of Iranian General Suleimani, *The New York Times*, Jan 3, 2020, *available at*: <https://www.nytimes.com/> (Visited on December 3, 2020).

for the death of millions of people, including the recent large number.”¹⁵

However, the strike, on the other hand, was dubbed a dangerous escalation by the President’s detractors. The speaker of the House Nancy Pelosi, a Democrat, said the action was done without consulting the legislators and “demanded that the administration must brief the full Congress”¹⁶. These two approaches reflect the politics of the use of armed drones. This attack also killed five other people who were travelling along with Soleimani. Thus, in comparison to one target, the civilian casualties were outnumbered.

Drone strikes may only be regarded as legal if they are carried out completely in accordance with IHL regulations. The “four Geneva Conventions of 1949” and “Additional Protocol I of 1977” along with the “customary international law” govern the armed conflicts. According to Article 2, the provisions of the Convention apply to all cases of “declared war and of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them”¹⁷. This article is common to all four Conventions, “has broadened their scope of application by introducing the notion of armed conflict, thereby making their application less dependent on the formalism attached to the notion of declared war.”¹⁸

Non-international armed conflicts have surpassed international armed conflicts as the most prevalent kind of conflict today. “It exists where there is protracted armed violence between governmental authorities and organised armed groups or between such groups within a state”¹⁹. Other requirements are that the hostilities must be intensive, organised, having “control over a certain part of the territory” and under the responsible command. Further, as per the Additional Protocol II, “the non-governmental parties must exercise such territorial control as to enable them to carry out sustained and concerted military operations and to implement this Protocol”²⁰. Drone strikes have been used against non-governmental armed forces. Interestingly, these four Conventions along with Additional Protocols are applicable between the state and non-international armed groups within that state. They don’t contemplate the situation when the third state engages in such conflicts against the non-armed groups ipso facto. Such engagements

15 *Ibid.*

16 *Ibid.*

17 First Geneva Convention, 1949.

18 *Ibid.*

19 *Prosecutor v. Tadic*, [July 15, 1999] IT-94-1-A, Appeals Chamber Judgment 70.

20 Additional Protocol II to the Geneva Convention of August 12, 1949.

without the consent of that state amount to aggression against that state and constitute intervention in the internal affairs of the state under Article 2(4) of the UN Charter.²¹ Saudi Arabia's involvement in the "non-armed war" between the Yemeni government and the Houthi insurgency, as well as combat spilling over into a third state (e.g., the conflict in Afghanistan crossing the border into Pakistan), are the best instances of such interventions.²²

The USA has been carrying out drone strikes against even those terrorist groups which have never attacked the USA. In Somalia, "so-called drone strikes against al-Shabaab" are an example of this.²⁴ What would be the status of drone strikes after 2013 when the Pakistan Government revoked its "consent to the US drone strikes through a resolution passed by the Pakistan National Assembly"?²⁴ The resolution stated, "The House strongly condemns the drone attacks by the allied forces on the territory of Pakistan, which constitute [a] violation of the principles of the Charter of the United Nations, international laws and humanitarian norms. Such drone attacks must be stopped forthwith."²⁵

Whether subsequent drone strikes resulted in a state of international conflicts between two high contracting parties is a vital question to be considered. Nawaz Sharif, Pakistan's former Prime Minister, has frequently called for an end to the strikes claiming: "The use of drones is not only a continual violation of our territorial integrity but also detrimental to our resolve and efforts at eliminating terrorism from our country". He further said, "Drone attacks are against the national sovereignty and a challenge for the country's autonomy and independence."²⁶ Besides, the Pakistani Peshawar High Court found that such assaults are unlawful, inhumane and infringe the Universal Declaration of Human Rights, as well as being a war crime.²⁷

Despite clear-cut opposition to drone strikes by Pakistan, the USA kept on justifying drone strikes. The main arguments of the USA are that the Pakistan Government has failed to "control and keep the track of terrorist activities" which is characteristic of a "failed states" and secondly,

21 *Supra* note 6.

22 International Bar Association's Human Rights Institute, Background Paper on the Legality of Armed Drones Under International Law (Adopted on May 25, 2017), *available at*: www.ibanet.org (Visited on Feb 15, 2020).

23 *Ibid.*

24 "NA unanimously passes resolution against US drone strikes", DAWN, December 10, 2013. "In December 2013, the National Assembly of Pakistan unanimously approved a resolution against US drone strikes in Pakistan, calling them a violation of the charter of the United Nations, international laws and humanitarian norms".

25 *Ibid.*

26 "Pakistani court declares US drone strikes in the country's tribal belt illegal", *Independent*, May 9, 2013.

27 *Ibid.*

the USA has acted under “the right of self-defence under Article 51 of the UN Charter”. In his 2013 lecture at the National Defense University, former US President Barack Obama remarked, “We act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat”²⁸. “The drone strikes were legal, according to US State Department legal advisor Harold Koh, because of the right of self-defense. According to Koh, the US is engaged in an armed war with al-Qaeda, the Taliban, and their affiliates, and so has the legal authority to use force in self-defense.”²⁹

However, such drone strikes were also opposed within the USA. Dennis Kucinich, a former US Congressman, said that the “US was breaking international law by conducting strikes on a country that had never attacked the US”³⁰. Prof. Gary D. Solis also asserted that because the “CIA’s drone attack operators are civilians actively involved in armed conflict, they are “unlawful combatants” and possibly subject to prosecution.”³¹ According to Antony Anghie, “the USA ambition to transform these states as peace-loving democracies resembles in many ways a much earlier imperial venture in which the West had assumed the task of civilising the East in the guise of colonialism. This USA’s policy appears to be premised on the belief that only the use of force and the transformation of alien and threatening societies into the ‘democratic states’ will ensure its security”³².

It is interesting to note that according to “leaked military documents that the vast majority of people killed were not intended targets”. Only 13% were intended targets whereas 81% were others and 6% were civilians.³³ It also indicates that among the 94 percent of terrorists killed were some “military-age guys” who were labelled as militants because they were in a “militant facility” when strikes took place. The number of civilians killed was “estimated to be between 158 and 965”. According to Amnesty International, “several of the victims were unarmed, and some of the strikes may have been considered war crimes.” The report further revealed, “This

28 Jehanzed Halil and Saima Perveen, "The United States Covert War in Pakistan: Drone Strikes an Infringement on National Sovereignty" 4 (8) *Journal of Applied Environment and Biological Sciences* 209-215 (2014).

29 U.S. Offers argument for drone strikes, Japan Times, March 28, 2010, available at: <https://www.japantimes.co.jp/news/> (Visited on March 23, 2020).

30 US warned against sending troops to Pakistan: Congressman terms Bush’s decision an election issue, DAWN September 14, 2008.

31 U.S. missile strikes take heavy toll on al-Qaeda, officials say, The Los Angeles Times, March 22, 2009, available at: <https://www.latimes.com/> (Visited on May 13, 2020).

32 Antony Anghie, “The Evolution of International Law: Colonial and Postcolonial Realities” 27 *Third World Quarterly* 739-753 (2006).

33 Manhunting in the Hindu Kush, Civilian Casualties and strategic failure of America’s longest war, The Intercept, October 15, 2015, available at: <https://theintercept.com/drone-papers/> (Visited on May 13, 2020).

secrecy has enabled the USA to act with impunity and block victims from receiving justice or compensation. As far as Amnesty is aware, no US official has ever been held to account for unlawful killings by drones in Pakistan.” According to a separate study of Human Rights Watch claims that “two of the six US attacks in Yemen killed 82 people, including at least 57 civilians at random, in violation of international law.³⁴” As per the TBIJ (The Bureau of Investigative Journalism) reports spanning from June 2004 through mid-September 2012 indicated that “drone strikes killed 2,562 - 3,325 people in Pakistan, of whom 474 - 881 were civilians, including 176 children”. The TBIJ also reported that these strikes also injured an additional 1,228 - 1,362 individuals.³⁵ The inquiry conducted by the United Nations revealed that “the US drone strikes had killed at least 400 civilians in Pakistan, far more than the US has ever acknowledged.” Ben Emmerson, the UN special rapporteur accused the United States for violating the international legal norms by advocating the use of lethal force outside the war zones.³⁶

While studying the effects of the US drone strikes on Pakistan using “interview and survey data”, Aqil Shah noted that “no evidence would show that drone strikes have a significant impact on militant Islamist recruitment either locally or nationally. Rather, the data reveal the importance of factors such as political and economic grievances, the Pakistani state’s selective counterterrorism policies, its indiscriminate repression of the local population, and forced recruitment of youth by militant groups.”³⁷

The report titled, *Living under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan* noted the effects on the mental health of civilians. It observed, “[The] US drone strike policies cause considerable and under-accounted harm to the daily lives of ordinary civilians, beyond death and physical injury. Drones hover twenty-four hours a day over communities in North-West Pakistan, striking homes, vehicles, and public spaces without warning. Their presence terrorizes men, women, and children, giving rise to anxiety and psychological trauma among civilian communities. Those living under drones have to face the constant worry that a deadly strike may be fired at any moment and the knowledge that they are powerless to protect themselves. These fears have affected behaviour.”³⁸

34 US drone strike killings in Pakistan and Yemen’ unlawful, BBC News, October 22, 2013, *available at*: <https://www.bbc.com/> (Visited on May 13, 2020).

35 *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan*, *available at*: <http://livingunderdrones.org/> (Visited on May 13, 2020).

36 *Ibid.*

37 Aqil Shah, "Do U.S. Drone Strikes Cause Blowback? Evidence from Pakistan and Beyond" 42 (4) *International Security* 47-84 (Spring 2018).

38 *Supra* note 36.

These instances reveal that the US drone strikes do not only breach the IHL but also violate the human rights of civilians.³⁹ The US drone strikes have become a part of its foreign policy in disregard to international norms including disrespecting the inviolability of the sovereignty of relatively weaker states in order to pursue its varied, vague, and hegemonic objectives.⁴⁰

VIOLATION OF HUMAN RIGHTS

The West's expanding use of drone attacks has resulted in numerous violations of people's human rights in the Third World. The preamble of the Universal Declaration of Human Rights (UDHR) begins with "recognition of the inherent dignity and the equal and inalienable rights of all members of the human family". They are "indispensable rights for the foundation of freedom, justice and peace in the world". The UDHR preamble also acknowledges that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy the freedom of speech and belief" and "freedom from fear" and want has been proclaimed as the highest aspiration of the common people.⁴¹

Article 3 of the UDHR provides the "right to life, liberty and security of person".⁴² Article 7 "recognises the equality of whole mankind" and also extends the "equal protection to all"⁴³, whereas Article 11 provides the "fundamental principles of criminal law" such as "presumption of innocence till proven guilty according to the law in a fair public trial"⁴⁴.

Armed drone strikes totally disregard these rights. They are death warrants without trials and evidence executed by the powerful states against the weak states. Unfortunately, the present international law does not provide an effective remedy for holding these nations accountable for violations of Third World people's human rights. Whatever the institutional mechanism exists under "international law" is also at the mercy of these powerful states. Under these

39 ICJ on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, "concluded that international human rights instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory". (Advisory Opinion of July 9, 2004).

40 *Supra* note 38.

41 Preamble of Universal Declaration of Human Rights, *available at*: <https://www.un.org/> (Visited on June 3, 2020).

42 Article 3 of the UDHR: "Everyone has the right to life, liberty and security of person."

43 Article 7 of UDHR: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

44 Article 11 of UDHR: "(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a

circumstances, the Third World countries are left with no other option except to resort to verbal condemnation for their outrageous acts. On December 12, 2013, for example, 12 individuals were murdered in Yemen by drone attacks carried out by the CIA while travelling in “a convoy to attend a wedding.” In addition, “14 victims suffered serious wounds, with some losing limbs and others losing their eyes”. “Shepherds and farmers were among those who died”. These individuals were targeted because they were travelling in a convoy of vehicles and were assumed to be militants.⁴⁵

The researcher, Shiban who investigated this attack also received death threats for his continued investigation. Peter Schaapveld, a psychologist who conducted the study of effects on drone strikes in Yemen “noted that the constant presence of drones in the skies was causing a psychological emergency” in the country. “Entire communities - including young children who are the next generation of Yemenis - are being traumatised and re-traumatised by drones. Not only is this having truly awful immediate effects, but the psychological damage done will outlast any counter programme and surely outweigh any possible benefits.”⁴⁶

It is also important to mention here that like Pakistan Parliament, “the Yemeni Parliament has also passed a resolution banning drones in Yemeni airspace.” The use of drones for extrajudicial killing has been criminalised by the National Dialogue, demonstrating that “a national consensus has been reached that these brutal and unlawful attacks are unacceptable.”⁴⁷

There is the same story of Afghanistan where the USA has its presence since 2001. In September 2019, the USA drone strikes killed 30 civilians and injured 40 others who were farmers and labourers. They were in fields and had “just finished collecting pine nuts at mountainous Wazir Tangi in the Eastern Nangarhar province.”⁴⁸ According to the UN documents, drone strikes in Afghanistan have killed 16,000 civilians and injured 30,000 since January 2009.⁴⁹ The grave abuse of human rights and wanton killing of civilians through drone strike also “amount to war crimes under Article 8 of the Rome Statute of International Criminal Court” for which an

penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

45 Hyder Iftikhar Abbasi, “The risk of reporting US drone strikes”, Aljazeera, May 21, 2014, *available at*: <https://www.aljazeera.com/> (Visited on June 11, 2020).

46 *Ibid.*

47 *Ibid.*

48 U.S. drone strike kills 30 pine nut farm workers in Afghanistan, Reuters, September 19, 2019, *available at*: <https://www.reuters.com/> (Visited on June 15, 2020).

49 *Ibid.*

individual can be held responsible.⁵⁰

These examples reveal how the West consider the lives of people of Third World countries so cheap. The killing and maiming the innocent people by drone strikes are brazen global injustices lashed out against the people of these countries in utter disregard to their human rights.⁵¹ It also reflects the double standards of the “so-called international community”⁵². The West makes hue and cry when there are killings by the terrorists in their countries whereas, they remain, mute-spectators, when their drone strikes result in misadventures in the East. At the most, there would be lip-sympathy for the victims. Almost in all cases of mistaken drone strikes, neither the compensation was paid to the victims nor the concerned officers were held responsible for these misadventures. Unfortunately, the dictum, “might is right” is still very much prevalent in international law even in the 21st century and it will keep on serving the vested interests of powerful states in future too. In a nutshell, Antony Anghie has rightly summarised the dilemma of the USA war against terrorism in the following words, “The USA has persistently violated the human rights while seeking to prevent terrorism, it has generated further violence. There is a cycle of violence here that could make the attempts to create a Kantian world of peace-loving democratic states into a guarantee of endless war rather than perpetual peace.”⁵³

CONCLUSION

Armed drones have been increasingly employed in modern warfare since their initial deployment in 2002 against Yemen. The deployment of armed drones is justified by nations

50 Article 8 Rome Statue, “War crimes 1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. 2. For the purpose of this Statute, “war crimes” means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Willful killing; (ii); (iii) Willfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

51 *Supra* note 39, para 106, “The protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”

52 The term ‘international community’ used by the West in the literature of international law does not have a precise meaning. It includes many things at the same time. How many states constitute ‘international community’ and which states have ‘say’ in the international community are vital questions because in the majority cases, it is the Western Community (First World States Community) which predominately constitute and lead the ‘so-called international community’ whereas, the Eastern Community (Third World States Community) has a marginal role to play in making and shaping the ‘international community’.

53 *Supra* note 32.

using international norms governing the force. These norms include the host state's legitimate permission, the UN Charter's Article 51 right to self-defense, the customary right of anticipatory/preemptive self-defense, and the unwilling/unable test.⁵⁴ However, the above analysis reveals that these norms are propagated in order to shelter wide spread misuse of armed drones. It also reveals that in the majority of cases, these norms were never followed in practice. These drone strikes have been often carried merely on the basis of suspicion.

The secrecy and selectivity are at the helm of the armed drone policy which makes their use non-transparent and unaccountable. Besides, indiscriminate use of armed drones may constitute an act of "aggression" as well as a breach of principles of the UN Charter and IHL. But who will bell the cat is a pertinent question to decide in the wake of their use against the Third World countries which have been facing numerous problems internally? Even the resistance on the part of the Third World states has proved futile and their sovereignty is violated frequently. The huge number of deaths of civilians through drone strikes violate the "principles of proportionality and discrimination between combatants and non-combatants under IHL".

The killing of innocent civilians under mistaken identity and constant fear of drone strikes resulting in psychological pressure is utter disregard to the human rights of the victims of drone strikes. These irresponsible and reckless drone strikes cannot be justified because the majority of them were carried without due verification. Therefore, the armed drones must be regulated under international law as their use and abuse have been increasing. There is a need to call an "international convention" in order to make the use of armed drones transparent and accountable. Under this convention, the violators must be held responsible for violating the norms of the convention and adequate provisions for compensation/reparation for the victims of drone strikes must be made.

54 Note: There are considerable controversy regarding right of anticipatory/preemptive self defence and unwilling and unable test. The states and scholars are divided on these issues.

MFN CLAUSE IN BILATERAL INVESTMENT AGREEMENTS OF INDIA- A CASUALTY OF UNWITTING CHANGE IN POLICY OF THE GOVERNMENT

Dr. G V Narasimha Rao*

INTRODUCTION

‘Trade’ and ‘investment’ are the catch words of 21st century and are inextricably intertwined. These words endear all states alike ‘developed, developing, and emerging economies and countries in transition’. These words also endear investor companies and individual investors which or who wish to invest their resources in a territory alien to them. States, investor companies or individual investors all alike, as in case of trade, crave to embrace investment. States in a bid to embrace investment allowed their economies, markets wide open for investment by foreign investor companies and individual investors. Why do States and investor companies and as the case may be individual investors wish to invest is a question that does not require much debate. ‘Investment’ in 21st century is perceived as an instrument of growth which brings multiple advantages to the States¹. The advantages so perceived, however will fructify and come within the States’ reach only when they make definite assurances or pledges to the potential foreign investor companies and individual investors as to the safety of their person and investment. States, therefore with the objective of reaping the advantages investment, have been signing investment treaties bilaterally, even at the cost of erosion of national regulatory sovereignty,² with definite assurances such as ‘treatment of investment, business facilitation and rights, protection of intellectual property, transfers, taxation, compensation on expropriation, exchange of information, settlement of disputes, returns and repatriation of investments in case of nationalization, compensation in case of war and prevention of inequitable treatment of foreign investors vis-à-vis the local investors and foreign investors’. One such pledge the host State usually extends is “fair and equal treatment” of foreign investors and investment on par with domestic investors and investment and foreign investors inter se.

* Associate Professor of Law, School of Maritime Law, Policy & Administration, Gujarat Maritime University, Gandhinagar- Gujarat.

1 OECD (1998), Open Markets Matter: The Benefits of Trade and Investment Liberalization, OECD Publishing, Paris, available at: http://read.oecd-library.org/trade/open-markets-matter_9789264162938-en (Visited on August 10, 2021).

As per the above publication, foreign investment brings “higher wages and is a source of technology transfer and managerial skills in the host developing countries and contributes to raising prosperity in the developing countries and enhances demand for higher value added exports.....”

2 *Ibid.*

States, with a view to translate this pledge of “fair and equal treatment” into action have got the principles of “national treatment” and “MFN treatment” imbedded in the bilateral investment agreements by incorporating suitable clause or clauses in them. Thus, the principles of “national treatment” and “MFN treatment” have become synonymous to “fair and equal treatment” and are considered the species which prevents discrimination of foreign investors and investment vis-a-vis domestic investors and investment, foreign investors inter se. The principles of ‘national treatment’ and ‘MFN treatment’ more often go hand in hand out, acquired prominence in international trading system in general and international investment field in particular and also occupied a preeminent place in the trading system under GATT³ and WTO.⁴ The principal agreements such as General Agreement on Tariffs and Trade (GATT)⁵, General Agreement on Trade in Services (GATS)⁶ and Agreement on Trade Related Intellectual Property Rights (TRIPS)⁷ of WTO contain clauses on “national treatment” and “MFN treatment”. Besides, the clauses on national and MFN treatment have also been traditionally incorporated in international bilateral agreements on trade,⁸ merchant shipping,⁹ avoidance of double taxation,¹⁰ protection of investments,¹¹ intellectual property rights¹² and Commerce,

3 Available at: https://www.wto.org/English/Docs_E/_e/gatt47_01_e.htm (Visited on July 22,2021)

4 Available at: https://www.wto.org/english/thewto_e/whatis_e/TIF_e/fact2_e.htm (Visited on July 22,2021)

5 Available at: https://www.wto.org/english/docs_e/legal_e/legal_e.htm#GATT94 (Visited on July 22,2021)

6 Available at: https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#ArticleII (Visited on July 22,2021)

7 Available at: https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm#art4 (Visited on July 25,2021)

8 Long Term Trade Agreement Between Government of Spanish State and Government of Hungarian People’s Republic (signed April 8, 1976) (1985) 1403 UNTS 344-345; Long Term Agreement on Trade and Economic, Industrial and Technical Cooperation Between Government of New Zealand and Government of Socialist Republic of Romania (signed May 15, 1979) (1986) 1324 UNTS 124-129; Long Term Trade Agreement Between Government of Sweden and the Socialist Republic of Romania (signed December 31, 1985) 1424 UNTS (1986) 214-219.

9 Agreement between the Government of Union of Soviet Socialist Republics and Government of Islamic Republic of Pakistan on Merchant Shipping (signed October 18, 1979) (1983) 1337 UNTS 189-192; Merchant Shipping Agreement between Government of Republic of Cyprus and the Government of Philippines (signed September 7, 1984) (1986) 1441 UNTS 248-253.

10 Convention between Japan and the Union of Soviet Socialist Republics for the Avoidance of Double Taxation (signed January 18, 1986) (1987) 1464 UNTS 69-77; Convention between Spain and Union of Soviet Socialist Republics for the Avoidance of Double Taxation (signed March 1, 1985) (1986) 14 UNTS 186-195.

11 Agreement between the United Kingdom of Great Britain of Great Britain, Northern Ireland and Jamaica for the promotion and protection of investments (signed January 20, 1987) (1988) 1507 UNTS 153-158; Agreement between U.K. of Great Britain and Ireland and Hungarian Peoples Republic for the promotion and reciprocal protection of Investments (signed March 9, 1987) (1990) 1556 UNTS 5-6; Treaty between Federal Republic of Germany and the People’s Republic of Bulgaria Concerning the Reciprocal Encouragement and Protection of Investment (signed April 12, 1986) (1988) 1518 UNTS 23.

12 Convention between French Republic and the Republic of Tunisia on Economic Relations and Protection of Investments (1990) 1565 UNTS 11-12.

Friendship and Navigation.¹³

MFN clause however surprisingly did not find a place in the revised model bilateral investment promotion Agreement (model BIPA). Government of India in 2015 took a decision to omit MFN clause altogether from the model bilateral investment agreement of India. Government of India, following the decision to omit MFN clause has even terminated several of the bilateral investment promotion it has signed with various countries. This article however, in the light of the decision of the Government of India to omit MFN Clause from the revised model BIPA and termination of several bilateral investment promotion agreements, aims at examining the implications of the decision of the Government of India.

Use of MFN Clause in the Field of Investment

The inclusion of the MFN clause in 21st century in bilateral investment treaties (BITs) (investment promotion agreements) is a new development hitherto unknown to States and is very significant in the evolution of the clause. MFN clause in these bilateral investment treaties assures treatment in the host State to the foreign investor or investors and their investment on par with the investors of the host State and investors of other States. Thus, inclusion of MFN clause in bilateral investment treaties has become regular feature assuring equality of treatment among the foreign investors in the host State. The inclusion of MFN clause though of recent development, has been widely accepted as one of the most important standards of treatment but subject to the exclusions agreed upon.¹⁴ The MFN clause in bilateral investment treaties generally deals with the standard of treatment to be extended to an investor, his investment and returns on investment. In the context of the investment agreements, MFN clause obligates a Contracting Party to extend to the investor and his investments from the other Contracting Party treatment “no less favorable than it accords to investors or investments from other Countries”. Thus the inclusion of MFN clause in investment treaties brings about equality in competitive opportunities between investors or the investments or returns on investment of nationals or companies from different foreign countries and acts as an “agency of equality and prevents discrimination the foreign investors inter se”¹⁵. This apart, the inclusion of MFN clause also

13 Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China (signed November 4, 1946) (1946) 25 UNTS 69.

14 Free trade area, customs union, matters of taxation, subsidies, government procurement, and country exceptions are matters generally excluded from the purview of the MFN clause in bilateral investment treaties.

15 George Schwarzenberger, “The MFN Standard in British State Practice” 97-98, 22 *British Year Book of International Law* (1945).

reduces the “host State’s scope for maneuver as to future investment treaties because the obligation under MFN clause makes the host State to unilaterally extend to the investors and the investments from treaty partners any additional rights that it grants to third States or countries in future agreements”¹⁶. Inclusion of MFN principle has also become “an important instrument of liberalization in the investment area, besides avoiding economic distortions that would occur through more selective country by country liberalization”. “MFN principle/clause” in spite of its preeminence as an “agency of equality” and an “instrument of liberalization”¹⁷ as indicated above was dispensed with and omitted by the Government of India in 2015 from the revised model BIPA (2015 BIPA).¹⁸ Government of India in the pursuit of its decision to omit MFN clause by the end of 2017 terminated, except eight agreements mentioned herein,¹⁹ all the bilateral investment promotion agreements it has signed with various States which entered into force.²⁰ This article, as indicated above, examines in the light of decision of the Government of India to omit MFN clause from the revised model BIPA followed by termination several bilateral investment agreements, the likely impact the decision to omit MFN clause from the 2015 BIPA and the termination of the agreements do generate.

MFN CLAUSE – POLICY AND PRACTICE OF THE GOVERNMENT OF INDIA

Prior to 2015

The policy and practice of the Government of India as to the adoption of MFN clause can be deduced from the model bilateral investment promotion agreement (BIPA) and the bilateral investment promotion agreements actually concluded with the governments of various States.

Policy Reflected in Model Bilateral Investment Promotion

Agreement 1993(1993 BIPA)

India in 1991 as a part of the programme of economic reforms liberalized its investment regime

16 Carlos McCrea, Grain, *Bilateral Investment Agreements: Agents of New Global Standards for the Protection of Intellectual Property Rights?* (2004) *available at*: <http://www.grain.org> (Visited on August 8, 2021).

17 OECD (2004), *Most-Favored-Nation Treatment in International Investment Law*, OECD Working Papers on International Investment, 2004/02, OECD Publishing. *available at*: <http://dx.doi.org/10.1787/518757021651> (Visited on July 20, 2021).

18 Model Text for the Indian Bilateral Investment Treaty, *available at*: https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf (Visited on August 9, 2021).

19 India -Philippines BIT (2000), India-Sudan BIT (2003), Iceland -India BIT (2007), India-Senegal BIT (2008), India-Bangladesh BIT (2009), India-Latvia BIT (2010), India-Lithuania BIT(2011), India-UAE BIT(2013) are only the eight agreements in force. *available at*: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india?type=bits> (Visited on July 09, 2021).

20 Department of Economic Affairs, Ministry of Finance, Government of India, *Bilateral Investment Treaties*, *available at*: <http://dea.gov.in/bipa> (Visited on July 21, 2021). Government of India by the end of September 2017 terminated all the, except eight agreements, bilateral investment treaties signed with the government of various States.

and signed bilateral investment promotion agreements with several countries with a view to “promote and protect on reciprocal basis the investments of the investors”. The provisions of all these bilateral agreements were exactly similar to the provisions of the model BIPA of 1993 which seemed to have been based on “OECD Draft Convention for the Protection of Foreign Property”.²¹ The model BIPA of 1993 contained provisions on “national treatment, investment, MFN treatment for foreign investment and investors, repatriation or transfer of returns on investment, recourse to domestic dispute resolution and international arbitration for investor-state disputes, nationalization or expropriation and awarding of compensation on non-discriminatory basis etc.”²² The 1993 BIPA in principle encompassed all “investments and investors of a Contracting Party in the territory of other Contracting Party accepted as such in accordance with its laws and regulations”²³ and sought to “encourage and promote in general terms favourable conditions for investors of other Contracting Party to make investments in its territories”.²⁴ It also contained a provision obligating the Contracting Parties to “accord fair and equitable treatment to the investment and returns of the investment in the territory of other Contracting Party”. 1993 BIPA for the purpose of enabling the host State to accord “fair and equal treatment” adopted a model clause on national and MFN treatment in a conjoined form.²⁵ Each of the Contracting Parties as per the conjoined clause has to accord “national treatment” and “MFN treatment” to the investments and investors of other Contracting Party. Each Contracting Party shall accord to the” investments and investors of the other Contracting Party treatment which shall not be less favourable than that accorded either to the investments and investors of its own or investments and investors of a third State”²⁶. In addition, each Contracting Party has to accord investors of the other Contracting Party including in respect of “returns on their investment, treatment which shall not be less favourable than that accorded to investors of any third State”²⁷. This favourable treatment to be extended in normal circumstances as above to investors and investments has also to be accorded by the host State on

21 Department of Economic Affairs, Ministry of Finance, Government of India, Transforming the International Investment Agreements Regime: The Indian Experience *available at*: https://worldinvestmentforum.unctad.org/wp-content/uploads/2015/03/India_side-event-Wednesday_model-agreements.pdf (Visited on July 21, 2021).

22 Working Group on the Relationship between Trade and Investment, WTO, Communication from India WT/WGTI/W/71(1999) *available at*: www.commerce.nic.in/trade/international_trade_papers_nextDetail.asp?id=111 (Visited on September 4, 2021)

23 Model Bilateral Investment Promotion Agreement 1993, art. 2.

24 *Id.*, art.3.

25 *Id.*, art.4.

26 *Id.*, art.4 (1).

27 *Id.*, art. 4(2).

par with its own investors and their investments and investors or investments of a third State, if an investor or investment of a Contracting Party suffers losses on account of “war, armed conflict, state of national emergency or disturbances” in the territory of the other Contracting Party as to “restitution, indemnification, compensation, or other services”. Such favorable treatment shall be “no less than that which the other Contracting Party extends to its own investors and their investments” and to the “investors and the investment of the investors of any third State”.

Policy Reflected in Bilateral Investments Concluded with other States

India, in conformity with the policy reflected in the model BIPA 1993 up to 2014 signed bilateral investment promotion agreements with 83 countries which included agreements signed with major countries like United Kingdom of Great Britain²⁸, Germany²⁹, Russian Federation³⁰, France³¹, Government of Republic of Korea³², Government of Australia³³ and Government of Israel³⁵ and Government of Sudan³⁵; out of which agreements with sixty nine countries came into operation and the remaining agreements are under negotiation with the respective countries.³⁶

A brief survey of investment agreements signed by India with the other States mentioned above

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- 28 For the Agreement between United Kingdom of Great Britain and India on the Promotion and Protection of Investments (signed March 14, 1994) (1995) 27(UKTS).
- 29 For the Agreement between Republic of India and Federal Republic of Germany for the Promotion and Protection of Investments (signed July 10, 1995) (1995) *available at:* <https://dea.gov.in/sites/default/files/Germany.pdf> (Visited on July 2, 2021).
- 30 For the Agreement between the Government of the Russian Federation and the Government of the Republic of India for the Promotion and Mutual Protection of Investments (signed December 23, 1994) (1994) *available at:* <http://dea.gov.in/sites/default/files/Russian%20Federation.pdf> (Visited on July 2, 2021).
- 31 For the Agreement between the Government of the Republic of India and Government of Republic of France on the Reciprocal Promotion and Protection of Investments (signed September 2, 1997) (1997) *available at:* <http://dea.gov.in/sites/default/files/France.pdf> (Visited on July 5, 2021).
- 32 For the Agreement between the Government of the Republic of India and the Government of the Republic of Korea on the Promotion and Protection of Investments (signed February 26, 1996) (1996) *available at:* <http://www.Indimbassy.org.kr/investmentandTradeAgreements> (Visited on July 16, 2021).
- 33 For Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments (signed February 26, 1999, entered into force 4 May 2000) (2000) *available at:* <http://www.austlii.edu.au/au/other/dfat/treaties/2000/14.html> (Visited on August 16, 2021).
- 34 for the Agreement between the Government of the Republic of India and the Government of the State of Israel for the Promotion and Protection of Investments (signed January 29, 1996) (1997) *available at:* <http://www.financeisrael.mof.gov.is/FinanceIsrael/Docs/En/InternationalAgreements>.
- 35 For the Agreement between the Government of Republic of India and Government of Republic of Sudan for Promotion and Protection of Investments (signed October 23 2003) (2002) *available at:* <http://dea.gov.in/sites/default/files/Sudan.pdf> (Visited on July 22, 2021).
- 36 For India's list of investment agreements www.investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu (Visited on September 2, 2021).

reveals that India consistently followed the same policy reflected in the 1993 BIPA and adopted the same text as the one used in the model text of the 1993 BIPA. The text used, for example, in Article 4 and 6 in the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Republic of India is exactly similar to the one used in 1993 BIPA. Article 4 of the said Agreement obligates United Kingdom of Great Britain to accord treatment in their respective territories to the investors and investment of other Contracting Party on par with its own investors or investments or to the investors or investments of any third State.³⁷ Similarly, article 6 obligates India and United Kingdom of Great Britain to accord in their respective territories national treatment or MFN treatment to the investors or investments of other Contracting Party in respect of compensation for losses suffered by them in its territory on account of “war, armed conflict, and state of emergency or civil disturbances”³⁸. Not only the text of the Agreement resembles to that of 1993 BIPA, but the arrangement of the text is also similar as that of 1993 BIPA. The MFN clause, as is the case of 1993 BIPA has been jointed with national treatment clause and has been made to operate in the similar circumstances in which national treatment clause operates.

It is obvious from the above provisions that India and United Kingdom of Great Britain agreed

³⁷*Id.*, art. 28.

(1) Article 4 which deals with national treatment and MFN treatment says that

“(1) Each Contracting Party shall accord to investments of investors of the other Contracting Party, including their operation, management, maintenance, use, enjoyment or disposal by such investors, treatment which shall not be less favourable than that accorded either to investments of its own investors or to investments of investors of any third State.”

“(2) In addition, each Contracting Party shall accord to investors of the other Contracting Party, including in respect of returns on their investments, treatment which shall not be less favourable than that accorded to investors of any third State.”

“(3) The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the investors of either Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from: (a) any existing or future customs union or similar international agreement to which either of the Contracting Parties is or may become a party, or (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation”.

³⁸ *Ibid.*

Article 6 which deals with compensation for losses is under:

“1. Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency or civil disturbances in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.”

“2. Without prejudice to paragraph (1) of the above Article, investors of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from (a) requisitioning of their property by its forces or authorities or (b) destruction of their property by its forces or authorities, which was not caused to combat action or was not required by the necessity of the situation shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable”.

that it would accord to the investors and investments of other Contracting States “treatment no less favourable than it would accord to the investments of its domestic investors and investments of investors of other countries”. The obligation of treating the investments of other countries on par with investors of its own and investors of other countries, extends to the “operation, management, maintenance, use, enjoyment or disposal” by such investors. India and Great Britain also agreed to accord return on investment of investors of other countries “treatment no less favourable than it would accord to the investors of any third State”. The treatment which India and United Kingdom of Great Britain promised or undertaken would automatically be extended to the treaty partners under other bilateral investment promotion agreements on account of their commitment under MFN clause to extend similar treatment to the investors and investment of other treaty partners. Similarly, India and United Kingdom of Great Britain undertook to pay compensation “no less favourable than the payment it would make to its own investors and investors and investments of other Contracting States”, if such investor or investment suffers loss owing to “war, other armed conflict, and state of national emergency or civil disturbances in the territory of other Contracting Party”.

The scope of the MFN clause under Article 4 of the Bilateral Investment Promotion Agreement between India and United Kingdom of Great Britain could be explained through an illustration. Suppose, United Kingdom of Great Britain, besides entering into a bilateral investment promotion agreement with India, also signs a bilateral investment promotion agreement with Russian Federation assuring that it would treat the investments of Russian investors and investment in the United Kingdom on par with the domestic investors of UK and on par with the investors and investment of other treaty partners like India. The assurance given by the United Kingdom of Great Britain to treat the investors of Russian Federation can, however, be best used by the Indian investors who/which likes or like to invest in the United Kingdom by claiming under MFN clause that United Kingdom of Great Britain has the same obligation towards Indian investors as it has promised to the investors of Russian Federation, if, for any reason whatever, the actions of the Government of United Kingdom fall short of the standard of treatment agreed or in case the actions of the United Kingdom of Great Britain result in an unfair treatment in terms of investment to the Indian investors in United Kingdom of Great Britain. The Sweep of the obligation undertaken by the United Kingdom of Britain under MFN clause with Federation of Russia will extend to the investors and investments under bilateral investment promotion

agreements which Government of United Kingdom signed with other States.

This is how exactly the Government of India positioned itself in *White Industries v Union of India* on account of the obligation undertaken by the Indian Government with Kuwait agreeing to provide “effective means” to the investors in India. The arbitral tribunal held India responsible of breaching the India-Australia bilateral investment treaty for the reason that “Indian judicial system was unable to deal with the jurisdictional claim of the White Industries for over nine years”. The tribunal came to the conclusion that the delay by the Indian courts amounted to violation India’s obligation to provide White Industries with an “effective means” of asserting claims and enforcing rights assured in bilateral investment treaty which India had concluded with Kuwait. The Tribunal came to the above conclusion for the reason that White Industries could borrow the ‘effective means’ present in India-Kuwait treaty based on the MFN clause present in India-Australia bilateral investment treaty.

Why Change in Policy Since 2015? What Does the Changed Policy Say?

Government of India, following the adverse decision in *White Industries v Union of India*³⁹ and fearing similar decision would follow in other cases pending,⁴⁰ revised model BIPA in 2015 (2015 BIPA). One of the major changes brought about in 2015 BIPA is that MFN clause had been completely dispensed with and omitted from the revised model BIPA. The reasons for the omission of MFN clause were nowhere explained, but in a brief press release issued by the Government of India which stated that :

“The Union Cabinethas given its approval for the revised model text for the Indian bilateral investment treaty. The revised Indian model text for bilateral investment treaty (BIT) will replace the existing Indian model BIT”

“The revised model BIT will be used for re-negotiation of existing BITs and negotiation of future BITs and investment chapters in Comprehensive Economic Cooperation Agreements (CECAs), Comprehensive Economic Partnership Agreements (CEPAs) and Free Trade Agreements (FTAs)”

The press release also stated that :

39 *White Industries Australia Limited v. The Republic of India*, Final Award
available at: <http://www.italaw.com/cases/documents/1170>(Visited on September 14,2021).

40 See for list of cases pending against India
available at: <https://investmentpolicyhubold.unctad.org/ISDSThere> are in all 24 arbitration cases pending against India during 2003-2017.

“The new Indian model BIT text will provide appropriate protection to foreign investors in India and Indian investors in the foreign country in the light of the relevant international precedents and practices, while maintaining a balance between the investor’s rights and the government obligation”

The press release further stated that :

“A BIT increases the comfort level and boosts the confidence of investors by assuring a level playing field and non-discrimination in all matters while providing for an independent forum for dispute settlement by arbitration. In turn, BITs help project India as preferred foreign direct investment destination as well as protection outbound Indian FDI”

The press release also claimed that :

“The “enterprise” based definition is one of the essential features of the 2015 BIPA”⁴¹

Government of India following the decision of omitting MFN clause from 2015 Model BIPA, by September 2017 has terminated except eight agreements shown in the preceding pages, all bilateral investment promotion agreements it signed with the Governments of various countries.

GOVERNMENT’S DECISION – POSSIBLE CONSEQUENCES

The decision to omit MFN clause and terminate bilateral investment promotion Agreements is certainly fraught with negative consequences.

(3.1). Consequences arising out of the Decision of Omitting the MFN clause from Model BIPA

The omission of MFN clause from 2015 BIPA seemed without valid reasons. Reciprocity in promoting and protecting investment in the territory of each other is an unwitting causality of the decision of Government of India.

The MFN clause in the bilateral agreements signed so, equally applies to India as it applies to other treaty partner under them. It operates against India as it operates against other treaty partners. The same text was used in the investment treaties signed by India including the above-mentioned countries, since India entered into its first investment promotion agreement in 1994

41 Press Release, Press Information Bureau Government of India, “Model Text for the Indian Bilateral Investment Treaty” (December 16, 2015) available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=133411> (Visited on April 17, 2019).

with the Government of United Kingdom of Great Britain. The suspicion after more than two decades of signing first investment agreement with UK that MFN clause in the investment promotion agreements is operating against the interests of India is terribly bad argument. Above all, no single treaty partner of 83 agreements has ever approached India suggesting for deletion or amendment of the MFN clause that its sweep too wide; nor did a single treaty partner ever express that MFN clause is operating against its interests. There seemed no wrong with drafting of the clause as it is working well with other countries or treaty partners. On the other hand, it is obvious that bilateral investment promotion agreements were signed with an objective of promoting and protecting the interests of the investments of investors on the basis of reciprocity. Omission of MFN clause brings reciprocity to a break off. Omission of the MFN clause is not a solution in itself and will certainly tilt the balance against the interests of the Indians who want to invest in other countries.

Consequences Arising out of Termination

Similarly, termination of the bilateral investment promotion agreements concluded with the Governments of various States especially major trading partners like United Kingdom of Great Britain, Germany, Russian Federation, France, Australia, Korea, Israel and Sudan also seemed without valid reasons. MFN clause in bilateral investment promotion agreements with the countries above, seemed not discriminatory and arbitrary. The decision of the Indian Government to terminate investment promotion agreements it has signed with various countries except the eight agreements referred above, will have inimical consequences for the Indian tradesmen when competing with the tradesmen of other countries in the host State; similarly, a foreign trades man who wants to sell the goods in India has to place himself in precarious position to the vagaries of the Indian Government.

- i. As per the press release, “the revised BIPA will replace the existing one’ and the revised BIPA will be used for renegotiation of existing BITs and the negotiations of future BITs and investment chapter in Comprehensive Economic Cooperation Agreements and Comprehensive Economic Partnership Agreements and Free Trade Agreements”. There was no indication in the press release as to how exactly ‘renegotiation’ means and will take place. But the Government of India following the decision to omit MFN clause

appears to have terminated all the bilateral investment promotion agreements, except eight agreements referred above, signed with the Government of various States. It is too early to predict what the consequences of the termination would be and how the Government of India will use the revised BIPA for renegotiating the BITs or bilateral investment promotion agreements already terminated; how many treaty partners are ready for renegotiation, if the proposal for renegotiation of an investment agreement without MFN clause is broached by the Government of India? How long will the renegotiation take place? And on what terms? are some of the moot questions the answer of which cannot easily be predicted.⁴²

- ii. The press release also says that “the new Indian model BIT text will provide appropriate protection to foreign investors in India and Indian investors in the foreign country in the light of relevant international precedents and practices, while maintaining a balance between the investor’s rights and the government obligation” but did not explain, how the interest of the foreign investors in India *inter se*, in the absence of MFN clause, would be protected from the competitors. The press release did not even explain how the interest of the Indian investors in foreign countries would be protected from their competitors when Government of India in reciprocity was not ready to assume the responsibility of protecting the foreign investors in India. Nor did it explain what the relevant international precedents were and by which relevant international precedents and practice the interest of the Indian investors would be protected in the host State? And how exactly can the Indian investors can have recourse to these precedents and practice relevant and applicable?
- iii. Thirdly, the press release also said that “a BIT increases the comfort level and boosts the confidence of investors by assuring a level playing field and non-discrimination in all matters while providing for an independent forum for

42 Most Recent IIAs, UNCTAD
available at: <http://investmentpolicyhub.unctad.org/IIA/MostRecentTreaties#iiaInnerMenu> (Visited on September 9, 2021).
The list of most recent treaties shows that India, since the revision of BIPA in 2015 could only sign three Bilateral Investment Promotion Agreements; one with Belarus in 2018 and other two with Kyrgyzstan and Brazil respectively in 2019 and 2020.

dispute settlement by arbitration. In turn, BITs help project India as a preferred foreign direct investment destination as well as protect outbound Indian foreign direct investment.” The press release is more a rhetoric in hollow terms rather a binding assurance and did not explain how the revised BIT would increase and boost the confidence of investors in the absence of definite assurance by the Government of India that their investments would be protected on par with the investments of the fellow foreign investors. Omission of MFN clause certainly disrupts or takes away the balance of rights of foreign investors inter se and qua the Government of India. MFN standard historically has been seen and accepted as “agency of equality of rights” between foreign traders. The same is true with respect to the rights of the foreign investors in the host State under bilateral investment treaties. The presence of MFN clause in 2015 BIPA could have made the foreign investor feel assured that he and his investments are placed on par with those of other foreign investors and their investments.

- iv. The retention of MFN clause in 2015 BIPA could have prevented “discriminatory pacts with various foreign investors and minimize the scope of maneuvering” by successive Indian Governments with foreign investors. It is likely, with the omission of MFN clause, that probability of maneuvering and entering into discriminatory pacts by the successive Government of India with foreign investors would scale up.
- v. Further the Indian investors who wish to invest in foreign countries, in the absence of MFN clause in BIPA, shall be deprived of the equality of opportunities on par with the other foreign investors in competition with them in that country. Omission of MFN clause altogether from the 2015 BIPA creates uncertainty and a losing proposition for the Indian investors in foreign territories.
- vi. Till date no country except India seemed to have dispensed with the MFN

clause from the bilateral investment agreements it has entered. A brief survey of model agreements of leading trading nations like USA,⁴³ UK,⁴⁴ Canada,⁴⁵ Germany,⁴⁶ Netherlands⁴⁷ and Belgium and Luxemburg Union⁴⁸ shows that MFN clause forms part of the model agreement on the promotion and protection of investments of these countries.

CONCLUSION

Therefore, omission of MFN clause from 2015 BIPA followed by termination of bilateral investment promotion agreements is not a solution at a time where countries are moving towards non-discriminatory trade pacts. The Law Commission of India too expressed concern over the possible discrimination the foreign investor may face in India in the absence of MFN clause in 2015 BIPA. The Law Commission could foresee the likely imbalance of rights that may occur on account of the omission of the MFN clause from 2015 BIPA and accordingly suggested to consider the inclusion MFN clause with the restricted scope of application.⁴⁹ Government of India keeping in view of the interests of Indian investors in foreign countries, rather than omitting the MFN clause completely, ought to have narrowed the scope of the application of MFN clause in the bilateral investment treaties (BITs) to be signed in future with sufficient qualifications like “like circumstances” as in the case of bilateral investment promotions treaties of USA and Canada⁵⁰ and developed with a strong administrative machinery to monitor the working of the investment agreements signed.

43 Article 4, 2012 U.S. Model Bilateral Investment Treaty *available at:* <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2870/download> .(Visited on September 9, 2021).

44. Article 3, UK Model Text [Draft] Agreement for The Promotion and Protection Of Investments *available at:* <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2847/download>(Visited on September 9, 2021).

45 Article 6, 2021 Canada Model FIPA, *available at:* <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6341/download>(Visited on September 9, 2021).

46 Article 3, 2008 German Model Treaty -2008 *available at:* <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download>(Visited on September 9, 2021).

47 Article 8, 2019 Netherlands model Investment Agreement, *available at:* <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>(Visited on September 9, 2021).

48 Article 6, 2019 Belgium-Luxembourg Economic Union Model Agreement, *available at:* <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5854/download>(Visited on September 9, 2021).

49 Law Commission of India, 260th Report on Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty para 3.4.4. (2015).

50 The bilateral investment treaties concluded by United States of America and Canada with other States are explicit in declaring that the right under MFN clause applies in ‘like circumstances’ implying the likeness of circumstances in which the treatment to be granted thereby restricting the scope of applicability of the MFN clause to the similar circumstances described therein.

LEGAL REGIME REGULATING SPACE

Harmandeep Kaur*

“That’s one small step for a man, one giant leap for mankind”

-Neil Armstrong

INTRODUCTION

20th century marked the beginning of the space age. The space exploration has proved to be the most significant effort done by mankind, resulting into vast social and economic benefits. In modern times, the fruits of space activities can be seen in the form of services such as broadcasting, communication, defence purposes, navigation, environment assessment including earth observation and so on. The countries are in race of exploring celestial bodies earlier than other nations as a result of which, attempt has been made to find out traces of life on Moon and Mars. However, this aspect has its dark side too which is in the form of pollution, damages, disputes, space debris, intellectual property rights in outer space, unequal distribution of space in orbit, unlimited and unregulated exploitation of the natural resources, involvement of private entities in outer space, space tourism and various other harmful effects are there. Further, for safety purposes, the State Parties are duty bound to share information whenever the State Party has knowledge about apprehension of danger in outer space while applying space technologies therein.¹

The term ‘outer space’ is also called ‘space’. The word ‘space’ was used in the beginning by John Milton in 1667, who explained ‘space’ as “space is the area which starts when the earth’s sky ends”². This is also said that universe is the area of outer space which begins when the air space ends.³ However, this is not desirable to use term ‘aerospace’⁴, as aerospace includes both air space and outer space. The Von Karman Line Theory carries significance which draws a line between air space and outer space, after considering the changing elements of flights instrumentalities, based on technological aspect. According to this theory, outer space starts

* Research Scholar, Department of Law, Punjabi University, Patiala.

1 Prof. Dr. I. H. Ph. Diederiks-Verschoor and Prof. Dr. V. Kopal, *An Introduction to Space Law 1* (Kluwer Law International, 3rd edn., 2007).

2 *Ibid.*

3 Prof. Dr. Ranbir Singh, Prof. Dr. Srikrishna Deva Rao and Dr. Sanat Kaul, *Current Developments in Air & Space Law 1* (National Law University Press, 2012).

4 U.V. Kadam, *A Study of International Law with Specific Reference to Military Activities in Outer Space* (1990) (Unpublished Ph.D. thesis, Shivaji University).

after an altitude of approximately 100 km height from sea level.⁵ An effort has also been made to demarcate on the basis of gravitational pull of earth and by division of space into zones or layers.⁶

Space is dark place with absence of oxygen and no signs of air or light. Space is the place for existence of celestial bodies such as galaxies, planets and stars. The stars are composed of gases and radiation is emitted therefrom. The satellites move in geostationary orbit of the earth with varying speed, inclination and altitude.⁷ The planets further orbit the Sun.⁸

The space law has been explained as “the law governing space related activities.”⁹ The law regulating space is available in the form of international treaties, conventions, resolutions adopted by UN General Assembly as well as the principles and the declarations. Space law has become part of public international law. Various nations have enacted their own laws and principles. The countries are free to use and explore outer space with the use of science and technology. The great knowledge about celestial bodies and their benefits for humanity has been acquired through these space probes.¹⁰

The milestone of space missions was laid down by Soviet Union on October 4, 1957, with the launch of first artificial earth satellite into orbit of earth. Thereafter, US was the second country to launch space craft into outer space. Need arose to regulate the space activities which was initiated by establishment of Committee on the Peaceful uses of Outer Space (COPUOS) in the year 1958.

Thereafter, Sputnik-II mission was launched with a passenger dog named ‘Laika’¹¹. . In the following year, in 1958, ‘Explorer-1’ was launched by United States. the most significant step was taken towards outer space missions, on April 12, 1961, when a manned space flight was launched by Russia.¹²

INTERNATIONAL SPACE LAW

The need to establish international legal system to control space arose after the States started

5 Outer Space, available at: <http://www.newworldencyclopedia.org> (Visited on June 2, 2021).

6 Dr. S. K. Kapoor, International Law & Human Rights 2 (Central Law Agency, 2016).

7 Raj Paul Dhand, Delimitation of air space and outer space a problem in aerospace law (1990) (Unpublished Ph.D. thesis, Panjab University, Chandigarh).

8 *Supra* note 6 at 3.

9 Space law, available at: <http://www.unoosa.org.com> (Visited on March 27, 2021).

10 Space Exploration, available at: <http://www.britannica.com> (Visited on May 2, 2021).

11 Space based astronomy, available at: <http://www.nasa.gov> (Visited on May 27, 2021).

12 *Supra* note 4 at 18.

stepping beyond the air space of the earth and started exploring the outer space and the celestial bodies present therein. The actions taken by countries was a kind of intervention in the space. The international bodies wanted that the knowledge regarding nature of space, the uses of celestial bodies, should reach to all nations equally. Thus, international space law is based on common call of space faring nations. The benefit of applying international law is acceptance of common rules by the State Parties and through this, international cooperation is established.¹³

The UN General Assembly Resolutions became basis for laying down international law on space. Firstly, in 1961, the first Resolution stressed upon elimination of discrimination with any State based upon any economic or scientific status.¹⁴ Two years later, in 1963, the UN General Assembly asked the State Parties to follow two basic principles while conducting space exploration. The first principle stated that the States are bound to follow the principles laid down under UN Charter, 1945 and second, to observe the international law prescribed for that purpose.¹⁵ These principles were adopted in the Declaration of Legal Principles Governing the Activities of States in Exploration and Use of Outer Space, 1963, Nuclear Test Ban Treaty, 1963. The year of 1967 gave concrete shape to Un General Assembly Resolutions with the adoption of first treaty on outer space named, 'the Outer Space Treaty, 1967'. This treaty came into effect from October 10, 1967. The Outer Space Treaty has been given the status of Magna Carta of space law.¹⁶ Thereafter, the other four main treaties were adopted by State Parties.¹⁷ The basic purpose behind all these instruments is to ensure peaceful exploration and exploitation of outer space. Besides these treaties, various principles and declarations have also been adopted at international level.

A. The Space Law Treaties

There are five main treaties dealing with space under international law and these include; the Outer Space Treaty, 1967, The Rescue Agreement, 1968, the Liability Convention, 1972, the Registration Convention, 1975 and the Moon Treaty, 1979.

13 Asha. P. Soman, *Evolving International Humanitarian Legal Regime for Sustainable Use of Outer Space and its Application to India* 9(NLSUI, Bangalore, 2018).

14 UN General Assembly Resolution 1721 (XVI), December 20, 1961.

15 UN General Assembly Resolution 1962 (XVIII), December 13, 1963.

16 *Supra* note 1 at 2,3.

17 The Rescue Agreement, 1968, the Liability Convention, 1972, the Registration Convention, 1975 and the Moon Agreement, 1979.

The Treaty Banning Nuclear Tests in the Atmosphere, in Outer Space and under Water, 1963

The very initiative was taken by adoption of the Treaty Banning Nuclear Tests in the Atmosphere, in Outer Space and under Water, 1963 which is considered as partial ban or limited ban. The treaty came into effect from October 10, 1963¹⁸. India, United States, Soviet Union, United Kingdom had made proposal in 1958 for preventing nuclear weapon tests in air space or outer space.¹⁹ This treaty laid down condition of verification to curb this menace.²⁰

The Outer Space Treaty, 1967

The Outer Space Treaty is also called the Magna Carta of the space law and also the non-armament treaty. Thereafter, the Outer Space Treaty, 1967,²¹ was executed in the year of 1967. The Treaty requires the States to conduct peaceful activities of space exploitation which aims towards common interest of all States. No State is to be discriminated in providing access to space exploration.²² The States do not enjoy sovereign status on any part of outer space or on any celestial body. No State can own or occupy any celestial body. The space missions are to be launched by following the guidelines laid down under UN Charter so that peace and safety can be maintained at international level. The nuclear explosions are strictly prohibited in the orbit of earth. The weapons capable of causing mass destruction are not to be placed in the space.²³ Establishment of international co-operation is the duty imposed on each State Party to the treaty. The astronauts of own as well as of other States, have right to seek equal protection in the State Party in case of need and emergency. The Launching State has control and jurisdiction over the spacecraft and personnel launched by it. The UN Secretary General has power to give advice in case of risk.²⁴

After the making of the Treaty, the two superpowers, United States and Soviet Union, both entered into an agreement to launch manned spaceflights.²⁵

18 The Liability Convention, 1972, art. XIV.

19 *Id.*, art. XV.

20 *Id.*, art. XVIII.

21 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967.

22 The Outer Space Treaty, 1967, art. I: the exploration and use of outer space shall be carried out for the benefit and in the interest of all countries, irrespective of their degree of economic and scientific development and shall be the province of all mankind.

23 *Id.*, art. IV.

24 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967, available at: <http://www.state.gov> (Visited on August 22, 2021).

25 On June 1966, both the United States and the Soviet Union submitted draft treaties. The U.S. draft dealt only with celestial bodies; the Soviet draft covered the whole outer space environment. The United States accepted the

The Agreement on the Rescue of Astronauts, the Return of Astronauts, the Return of Objects Launched into Outer Space, 1968

The main focus of this Agreement is on astronauts. This Agreement fulfils the purpose of the Outer Space Treaty as laid down under Article V and Article VIII of that Treaty. Article V of the Treaty of 1967, call the astronauts as envoys of mankind. So, these personnel must be given assistance in case of accident, emergency while landing or other distress. Further, any spacecraft or astronaut found on territory of a State other than the launching or registering State, the State on whose territory they are found, is bound to assist and return them to their State of Registry. Further, Article VIII of the Outer Space Treaty, 1967 provides that the registering or launching State shall retain control and jurisdiction over their space craft and astronauts.²⁶ These objectives are based on humanity and peaceful exploration. To fulfil these objectives, in the following year, the Rescue Agreement²⁷ was adopted on December 19, 1967. The treaty protects astronauts and the spacecrafts from consequences of distress and accident and resulting unintended landing and other risks so that they may be returned safely to their launching States²⁸. On such happening, the State Party, whose space object and astronaut is affected, is given information and a public declaration is also made as well as the UN Secretary General is notified about the same.²⁹ The basic principle of cooperation is to be followed while conducting rescue operations.³⁰ 'Launching', here, also includes the act of attempt to launch.³¹ A duty has been imposed on the State Parties to immediately inform to the launching State as well as to the UN Secretary General.³²

Soviet position on the scope of the Treaty and by September agreement has been reached in discussions at Geneva on most Treaty provisions. Differences on the few remaining issues, chiefly involving access to facilities on celestial bodies, reporting on space activities and the use of military equipment and personnel in space exploration, were satisfactorily resolved in private consultations during the General Assembly Session by December. On 19th December, the General Assembly approved by acclamation a Resolution commending the Treaty. It was opened for signature in Washington, London and Moscow on January 27, 1967.

26 The Outer Space Treaty, 1967, *available at*: <http://www.unoosa.org> (Visited on August 29, 2021).

27 Agreement on the Rescue of Astronauts, the Return of Astronauts, the Return of Objects Launched into Outer Space, 1968.

28 *Id.*, art.4.

29 M.P. Tandon, Public International Law 180 (Allahabad Law Agency, 2017).

30 The Treaty Banning Nuclear Tests in the Atmosphere, in Outer Space and under Water, 1963, Article I.

31 Space Legal Issues, *available at*: <http://www.spacelegalissues.com> (Visited on June 4, 2021).

32 The Rescue Agreement, 1968, Article 1 casts duty on the Member States to immediately notify the launching authority or if it can not identify and immediately communicate with the launching authority, immediately make a public announcement by all appropriate means of communication at its disposal. The State Party is also required to notify to the Secretary General of the UN, who should disseminate the information without delay by all appropriate means of communication at his disposal.

Both States are required to cooperate with each other for rescue purposes. The rescue operation is to be conducted as per the directions of the launching State, whose spacecraft and astronauts are to be rescued and returned.³³

In case, after emergency landing or accident, the space craft or astronauts are found on high seas which does not come under jurisdiction of either State Party, then the State Party competent to conduct speedy rescue operation, can come forward for providing assistance.³⁴ More effective steps are required to be taken in case the object found is of hazardous nature. However, the launching State or State of Registry is required to pay to the other State, the expenses of such rescue and return.³⁵

The Convention on International Liability for Damage Caused by Space Objects, 1972

The Liability Convention, 1972³⁶, provides for liability to pay damages³⁷ by the launching State or State of Registry to the other State or States to which damage is caused through space object³⁸. The Liability convention became effective from September 1, 1972. This was in 1978 when the first issue came under this Convention. In this case Canada suffered damage due to crash of a satellite on its territory. This satellite, named, Kosmos 954, was launched by Soviet Union and caused large amount of damage because of its nuclear components. 'Damage', here can be to a person or to a property.³⁹ The launching State is held liable under this convention.⁴⁰ The act to launch a space object also includes attempt to do so.⁴¹ The liability is absolute liability for the damage caused to the surface of the earth or to an aircraft while is in flight, otherwise, fault has to be proved on part of launching State.⁴² Under the convention, the State Party can be held liable jointly or severally.⁴³ The States are not liable in case damage is caused to its own nationals or to

33 *Supra* note 13 at 58.

34 *Supra* note 27, art. 3.

35 *Id.*, art. 5.

36 The Convention on International Liability for Damage Caused by Space Objects, 1972

37 The term 'damage' has been defined under Article I of the Convention as "loss of life, personal injury or other impairment to health or loss of or damage to property of States or of persons, natural or juridical or property of international intergovernmental organisations.

38 Space object under the Convention includes component parts of a space object as well as its launch vehicle and parts thereof.

39 The Liability Convention, 1972, Article I.

40 *Supra* note 3, at 35.

41 *Ibid.*

42 *Id.*, art. III.

43 *Id.* art. IV.

foreign nationals while they are present in the launching State for the purpose of launching.⁴⁴ Further, the procedure to impose such compensation and to recover the same has been provided under Article VIII of the Convention. The procedure starts with the filing of complaint to the launching State. The whole process is carried on through diplomatic channels or through UN Secretary General. However, no claim shall be admitted after expiry of one year from date of cause of action or from date when the occurrence comes to knowledge.⁴⁵

- **Claims Commission**

A provision has been laid down under the Liability Convention as to creation of a Commission to deal with space disputes. In case, the diplomatic negotiations among parties have not proved to be beneficial, claim can be filed before the Commission. The Commission is to be established by the parties themselves and shall consist of a Chairman and other members representing both States. The members are to be appointed either by the parties themselves or by the UN Secretary General, on request of parties. The decision is based on merits of the case but is binding only if parties consent thereto, otherwise, the decision has mere recommendatory value. The cost is to be paid by both parties.⁴⁶

The Convention on Registration of Objects Launched into Outer Space, 1975

Further, the Convention on Registration of Objects Launched into Outer Space, 1975,⁴⁷ requires the State Parties to register their space objects for purpose of identity.⁴⁸ The launching State, before launching its object into outer space, is duty bound to register the same with the UN Registry and also in the register maintained by the launching State. The information about the registration is delivered to the UN Secretary General,⁴⁹ as the Secretary General further maintains the records of registration conducted by State Parties.⁵⁰ The contents of registration are: the name of the launching State/States, registration number, the designator of the space object, date and place from where object is scheduled to be launched and other parameters.⁵¹

The launching State has been vested with responsibility at international level for consequences of their space activities. The registration of space object has become mandatory under the

44 The Liability Convention, 1972, art. VII.

45 *Supra* note 13 at 66.

46 *Supra* note 13, arts. XVI and XIX.

47 The Convention is also called the Registration Convention, 1975 and came into force from September 15, 1976.

48 UN Register of Objects Launched into Outer Space was established by UN General Assembly Resolution 1721B (XVI).

49 Convention on Registration of Objects Launched into Outer Space, 1975, Article II.

50 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979, Article III.

51 *Id.*, art. IV.

Convention. The registration is also useful in case of rescue and return of space objects and astronauts for purpose of identifying the country to whom that space object or personnel belongs. Certain important terms have been defined under Article I of the Convention. Further Article explains the situations in which registration is compulsory. The UN Secretary General is also required to perform registration work under which the information about registration in State Parties shall be recorded which shall be open to inspection at any later stage.⁵² Such register shall contain information about the launching State, the designator, the registration number, place of launch, the functioning method of the space object registered and so on.⁵³

Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979

The last most important international instrument was entered into by the State Parties in the year of 1979, named, the Moon Agreement, 1979.⁵⁴ However, this Agreement has not been signed by most of the States because of imposition of restrictions and undefined terms. The Agreement provides for principle of use of space as common heritage of mankind and that all countries have equal rights in respect of moon, orbit and other celestial bodies.⁵⁵ The State Parties, conducting moon probe, are required to follow the principle laid down under UN Charter, 1945 and the Declaration, 1970.⁵⁶ The moon is to be explored only for peaceful purposes and any hostile act therein, such as placing of nuclear weapons or other military activities, is strictly prohibited which may cause harm to the planet.⁵⁷ No State Party is to be discriminated on any basis either economically or scientifically.⁵⁸

B. The General Assembly Resolutions

General Assembly is one of the main organs of the United Nations. The Resolutions passed by the General Assembly are in the form of decisions which are subject to vote by State Parties to the United Nations. The majority is considered as equal to more than fifty percent voting in favour or it can be two third as the case may be. These Resolutions or decisions are non-binding in nature and State Parties can not be compelled to follow the same.⁵⁹ General Assembly has been

52 *Id.*, art. III.

53 *Supra* note 13 at 70.

54 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979

55 *Id.*, art. I.

56 The Declaration on Principles Concerning Friendly Relations and Co-operation among States, 1970.

57 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979, art. III.

58 *Id.*, art. IV.

59 Resolutions and Decisions- UN Documentation: General Assembly, *available at*: <http://www.researchgate.un.org> (Visited on September 3, 2021).

defined under UN Charter⁶⁰ which states that all the members of UN Charter shall be members of the General Assembly with five representatives each. The Assembly has power to recommend on matters of international interest to the members of United Nations, to maintain international cooperation and so on.⁶¹

To regulate space activities, the UN General Assembly has adopted certain Resolutions such as, the Resolution No. 1721 (XVI) of December 20, 1961, Resolution 1802 (XVII) of December 14, 1962, Resolution 55/122 of December 8, 2000, Resolution 59/65' on Prevention of an Arms Race in Outer Space and so on. Through these Resolutions, the General Assembly has aimed towards securing interest of all by stressing upon international co-operation while using and exploring outer space. The principles provide for application of international law and UN Charter on outer space activities. The State Parties are required to conduct their space missions in accordance with principles laid down under international law. The recommendations of UN Committee on Peaceful Uses of Outer Space became part of these Resolutions.⁶²

C. General Assembly Declarations

There are two main Declarations adopted by UN General Assembly for purpose of space exploration which are; the Declaration on Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, 1963 and the Declaration on International Co-operation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, taking in to Particular Account the Needs of Developing Countries, December 13, 1996. These Declaration, like UN Resolutions, aim towards securing common interest mankind, equality in freedom to use outer space and other celestial bodies. Principles of non-appropriation and non-sovereign status of State Parties has been emphasised. The State Parties are made accountable for its State and non-State activities. The launching State is required to have prior consultation at international level before proceeding further. The principle laid down under these Declarations were adopted worldwide and became part of provisions of the first treaty on space i.e., the Outer Space Treaty, 1967.⁶³

D. General Assembly Principles

The Principles Governing Activities of States in Exploration and Use of Outer Space, 1963, The

60 UN Charter, 1945, Chapter IV, ss. 9-22.

61 *Ibid.*

62 *Supra* note 1 at 3.

63 The Declaration on Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, 1963, available at: <http://www.unoosa.org> (Visited on June 1, 2021).

Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, 1982⁶⁴, Principles on Remote Sensing, 1986⁶⁵, Principles Relevant to the Use of Nuclear Power in Outer Space, 1992 and the principle of international cooperation, are the principles adopted by UN to regulate the conduct of State Parties while their space activities.

However, certain General Principles have been laid down under these Resolutions, which were adopted in international treaties and other principles on space law, which are as following:

- a. Principle of Good Faith
- b. Principle of International Cooperation
- c. Principle of Non-Appropriation
- d. Principle of Liability
- e. Principle of Common Heritage of Mankind⁶⁶

E. Other Important International Agreements

The Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, 1974, Agreement Relating to the International Telecommunications Satellite Organisation, 1971, an Agreement on the Establishment of INTERSPUTNIK International System and Organisation of Space Communications, 1971, the Convention for Establishment of European Space Agency, 1975, the Convention Establishing the European Organisation for the Exploitation of Meteorological Satellites, 1983, the Agreement of the Arab Corporation for Space Communications, 1976, the Convention on International Mobile Satellite Organisation, 1976, the International Telecommunication Constitution and Convention, 1992 and Agreement on Cooperation in the Exploration and Use of Outer Space for Peaceful Purposes, 1976 are some other considerable achievements in protection and regulation of space missions.⁶⁷

F. International Organisations Regulating Space

Both inter-governmental and non-governmental international organisations deal with space. the most significant institution is the United Nations which is the drafting agency for space law. Other institutions include the specialised agencies of UN, the UN Office for Outer Space Affairs,

64 These Principles were adopted through General Assembly Resolution 37/92.

65 These Principles were adopted by consensus on December 3, 1986 which were drafted by the Legal Subcommittee to Committee on Peaceful Uses of Outer Space.

66 *Supra* note 13, at 100.

67 *Supra* note 13 at 51.

the International Law Association, UN Committee on Peaceful Uses of Outer Space (UNOOSA), the Space Law Committee, the International Telecommunication Union (ITU), the World Meteorological Organisation (WMO), the United Nation Educational, Scientific and Cultural Organisation (UNESCO), the International Atomic Energy Agency (IAEA), the International Council of Scientific Unions (ICSU), the International Institute on Space Law (IISL), the Committee on Space Research (COSPAR), the International Astronautical Federation (IAF) and various others.⁶⁸

G. Settlement of Disputes

The most important international document is United Nations Charter, 1945 which is followed in other international instruments. The Charter provides for peaceful settle of international disputes.⁶⁹ The priority has been given to peaceful methods such as mediation, negotiations, arbitration, enquiry, conciliation as well as through judicial means. The basic purpose of laying down international rules and regulations is to maintain international peace and security.⁷⁰ The Outer Space Treaty, 1967 provided that in case of any dispute among States, the general principles of international law are to be applied for peaceful settlement.⁷¹ The Liability Convention, 1971 provides for the establishment of Claims Commission. However, the decision of the Commission is only recommendatory nature and is binding only on parties to the dispute and only with their consent. The Moon Treaty, lays down the principle of consultation.⁷² The UN authorities such as Secretary General performs the function of dispute settlement through mediation. Besides these principles, two courts at international level have also been established, named, the International Court of Justice and the Permanent Court of Arbitration. On other side, the countries are empowered to take actions at their individual level to solve dispute through bilateral treaties or national laws. To illustrate the same, in US the National Astronautics and Space Act, 1958 is applicable to resolve space disputes.⁷³

CRITICAL ANALYSIS OF INTERNATIONAL SPACE LAW ALONG WITH CONCRETE SUGGESTIONS

Although the space law Treaties have defined the space activities and their regularisation but in recent scenario, outer space has created an opportunity as well as a challenge before the world.

68 *Supra* note 1 at 12-13.

69 The United nations Charter, 1945, Chapter VI, art. 33-38.

70 UN Charter, art.2(3).

71 The Outer Space Treaty, 1967, art. III and IX.

72 The Outer Space Treaty, 1967, art. XV.

73 *Supra* note 1 at 142-144.

Many new issues relating to use of outer space have arisen with which the present space law is not capable of dealing efficiently. These issues are private space activities, space tourism, space debris, space environment protection and so on. Further, claim of private property rights on the moon and other celestial bodies, lack of equality in allocation of space in orbital space, lack of effective regulation regarding the natural resource exploitation in outer space, space habitation and colonisation, State responsibility and liability for private space activities and so on are the issues which require enactment of specific space laws or amendment to be made to the existing one. This is also because the present international law is not adequate to deal with all these current problems. Therefore, for equitable and appropriate use of outer space, there is need to review the international space law to make it suitable for present situations.

Following are the gaps in space law or the critical issues which show that the present international space law is not sufficient enough to maintain peaceful exploration of outer space:

- a. First of all, nowhere the term 'space' or 'outer space' has been defined in the international space law. Thus, it is difficult to demarcate between space and outer space. There is need to provide a legal definition of term 'outer space' in space law.
- b. Further, no legal provision delimiting the air space and outer space can be found in international space law. Although, the Von Karman Line theory has been adopted by most of the States for delimitation purpose but there is need to define the uniform delimitation in legal sense which would be applicable to all States at international level.
- c. At present, large number of private entities have shown their interest for participation in space exploration but there is no space law providing for control over private space activities. Few countries such as United States has enacted laws regulating private space activities; the Space Resource Discovery and Use Act, 2015 and the Exploration and Use of Space Resources Act, 2017. But how can any State lay down a legal provision against the international space law such as under Article VI of the Outer Space Treaty, 1967, the States have been held responsible for their space activities, although by private bodies. It impliedly permits private space activities but held the State itself liable also for private activities.

There is need to fix responsibility of these private entities for their actions and not the State as this imposes extra burden on the State. The owner of space entity should be made answerable. Further, under the Liability Convention, the definition of launching State, needs to be amended by including the term 'launching entity' by which the liability and responsibility can be imposed on real functionary and not mere the State.

- d. Participation of non-State actors in the development of space technology and space exploration has generated an immediate need for enactment of a legislation for making its activities more focused and resourceful. Space has become a place that is increasingly used by a host of nations, consortia, businesses and entrepreneurs. The business of space operations beyond the sovereignty of national borders. Efficiently drafted law will help in growth and development of the nation thereby leading to its progress and economic stability.

The specific legislation which we need to enact must be capable of handling the issue of responsibility and liability of State vis-à-vis private entities working in the State, it must also include key provisions for peaceful use of outer space for the benefit of all mankind worldwide. Most importantly, it should provide for licensing norms for space entrepreneurs associated with various commercial activities and applications so that the issues that arise at the time of liability are already settled beforehand.

- e. The developed countries are becoming more developed and the developing and under developed have remained on lower place in various aspects of growth including space activities. The space has remained the place for few States who are developed technologically and scientifically. There is need to strictly follow the principle of co-operation as is provided under the preamble to Outer Space Treaty.
- f. Under the Moon Agreement, the principle of 'common heritage of mankind' has been used due to which the countries hesitate from becoming party to this treaty as the countries demand sovereign right over parts of celestial bodies explored by them. The countries are not ready to share their fruits with other countries by applying the principles of common heritage of mankind.
- g. The provisions of international space treaties have not been made binding on States. further, States are free to ratify the treaties or not to do so. Those who

become parties, are not bound to follow the same due to reservations. Thus, for effective implementation of space law, it should be declared binding so that States can be held strictly responsible for any harm caused due to their space activities.

- h. The countries have started looking towards space for commercial benefits which poses threat of exploitation of space bodies for selfish purposes such as for mining as well as for militarisation. The existing international law regulating space exploration is not well suited to large-scale commercial access to space.
- i. Further, the international space law does not make any reference to activities such as space tourism and transport activities.
- j. Further, the issue of space debris has not been sufficiently addressed by either the space law treaties or other principles.

There is need to adopt a separate legal instrument controlling space debris and to lay down the responsibility for loss caused. Although, the Liability Convention provides for liability of State in case damage is caused to people and property due to negligence, but to prove negligence on part of State is very difficult as there are no uniform space traffic rules. Further, there are numerous space objects present in outer space and this is difficult to identify the responsible spacecraft in case of collision. There is also need to lay down specific legal definition of 'space debris', which has been provided nowhere under the treaties.

CONCLUSION

At end, it can be concluded that the era of space exploration started with growth of science and technology. This has brought better understanding of our surroundings which exists beyond air space. With emergence of concept of space, man has understood the difference between two spaces i.e., air space and outer space. The human being has acquired great knowledge about the universe in which our planet exists along with other celestial bodies. The space has been used for navigation, to understand the atmosphere of earth, telecommunication, broadcasting, earth observation and many more. Various satellites for different purposes are being launched by States individually and jointly. Further, International law has laid down certain principle as per which the State Parties are to conduct their space probes. The significance lies in the principles

laid down by international treaties, declarations, resolutions which are; principle of non-appropriation, no discrimination, no State has sovereign right over any part of celestial bodies, space as common heritage of mankind, principle of liability, need for registration of space objects, need to establish international cooperation and many more. These principles aim towards peaceful use and exploration of outer space. The disputes are to be settled through peaceful means. No particular State can claim proprietary rights over any celestial body and one of such risk includes space colonisation. Space tourism is hoped to begin in near future. Certain private companies are also involved in space exploration but the State itself has been made liable for their activities, under international law. Thus, a lot has been done and a lot more is left to be done.

The end would be interesting by quoting Rabindranath Tagore saying “Through our sense of truth we realise law in creation and through our sense of beauty we realise harmony in the universe.”

PATENTABILITY OF SELECTION PATENTS IN INDIA, USA AND UK: A COMPARATIVE ANALYSIS

Huma Mehfooz*

Gaurav Bhalla**

INTRODUCTION : WHAT ARE SELECTION PATENTS :

A number of problems would arise in patenting compounds which although individually new, fall within an earlier disclosure of a broader group of compounds. The invention then can only be the selection of a particular compound of relatively small group of compounds from the larger group previously disclosed in broad terms.¹ A selection patent is a patent whose subject matter is a fraction of a larger known class which was the subject matter of a prior patent.² Selection patents are patents for inventions based on a selection of particular compounds for a larger group which is previously disclosed in broad terms. Selection patent is therefore founded on the discovery of new discovered forms. They are employed for protecting particular compounds which are claimed to be individually new but fall within an earlier disclosure of a broader group of compounds for which protection is already claimed.

Selection inventions conventionally exist in chemical, pharmaceutical industries, engineering and manufacturing processes, technological areas, such as biotechnology, material science and telecommunications. A selection invention is one where a certain compound (not disclosed before) is isolated from a larger group (that is already disclosed), and this new smaller group that has been isolated shows beneficial properties that the earlier larger group did not. Building upon what has been stated already, in a condition where any new step or selection produces an unexpected result in functioning or properties in an otherwise known product/condition, it could be deemed to be a selection invention. Lastly, a new use may be considered to fall under the concept of selection invention or at least to relate to this concept. It can be claimed as a "use" or a method or as a product intended for such new use.³

* Assistant Professor, School of Law, Bennett University, Greater Noida.

** Partner Ahlawat & Associates, Delhi.

1 Philip W. Grubb & Peter R. Thomsen, *Patents For Chemicals, Pharmaceuticals & Biotechnology* (Oxford University Press, 5th edn., 2010)

2 *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61, 69 C.P.R. (4th) 251 at paras. 10, 32.

3 Jochen E. Bühling et al, Selection Inventions – the Inventive Step Requirement, other Patentability Criteria and Scope of Protection, AIPPI Working Guidelines

A “selection” invention should meet the criterion that the selection leads to considerable benefit gained or disadvantage avoided. Out of the selected group, the selected members should possess some advantage over the other members, though all the selected members. If it is eventually found out that some other members also possess the same advantage as that of the selected members, then it would not nullify the patentability of the selected patents. But on the other hand, if it is found out that majority of the members of the group possess the same characteristic as that of the selected patent, it would nullify the protection granted to such selected invention.

Sufficient Disclosure :

An important point to be kept in mind is that the benefit relied upon to validate the patentability of a selection invention should be clearly disclosed such that it is clear to the person skilled in the art. In the absence of such disclosure of benefit in the specification at the time of filing it can be presumed that it will not be added later, although if such a statement may be filed taken into account at a later stage. This disclosure plays an important role in the determination of anticipation, which in turn decides novelty, as it is seen in comparison with the disclosure and elements or characteristics of the prior art.

There may be situations where the advantage claimed is inherently disclosed in the earlier patent. To understand this in a better manner, it would be better to have a look at para 156 of the Draft Practice Guidelines of the SPLT⁴ which discusses the concept of ‘inherent disclosure’:

“As regards the words “inherently disclosed”, even if a certain characteristic is not disclosed explicitly in the item of prior art, such characteristic is inherent, where it could be recognized by a person skilled in the art that, taking into account his/her general knowledge, the characteristic is necessarily contained in the disclosure. Inherency requires that the extrinsic evidence should make it clear that the missing descriptive matter is necessarily present in the information described in the item of prior art, and that it would be so recognized by a person skilled in the art. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.”

There can be two types of disclosures i.e. generic disclosure and specific disclosure. The concept relating to this has been further explained in para 158 and 159 of the Draft Practice Guidelines of the SPLT, 2000:

4 Substantive Patent Law Treaty, 2000.

“An item of prior art that discloses a genus does not always anticipate a claim to a species within the genus. In other words, where a claim contains a specific disclosure, for the determination of novelty, a generic disclosure in the item of prior art does not always anticipate the claim to a specific example falling within that generic disclosure. However, where the specific example is identified with sufficient specificity in the scope of the item of prior art, the species claim is anticipated no matter how many other species are additionally described in the item of prior art. On the other hand, where a claim contains generic disclosure, for the determination of novelty, the disclosure of a specific example in the item of prior art falling within a claimed generic disclosure anticipates that generic disclosure. For example, the disclosure of “copper” in the item of prior art defeats the novelty of a claim comprising “metal” as a generic concept.”

What is understood from this is that where the prior art effect of earlier applications is concerned, if an earlier application contains specific disclosure, a claim containing generic disclosure would lack novelty. On the other hand, where an earlier application contains a generic disclosure, a claim under examination with a specific disclosure is not always anticipated by the earlier application.

The concept of claiming of a ‘specific range’ is of relevance and needs to be discussed. Where the claimed invention has claimed a range, it would lack novelty if the earlier application provides a specific figure within the claimed range. For example, a claim to an alloy with 0.1 to 0.3% Copper (Cu) and 0.5 to 0.9% Iron (Fe) would be anticipated by an item of prior art that describes an alloy containing 0.25% Cu and 0.6% Fe. In a scenario, where claims are concentrating towards a narrow range and the prior art divulges a broad range, and if the selected narrow range is not merely the only way of carrying out the teaching of the item of prior art. In our view it may be reasonable to conclude that the claim would be held to be not disclosed with sufficient specificity in the item of prior art, resulting in lack of anticipation. For example, there is evidence that the effect of the selection, for instance the unexpected results, occurred in all probability only within the claimed narrow range. Thus, it can be said that unexpected results have the effect of rendering the claim unobvious.

SELECTION PATENTS IN UK :

Section 2(1) of the Patents Act 1977 talks as to how an invention that is part of the state of the art is not new, this section puts forward a very important aspect required for grant of a patents i.e. presence of novelty or lack of anticipation. A prior disclosure is said to happen when a prior

publication of an invention contains a clear description of, or clear instructions to do or make, something that would infringe the patentee's claim if carried out after the grant of the patentee's patent, the patentee's claim will have been shown to lack the necessary novelty, that is to say, it will have been anticipated. But in case of selection patents the situation is different and a prior disclosure in general terms embracing a number of alternatives may amount to no more than a mere suggestion that any of the members, including any specifically exemplified, might be used, and may therefore be regarded as not anticipating a claim to a specific one of the members. An invention so claimed is generally referred to as a "selection" invention. In *Union Carbide Corp v BP Chemicals Ltd.*⁵, Jacob J held that "the information given by a direction not to do X because it will have adverse consequences is not equivalent to a direction to do X because it has beneficial consequences or does not have the supposed adverse consequences" and so novelty will not be impugned by an earlier disclosure which in effect gives clear directions not to do that which is claimed in a later application. He commented that "invention can lie in finding out that that which those in the art thought ought not to be done, ought to be done." It was further held that a prior disclosure of a range should normally be regarded as disclosing each and every part of that range. However, there might be room for an invention along the lines of a selection invention if there was something special about a later-claimed part of the range.⁶

An interesting fact that comes up in case of selection inventions in UK is that any document in relation to an invention that merely describes the way that might lead to it is not considered to constitute anticipation. What necessarily follows from the abovementioned observation is that if a prior disclosure disclosing the broad class merely indicates the inclusion of that particular member and not specifically relating to the manufacture of the substance in question nor discloses the advantages that are claimed in the same, then it is not anticipation in relation to selection inventions. In *Bayer AG (Batz's) European Application*⁷, carbonless copying paper was characterised by microcapsules made of a particular polymer, which was already known for forming coatings on textiles, leather, wool and metal. Even if these were thought to be neighbouring fields, there was no reason to expect that improved results would be obtained by the use of this material (as the results of comparative experiments showed they were), and thus it

5 [1998]RPC 1.

6 United Kingdom Manual Of Patent Practice (MOPP) as updated on July 2013, *available at*: www.sipo.gov.cn/tfs/dttx/gglfdt/oz/.../P020140107567564264955.pdf (Visited on July 29, 2020-2021).

7 [1982]RPC 321.

was not obvious to select it from the enormous number possible. In the case of *Du Pont v. Akzo*⁸, a document describing a copolymer with a glycol of general formula $\text{HO}(\text{CH}_2)_n\text{OH}$, where n is between 2 and 10, was held not to anticipate a claim to the copolymer with $\text{HO}(\text{CH}_2)_4\text{OH}$, since all the specific examples disclosed in the earlier document used ethylene glycol ($n=2$), and since the claimed copolymer was found to have a rapid hardening rate, making it especially effective in injection moulding and high speed extrusion, a fact not previously known or contemplated in the earlier document, which was concerned with textile fibres having a good affinity for dyes. The document thus merely indicated that the use of one preferred glycol would produce a compound with particular properties, suggesting at the same time that use of any one of the other eight glycols would produce the same result. Although the document stated that the C3, C4, C6 and C10 glycols were examples which would be used, there was no statement that any of these others had in fact been used, or that the product resulting therefrom had been found to have any particular advantages. It was therefore open to the applicant to select one of them and discover that the product had valuable properties in a different field. However had the polymer now claimed been specifically disclosed in the earlier document, a discovery that it had some advantage or useful quality not previously recognised would not make it patentable.⁹ In *Dr Reddy's Laboratories (UK) Ltd v. Eli Lilly & Co Ltd*.¹⁰ too, the Court of Appeal decisively rejected the argument that the mere disclosure of a generic formula or class of compounds discloses every possible compound falling within that class. The Court of Appeal upheld the decision of Mr Justice Floyd and confirmed that Lilly's (selection) patent concerning the drug olanzapine is valid. The question before the court was, "Whether the patentee made a novel, non-obvious technical advance and provided sufficient justification for it to be credible?" it was observed that an 'arbitrary selection' provides no technical contribution. The patent in view of the prior art does not indicate a mere arbitrary selection (the problems identified by the patent have nothing to do with selecting from a wider class and one cannot say that a particular compound out of a vast class is obvious if one has no real idea as to how any individualised member of that class might behave. This case disregarded and brought a change in law as earlier certain special rules were applied for selection inventions, that needed to be applied along with the basic requirements for the compounds to be novel when selected from a previously disclosed

8 [1982] FSR 303 (HL).

9 *Supra* note 2 at 8.

10 [2010] RPC 9.

group, these rules were set out in *I G Farbenindustrie AG's Patent*¹¹ popularly known as 'I.G. Farben' rules and were as follows:

- (i) *there must be some substantial advantage to be secured by the use of the selected members;*
- (ii) *all of the selected members must possess the advantage (although a few exceptions would not invalidate the patent); and*
- (iii) *the selection must be in respect of a property which can fairly be said to be peculiar to the selected group.*

Another important requisite for patenting is the presence of an inventive step. In case of selection inventions, it's a belief that there is no inventive step but such an invention can be granted patent if it is only one of many courses possible, and there is no reason to infer from the prior art that this one is more likely than the others to be probable. In cases relating to selection inventions to answer the question that whether there is inventiveness or not what needs to be determined is that whether the invention makes any technical contribution or is merely an arbitrary selection. If it is merely an arbitrary selection then the invention is obvious. In order for there to be a technical contribution, and thus for the selection to be inventive, the following criteria derived from relevant statements in the EPO Board of Appeal decision in T 939/92 AGREVO/Triazoles¹² should be satisfied: *i) the selection must not be arbitrary but must be justified by a hitherto unknown technical effect; ii) a technical effect which justifies the selection of the claimed group must be one which can be fairly assumed to be produced by substantially all the selected members; iii) this technical effect can only be taken into account if it can be accepted as having been indicated in the specification as filed.*¹³

SELECTION PATENTS IN USA:

US law differs from other nations in an important context and that it does not classify selection inventions as a distinct category of invention. Upon a reading of 35 USC § 101 it can be understood that "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof," may be patented, subject to additional requirements as provided. Thus, any invention that falls in the above list of subject matter be it a selection invention can be patented in USA provided that it meets the other substantive

¹¹ 47 RPC 289.

¹² 6 OJEPO 309.

¹³ *Supra* note 2 at 24.

requirements, i.e. novelty, non-obviousness, written description, enablement, and best mode. So upon a mere glance it appears that selection inventions are treated as any other invention but over the years decisions of the courts have helped in determining a criteria for patentability of such selection inventions.

The U.S. Supreme Court in the case *KSR Int'l Co. v. Teleflex Inc.*¹⁴, unquestionably made it more difficult to establish the non-obviousness of any invention, including selection inventions. While KSR dealt with a mechanical invention, it reset the standard for obviousness determinations for all inventions. Under KSR, an examiner or a court may go beyond the express teachings of references to consider “the background knowledge possessed by a person having ordinary skill in the art” and “the inferences and creative steps a person of ordinary skill in the art would employ” in determining if the selection would have been obvious. Thus, KSR relaxed a former strict requirement for proof relating to inferences. KSR also states that the success of one of “a finite number of identified, predictable solutions,..... is likely the product not of innovation but of ordinary skill and common sense,” and if so, is not patentable. The foregoing passage limits the probative value of the number of elements in a genus in determining obviousness of selected species. KSR also allows a claim to be held obvious based upon an “obvious to try” standard, stating that the lower court “conclude[d], in error, that a patent claim cannot be proved obvious merely by showing that the combination of elements was ‘obvious to try.’ After KSR, the obviousness determination requires two distinct elements: (1) motivation; and (2) reasonable expectation of success.

As far as novelty and non-obviousness are concerned they are considered in the context of the degree of predictability of the subject matter area being claimed. Thus, in general, it is more difficult to obtain a patent to a selection invention in a “predictable” art area (e.g., mechanics, electronics) than in an “unpredictable” art area (e.g., chemistry, biotechnology). In United States Patent Law, it is well recognized that the disclosure of a genus in the prior art is not necessarily a disclosure of every species that is a member of that genus. In fact, there may be many species encompassed within a genus that are not disclosed by a mere disclosure of a genus. With reference to new use it is followed that a claim for a new use of an old compound is novel unless it is exactly disclosed in the prior art. In assessing obviousness under § 103 35 USC, the scope

14 550 U.S. 398 (2007).

and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Objective evidence of inventive step or non-obviousness, such as commercial success, long-felt but unsolved needs, failure of others, etc., also may be relevant, shedding light on the circumstances surrounding the origin of the subject matter sought to be patented.

The patentability of a claim to a specific compound or subgenus embraced by a prior art genus is analysed no differently than any other case by the USPTO. In the case of a prior art reference disclosing a genus, the USPTO is required to look at the following criteria:

- (A) the structure of the disclosed prior art genus and that of any expressly described species or subgenus within the genus;
- (B) any physical or chemical properties and utilities disclosed for the genus, as well as any suggested limitations on the usefulness of the genus, and any problems alleged to be addressed by the genus;
- (C) the predictability of the technology; and
- (D) the number of species encompassed by the genus taking into consideration all of the variables possible.¹⁵

Unlike many other jurisdictions, the U.S. law does not ask for advantageous properties of a selection invention to be presented in the application while filing.

SELECTION PATENTS IN INDIA:

In order to discuss the patentability of selection inventions in India, some light has to be thrown upon the Draft Manual of Patent Practice and Procedure by the Patent Office, India. With regard to assessing novelty in selection patents, the Indian Patent Office follows the criteria as laid down in a UK Court judgment in *IG Farbenindustrie AG's Patent*¹⁶. The following guidelines were laid down in this case:

- (a) the selection is based on some substantial advantage gained or some substantial disadvantage avoided,
- (b) substantially all the selected members necessarily possess the advantage in question, and
- (c) the selection is in respect of a quality of special character which can fairly be

¹⁵ *Ibid.*

¹⁶ 47RPC 289.

peculiar to the selected group.

In order to assess whether the claimed selection invention has an inventive step or not, the Indian Patent Office has referred to the UK judgments and has adopted the principles laid down in them.

Thus, we can see that the Indian Patent Office does not expressly state that selection patents are not patentable in India but the Patent Manual only lays a set of guidelines that are to be followed in a case relating to selection patents. In order to find out whether selection patents are valid in India or not, we have to go into the substantive provisions of the existing Patent Act as well as its development.

The Indian Patents and Designs Act, 1911 incorporated the definition of invention from the Patents and Designs Act, 1907 (United Kingdom). Section 93 of the Patents and Designs Act, 1907 (United Kingdom) defined an invention as meaning “any manner of new manufacture, the subject of letters patent and grant of privilege . . . , and includes an alleged invention”. Section 2(8) of the Indian Patents and Designs Act, 1911 defined an invention as meaning “any manner of new manufacture and includes an improvement and an alleged invention”. It did not define the terms novelty, inventive step or industrial application.

The English Courts in 1930 developed the doctrine of selection patents against this definition of ‘invention’. Given the identical provisions under the U.K. and Indian Patent law, the Bombay High Court in *F.H. & B. Corp. v. Unichem Laboratories*¹⁷ applied the English common law doctrine of selection patents to the case at hand.

In 1970, the Indian Parliament enacted the Patents Act, 1970. The term “invention” was defined by section 2(1)(j) as meaning “any new and useful—(i) art, process, method or manner of manufacture; (ii) machine, apparatus or other article; (iii) substance produced by manufacture”. Section 3 of the Patents Act, 1970 sets out what are not inventions and in sub-section (d) excludes “the mere discovery of any new property or new use for a known substance . . .”

In 2002, the definition of invention in Section 2(1)(j) of the Patents Act was amended to read as “invention means a new product or process involving an inventive step and capable of industrial application.”

In 2005, the definition of inventive step was added by section 2(1) (ja) of the Patents Act, which

¹⁷ AIR 1969 Bom 255.

23 reads as “‘inventive step’ means a feature of an invention that involves a technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art”.

We can see that ‘the mere showing of an added advantage or avoidance of a disadvantage is not sufficient to meet the requirement of inventive step in India’. Also, Section 3(d) of the Patents Act, 1970 explicitly excludes the patenting of discovery of a new property or a new use of a known substance. A selection invention is, in simple terms, an invention in respect of an element in an already known (patented) substance, but it is just that it showcases new property or some new use of such element has come to light. A combined reading of Section 3(d) and Section 2(1)(ja) would make it clear that selection inventions are in fact patentable in India, though, India adopts a far stricter standard when the question of patentability of selection invention arises.

Furthering on what has been said above, it is interesting to note that before the case of *Novartis AG v. Union of India*¹⁸ went to Supreme Court (in appeal), the IPAB in TA/1 to 5/2007/PT/CH with respect to patentability of beta crystalline form of imatinib mesylate while acknowledging that selection patents are not expressly disallowed patents observed that, *“What we observe is that there is no reference of “selection patent” as such in the Indian patent law i.e. the Act. The patentability of an alleged invention is basically determined by establishment of novelty (anticipation), inventive step and industrial applicability of a product or a process [section 2 (1)(j), and 2 (1) (l) of the Act] to the exclusion of inventions which are not patentable listed in section 3 and 4 of the Act. However, in our mind we cannot totally deny that there cannot be any possibility under the Indian law, where the required conditions as above cannot be fulfilled, for the grant of a patent in India where the inventive step is demonstrated by way of an inventive selection.”*¹⁹ IPAB further laid down guidelines as follows that are to be followed while granting patents to selection inventions:

- “Whether there is any statement in the specification where the nature of the invention concerns with some kind of selection.
- Whether the selection is from a class of substances which is already generally known.

18 (2013) 6 SCC 1 19 TA/1 to 5/2007/PT/CH IPAB order dated June 26, 2009

19 TA/1 to 5/2007/PT/CH IPAB order dated June 26, 2009

- Whether the selected substance is new.
- Whether the selection is a result of any research by human intervention and ingenuity opposed to mere verifications.
- Whether the selection is unexpected or unpredictable.
- Whether the selected substance possesses any unexpected and advantageous property.”²⁰

It is further interesting to note that the IPAB, in 2007 had passed an order²¹ stating that selection patents are valid and should be properly considered. In the Order, it stated: “Particularly in chemical patents the concept of ‘selection patent’ where the inventive step is demonstrated by way of an inventive selection of even a new, unexpected and unpredictable single member having

surprisingly advantageous properties previously not known from a known series of a family disclosed in the art can be accepted in the Indian law also. In our view, keeping in mind the substantive provisions of Indian Patent Law, it would absolutely clear that selection patent are not patentable in India. Thus, we feel that the IPAB erred in holding that selection inventions are patentable in India. The ‘Revised Draft Guidelines for Examination of Patent Applications in the field of Pharmaceuticals’²² issued by the Office of the Controller General of Patents, Designs and Trademarks mentions selection inventions but does not specifically deal with their patentability requirements.

Thus it could be stated that India is not opposed to patentability of selection inventions but they have to be put to the tests for patentability as are provided in Indian Patent Act.

CONCLUSION (COMPARATIVE ANALYSIS):

There is a long drawn debate whether selection inventions are in fact inventions, owing to the fact that their subject matter is a part of a larger known class which was the subject matter of a prior patent. Thus it is an opinion that they are not really inventions as there are technically not new or novel. But nevertheless selection patents are a reality and they are being granted almost

²⁰ *Ibid.*

²¹ IPAB Order TA/1 TO 5/2007/PT/CH.

²² The guidelines can be found *available at*:

http://ipindia.nic.in/iponew/draft_Pharma_Guidelines_12August2014.pdf (Visited on March 8, 2020).

all around the world, like USA, UK, India etc. The only country that does not grant selection patents is Germany, and the same is evident in a case wherein it was held that out of a relatively large generic group of compounds, disclosure of the group is, to the skilled chemist, fully equivalent to a disclosure of each compound within the group. When considering the validity of selection patents the question as to whether novelty is present or not is not considered in the same manner as for other inventions, it is slightly different. The founding principle upon which the novelty of a selection invention is based is that a general disclosure is not to be regarded as a specific disclosure of everything embraced by the general disclosure, thereby permitting claims to protect further discoveries within (or selected from) the prior general disclosure. This means that even though the subject matter of the selection patent is mentioned or covered in the prior art but the same would not be taken as anticipation because the patent in question covers such aspects of the compound or thing in question that was not known earlier, and these aspects may either refer to an advantage or avoidance of a disadvantage and thus novelty lies in the efforts of inventor in accentuating those beneficial aspects that could be seen earlier. The same is not to be confused with a new use patent which is patentable only in USA. In the present scenario what forms part of the selection invention could be a small selection from a broader group that is part of earlier patent and but it was not known that the small or specific selection in question possessed different qualities than the rest of the group at the time of grant of earlier patent. Comparing the novelty requirement for selection inventions between the three nations delivers interesting results. UK deals with selection inventions separately, meaning thereby they have distinct rules when it comes to checking anticipation of an invention vide prior disclosure and it is observed that that if a prior disclosure disclosing the broad class merely indicates the inclusion of that particular member and not specifically relating to the manufacture of the substance in question nor discloses the advantages that are claimed in the same, then it is not anticipation in relation to selection inventions. It is also held that any document in relation to an invention that merely describes the way that might lead to it is not considered to constitute anticipation. There has been a long trail of cases that reflect the stand on selection patents wherein the courts have decisively rejected the argument that the mere disclosure of a generic formula or class of compounds discloses every possible compound falling within that class. Coming to USA, the position of selection inventions is like any other invention as they do not put them in a separate

category, which means that the novelty requirement for selection inventions is the same as other inventions. Novelty is considered in the context of the degree of predictability of the subject matter area being claimed, and therefore it is easier to obtain selection patent in an unpredictable area. Such a distinction depending upon the predictability of area of subject matter is not seen in UK. But the stand on prior disclosure is similar in both countries as it is well established in USA that the disclosure of a genus in the prior art is not necessarily a disclosure of every species that is a member of that genus. One of the practices that completely distinguishes USA from the rest of the nations in terms of selection patents is the fact that there is no requirement of evidence of advantageous properties of a selection invention to be presented. Also, USA is a country that provides new use patents and with reference to them it is followed that a claim for a new use of an old compound is novel unless it is exactly disclosed in the prior art. Finally, the Indian position is a bit unclear because the Indian Patent Act neither denies selection patents specifically nor validates them. Upon consideration of Section 3(d) of the Patents Act it explicitly excludes the patenting of discovery of a new property or a new use of a known substance and section 2(1)(ja) of the Patents Act, that provides 'inventive step' as meaning a feature of an invention that involves a technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art, and both of these statutes specifically relate to the patentability of an invention, and apply them to the case of selection inventions that are in simple terms inventions relating to in an already known substance that it showcases new property or some new use. A possible inference in such circumstances is that selection inventions are not patentable in our country. In spite of the statutes being clearly against such patents, selection patents are being granted in India, and this really complicates the whole situation. Nevertheless, for the selection patents that are being granted the UK pattern is followed especially the criteria as laid down in a UK Court judgment in IG Farbenindustrie AG's Patent, the since the same has now been disregarded by Dr Reddy's Judgment, it would be interesting to note the turn of events in our country with regard to selection inventions.

The law relating to inventive step varies from one jurisdiction to another. USA adopts a standard wherein the inventive step (in case of selection patent) lies in the selection for a useful and special property or characteristic adequately defined. The case of *KSR v. Teleflex* posed a problem for the prospective inventors of selection inventions as now while assessing whether an

inventive step is there or not, an examiner or a court may go beyond the express teachings to consider not only “the prior knowledge of the person having ordinary skill in the art” but also “the inferences and creative steps such person would employ” in determining if the selection would have been obvious. Therefore, in order to ensure the grant of a valid selection patent in USA, the patentee would have to strike a balance between inventive step (by explaining the advantage which distinguishes it from the prior art) and sufficiency (by showing that all the members of the selected group possess that advantageous property). The situation is somewhat similar in UK where also the Courts have identified that the inventive step lies in the selection of one of more members from a previously known class of products which possess some special advantage/benefit which could not be predicted before the discovery was made. In addition to this, the UK Courts while discussing inventive step have held that the selection should not be arbitrary but must necessarily have an advantageous technical effect. The technical effect should necessarily be produced by all the members of the selected group and the same should be mentioned in the complete specification itself while filing for a selection patent. The UK Courts have also recognised and granted selection inventions in a number of cases. As far as India is concerned, the assessment of inventive step in case of selection patent is carried out according to the guidelines and standards laid down in UK.

Having compared the stands of the above-mentioned three nations on selection patents, it is necessary to consider that whether grant of selection patents is resulting in lowering of the bar for patentability of inventions as the subject matter of these inventions is nowhere close to the effort and toil put in by the inventor in discovering the subject matter of the earlier patent. Also another issue that relates to selection patents is with respect to ever-greening of patents as these patents are granted for their surprising advantages or avoidance of disadvantages that was not known at the time of earlier patent, and this raises doubt on the intentions of the inventor as it cannot be known if the inventor had knowingly concealed the information that is subject matter of the selection patent in his initial disclosure so that he could claim it later as a separate patent and thus get more benefits than is allowed by law. All of this raises a doubt on the validity of selection patents and needs to be considered by the legislators.

PROTECTING FASHION DESIGNS IN THE INTELLECTUAL PROPERTY REGIME: AN ANALYSIS

Kritika Sheoran*

Dr. Amita Verma**

INTRODUCTION

“Fashion is a form of ugliness so intolerable that we have to alter it every six months.”¹

Oscar Wilde

Since time immemorial, articles of clothing have been perceived as an article having functional aspect rather than being an article with artistic value. No doubt clothes have been used to cover human body but ignoring the creative and intellectual skill involved in making designer clothes is not a good practice. Designers across the world work tirelessly to provide latest and unique designs to their customers. Fashion industry has grown tremendously in the last few years. The Indian apparel industry is expected to touch 223 billion dollar mark by the end of 2021². This industry made contribution up to 2.3% in GDP in the year 2018-19³. Looking at the major contribution of this industry in the economy of a country, it becomes incumbent to accord protection to the designers who invest their creative and intellectual skill in creating new designs in the fashion industry. In order to get legal protection, designers seek remedy in the intellectual property regime. There are various areas in the IP law which protects different aspects of a fashion design such as copyright, trade mark, trade dress, designs and design-patent. Different countries have their own national laws to protect fashion designs. Although creative works such as films, paintings and music are highly protected in different jurisdictions, the designs created by fashion designers are not protected on the similar lines.

HISTORICAL BACKGROUND OF THE FASHION INDUSTRY

Since ancient times, the term 'fashion' is associated with the status/rank a person holds in the society. According to their social standing, people dress-up in clothes and accessories that are of latest trend. They want to depict themselves separate from the other class people and hence use fashionable items with well-known brand names.⁴ There is another theory regarding historical

* Ph.D. Research Scholar, Department of Laws, Panjab University, Chandigarh.

** Associate Professor, University Institute of Legal Studies, Panjab University, Chandigarh.

1 'Oscar Wilde Quotes', available at: <https://www.goodreads.com/quotes/5298-fashion-is-a-form-of-ugliness-so-intolerable-that-we> (Visited on August 1, 2021).

2 Available at: <https://fashionunited.in>statistics> (Visited on August 6, 2021).

3 Available at: <https://www.ibef.org/industry/textiles> (Visited on August 6, 2021).

4 C. Scott Hemphill and Jeannie Suk, 'The Law, Culture and Economics of Fashion' 61 *Stan. L. Rev.* 1147 (2009).

aspect of fashion propounded by jurist Herbert Blumer, called as Zeitgeist wherein emergence of fashion was attributed to collective effort of people who expressed similar taste in the fashion trends. According to Blumer, people tend to follow fashion because they want to remain in fashion and be tagged as fashionable.⁵ People develop the habit of linking their individuality, identity and personality with the clothes they wear hence they express themselves by their fashion choices.

In the ancient societies, clothing was regulated on the basis of religion but with the passage of time it has become more influenced by status of an individual in the society. Nowadays wearing designer clothes and accessories are linked with the personality of an individual. This resulted in an increase in demand of designer articles which forced the designers to come up with new, unique and innovative designs to attract the consumers. Owing to the time and intellectual skill a designer puts in creating a designer item, there was an increase in demand of laws which could protect their intellectual labor.

IP PROTECTION TO FASHION DESIGNS IN U.S.A.

Legislative framework to protect fashion designs in U.S.A is not strong as comparison to protection available to other industries. But this does not mean that fashion designs are not at all protected in U.S.A. Protection available in the IP regime in U.S.A to fashion designs is scattered in different legislations with respect to different subject-matter viz. trade mark, copyright and patent.⁶ All of them protect one or the other aspect of design but none of them gives complete protection.

Trade Mark Law

The trade mark law⁷ provides a viable option to the fashion designers to protect their designs by putting their logo on the objects they create. Although trade mark law does not protect the actual design of the article but if the mark is put on the article, then it accords protection to the designer for the article. The Lanham Act (trademark law) gives an option to the designer to register certain elements of design as trade mark but this protection is available on the condition precedent that the registered mark must be used in business.⁸ Designers have to adopt a

5 *Ibid.*

6 Susanna Monseau, 'European Design Rights: A Model for the Protection of All Designers from Piracy' 48 *American Business Law Journal* 27 (2011).

7 The Trademark Act, 1946 (U.S).

8 Ronojoy Basu, 'Fashion, IPR and the Emerging designer', available at: <https://ssrn.com/abstract=2635087> (Visited on August 10, 2021).

distinctive mark/logo which should be put on the article so as to make consumers aware about the source of the article.⁹ In order to make their design distinctive, designers sometimes include some unique pattern in the article itself e.g. the famous international brand Burberry incorporates plaid design in its article which has become a distinctive design for this brand.¹⁰ But what is actually protected here is the logo or the brand name rather than the design itself. So, there is a chance that the design is copied without any infringement under the trade mark law since copying the design is not termed as infringement as the design is not protected. If the brand name or logo would have been copied that could be a case of infringement under the trade mark law.

Trade Dress

The concept of trade dress is an extension of trade mark law whereby visual features of an article gives information about its source and origin viz. packaging of the product,¹¹ product configuration, outlook of the product.¹² It includes size, color, shape and graphics.¹³ Customers use trade dress as a distinctive mark to differentiate between goods of different sources because they relate the specific shape/design of the product with a particular person/company. There are certain conditions which should be satisfied before claiming trade dress protection such as-

- Distinctive character
- Non-functional design
- It has acquired secondary meaning.

Secondary meaning means the customers link the peculiar packaging or design with the brand without even looking at the brand logo or brand name. This means the packaging/design has acquired a distinctive character to claim protection as a trade dress. The concept of trade dress came to light in *Wal-mart Stores, Inc. v. Samara Brothers, Inc.*,¹⁴ wherein it was held that in order to claim protection under trade dress, packaging of the article must have acquired distinctiveness or secondary meaning i.e. people associate a specific design/packaging with a trade mark.¹⁵ Designs in the fashion industry have a short life-span and in that time period it is

9 Francesca Montalvo Witzburg, 'Protecting Fashion: A Comparative Analysis of Fashion Design Protection in The United States and The European Union' 107 *The Trademark Reporter* 1131 (2017).

10 *Ibid.*

11 Mark K. Brewer, "Fashion Law: More than Wigs, Gowns, and Intellectual Property" 54 *San Diego L. Rev.* 739 (2017).

12 Joanna Buchalska, "Fashion Law: A New Approach?" 7 *Queen Mary Law Journal* 13 (2016).

13 The Trademark Act, 1946, s.45 (U.S).

14 529 U.S. 205 (2000).

15 *Supra* note 10.

very difficult to overcome this threshold of achieving secondary meaning in order to claim trade dress protection. Hence, fashion designers find it difficult to protect their designs in the trade dress regime.

Design Patents

Patent protection is available to a new invention having utility¹⁶ and articles having original designs.¹⁷ Patents are of two types in U.S patent law- utility patent and design patent, former protecting the utility aspect of a new invention and latter protecting the appearance of an article. Conditions of patentability in U.S are novelty¹⁸ and non-obviousness.¹⁹ Since design patents protect the ornamental aspect of the article so the functional aspect must be separable from the ornamental aspect in order to claim design patent.

Patent law basically deals with invention i.e. it is mostly related to the field of science but fashion designers have tried to take benefit of design patents to claim protection for their designs.²⁰ However, it is very difficult to claim protection under design patents for a fashion designer as the condition of novelty and non-obviousness is difficult to achieve in the fashion industry, unless a new type of cloth or article is created.²¹ Moreover, clothing is viewed from a functional perspective, the ornamental aspect is just a small part of it so only a limited aspect of entire clothing or the article is eligible for design patent protection. Hence the entire fashion design gets limited to no protection in patent law.²²

There are certain hurdles that make claim of design patent for fashion designers even more difficult. Firstly, the process of getting patent is time consuming which is not conducive for the fashion industry where trend changes every season.²³ Secondly, the long-term protection of 14 years granted under patent law is not needed in the fashion industry because of short span of fashion designs.²⁴ It will just be a futile process in spending time and money for a process that is going to benefit only for a few months. Moreover, new and small-scale designers cannot afford

16 35 U.S.C s.101.

17 35 U.S.C s.171.

18 35 U.S.C s.102.

19 35 U.S.C s.103.

20 Christine Cox and Jennifer Jenkins, 'Between the Seams, A fertile Commons: An Overview of the Relationship Between Fashion and Intellectual Property' *available at*: <https://learcenter.org/wp-content/uploads/1969/12/RTSJenkinsCox.pdf>

21 Christian Barrere and Sophie Delabuyere, 'Intellectual Property Rights on Creativity and Heritage: The Case of the Fashion Industry' 32 *European Journal of Law and Economics* 305 (2011).

22 Julie P. Tsai, "Fashioning Protection: A Note on The Protection of Fashion Designs in The United States" 9 *Lewis & Clark L. Rev.* 447 (2005).

23 *Supra* note 5.

24 *Supra* note 22.

the high costs involved in obtaining design patent for their entire collection. All these difficulties in getting a design patent and the lengthy, tedious and expensive process of obtaining patent make the designers reluctant to use this intellectual property right for the protection of their fashion designs. Even if they could satisfy the condition of novelty and non-obviousness for their designs, it is extremely difficult for them to meet the time deadlines and monetary issues involved in claiming design patent.

Copyright Law

The copyright regime aims at protecting the artistic and literary works such as books, paintings, music, videography, dramatic work. There is a firm division of works which can be protected in U.S copyright law and those which cannot claim protection. The U.S Copyright Act clearly lays down that the useful articles²⁵ are not given protection. Hence clothing articles which are generally perceived as having utility are excluded from the copyright protection. Although there are certain aspects of a design that can get copyright protection which falls under the concept of 'pictorial, graphic or sculptural works', it is crucial for a design to exist independently from the utilitarian aspect of the article so as to claim copyright protection.²⁶ This principle of 'separability' was laid down in the landmark case *Mazer v. Stein*²⁷ wherein the U.S Supreme Court held that statuettes forming the base of lamps can get copyright protection as statuette (aesthetic work in question) can be separated from the lamp (the useful article).²⁸ Following the decision in *Mazer's* case, U.S courts protected designs on scarves, fabric designs and artistic jewelry in the domain of copyright law.²⁹

In *Kieselstein-Cord v. Accessories by Pearl, Inc.*³⁰, the U.S court laid down the concept of 'conceptual separability' to increase the ambit of copyright protection for the fashion designers. It was held that the separability rule means not only physical separability but it also includes conceptual separability in its ambit and if a designer can put his design in any one of these concepts, he can claim copyright protection. The courts applied the concept of 'separability' and started giving protection to aesthetic element in clothing and other accessories in the fashion industry as that could be separated from the utility aspect. But in most of the fashion designs, it is

25 17 U.S.C.s. 101.

26 17 U.S.C.s. 102(5).

27 347 U.S. 201 (1954).

28 *Supra* note 20.

29 Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' 92 *Virginia L. Rev.* 1687 (2006).

30 632 F.2d 989 (2d Cir. 1980) (U.S.A).

very difficult to separate aesthetic element from the utility one as this rule of 'separability' looks easy to mention on paper rather than to execute in practice.

Thus, copyright law gives very little scope of protection for designs in the fashion industry. The principle of 'conceptual separability' is very difficult to meet in fashion designs. Apart from a very few cases such as printed designs on fabric, patterns on knit cardigans³¹ that can be copyrightable wherein only the design is protected not the entire article, it is very difficult to protect designs by the fashion designers under the copyright law.

IP PROTECTION TO FASHION DESIGNS IN INDIA

It is undeniable that designers put a lot of effort and money in creating unique and new designs. Thus, it becomes more important for them to protect their designs from infringement by others who indulge in the practice of counterfeiting and piracy. Designers, in order to get IPR protection gets their design registered either under Design law or Copyright law, as these two are the most suitable to fashion industry in India. Law relating to intellectual property in the fashion industry in India is spread over three legislations viz., the Copyright Act, 1957, the Trademarks Act, 1999 and the Designs Act, 2000. Different aspects of a fashion design are protected under different statutory provisions. For example- a dress (say gown) can have different aspects covered under different IP laws. It may have a mark/logo that will be protected by trademark law. The printed design of the gown can be protected under copyright law. If the gown is created in multiple copies by an industrial process, the same can be protected under design law. The gown may have been created by a new type of fabric/material which can be protected under patent law. There is no single statute that can protect entire fashion design hence fashion designers have to select the area/subject-matter related to their design with respect to which they want to claim protection and claim respective IPRs accordingly.

Trademarks

When a designer uses a specific symbol, mark, logo or name so as to distinguish his article from other designers, the trademark law comes into play. If a designer puts his logo/mark on the fashion item (say handbag), customers look at the logo/mark and on the basis of reputation attached to the logo/mark, makes their decision whether to buy the product or not. Thus, trademark law is an important tool available for the owner of those marks to protect their goodwill and reputation in the market. There is an increase in instances where fashion designers

31. *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996 (2d Cir. 1995)(U.S.A).

include a trademark on their garments/accessories at the time of creation so as to get protection under the trademark law. Trademark under the Trademarks Act, 1999 includes in its ambit any name, mark, logo or symbol which helps in differentiating goods of different individuals.³² For example- the trademark 'Tanishq' identifies the jewelry items made by this brand from other brands of jewelry. Merely by seeing the logo of the company, a person can easily identify the source of the article as well as about its quality.

The question of trademark protection in the fashion industry came to light in the case of *Louis Vuitton Malletier v. Atul Jaggi and Another*,³³ wherein plaintiff who was the registered proprietor of trademark 'Louis Vuitton' contended that the mark has acquired goodwill and reputation worldwide and has acquired distinctive character by distinguishing goods of plaintiff from other designers. The bags and other accessories made by plaintiff became famous because of their innovative and unique designs. A claim was also made regarding the use of letters "LV" on the goods made by plaintiff company and this practice of using this trademark was registered in India under Classes 3 and 14 as per the provisions of Indian trademark law. The plaintiff claimed that defendants used their trademark and copied their design on their products. Based on the evidences, Delhi High Court granted permanent injunction in favor of plaintiff and restrained defendants from using the trademark 'LV' or "Louis Vuitton" on their products.

Trade Dress

The Trademark Act, 1999 does not specifically contain any provision related to the concept of trade dress but by interpreting the definition given under section 2(1)(zb),³⁴ it can be observed that trade dress is included in the concept of trademark in the form of any peculiar combination of colors, packaging of a product or any unique shape of a product. But this trade dress protection in India especially in the fashion industry is in its infancy stage as there are neither any clear statutory provisions for the same nor there is any judgment referring to this perspective of designs in the fashion industry.

Copyright Law

Law relating to copyrights in India has been laid down in the Copyright Act, 1957. Fashion designers can protect their creations in the copyright regime if they meet the statutory requirements of the Copyright Act. The Act expressly lays down the work in which a person can

32 The Trade Marks Act, 1999, s. 2(1)(zb).

33 2010 (44) PTC 99 (Del.) (India).

34 *Supra* note 33.

claim copyright protection viz., sound recording, literary work, artistic work, dramatic work, musical work and films.³⁵ Fashion designs fall in the category of 'artistic works'³⁶ wherein the designer can get protection of the design even if it is in the form of a drawing or sketch³⁷ but there is a condition precedent to claim protection i.e. the work should be original³⁸ although artistic merit is not required.³⁹ Ideas are not protected under the Indian copyright law and the work should be in some tangible form in order to claim protection. So, if a designer has some design in his mind, he cannot claim protection unless he transfers that idea on a paper or makes a dress using that idea. Once the idea is converted into some tangible form, there is inherent protection available to an artist for his creation under copyright law and there is no mandatory requirement of getting the work registered so as to claim copyright protection.

There is another important provision applicable to fashion designs given under Section 15 of the Act whereby specific provision has been laid down related to copyright protection in designs. The section is in two parts- one is with respect to registered designs and other with respect to designs capable of registration but not registered under the Designs Act, 2000. A design which fulfills the criteria of registration under the Designs Act, 2000⁴⁰ but not registered there, can be protected under the copyright law. But a limit as to the number of articles on which the design can be applied has been fixed to 50 and if it exceeds this number then copyright will cease to exist.⁴¹ Hence, a fashion designer can claim protection for his design under copyright law only if-

- Work falls exclusively in the definition of 'artistic work'.
- It is original.
- It has not been protected under the Designs Act, 2000.

Design Law

The most suitable legal way of protecting fashion designs in India is through the Designs Act, 2000. An elaborate definition of the term 'design'⁴² has been given under the Act wherein it is clearly stated about the designs which can be registered and those which cannot be registered

35 The Copyright Act, 1957, s. 13.

36 *Id.*, s.2 (c).

37 *Rajesh Masrani v. Tahiliani Design Pvt. Ltd.* FAO (OS) No. 393/2008 (India).

38 The Copyright Act, 1957, s. 13 (a).

39 *Supra* note 37.

40 A design can be registered under the Designs Act, 2000 if it fulfils the following conditions-

(a) It falls under the definition of design given under sec. 2(d) of the Act and

(b) The conditions laid down under sec. 4 of the Act are fulfilled.

41 The Copyright Act, 1957, s. 15 (2).

42 The Designs Act, 2000, s. 2 (d).

under the Act. The elements of a design protected under the Act includes- shape or pattern which has been applied to an object with the help of an industrial process and it must also have an eye appeal. Trademarks and artistic works are explicitly excluded from the definition of design⁴³. There are certain prohibitions imposed under the Act with respect to registration of a design which must be adhered to while registering a design under the Act. A design which is not original or new or has been previously published cannot be registered under the Act.⁴⁴ Once the design is registered, the Act gives an exclusive right to the registered proprietor to use the design on an article specified in the class under which design is registered.⁴⁵ The right given under the Act is not with respect to a specific article but it can be claimed against a class of articles provided under the Locarno classification.⁴⁶ The classes under which a fashion designer can protect his designs may fall under the following categories-

- Class 2 - clothing articles, footwear, scarves, accessories used in clothing such as buttons, laces, pins, belts.
- Class 3 – handbags, wallets.
- Class 5 – textile material, textile fabric, thread, yarn, embroidery.
- Class 10 – wrist watch.
- Class 11 – jewelry.

Once the design is registered, the Act provides protection to the designs for a period of 10 years⁴⁷ extendable up to 5 more years.⁴⁸ But the rights and protection available to the designers under the Act is only if they have registered their design as per the provisions of the Act and there is no protection for unregistered designs under Indian design law.

CONCLUSION AND SUGGESTIONS

There has been unprecedented increase in the share and contribution of fashion industry in the Indian economy in the past few years. Looking at its contribution, there is a need to grant protection to the fashion designers so that they are motivated to create new and unique designs and protect their creations if someone else tries to copy the same. The present IP regime in India accords protection to the fashion designers but this protection is not a complete one. A designer

43 *Ibid.*

44 The Designs Act, 2000, s. 4.

45 *Id.*, s.2(c).

46 International classification for industrial designs.

47 The Designs Act, 2000, s. 11 (1).

48 *Id.*, s. 11 (2).

has to make segmentation of his design and then has to decide about the specific IPR which he wants to claim with respect to the segmented part of his design as a complete protection to the entire design is not available in any statutory provision. Hence, designers are reluctant in taking recourse to the IP regime and this ultimately results in the problem of copying of designs.

In order to make the IPR regime more effective for the fashion designers in India, the following suggestions are put forward-

- The copyright law protects a design even if its is unregistered but the condition of 'originality' acts as an impediment in claiming this protection. There is a need to give liberal interpretation to this 'originality' concept with respect to fashion designs.
- The trademark law protects the brand name that is affixed on the article but infringers can copy the design without any infringement under the trademark law as not the design but only trademark is protected. There must be inclusion of some provision in the Trademarks Act so as to give protection to design of the article as well even if the trademark is not copied.
- There is a need to include a clear and precise definition of the term 'fashion design' in the Designs Act to make clarity about the subject matter of protection under this Act.
- A provision should be included in the Designs Act for the protection of unregistered designs as most of the designers could not claim protection because of the reason that their designs are not registered under this Act.
- The limit fixed by Section 15 (2) of the Copyright Act⁴⁹ beyond which copyright will cease to exist must be increased so that designers can get copyright protection even if they exceed this limit and are not bound to file for registration of designs under the Designs Act.
- The concept of design patents as available under U.S patent law must be included in Indian patent law so that if a designer creates a new design which fulfills other conditions of patent law can be protected.

⁴⁹ The copyright in an article shall cease as soon as the article to which the design has been applied has been reproduced more than 50 times by an industrial process.

REVITALIZING THE HIGHER EDUCATION IN INDIA: AN ANALYSIS ON THE FIRST ANNIVERSARY OF NATIONAL EDUCATION POLICY 2020

Dr. Mohammad Atif Khan*

INTRODUCTION

The National Education Policy (NEP) 2020 gets the cabinet nod on July 29, 2020, which has ended the prolonged wait for an innovative and improved education system in India. The NEP 2020 is a result of long deliberations and continuous efforts of the present government which ultimately resulted in a short and crisp 66 pages policy document, as compare to 484 pages previously submitted draft. Although the entire policy is a ‘new dawn’ (as quoted by academia¹), but this paper only focuses on one aspect of the NEP and that is ‘Higher Education’.

The first education policy was promulgated in 1968, after twenty-one years of independence, by the government under the leadership of then PM Mrs. Indira Gandhi. It was the outcome of the recommendations of the Kothari Commission² (1964-66) which emphasised on the radical reconstruction of education, essential for economic and cultural development of the society.³ The problem of implementation of the first education policy was addressed upto certain extent by the 42nd Constitution Amendment, 1976 wherein the education was made a subject matter from the state list to concurrent list under the 7th Schedule of the Constitution of India. The second education policy was promulgated in 1986 under the leadership of Mr. Rajiv Gandhi, the then Prime Minister, which was further modified in 1992 by the P.V. Narshima Rao government. After long 34 years (being 1986 the last policy), now we have a new education policy, with a new horizon, intended to revitalise our education system at both school and higher education level. The government claims that the NEP 2020 is brought with the aim to promote education so that it matches with the international standards. NEP highlights the importance of education for achieving a just society and mentioned in its opening remark as:

* Assistant Professor of Law, Hidayatullah National Law University (HNLU), Naya Raipur, Chhattisgarh.

1 Arvind Panagariya, Professor of Economics at Columbia University, “Higher education: A new dawn – National Education Policy 2020 offers transformative road map for colleges and universities”, *The Times of India*, Aug. 19, 2020, available at: <https://timesofindia.indiatimes.com/blogs/toi-edit-page/higher-education-a-new-dawn-national-education-policy-2020-offers-transformative-road-map-for-colleges-and-universities/> (Visited on August 15, 2021).

2 Government set up a seventeen-member Education Commission under UGC chairperson DS Kothari.

3 Government of India, “National Education Policy, 1968”, Chapter 3 (Ministry of Human Resource Development, 1968), available at: https://www.education.gov.in/sites/upload_files/mhrd/files/document-reports/NPE-1968.pdf (Visited on April 2, 2021).

*“Education is fundamental for achieving full human potential, developing an equitable and just society, and promoting national development. Providing universal access to quality education is the key to India’s continued ascent, and leadership on the global stage in terms of economic growth, social justice and equality, scientific advancement, national integration, and cultural preservation.”*⁴

An entire Part-II of the NEP is dedicated to Higher Education. Despite having various challenges before higher education during last 75 years of independent India, many reforms have been introduced to Higher Education. The analysis of the NEP shows that it is a visionary and ambitious document with respect to higher education but its success is dependent on its proper execution which is a challenging task. Therefore, this paper analyses the NEP 2020 with respect to Higher Education in India and critically evaluates various promises made in the NEP to have an advanced higher education with the possibility of its fulfilment in a time framed manner.

WHAT PURPOSE DOES THE NEP 2020 SERVE?

This is a very relevant question which can only be answered when someone goes through the reforms suggested in NEP 2020. Many aims have already been fixed in first and second education policy in 1968 and 1986 respectively. Still many reforms seem to be novel and attractive too, to push on our higher education to the next level, to match with the international standards.

India adopted the 2030 Agenda for Sustainable Development in 2015, wherein the Goal 4 (SDG4) seeks to “ensure inclusive and equitable quality education and promote lifelong learning opportunities for all” by 2030.⁵ Pursuant to SDG4, the government of India has come up with the NEP 2020, where it has been mentioned that: “the entire education system to be reconfigured to support and foster learning to achieve the critical targets and goals of the 2030 Agenda for Sustainable Development”⁶.

Specially with reference to higher education, the NEP 2020 has identified that “higher education plays an extremely important role in promoting human as well as societal well-being and in

4 Government of India, “National Education Policy, 2020”, (Ministry of Human Resource Development, 2020) available at: https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf (Visited on July 30, 2021).

5 UN General Assembly, Department of Economic and Social Affairs, “Transforming our world: the 2030 Agenda for Sustainable Development”, A/RES/70/1 (Sep. 25, 2015), available at: <https://sdgs.un.org/2030agenda> (Visited on July 15, 2021).

6 *Supra* note 4.

developing India as envisioned in the Constitution - a democratic, just, socially-conscious, cultured, and humane nation upholding liberty, equality, fraternity, and justice for all. Higher education significantly contributes towards sustainable livelihoods and economic development of the nation.⁷

While identifying many problems prevalent in the higher education, the NEP 2020, being a visionary and forward-looking document has recommended many structural and non-structural reforms. The NEP proposes a complete overhaul and revitalizing the higher education to overcome prevalent challenges (chapter 9.2 of the NEP)⁸ and thereby intended to deliver a high-quality and inclusive higher education with equity.⁹

The world has undergone a rapid change since 1990s and India also responded the globalisation wave with LPG (liberalisation, privatisation and globalisation) model but the similar reforms has not been taken in education sector. And this is the reason that after a long time and much deliberations government announced the NEP in response of the rapid changes in the knowledge landscape.

GROWTH OF HIGHER EDUCATION IN INDIA

India has always known for its rich culture and high standard of ancient education system. Many of ancient Indian academic institutions like Nalanda, Taxila and Vikramsila etc. were renowned seats of higher education. Those institutions were the centres of attraction not only among the students from various parts of the country but from abroad as well including China, Korea, Ceylon (now Sri Lanka), Burma (now Myanmar) etc.¹⁰ By the time of British rule, India somewhere lost its impact in education sector. But at least, we should give some credit to the British regime for the laying foundation of modern system of higher education.

The first three universities were established in the presidency towns of Bombay, Calcutta, and Madras in 1857. There was a meagre growth in higher education in subsequent decades, and it took almost 30 years to setup the fourth Indian university at Allahabad in 1887¹¹. Again, after a long gap of 29 years, the fifth and sixth universities came into existence at Mysore and Banaras in

7 *Id.*, at Chapter 9.1.

8 *Supra* note 4 at Chapter 9.2.

9 *Id.*, at Chapter 9.3.

10 Tulika Khemani & Jayaprakash Narayan, , "Higher Education Sector in India: Opportunities and Reforms", *Foundation for Democratic Reforms*, (Hyderabad, 2006).

11 University Grants Commission, "Genesis", *available at*: <https://www.ugc.ac.in/page/genesis.aspx> (Visited on August 10, 2021)

1916.¹² Initially for many years, the degree courses were offered only by colleges and the post-graduate and research programmes were launched in universities only in 1920.¹³ Since beginning, despite having all required resources, the Britishers did not show their much interest in developing the professional education. As per the records, by 1916-17, the number of engineering colleges in India were limited only to 4, with a total intake of 74 students.¹⁴ In 1911-12, there were only 4 medical colleges, which further raised upto 12 by 1939-40.¹⁵

Apart from the very slow growth of higher education in India, there was also a major issue of the location of those colleges which were located in bigger cities, equipped with a tradition of education and hence, the advantage of education was only limited to people living in those big cities.¹⁶ Under the influence of their vested interests, Britishers kept the access to higher education limited, therefore, the higher education was almost out of the reach of the public at large.

After independence, considering the importance of education in nation building, the government had concentrated on the development of education, particularly higher education. There were only 20 universities and 591 colleges in pre-independence era, whereas, in post-independence era, we have seen a drastic growth in the number of institutions of higher education. According to the UGC annual report 1990-91, the number of universities has increased from 28 in 1950-51 to 147 in 1990. The same growth was also recorded in the no. of colleges, as it has increased from 578 in 1950-51 to 7,121 in 1990, with 44,25,247 registered students.¹⁷ The number of teachers has also doubled from 24,000 in 1950-51 to 58,663 in 1990-91. But even this growth was not at a high pace which we have later witnessed after 1990-91.

In 1991, with the opening of the Indian market under the influence of globalisation, India had entered into the new world economic order. After adopting of the LPG model, India also realised

12 S. Radhakrishnan, Chairman, "The Report of the University Education Commission", 21 (Dec. 1948 - August 1949), available at: <https://www.educationforallindia.com/1949%20Report%20of%20the%20University%20Education%20Commission.pdf> (Visited on Aug. 25, 2021).

13 Ved Prakash, "Trends in Growth and Financing of Higher Education in India" 42 *Economic and Political Weekly* 3249 (Aug. 2007).

14 Uttam B. Bhoite, "Higher Education in India: A System on the Verge of Chaos" 58 *Sociological Bulletin* 150 (May - Aug. 2009).

15 *Ibid.*

16 *Ibid.*

17 University Grant Commission, Annual report 1990-91, p. 7, available at: http://14.139.60.153/bitstream/123456789/865/1/UGC-Annual%20Report%201990-91_D-7250.pdf (Visited on August 25, 2021)

the significance of higher education to become a world leader having the second largest population. In this series, the Government had proposed fivefold budget (6% of the GDP) for education in the XI Five Year Plan in order to achieve a knowledge-based society and to become a global economic power.¹⁸

India's higher education has rapidly expanded over the past 15 years. In 2004-05, while the number of universities were 348, the number of colleges were 17,625, as compared to the present data published under the AISHE report 2019-20, where there are 1043 Universities, 42343 Colleges and 11779 Stand Alone Institutions in India.¹⁹ This is the time, when India has witnessed a steep hike in the enrolment in higher education from 10.48 million to 38.5 million.²⁰ The similar trend was seen in the number of teachers which raised from 4,72,000 in 2004-05 to 15,03,156 in 2019-20.²¹ The data reflects that during the mentioned period, number of universities and colleges in India have also grown by 3 times and had a massive expansion. Whereas, 44.25 lakh enrolled students were estimated 1990-91, today, India has entered into a stage of massification with total 3.85 crore enrolled students²², with a higher national gross enrolment ratio (GER) at 27.1%.²³

Despite the massive growth in higher education since independence and the growing investment in education sector, still 22.3 per cent population is illiterate²⁴, and just only 8.15 percent²⁵ population is graduate. Despite being the second largest higher education system in the world, none of India's 1043 universities and 42,343 colleges has made a place in the top 300 universities of the World, in the latest *Times Higher Education World University Rankings 2022*, which

18 Government of India, Eleventh Five Year Plan (2007–2012), (Planning Commission, June 25, 2008), available at: https://niti.gov.in/planningcommission.gov.in/docs/plans/planrel/fiveyr/11th/11_v1/11th_vol1.pdf (Visited on September 2, 2021).

19 Government of India, Ministry of Education, "All India Survey on Higher Education (AISHE) 2019-20", Key Results p. II, (Department of Higher Education, 2020), available at: <https://aishe.gov.in/aishe/viewDocument.action?documentId=277> (Visited on August 20, 2021).

20 *Ibid.*

21 *Supra* note 19.

22 *Id.*, at 13 (Point 2.2 Student Enrolment). (The enrolment classification has been made in eight categories as Ph.D., M.Phil., Post Graduate, Under Graduate, PG Diploma, Diploma, Certificate and Integrated).

23 *Id.*, at 25 (Point 2.3 Gross Enrolment Ratio In Higher Education).

24 Government of India, "NSS Report No.585: Household Social Consumption on Education in India, 2020", p.I, (Ministry of Statistical and Programme Implementation, 2020). (As per the report, Literacy rate in India is 77.7%, considering persons aged 7 years and above), available at: http://mospi.nic.in/sites/default/files/publication_reports/Report_585_75th_round_Education_final_1507_0.pdf (Visited on Aug. 20, 2021).

25 Government of India, Office of the Registrar General & Census Commissioner, "Census 2011" (Ministry of Home Affairs, 2011), available at: <https://censusindia.gov.in/2011-Common/Archive.html> (Visited on May 18, 2021).

included more than 1,600 universities across 99 countries.²⁶ These are certain question we have to ask ourselves and ponder upon while analysing the NEP 2020 as a battleplan claimed by the government.

Reforming the higher education in India is always considered as a daunting challenge. There are various reasons among which the typical university governance structure is the most challenging. Since education is in the concurrent list of the constitution, which also poses certain challenges to bring all the states on board in a federal structure of government for effective implementation of any policy. Also, due to covid-19, there is an uncertainty about post-pandemic new global order in which our education system has to make its prominent place.²⁷

MAJOR REFORMS PROPOSED IN THE NEP 2020 WITH RESPECT TO HIGHER EDUCATION

The NEP 2020 proposes sweeping changes in higher education. In this section certain most important changes are discussed. According to AISHE 2019-20, there are 1043 Universities²⁸, 42343 Colleges and 11779 Stand Alone Institutions in India. The NEP intends to restructure higher education and to establish universities of high repute, which seems a challenging task within a time bound manner by 2040 or so for such a massive higher education system in terms of numbers. Below are the few most important reforms proposed by the NEP 2020 in the higher education:

Multidisciplinary Education: While emphasising the importance of multidisciplinary education, the NEP majorly focuses on to establish multidisciplinary universities and colleges with the intention of procuring high-quality, holistic and multidisciplinary education.²⁹ The policy has also set a challenging goal to make all higher education institutions (HEIs) as multidisciplinary institutions by 2040, which as of now seems to be over ambitious.

Gross Enrolment Ratio and multi exit option: The policy aims to achieve 50 percent Gross Enrolment Ratio (GER) by 2035 in higher education including vocational education from a present growth of 27.1% as notified in AISHE 2019-20.³⁰ Another attraction for students is the

26 Times World University Ranking 2022 (released on Sep. 02, 2021), available at: https://www.timeshighereducation.com/world-university-rankings/2022/world-ranking#!/page/0/length/25/sort_by/rank/sort_order/asc/cols/stats (Visited on September 3, 2021).

27 Saumen Chattopadhyay, "National Education Policy, 2020 An Uncertain Future for Indian Higher Education", 46 *Economic and Political Weekly* 24 (Nov., 2020).

28 As per AISHE (2019-20), there are 396 Private Universities and 420 Universities are located in rural area.

29 *Supra* note 4, at Chapter 11.6.

30 *Id.*, at Chapter 10.8.

multi exit option as “the undergraduate degree will be of either 3 or 4-year duration, with multiple exit options within this period, with appropriate certifications, e.g., a certificate after completing 1 year in a discipline or field including vocational and professional areas, or a diploma after 2 years of study, or a Bachelor’s degree after a 3-year programme”³¹. The Master’s Programme would also be offered of 2 years and the second year would be devoted only to research where student has completed 3 years undergraduate course otherwise the it would be of 1 year only.

Academic Bank of Credit (ABC) system and Flexi Learning: Considering the previous education policy’s linear approach where different needs of students were not accommodated, the NEP 2020 introduces the Academic Bank of Credit (ABC) system. Under the ABC system, the academic credits digitally stored, earned from various recognized Higher Education Institutions (HEIs), and could be included at the time of awarding degrees from an HEI.³² The policy introduces “the flexibility of subjects, credit transfer and multiple entry-exit points” to ensure the choice-based education and learning, to ultimately counter the menace of dropouts.³³

Radical Structural Changes: A major change has been introduced in the form of radical structural changes, wherein the NEP 2020 proposes for the establishment of the Higher Education Commission of India (HECI) by replacing the University Grants Commission (UGC) and the All India Council for Technical Education (AICTE) which was also recommended by the National Knowledge Commission (NKC) in 2007 and the YashPal Committee Report in 2009.³⁴ Except the medical and legal education, the proposed Higher Education Commission of India (HECI) would be the single overarching umbrella for the entire higher education system. Under HECI there would be four specialised councils for different purposes like “the National Higher Education Regulatory Council (NHERC)³⁵, the National Accreditation Council (NAC)³⁶

31 *Id.*, at Chapter 11.9.

32 *Supra* note 4 at Chapter 11.9.

33 Shalini Saksena, “A new chapter begins”, *The Pioneer* (Aug. 02, 2020), *available at*: <https://www.dailypioneer.com/2020/sunday-edition/a-new-chapter-begins.html> (Visited on July 20, 2021).

34 *Supra* note 27.

35 *Supra* note 4 at Chapter 18.3. (The NHERC will function as sole regulator for the purpose of higher education to eliminate the problem of multi-layered and duplicated regulatory efforts prevalent at the present time).

36 *Id.*, at Chapter 18.4. (The NAC will be a ‘meta-accrediting body’, which will supervise and oversee the accreditation of institutions based four pillars named “basic norms, public self-disclosure, good governance, and outcomes”).

, the Higher Education Grants Council (HEGC)³⁷, the General Education Council (GEC)³⁸. This structural change is required to avoid repetition of regulation and to ensure the principle of functional separation as claimed by the NEP 2020 which is somewhere justified also for eliminating conflicts of interests between different regulatory bodies.

Public Funding: The most awaited promise which the NEP 2020 has made that now the education sector would get the 6 per cent of the GDP which had been promised since the first education policy of 1968, reiterated in 1986. But the Economic Survey 2020-21 reported that spending on education reached to 3-3.5% only for 2019-21 period. The policy further states that in order to achieve educational excellence, the Centre and the State governments will cooperate to raise the public investment in education sector to the intended level of 6% of the GDP.³⁹ This step of government is really a welcome step but at the very same time it is important to see that how government will achieve this goal in a federal set up.

Internationalisation of Higher Education: There is also a mention of internationalisation of higher education, where high performing Indian universities would be encouraged to register their presence through outreach campuses in other countries. At the same time, top performing foreign universities, “among the top 100 universities in the world” will be facilitated to operate in India.⁴⁰ This move of the government is a welcoming move which would provide more exposure to our Indian students.

Quality of Faculty: While discussing the success of the higher education institutions, the NEP 2020 highlights the importance of the quality of its faculty. The NEP highlights the responsible factors for low motivation of faculty and proposes to ensure the teachers’ autonomy with best facilities and low level of student-teacher ratio for a happy, enthusiastic, engaged, and motivated faculty.⁴¹

Research and Higher Education: The NEP emphasised on Knowledge creation and research as both are considered important for a vibrant growth both social and economic as have been seen in Mesopotamia, Egypt, and Greece and in modern times the best examples are Israel, South

37 *Id.*, at Chapter 18.5. (The HEGC will deal with most important area of higher education i.e. funding and financing, with full of transparency).

38 *Id.*, at Chapter 18.6. (The GEC will formulate the ‘graduate attributes’ which is simply the expected learning outcomes for higher education. It will also be responsible for formulating a National Higher Education Qualification Framework (NHEQF)).

39 *Supra* note 4 at Chapter 26.2. (Education is mentioned in the concurrent list under the 7th Schedule of the Constitution of India).

40 *Id.*, at Chapter 12.8.

41 *Id.*, at Chapter 13.

Korea, Germany, Japan and United States. The NEP also highlighted our weakness in this field and mentioned that “despite the critical importance of research, the research and innovation investment in India is, at the current time, only 0.69% of GDP as compared to 4.3% in Israel, 4.2% in South Korea and 2.8% in the United States of America.”⁴² It is definitely important to enhance the budget for research and government has to take serious steps in this regard.

The Use of Technology in Education: The advent of technology has transformed the teaching learning process throughout the world and major disruption in the academic activities triggered by the pandemic has expedited this embrace of technology.⁴³ Considering the Indian potential in information and communication technology, the NEP 2020 has given a further boost to the process of adoption of technology in the teaching learning process with the aim to develop rich variety of educational software.⁴⁴

ANALYSIS AND DISCUSSION

The promises made under the NEP 2020 seem to be very attractive, innovative, student centric and a great step to help India to restore its position as ‘Vishwa Guru’. Although government is claiming that the NEP is not only a policy but a battle plan but many of scholars while criticizing the NEP, mentioned that “*anyone familiar with the ground realities of India will find the NEP 2020 as over-ambitious exercise, trying hard to appear intellectually agile but ending up as a document that is pompous and faintly absurd*”.⁴⁵ There is a Latin Maxim ‘*Res ipsa loquitur*’ which means “the thing speaks for itself”. Therefore, it is advisable to mull over the present position of the higher education in India and to analyse with factual evidences before coming to any conclusion to declare the NEP 2020 as over ambitious policy or a battle plan.

The All-India Survey on Higher Education (AISHE) is conducted by the Ministry of Education (earlier the MHRD) since 2010-11.⁴⁶ The AISHE is an annual and web-based Survey which portrays the current status of higher education in the country. Therefore, per the research point of view, the AISHE can be considered an authentic source of information published by the

42 *Id.*, at Chapter 17.3.

43 *Supra* note 27.

44 *Supra* note 4 at Chapter 23.1 & 23.6.

45 Mrinal Pande, “NEP 2020: Over-ambitious exercise to bring Harvard in Hyderabad during sad, struggling times?”, National Herald (Aug. 07, 2020), *available at*: <https://www.nationalheraldindia.com/opinion/nep-2020-over-ambitious-exercise-to-bring-harvard-in-hyderabad-during-sad-struggling-times> (Visited on May 28, 2021).

46 The AISHE is an authoritative document of the government on all the Institutions participating and engaged in higher education. There are several parameters for data collection such as infrastructure, academic programmes, finance, examination results, enrolled students and the number of teachers etc.

government. According to the AISHE (2019-20), there are 1043 Universities, 42343 Colleges and 11779 Stand Alone Institutions in India which is fair enough to understand the massiveness of the sector. Some relevant findings of AISHE (2019-20), which is important for our further discussion, mentioned below⁴⁷:

- There are total 396 Private Universities and 420 Universities are located in rural area.
- There are 17 Universities exclusively dedicated for women.
- There are 522 General, 117 Technical, 66 Medical, 63 Agriculture & Allied, 23 Law, 12 Sanskrit and 11 Language Universities. Remaining 145 Universities are put in the separate category as others.
- Available number of colleges per lakh eligible population among in the age-group of 18-23 years is defined as the college density. The college density is found lowest in Bihar with 7 and highest in Karnataka with 59 colleges as compare to the All-India average of 30.
- 60.56% Colleges are located in Rural Area.
- Only 2.7% Colleges run Ph.D. programme and 35.04% Colleges run PG programmes.
- 16.6% of the Colleges have enrolment less than 100, whereas, only 4% colleges have enrolment more than 3000.
- Total enrolment in higher education has been estimated in AISHE 2019-20 to be 38.5 million, where 19.6 million male and 18.9 million female candidates are registered. Female candidates constitute 49% of the total enrolment.
- Gross Enrolment Ratio (GER) in Higher education in India is 27.1, calculated for the age group of 18-23 years whereas 26.9 and 27.3 are the GER for male and female population respectively.
- The GER for Scheduled Castes and Scheduled Tribes are comparatively low. It stands 23.4% for Scheduled Castes and 18% for Scheduled Tribes, whereas the national GER is 27.1%.
- The highest number of students registered in the B.A. programme followed by B.Sc. and B.Com. Around 79% of the total students enrolled only in 10

⁴⁷ *Supra* note 19 at Key Results.

Programmes which shows the high concentration in few courses.

- The total number of foreign students enrolled in higher education are 49,348. The record highlights that India is a destination for higher education majorly for the neighbouring countries. Nepal with 28.1% of the total, has a highest share of foreign students in higher education in India, followed by, Afghanistan (9.1%), Bangladesh (4.6%), Sudan (3.6%), and Bhutan (3.8%).
- There is total 15,03,156 teachers, comprises 57.5% male and 42.5% female. At All-India level the ratio of female teachers is 74 as compare to 100 male teachers.
- If regular mode enrolment is considered, Pupil Teacher Ratio (PTR) in Universities and Colleges is 28, whereas, PTR for Universities and its Constituent Units is 18.

After considering the facts mentioned above, and comparing it with the set goals in the NEP 2020, it seems very challenging to revitalize higher education as intended by the NEP with full of its practicality in a time bound manner. The reasons for such a thesis is mentioned in following paragraphs.

As per the AISHE 2019-20, we have a massive system of higher education in terms of numbers but not in the quality. As previously mentioned, that in the latest Times Higher Education World University Rankings 2022, none of our universities found suitable to make a place in top 300 universities of the world. Therefore, to revamp the entire higher education system, the government has to pump up more funds to make our education system at par with international standards which seems very difficult during pandemic times.

The initiative of multidisciplinary education is a welcoming move but the NEP 2020 has over emphasised it without strengthening our existing higher education system. The country has invested huge amount of public funds making specialised institutions like IITs, NITs, NLUs etc., but the NEP is silent on the issue that how these specialised institutions would keep their speciality intact. There is no mechanism provided to promote multidisciplinary in specialised institutions, at the same time to protect their special status of eminence. Therefore, the very foundation of the specialised institutions is at stake which should be a priority concern of the government.

In order to achieve the goal of excellence in higher education, the NEP 2020 unequivocally

endorses the requirement of raising the public fund upto 6 percent of the GDP - but how? This question cannot be answered till the time all states would come across the board for an improved higher education system, ready to compete with world class institutions. Since we have a federal structure of government, where states are also having autonomy in many sectors and many times state governments put their vested interests above the national interest. Since education is in concurrent list under Indian Constitution, therefore, without the proper cooperation of states, it is not possible to raise funding upto 6 percent of the GDP because it is not clear in the policy that what contribution states would be liable for and further it seems more difficult when few states are blaming centre for not taking into consideration their objections to the Draft NEP. It has been 52 years since the government first recommended for 6% of its GDP for education sector but the data shows that in 2019-20 India has only spent 3.1% of its GDP on education which is slightly raised to 3.5% as estimated for 2020-21.⁴⁸ But it is surprising that this year also in budget 2021, the government has further slashed allocation⁴⁹ for education by about 6%.⁵⁰

Another point which has been emphasised a lot is the Gross Enrolment Ratio (GER). The NEP aims to raise the GER to 50% by 2035. But the trend shows that GER had a scanty growth in last 5 years, from 24.3 in 2014-15 to 26.3 in 2018-19 and 27.1% in 2019-20.⁵¹ Therefore, if we go with the same pace, we would be able to reach only 32-33% by 2035. Therefore, the government has to introspect on the issue and should think over to make the GER goal a slight realistic considering the Covid-19 pandemic.

There are also some utopian goals such as to encourage top Indian universities to set up outreach campuses. Here it is not clear that in which country the government is intended to open outreach campuses. Here the important question is that if none of the Indian University is in the top 300 world ranking of the universities, why any academic rich country would allow us to establish campuses in their territory when the NEP itself mentions that “*selected universities e.g., those from among the top 100 universities in the world will be facilitated to operate in India*”⁵². Also,

48 Government of India, “Economic Survey 2020-21”, Vol. II, 327 (Ministry of Finance, 2021), available at: https://www.indiabudget.gov.in/economicsurvey/doc/echapter_vol2.pdf (Visited on May 18, 2021).

49 Government of India, “The budget 2021-22”, (Ministry of Finance, Feb. 2021), available at: <https://www.indiabudget.gov.in/> (Visited on Aug. 10, 2021). The allocation for the education ministry has been cut to Rs 93,224 crore from Rs 99,311 crore, as per the budgetary proposals.

50 ET Bureau, “Budget 2021: 6% cut in allocation for education sector”, The Economic Times (Feb 02, 2021), available at: https://economictimes.indiatimes.com/industry/services/education/budget-2021-6-cut-in-allocation-for-education-sector/articleshow/80640500.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

51 *Supra* note 19 at 1.

52 *Supra* note 4 at Chapter 12.8.

we should not forget that in 2013, during the UPA-II, the government tried to push a similar outreach presence of Indian Universities, but as reported by the Indian Express “*the top 20 global universities, including Yale, Cambridge, MIT, Stanford etc., had shown no interest in coming down to India*”⁵³.

The NEP also overemphasised the use of technology in education and without considering the geographic challenges in India. We have to remember that even today 420 Universities are located in rural area. In this row, it is pertinent to refer the India Internet Report 2019, which shows that still in India, 99% of users access the internet through their mobiles, but not laptops or desktops.⁵⁴ When it comes to the rural India, the usage of Laptops and desktops only limited to 2% and 1% respectively.⁵⁵ The data for urban India is slightly high with 6% and 4% respectively which is also not very satisfactory from the higher education perspective. If we talk about the internet reach in the rural area, it is still very poor and stands at a mere 27%. More than 40% of the villages are yet to be connected to the internet grid under the Bharat Net program, which is very disadvantageous for rural students. Although the government has claimed to be a world leader in supporting the digital infrastructure for remote learning, but the data tells us a different story. In 2020-21, the government has reduced its budget for digital e-learning from Rs 604 crore (as per budget 2019-20) to Rs 469 crore presently.⁵⁶ This is contradictory to the policy aims.

The initiative regarding flexi learning is a welcome step from the perspective of students. Definitely students would be benefited from such policy. AISHE 2019-20 shows that 60.5% Colleges are located in Rural Area where proper guidance to students for the selection of subjects would be very difficult. Therefore, government should think over it and make benefits of the policy reachable to rural students as well. The NEP also proposes the radical structural overhaul in education sector. As of now, it is very difficult to comment on the functioning and success of the proposed Higher Education Commission of India (HECI). We all can hope that it would turn into an effective institution to promote higher education rather over regulating the

53 Ritika Chopra, “Explained: What’s new in India’s National Education Policy?”, The Indian Express (Dec. 9, 2020) available at: <https://indianexpress.com/article/explained/reading-new-education-policy-india-schools-colleges-6531603/> (Visited on July 09, 2021).

54 Internet and Mobile Association of India, “India Internet Report 2019” 10 (2019), available at: <https://cms.iamai.in/Content/ResearchPapers/d3654bcc-002f-4fc7-ab39-e1fbeb00005d.pdf> (Visited on August 20, 2021).

55 *Ibid.*

56 Protiva Kundu, “Indian education can’t go online – only 8% of homes with young members have computer with net link”, Scroll.in, May 05, 2020, available at: <https://scroll.in/article/960939/indian-education-cant-go-online-only-8-of-homes-with-school-children-have-computer-with-net-link#:~:text=According%20to%20the%202017%2D18,%2C%20the%20proportion%20is%2042%25> (Visited on May 25, 2021).

university/college campus life.

Regarding the quality of teachers in higher education, the NEP promises for best infrastructure and teachers' training for the improvement of motivation and quality of education. It seems that the government is serious in this regard as the expenditure on education has gone up from 3.84% of the GDP during 2014-15, to 4.07%, 4.20%, 4.32% and 4.43% during 2015-16, 2016-17, 2017-18 and 2018-19, respectively.⁵⁷ But at the very same time, the actual proportion of allocation for Ministry of Education (earlier MHRD) to the total central budget gradually decreased from 4.61% during 2014-15 to 3.89%, 3.66%, 3.71% and 3.48% during 2015-16, 2016-17, 2017-18 and 2018-19, respectively.⁵⁸ The government has to consider this issue so that the objective of motivation for quality teachers in the higher education can be fulfilled.

Although, the field of research and innovation is high investment intensive, whereas the government spends only for research and innovation 0.69% of GDP as compared to 4.3% in Israel, 4.2% in South Korea, 3.2 in Japan, 2.8% in the United States and 2.2% in China.⁵⁹ The lowest budget allocation for R&D in India as compare to competing countries is a fact but the more problematic issue is that there is no roadmap given in the NEP 2020 for boosting this sector with more funding from the government. In the absence of a proper roadmap to achieve the set goal by the NEP is put somewhere a less than battleplan. But, If the government would be able to resolve issues mentioned here, definitely the NEP 2020 would be a milestone in advancing the higher education in India.

CONCLUSION

The NEP 2020 has brought many changes in higher education but the success of the policy is ultimately dependent on its effective implementation. The lack of funds is a major setback in education sector for which government has to brainstorm to find out effective ways to raise funding in the higher education. It is also analysed that the policy is definitely student friendly but the benefits should also be in the reach of students of rural area and it should not only be limited to so called elite section of the society. The entire approach towards higher education has to be scrutinised and government should try to achieve the aims of the NEP 2020 upto best possible level. Anyways, we have to applaud the government for its efforts to envision a broader plan to revitalize the higher education in India, only through which we can regain our lost status of academic excellence.

57 Maitree Baral (edited), "Government Data Reveals Falling Budgetary Allocation For Education In Last 5 Years", NDTV Education, Feb 6, 2020, *available at*: <https://www.ndtv.com/education/government-data-reveals-falling-budgetary-allocation-for-education-in-last-5-years-2176083> (Visited on May 2, 2021).

58 *Supra* note 57.

59 *Supra* note 4 at Chapter 17.3.

HATE SPEECH LAWS IN INDIA: THE NEED FOR A REFORM

Dr. Puneet Bafna*

Rohan Samar**

INTRODUCTION

In an ideal democratic form of governance, differences in opinion are always respected and critics and contradicting views keep the dynamic culture rolling. Democracy flourishes when public dissent is allowed to be shared and all different voices are brought to a common minimum acceptable point. For the last seventy-five years, India has proven to be a successful democracy instilled with the resolve for fair treatment and righteousness, liberty, and parity. The Constitution itself guarantees all citizens the right to freedom of speech and expression, subject to certain restrictions related to national security and sovereignty.¹ Other certain restrictions to it are of course matters of relations with other countries, public law and order maintenance, matters concerning contempt of decency or defamation of courts, or incitement to an offence.²

With the augmentation in technology, increase in access to mobile-internet communication methods, the proliferation of social media, people have started to get in touch with lots of other people and can communicate faster. Nowadays, using any social media platform, people can put forth their views and opinions pretty faster to millions of humans across the globe. It has become easier to make a small petty issue victim of juicy gossips and slanderous social media posting. People perpetrate to offend other's respect, dignity, and liberty and create an air of distrust, and terror under the excuse of practicing one's intrinsic rights of free expression. In an utter zeal of considering one race/sect/gender/complexion to be superior over another or to spread a specific ideology the use of hate speech has risen very fast under the guise of freedom of expression and speech. The campaign for elections at the panchayat/district/state/national level carried out throughout the year also serves as green pastures for the growth of propaganda through hate speeches. In an urge to pull the crowd as voters towards one's side, the leaders tend to mobilize the people using words of malice and hatredness. The leaders express their hate-filled propoganda of targeting a particular group as substandard and less worthy of respect.³ They

* Associate Professor, Amity Law School, Amity University Jaipur, Rajasthan.

** Student, 5th Year, B.B.A. LL.B (Hons.), Himachal Pradesh National Law University, [HPNLU] Shimla, Himachal Pradesh.

1 The Constituion of India, art. 19(2).

2 Shanti Swaroop Singh, *Right to Freedom of Speech and Expression under the Indian Constitution* (Classical Publishing Company, New Delhi, 2nd edn., 2016).

3 A. Vyas & Faiz Uddin Ahmad, "Hate Speech, Trolls and Elections: A Nefarious Nexus" RGNUL Student Research Review (2019).

emphasize methods of boosting ideologies or identities under the umbrella of an ‘-ism’. The prejudice towards a group due to fallacy or false beliefs evolved due to historical reasons or myths develops a bias and scorn for that group in the remaining community which is further instigated and given fuel for an upsurge of abhorrence to swing the votes in one’s favour.⁴ A long era of slavery, oppression, poverty, and a social structure that encourages discrimination and cultural norms deeply embedded in the fabric of the society allows these hate voices to grow.

The recent Delhi elections witnessed the ‘hate speech’ of senior leaders like Union Minister Mr. Anurag Thakur urging the crowd ‘*Goli Maro*’ means to shoot down the traitors⁵ or Member of Parliament Mr. Parvesh Verma for instigating the people against the group protesting against the Citizenship Amendment Act.⁶ Recently, senior lawyer Prashant Bhushan too tore this thin layer of difference in freedom of speech and hate speech by remarking on the judiciary through his two tweets for which he has been convicted for criminal contempt by the apex court.⁷ Thus we see that the greatest challenge before the standard of sovereignty and free speech rule is to guarantee that the freedom imparted does not cross the limits of civil discourse and should not be allowed to cause inconvenience to any person or create hassles for the impeded segment of the masses. However, the public discourse should be kept from becoming a vehicle for promoting speech that is abusive to public order. The type of activity, the specific circumstances, and the level of freedom abused play a role in determining the types of limitations that are permissible.⁸

Most popular governments on the earth have banned hate speech on the limit of such combustible words to cause hurt as well as disturb public order by the intensity of hate speech which is equipped for prompting fierce outcomes, such as hate crimes amongst other violent outcomes. The Indian legal system does not recognise hate speech as a crime. As an exception to freedom of speech, certain forms of speech are restricted by legal provisions in specific legislation. In the year 2017 while looking at the extent of hate speech laws in India, the Law

4 D. Gilbert, “Facebook in India Is Drowning in Anti-Muslim Hate Speech”, Vice News, June, 2019 *available at*: <https://www.vice.com/en_in/article/mb8xxb/facebook-in-india-is-drowning-in-anti-muslim-hate-speech> (Visited on August 25, 2021).

5 PTI, “Union minister Anurag Thakur raises controversial slogan at Delhi rally”, Times of India, Jan. 27, 2020 *available at*: <<https://timesofindia.indiatimes.com/india/union-minister-anurag-thakur-raises-controversial-slogan-at-delhi-rally/articleshow/73670945.cms>> (Visited on August 20, 2021).

6 PTI, “Hate speeches made by BJP leaders using ‘fear of rape as campaign message’: Women’s groups to PM”, The Economics Times, Feb. 03, 2020 *available at*: <<https://economictimes.indiatimes.com/news/politics-and-nation/hate-speeches-made-by-bjp-leaders-using-fear-of-rape-as-campaign-message-womens-groups-to-pm/articleshow/73898204.cms?from=mdr>> (Visited on August 18, 2021).

7 In Re: Prashant Bhushan, (2021) 3 SCC 160.

8 S. Sivakumar, *Press Law and Journalists* (Universal Law Publishing Company, Gurgaon, 2015).

Commission in its report suggested further presenting new legislation inside the Indian Penal Code that explicitly rebuffs prompting to viciousness notwithstanding the current ones.⁹ In their report law commission characterized hate speech as an “*expression which is abusive, insulting, intimidating, harassing or which incites violence, hatred or discrimination against groups identified by characteristics such as one’s race, religion, place of birth, residence, region, language, caste or community, sexual orientation or personal convictions.*” This upsurge of uncontrollable propaganda and crime as a result of hate speeches has persuaded the authors to ponder at the causes behind the utterance of hate speeches and whether the existing laws are capable to deal with them.

Taking into account the above given background, this article in the first part begins with discussing the existing framework of provisions present in different Acts that regulate hate speech in the country. The second part of this article focuses on tracing the development of the law related to hate speech over time by analyzing various amendments and leading case laws that paved the way to the existing framework of laws existing in the country. It also discusses the ongoing debate in choosing between freedom of speech and expression vis a vis the need for stricter laws to curb the regular instances of hate speech. Further, the third part of the article aims in highlighting the loophole existing in the current framework of law and the need to reform the same while maintaining the balance between the freedom of speech and expression and hate speech. Finally, the article concludes with a suggestion for enacting a specific law to deal with hate speech and the proper implementation of the same by the government authorities.

Hence, the problem profile of this article consists of focusing on the reach of enforcement of existing laws and their abuse and further suggests the reforms required to effectively mitigate the effects of hate speech and the establishment of a multicultural harmonious environment that facilitate the free interplay of ideas leading to progress and development.

9 Law Commission of India, “267th Report on Hate Speech” (March, 2017).

EXISTING LAWS THAT REGULATE HATE SPEECH

Here we present the following legislations that have bearing on hate speech in India at present:

Table 1 – Existing Laws that Regulate Hate Speech

(a) The Indian Penal Code, 1860 (hereinafter IPC)	
Section 124A IPC	penalizes sedition.
Section 153A IPC	<i>“promotion of enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.”</i>
Section 153B IPC	<i>“imputations, assertions prejudicial to national-integration.”</i>
Section 295A IPC	<i>“deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs”</i>
Section 298 IPC	penalizes <i>“uttering, words, etc., with deliberate intent to wound the religious feelings of any person”</i>
Section 505(1) and(2) IPC	<i>“publication or circulation of any statement, rumour, or report causing public mischief and enmity, hatred, or ill-will between classes.”</i>

(b) The Representation of The People Act, 1951 (hereinafter RPA)

Section 8	<i>“disqualifies a person from contesting election if he is convicted for indulging in acts amounting to the illegitimate use of freedom of speech and expression.”</i>
Section 123(3A) and Section 125	<i>“prohibits the promotion of enmity on grounds of religion, race, caste, community, or language in connection with election as a corrupt electoral practice and prohibits it.”</i>

(c) The Religious Institutions (Prevention of Misuse) Act, 1988

Section 3(g)	<i>“prohibits religious institution or its manager to allow the use of any premises belonging to or under the control of, the institution for promoting or attempting to promote disharmony, feelings of enmity, hatred, ill-will between different religious, racial, language or regional groups or castes or communities.”</i>
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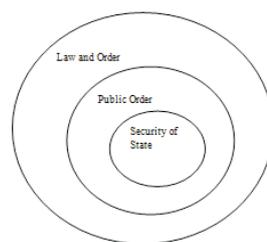
(d) The Cable Television Network Regulation Act, 1995	
Sections 5 and 6 of the Act	<i>"prohibits transmission or retransmission of a programme through cable network in contravention to the prescribed programme code or advertisement code. These codes have been defined in rules 6 and 7 respectively of the Cable Television</i>
(e) The Cinematograph Act, 1952	
Sections 4, 5B, and 7	<i>"empowers the Board of Film Certification to prohibit and regulate the screening of a film."</i>
(f) The Code of Criminal Procedure, 1973 (hereinafter CrPC)	
Section 95	<i>"empowers the State Government, to forfeit publications that are punishable under sections 124A, 153A, 153B, 292, 293, or 295A IPC."</i>
Section 107	<i>"empowers the Executive Magistrate to prevent a person from committing a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably cause a breach of the peace or disturb the public tranquility."</i>
Section 144	<i>"empowers the District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf to issue an order in urgent cases of nuisance or apprehended danger. The above offenses are cognizable. Thus, have serious repercussions on the liberties of citizens and empower a police officer to arrest without orders from a magistrate and a warrant as in section 155 of CrPC."</i>
(g) The Protection of Civil Rights Act, 1955	
Section 7	<i>penalizes "incitement to, and encouragement of untouchability through words, either spoken or written or by signs or by visible representations or otherwise."</i>

Incitement to violence, psychological oppression, destruction, ethnic cleansing, and other acts of terrorism are all examples of the consequences of hate speech. It is undeniable that the repercussions of offensive speech on people are real and terrible and their health and safety are placed at risk. Social advancement is also hampered by it. The right to life of any individual can be seriously affected by hate speech when it is allowed to fester.

AMENDMENT OF THE LAW

Any hate speech that can impel to offence the security of the country can be abridged through public order under article 19(2) of the constitution of India. According to the ruling of the Supreme court in *Brij Bhushan v. State of Delhi*,¹⁰ the public order request must be associated with the open wellbeing and thought proportionate to the State security. This translation was approved by the First Constitution Amendment where public order was embedded as a ground of limitation under article 19(2). The constituent assembly has inspected and discussed the various restrictions on freedom of speech and expression. 'Public order' and 'sovereignty and integrity' are the terms used to describe the First and Sixteenth Amendments, which restrict speech based on hate speech under article 19(2). Limitations under public order have been established for sections 153A and 295A of the Indian Penal Code. According to the apex court after the First Amendment in 1951, the language of 19(2) read – “*in light of a legitimate interest for public order*”. This must be perused broadly, so a law like section 295A may not legitimately manage public order however can be perused to be “in light of a legitimate interest for public order”¹¹.

Nonetheless, in *Ram Manohar Lohiya v. Territory of Bihar*¹², the apex court envisioned the role of law and order, public order, and security of State as three concentric circles; where the innermost circle represents the security of State, followed by a circle to represent public order and both these circles encircled by the largest circle of Law and order. One can easily comprehend that a demonstration may influence law and order yet not influence public order or the security of the State.



10 AIR 1950 SC 129.

11 *Jafar Imam Naqvi v. Election Commission of India*, AIR 2014 SC 2537.

12 AIR 1966 SC 740.

The standard useful for restricting article 19(1)(a) is the most elevated when forced in light of a legitimate concern for the security of the concerned place. Additionally, a sensible restriction under article 19(2) infers that the connection between restriction and public order must be proximate and immediate rather than a remote or whimsical connection.¹³ It tends to be regularly seen that a restriction on speech was advocated just on the off chance that it was inescapably dangerous to society. For abridging this freedom, the foreseen risk ought not to be remote, assumed, or farfetched. It ought to have an immediate and direct relation with the uttered expression. The expressed thoughts ought to be naturally hazardous to the interest of the public.

In *Shreya Singhal v. Union of India*¹⁴, the court found section 66A of the Information Technology Act to be inadmissible enough to establish a connection between the restriction and the law. The court ruled that there was no connection between the message and any actions that could be taken as a result of the message and that there was no element in this offence that would force anyone to do anything that a reasonable person would consider to be a danger to public safety or peace. Specifically, the court separated discussion and advocacy from instigation and determined that the first two were the essence of article 19(1) of the Constitution. When discussion and advocacy add up to affectation, the expression must be limited.

Deciphering section 153A and 505(2) of IPC in *Bilal Ahmed Kaloo v. State of AP*¹⁵, the Court pronounced that the common element in the two-section is that it makes the advancement of the feeling of animosity or hatred between various religions, races, societies or groups and doing exploits about the concordance of an offense. It is important that at least two groups or communities must be concerned in such cases to be included under these sections. Simply offending one group or community with no reference to another group or community can't be drawn under both these sections. In *Babu Rao Patel v. State of Delhi*¹⁶ the Court held that section 153A(1) of IPC does not limit the promotion of animosity solely on religious grounds, but also considers other grounds such as race, place of birth, residence, language, caste, or community. According to the above, Indian courts have a speech defence system and are extraordinarily reluctant to limit article 19 of the Constitution. Anxiety and fear of the State abusing prohibitive legislation are the motivations behind such a stance on the issue.

13 *Supdt. Central Prison v. Dr. Ram Manohar Lohia*, AIR 1960 SC 633.

14 AIR 2015 SC 1523.

15 AIR 1997 SC 3483.

16 AIR 1980 SC 763.

The laws mentioned in Table 1 and the pronouncements given in the above-mentioned cases may not straightforwardly manage the issues of hate speech, but the Constitution has been deciphered extravagantly by the Supreme Court to limit these provisions under the reasonable restrictions of article 19(2). Thus, the concept of hate speech has been made more extensive in our nation to maintain harmony and sustain public order requests. Despite such listed provisions in our laws, conflicting inquiries have been raised about them. It has been claimed several times that these laws and pronouncements are inadequate in themselves and that they limit the freedom to communicate.¹⁷ Such astounding exposure is portrayed in one of the cases of the Hon'ble Supreme Court i.e. *Pravasi Bhalai Sangathan v. Association of India*¹⁸, where the appellants found the current laws concerning hate speech deficient and prayed that the State ought to make stricter guidelines and make an authoritative move against individuals giving hate speech. It is interesting to note that in this case, the Court considered that the execution of existing laws is capable to tackle the issue of hate speech when consideration of all things is taken into account. Further, the matter of hate speech merited a clear concept in the reports of the Law Commission of India, presented before the Government of India in March 2017 wherein they have clearly observed and construed the various laws and different proclamations on hate speech.¹⁹

Freedom of speech and expression is the key aspect for the development and growth of democratic government. Notwithstanding, with each right, comes duty and in that, is the requirement for a constraint on the privilege to freedom of speech and expression to forestall the damage and the backward impact it can bring. The makers of our Constitution were perceptive of the history the country had faced and understood the need to feature the duties associated with freedom of speech and expression. During the course of India's development after adopting the framed constitution in 1950, the amendments to article 19 came up from time to time and included a few new grounds of restrictions upon the freedom of speech and expression. The restrictions imposed were to take care of the "*friendly relations with foreignstates, defamation or incitement to anoffense, the sovereignty and integrity ofIndia, security ofState, decency and*

17 Consultation Paper on Literacy in the context of the Constitution of India, available at: [https://legalaffairs.gov.in/sites/default/files/\(III\)Literacy%20in%20the%20context%20of%20the%20Constitution%20of%20India%20.pdf](https://legalaffairs.gov.in/sites/default/files/(III)Literacy%20in%20the%20context%20of%20the%20Constitution%20of%20India%20.pdf) (Visited on August 23, 2021).

18 AIR 2014 SC 1591.

19 *Supra* note 9.

contempt of court.”²⁰

The above-mentioned constitutional provisions were found to be inadequate to handle other decisive factors like offenses related to religion, offenses against public tranquility and criminal intimidation, insult and annoyance which should by and large fall under offence due to hate speech, then certain legislations, like section 153A, section 153B, and section 295A of IPC were included to curb the menace of hate speech. Section 124A punishes sedition, 153A punishes promoting ill-will among groups of different grounds and doing acts biased to the maintenance of harmony, section 153B punishes ascription statements biased to national integration, and section 295A punishes malicious acts planned to outrage religious emotions which supplement section 298 which identifies with expressing words with the aim to wound the religious sentiments. Peruse of the above provisions clearly reveal that there is no clear one watertight compartment to manage the different laws that by and large identify hate speech. In a specific circumstance, hate speech may become sedition also. The Supreme Court in the *Kedar Nath Singh v. State of Bihar*²¹ deciphered section 124A to imply that “*expression would be culpable under this section just when it is planned or has a sensible inclination to create disorder or unsettling disturbance of the public order by resort to ferocity*”. In any case, hate speech generally is an incitement to contempt essentially against a group of people characterized as far as race, ethnicity, sex, sexual orientation, religion, and so forth (sections 153A, 295A read with section 298 IPC). As a result, hate speech is defined as any verbal or written expression that causes dread, caution, or incites violence.

The revered way to deal with the difficulties that hate speech presents to freedom of speech and expression has yet not acquired a uniform way as the limits between the impermissible proliferation of contempt and secured speech differ across jurisdictions.²² Between the United States and other democratic nations, there is a difference in approach. Hate speech is protected in the United States,²³ while in other western democratic countries, such as Canada, Germany and the United Kingdom it is regulated and sanctionable.

Thus one can comprehend that there are blended emotions concerning the idea of hate speech in

20 *Supra* note 1.

21 AIR 1962 SC 955.

22 A. Chandrachud, *Republic of Rhetoric: Free Speech and the Constitution of India*. (Penguin Random House India Private Limited, 2017).

23 Hate Speech in the Constitutional Law of the United States, *available at*: <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1413&context=facpubs> (Visited on August 24, 2021).

our nation and even across the world. The doers prevent the laws to be prohibitive in nature while some, who are the survivors of this scorn, plead for stricter laws for their wellbeing and security. Taking into account the abovementioned, it must be contemplated that new provisions in IPC are required to be incorporated to address the issues extravagantly managing hate crime. Apart from bringing legislature, there is a dire there is a need to persuade and educate the citizen in general on the capable exercise of freedom of speech and expression.²⁴

THE BASIS FOR REFORMS IN THE EXISTING LAW

Hate speech is difficult to define because any ambiguity in a definition could allow for infringement on freedom of speech and expression. The recent section 66A of the Information Technology Act, 2002 which was struck down in *Shreya Singhal's case*²⁵ is a model wherein the dubiousness of the legal sections prompted abuse of the law. One of the grounds on which the European Court of Human Rights has ruled that a state-imposed limitation is legal is its accuracy. Therefore, any attempt to define hate speech must follow the precedents set by the Supreme Court.

If a speech incites violence or hatred, that alone is not enough to determine if it's hateful. A person or group can be undervalued by even non-violent speech. In the age of technology, the anonymity of the internet allows a reprobate to spread bogus and offensive ideas with ease and speed. They do not have to be violent, but they can reinforce the prejudicial views that are prevalent in society. Additionally, a call for discrimination adds to the evidence of hate speech in the same way.

The natural pride and homogeneity of each individual is the fundamental adage of global human rights characterized by article 20 of the ICCPR. Article 20(2) of the ICCPR expects states to ban hate speech. It is, in this manner, that worldwide law condemns statements that invalidate the equality of every individual. The backing of national, racial, or strict contempt that establishes induction to discrimination or antagonistic vibe is denied by law. Under the common law system, such speech had been treated as "*sui generis*" that is, "*outside the domain of protected discourse*".

In any case, if hate speech is additionally about offending people or injuring religious sentiments (without including public order), at that point, one could justify this under the 'decency and

24 NLUD, "Hate Speech Laws in India" (April, 2018).

25 *Supra* note 14.

morality' condition of article 19(2). The Supreme Court has held that section 123(3) was a protected limitation on speech, in light of a legitimate concern for decency. Correspondingly, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 forbids "*deliberately annoying or scaring with a purpose to mortify an individual from a Scheduled Caste or a Scheduled Tribe in wherever inside public view.*" The type of hate speech that the Supreme Court here is managing is an insult. It is identified with a background marked by embarrassment looked by Scheduled Caste people and isn't coordinated against public order. Using the word chamar to insult somebody could establish hate speech regardless of whether it prompts a public order aggravation. The limitation on the speech here is all the more straightforwardly connected to 'decency or morality' in article 19(2) than 'public order'. So similarly, the limitations under section 153B (Imputations, assertions identified with national integration) could be justified under the 'sovereignty and integrity' restriction in article 19(2). Hate speech laws are found in three distinct parts of the IPC, "*Of Offenses Relating to Religion*", "*Of Offenses Against the Public Tranquility*" and "*Of Criminal Intimidation, Insult and Annoyance*". Section 295A, IPC was instituted to explicitly target speech that planned to hurt religious emotions by offending religion or religious beliefs.²⁶

In *Dr. Ramesh Yeshwant Prabhuo v. Shri Prabhakar Kashinath Kunte and Ors.*²⁷ the Court examined the importance of sub-section (3A) of section 123 of The Representation of People's Act, 1951 seeing that the said section is like section 153A, IPC as "*the promotion of, or endeavor to promote, sentiments of animosity or hatred*" as against the expression "*Whoever...elevates our endeavors to promote.....disharmony or sentiments of enmity, hatred or ill-will*" in section 153A, IPC. The expression "*sentiments of enmity or hatred*" is basic in both the section however the extra words in section 153A, IPC is "*disharmony or on the other hand ill-will.*" The distinction in the plain language of the two arrangements shows that even simple promotion of disharmony or malevolence between any group of person is an offense under section 153A, IPC, while under sub-section (3A) of section 123 of the RPA, 1951, just the advancement of our endeavor to promote sentiments of enmity or hatred, which are more grounded words, are illegal in the political campaign.

Courts have reliably maintained the sacred legitimacy of hate speech laws, including sections

26 Neeti Nair, "Beyond the 'Communal' the 1920s: The Problem of Intention, Communal Pragmatism, and the Making of Section 295A of the Indian Penal Code" *50 Indian Economic Social History Review* 317 (2013).

27 AIR 1996 SC 1113.

153A and 295A IPC based on the ‘public order’, an exemption cut out in article 19(2).²⁸ In the *State of U.P. v. Lalai Singh Yadav*²⁹, the Supreme Court maintained “*the sacred constitutional of ordered security.*” It was held that courts should give consideration to the State in order to ensure well being and peace, as ordered security was defined as an established value that should be protected. A positive guideline of ordered security is articulated here, without which creativity and freedom are useless.

In the present situation, the risk of huge penalties is a dissuading factor for publishers, artists, specialists, intellectuals, and individuals who don’t have the monetary muscle to challenge hate speech cases. Different countries have created broad laws related to hate speech and hate crimes.³⁰ Judges in our nation have attempted to find some kind of harmony between hurt brought about by hate speech and the risk to freedom of speech and expression. Any legitimate guideline of hate speech must consider the rules that have developed from these lawful points of reference.

CONCLUSION

We can’t disregard the intensity of words, which can turn into the instrument for unraveling difficulty yet on the off chance that it is abused, at that point it will end up being the creator of crisis. In a country like India which is so diverse, it is anything but difficult to affect prompt break of harmony by utilizing words that beg to be defended on the bases of religion and caste and in present period numerous dubious individual for getting out of line advantage to have been utilizing their freedom of speech and expression for inducing violence between individuals belonging to religions, castes, beliefs, and customs. Due to the common hate crusade, India has encountered numerous mutual uproars in the past just as in present. As we realize that media is the fourth pillar of the constitution since it is a mechanism for mass correspondence however on the off chance that media permits it to be utilized as fuel for impelling brutality through dynamic purposeful publicity or announcing then there is have to cause media to comprehend that it is an obligation of a media to report communal riot in such a way, that it ought to harmonize the violence and construct individuals’ trust in the law which exist for taking care of the communal issue.

28 *Supra* note 24.

29 AIR 1977 SC 202.

30 Siddharth Narrain, “Hate Speech, Hurt Sentiment, and the (Im)Possibility of Free Speech” 51(17) *Economic and Political Weekly* 122 (2016).

In the present time, we have diverse laws that advise how to manage hate speech. We have a distinctive legitimate arrangement that gives discipline to instigating violence through words. To finish up it is recommended that India should have a specific law that will just deal with hate speech. Only a new law could help tackle the issue of hate speech and afterward, likewise government should actualize the laws in a severe sense.

RIGHT BASED APPROACH TO DATA PROTECTION: AN ANALYSIS OF PERSONAL DATA PROTECTION BILL, 2019

Dr. Puneet Pathak*

Anwasha Ghosh**

INTRODUCTION

In today's era of rapid technological growth, privacy is one of the most pressing concerns. It is a major challenge in the digital world to protect privacy of an individual or institution. Due to technological innovation, data privacy has become a concern for everyone. Therefore, the focus on data protection is required.¹ An Individual's digital information is accessible within a simple click, highlighting the importance of data protection and the protection of an individual's right to privacy. Identity qualities, traits, or attributes that can be used to identify an individual are referred to as personal data. The practise of securing the use of personal data through policies and procedures is known as data protection.

Since data privacy is such a prevailing concern all around, governments and organisations invest millions of dollars each year to protect data under their control. Data is a wide phrase which encompasses both personal and commercial aspects of a person. Personal information is protected by privacy laws, whereas commercial information is protected by proprietary laws. To comprehend the term data privacy, we need to first understand the meaning of personal data. Personal data is information or data of any kind relating to an individual who can be recognised from that data, irrespective of whether it is collected by the government or a commercial organisation or agency. The right to privacy is a constitutionally protected fundamental right, as established by the apex court in the case of Justice K.S Puttaswamy and another v. Union of India and others². The Union Government was also ordered in the same ruling to identify the possibility of establishing a robust data protection policy in order to have a balance between justifiable state concerns and individual interests. The government formed a Committee of Experts, under the chairmanship of Justice B.N. Sri Krishna, to investigate various concerns relating to data protection and also recommend a draft Bill in this regard. In September 2019, the Ministry of Electronics and Information Technology established an expert group, chaired by

*Assistant Professor, Department of Law, Central University of Punjab, Bathinda.

**Research Scholar, Department of Law, Central University of Punjab, Bathinda.

1 Jayanta Gosh and Uday Shankar, "Privacy and Data Protection law in India: A Right-Based Analysis" 5 *Bharati Law Review* 54 (2016).

Shri Kris Gopalakrishnan (Co-founder of Infosys), to make suggestions on the governance framework for non-personal data.³

Although the right to privacy is not officially stated in the Constitution, it is implicit in the right to privacy as a personal liberty guaranteed under Article 21.⁴ The phrase privacy generally refers to one's legal right to choose how much information s/he wants to disclose with others and to control when, and how s/he communicates with others. Furthermore, it refers to one's ability to retreat or participate in whichever way s/he thinks fit and restrict the release of personal information about oneself. Data generation, processing, storage, and transmission have all increased in recent years, similarly data theft and invasive surveillance incidents have occurred in the same pace. Customers of global businesses like Google, Facebook, and Amazon, whose business models rely on the gathering, storage, and use of consumer data, frequently find themselves in a vulnerable situation when the privacy is being compromised due to data theft or unauthorized access of data.

In the recent times technological and e-commerce advancements have not only made life easier, but they have also resulted in a significant increase in cybercrime, data theft, and misuse of personal and personal information. There have been several incidences of data theft in India lately. According to the Indian Computer Emergency Response Team (hereinafter, CERT-In) which is the government body in charge of recording and responding to cybersecurity threats, over 313,000 cybersecurity events were reported in 2019.⁵ Though there is no explicit legislation in India governing data protection or privacy, the Information Technology Act of 2000, the Information Technology (Reasonable Security Practices and Procedures and sensitive Personal data or information) Rules of 2011 contain few provisions addressing data protection or privacy. Data privacy is quite difficult to achieve since it is both politically necessary and challenging, but it is extremely valuable to an individual.⁶ Codified legislation on the subject of

2 *Justice K.S.Puttaswamy v. Union of India*, AIR 2017 SC 4161.

3 Renjith Mathew, "Personal Data Protection Bill, 2019 –Examined through the Prism of Fundamental Right to Privacy – A Critical Study", available at: https://www.sconline.com/blog/post/2020/05/22/personal-data-protection-bill-2019-examined-through-the-prism-of-fundamental-right-to-privacy-a-critical-study/#_ftn3 (Visited on Aug. 21, 2021).

4 Shiv Shankar Singh, "Privacy and Data Protection in India: A Critical Assessment" 53 *Journal of Indian Law Institute* 663 (2011).

5 Soumik Ghosh, "The Biggest Data Breaches in India", available at: <https://www.csoonline.com/article/3541148/the-biggest-data-breaches-in-india.html> (Visited on Aug. 21, 2021).

6 Lee A. Bygrave, *Data Privacy Law: An International Perspective* 56 (Oxford University Press, UK, 2014).

data privacy is yet to be enacted in India. The Personal Data Protection Bill, 2019, which is based on the GDPR Bill of the European Union, is still pending in the legislature.

The recent furore on Pegasus incident has reopened the debate about privacy and the extent to which the government can misuse privacy rights. It is alleged that a technical equipment software intended for defence and national security has been unethically utilised to gain access to all anti-governmental communications. Such alleged incidents may infringe the basic fundamental rights of the citizens as guaranteed under the Indian Constitution. The software Pegasus is a sophisticated surveillance programme developed by Israel's National Security Organization (NSO) which can not only tap phones but also listen to encrypted audio streams and read encrypted texts. When it comes to modern surveillance technology like Pegasus, India's surveillance law is still in its nascent stage. However, the current legal system protects the fundamental right to privacy by permitting appropriate derogations only in the national interest.

People are driven to maintain social distance in the current COVID-19 environment, which forces them to stay at home and work from home. This circumstance has resulted in a significant reliance on digital platforms. In light of these conditions, India must expedite the passage of the new Personal Data Protection Bill but with reasonable safeguards against unregulated state power to access an individual's data.

The purpose of this study is to address the gap in the existing framework for dealing with data privacy and to examine the Personal Data Protection Bill, 2019 in reference to data privacy as a right as has been recognised by Hon'ble Supreme Court.

EXISTING LEGAL FRAMEWORK FOR DATA PROTECTION

In absence of any exclusive statute on data privacy, provisions of other legislations deal with the subject of data privacy indirectly. These legislations include the Information Technology Act of 2000, the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Information) Rules of 2011, the Right to Information Act, 2005. Provisions dealing with the data privacy under the above statues are discussed as under:

The objective of Information Technology Act⁷ clearly state that the protection of cyber-related problems is a priority. It ensures that data from computer systems is protected from certain types

7 Information Technology (Amendment) Act 2008, Objective, *available at*: [https://police.py.gov.in/Information%20Technology%20Act%202000%20-%202008%20\(amendment\).pdf](https://police.py.gov.in/Information%20Technology%20Act%202000%20-%202008%20(amendment).pdf) (Visited on August 21, 2021).

of breaches. The Act has provisions to restrict the illegal use of firearms. It bestows legal recognition to electronic documents, digital signatures, and incorporates penal provisions for cybercrimes. Section 72 of the Act imposes a criminal liability for anybody to get access to any electronic record, book, register, correspondence, information, document, or other material without the approval of the person concerned. Section 72 carries a maximum sentence of two years imprisonment or a fine of one lakh rupees, or both. Only when a violation occurs while exercising powers given by the Act Section 72 is accordingly applicable. The Act has an extra-territorial applicability i.e., it is applicable to offenses committed outside the territory of India. The new sections 43A⁸ and 72A⁹ of the Act specifically address data protection. Section 43A of the Act states that a corporation is made liable for damages if it is negligent in possessing, dealing or handling any sensitive personal data or information in a computer resource it owns, controls, or operates. When a body corporate uses sensitive personal data or information, Section 43A is applicable. Section 72A, on the other hand, applies to any person who discloses information without authorization. An intermediary is included in the phrase “any person”. Information released under Section 72A should be received as a result of services supplied under a lawful contract without the approval/consent of such person in order to cause, or knowing that it will cause, wrongful gain or wrongful loss.

The Central Government has notified the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 under the powers given by Section 87(2) read with Section 43A of the Act. These rules only apply to bodies corporate or individuals based in India. They have no extraterritorial application.

There is an exception to the basic requirement of maintaining privacy under Section 69. This section allows the government to intercept, monitor, or decrypt data from any computer resources. Government can utilize this power in the interest of India’s sovereignty or integrity, security, defence, friendly relations with foreign states, or public order, or to prevent incitement to the commission of any cognizable offence relating to the above, or for investigation of any offence relating to the above.¹⁰ The 2009 Interception Rules¹¹ augment this section by defining the interception technique as well as the general and emergency scenarios in which data from a

8 Compensation for failure to protect data.

9 Punishment for disclosure of information in breach of lawful contract.

10 The Information Technology Act, 2000, s. 69(1) Power to issue direction for interception or monitoring or decryption of any information through any computer resource.

11 The Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009.

computer resource can be intercepted, monitored, or decrypted.¹² An officer of similar or higher level than the Joint Secretary to the Government of India can issue the interception order.

India currently lacks a specialised agency to supervise the privacy and security of personal data. The existing Data Security Council of India, which is operated by NASSCOM, is a self-regulatory body that collaborates on a voluntary basis with a variety of organisations. It creates code and procedures that all stakeholders must adhere to in order to secure data privacy and security.

Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Information) Rules, 2011 were notified in April 2011, which laid down India's most comprehensive data protection measure. The regulations detail all of the procedures and protocols that must be followed by a body corporate. The transfer of any information or sensitive personal data is only permissible in two instances, firstly, when it is essential for the performance of a valid contract; or secondly, when the person expresses his or her consent to the data transfer.¹³

Another statute which relates to the protection of data privacy is the Right to Information Act of 2005 which primarily encourages transparency and keeps government officials accountable for their conduct. Public officials are required to release pre-identified information under this statute. Citizens have the right to ask government entities for information through a public information officer. The Central Information Commissioner is responsible for handling complaints from members of the public who have been denied access to information by the public information officer. A list of particular categories of information that are protected from public disclosure is supplied under section 8¹⁴ to preserve privacy. In this way, data privacy is safeguarded by making an exception to the right to information. In the event of a conflict between an individual's right to privacy and the right to information of the general public, the information commissioner will apply the public interest test.¹⁵

THE PERSONAL DATA PROTECTION BILL, 2019

The Bill aims to protect people's privacy when it comes to their personal data. It also aims to

12 *Id.*, at Rule 3.

13 *Id.*, at Rule 7 of Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Information) Rules, 2011 (India).

14 The Right to Information Act, 2005, s. 8 Exemption from disclosure of information.

15 Vratika Phogat, "Right to Information in Consonance with Right to Privacy", *available at*: <https://cic.gov.in/sites/default/files/Internship%20Research%20Paper-%20Vratika%20Phogat.pdf>. (Visited on August 22, 2021).

safeguard the rights of individuals whose personal data is processed, and to put in place organisational and technical measures for data processing. According to the Bill, personal data is information about an individual's features, qualities, or identification attributes that can be used to identify them. As far as the sensitive personal data is concerned it includes certain forms of personal information. This can comprise financial data, biometric data, caste, religion, political views, or any other type of information that is provided. The Bill governs how the government, Indian companies, and overseas companies that deal with Indian individuals' personal data process it. Furthermore, the Bill specifies that an entity may only process an individual's personal data with the individual's consent however personal data can be processed without consent in some circumstances, such as when the government offers a service or benefit to a person, during legal proceedings, or in the event of a medical emergency. Individuals are given certain rights, referred to as data principals, under the Bill. The Bill creates a Data Protection Authority (hereinafter, DPA), which will be responsible for protecting individuals' rights, preventing the misuse of personal data, and ensuring that the Bill is followed. A structure for settling disputes is also included in the Bill. A data principal may file a complaint asserting that the Act's obligations have been breached, resulting in or likely to result in harm to them. The data fiduciary must respond as soon as possible to such a complaint within 30 days' time. If the data principal is unhappy with how the issue was handled, they can file a complaint with the DPA. The DPA has the authority to investigate the complaint and issue a penalty or compensation if necessary. Individuals' sensitive personal data may be transferred for processing outside of India if they express their explicit consent and meet certain other criteria. However, a copy of such sensitive personal information should be preserved in India. The government has categorised certain personal data as vital personal data that can only be processed in India. The central government may exclude any of its agencies from the Bill's provisions in the interests of state security, public order, India's sovereignty and integrity, and friendly relations with other governments, or to avoid encouragement to commit any cognizable offence. A range of offences and penalties are also specified in the Bill. The PDP Bill analysed under the following headings:

Data Protection Based on Consent

The major regulatory strategy of the Personal Data Protection Bill is to protect consumers against data uses that could be harmful to them. However, no specific detrimental practises are mentioned in the Bill. Instead, it emphasises the necessity of user consent in the data security

system.¹⁶ To that end, it states that personal data can only be collected when notification and consent have been received. Users must be able to rescind their consent if it is not freely provided, informed, unequivocal, and specific. Other features, like as data retention time limits and transparency standards, are intended to limit how data fiduciaries can use personal information. As a result, the law focuses on providing proper disclosure to persons as a means of averting harm. Furthermore, the Bill aims to bridge the knowledge gap between consumers and data fiduciaries about the use of personal data. It seeks to achieve this by limiting the purposes of data processing and giving consumers the right to view and control their personal data. Users can also make changes to the personal information that data fiduciaries have about them. Before data fiduciaries obtain personal data, consumers must be informed of their rights, according to the Bill.

Data Processing Limitations

The law imposes a number of limitations on data processing.¹⁷ These are founded on the notion that consumers have little comprehension of how their personal information is used. The Bill proposes that data be handled only for defined, clear, and lawful purposes; that the purposes be reasonable; that they be limited to those for which users have given their consent; and that only the data essential for such purposes be gathered. Furthermore, data must be destroyed once the purpose for its collection has been met due to data storage limits.

Increasing the Cost of Compliance

Certain parts in the Personal Data Protection Bill demonstrate the Bill's preventative strategy, which significantly increases compliance requirements for all organisations processing data in India. All firms that process data must comply with the law's standards. Among these are data minimization, notice-and-consent requirements, privacy by design, organisational and management requirements, transparency requirements, security measures, localization requirements, and the creation of grievance-redress systems. These and other norms, including as data protection impact assessments, data protection officers' appointments, record-keeping obligations, and data audits, would be required of significant data fiduciaries. While the law includes exemptions for small firms and specific goals such as journalism and research, as well as higher obligations for significant data fiduciaries, the majority of the obligations will apply to

¹⁶ The Personal Data Protection Bill, 2019, s. 11.

all organisations, regardless of the risks or likelihood of harm. The need for data localization may be too much for Indian businesses to handle. Despite the fact that no evidence of the economic benefits of such policies has been provided, localization measures would be necessary in various degrees across the economy. The regulations governing localization could potentially lead to a great deal of regulatory confusion.

Non-personal Data Expropriation

The Personal Data Protection Bill requires the government to make non-personal data gathered and generated privately to be disclosed.¹⁸ The government may direct any data fiduciary or data processor to reveal any anonymized or other non-personal data to facilitate better targeting of service delivery or formulation of evidence-based policies by the Central Government in the manner authorised by section 91(2) of the Bill. The inclusion of this provision in a statute allegedly designed to protect personal data adds to the ambiguity. Second, this section does not specify how the government will utilise such information or whether businesses that are forced to provide such information will be compensated for doing so. This forced transfer sanction gives government the power to expropriate intellectual property, which is likely to harm innovation incentives in the long run.

Processing of Personal Data

Collecting and analysing personal data from individuals has a number of advantages. Health care professionals, for example, can use data from a group of people to create diagnostic predictions and treatment suggestions; an individual's location data can be used to monitor traffic and improve driving conditions; and financial transaction data can be used to improve fraud detection. Businesses are also using personal data to give better services to their customers. In a developing country, personal data processing could bring up new commercial opportunities. However, there are certain disadvantages too. As a result of this rapid expansion, users may lack the knowledge and ability to recognise the risk of their personal data being abused. If personal data is utilised in an unregulated and unrestricted manner, users may experience injury.

Reporting of Breaches in Optional Manner

According to the Bill, data fiduciaries are only required to notify the DPA of any breach of

¹⁷ *Id.*, s. 5.

¹⁸ *Id.*, s. 37.

personal data if the breach is likely to cause harm to the data principal.¹⁹ A conflict of interest could arise if a data fiduciary decides whether or not a data breach should be reported to the DPA.

Process for Resolving Complaints

As per the Bill, a complaint can only be lodged if there is a danger of harm to the data subject. If a data principle believes they have been damaged or are likely to be harmed by a violation of any of the Bill's provisions, they may register a complaint with the data fiduciary.²⁰ If the data principal is unhappy with how the issue was handled, they can file a complaint with the DPA. Nevertheless, a complaint cannot be made for a simple violation of the data principal's rights or any other violation.

RIGHT BASED APPROACH TO DATA PROTECTION

In the international and national spheres, rights, which are inherent and inalienable characteristics of human society, have been reduced to a visible and implementable document.²¹ Some rights are mentioned explicitly in texts, while others are introduced through interpretative tools due to their close relationship with such rights. Among these, the right to privacy is one of the most important and widely recognised personal rights.²² In a constitutional bench in August 2017²³, the Supreme Court of India upheld this right and despite the fact that it is not explicitly stated in Article 21, the right to privacy has long been considered a component of the constitutional right to life. In *Kharak Singh v. State of Uttar Pradesh*²⁴, the right to privacy was viewed as a fundamental right under both Article 21 and Article 19 in Justice Subba Rao's minority judgement. Further, privacy was vividly discussed in the case of *Maneka Gandhi v. Union of India*²⁵, wherein the court had declared that right to privacy to be limited to legal procedures only and such procedures must be just, fair and reasonable. In *PUCL v. Union of India*²⁶, the right to privacy was once again broadened to include telephonic conversations, which are usually of a personal and sensitive nature. Internationally, all forms of electronic and internet communications have been recognised as being protected by the right to privacy. This

19 *Id.*, s. 25.

20 *Id.*, s. 32.

21 Prakash Shah, "International human Rights: A perspective from India", 21 *Fordham International Law Journal* 24 (1997) cited in *Supra* note 1.

22 *Supra* note 1 at 55.

23 *Justice K.S.Puttaswamy v. Union of India*, AIR 2017 SC 4161.

24 1964 SCR (1) 332.

25 [1978] 2 SCR 621.

26 (1997) 1 SCC 301.

has been considered as part of the notion of private life under Article 8 of the European Court of Human Rights.²⁷ In the landmark judgment of *Katz v. United States*²⁸, the U.S. Supreme Court established the limits of the sphere of privacy and it was held that all acts or places where a person has displayed a real (subjective) expectation of privacy and such expectation be one that society is willing to recognise as reasonable are covered by privacy protection. The right to privacy is derived from fundamental freedoms of movement, expression, and personal liberty, according to the court in *District Registrar and Collector, Hyderabad v. Canara Bank*²⁹. In the Puttaswamy judgement, the data privacy issue was examined in regard to the Unique Identity Scheme and the right to privacy was unanimously declared a fundamental right by the Supreme Court therein. It is clear from the above judgments³⁰ that recognizing the protection of data privacy as a right would safeguard the individual's privacy in a better way. With the right based approach, it is easy to identify the holder of a right and duty bearer. In case of breach of data privacy one can exhaust the available remedies for the violation of the rights similarly as in case of other rights.

CONCLUSION

In recent years, enormous volumes of personal data have been discovered being used by entities (both businesses and governments) for decision-making. Informational privacy, or the protection of personal data is equally important to the right to privacy. No existing legislation provides an adequate framework for data privacy of Indian people. After the Puttuswamy verdict by the Supreme Court, informational privacy is a constituent of the right to privacy. In response to the Supreme Court order the Indian government prepared the Personal Data Protection Bill based on the recommendation of the Justice B.N. Sri Krishna committee.

The Personal Data Protection Bill might create a comprehensive framework for personal data protection while allowing the Indian economy to benefit from data processing advancements. However, there are certain provisions in the Bill which might dilute the right to privacy of an individual.

The Bill gives the central government the authority to make reasoned decisions exempting any government agency from the Bill's provisions on the basis of national security, sovereignty, and

27 European Convention on Human Rights, art. 8 Right to respect for private and family life.

28 389 U.S. 347 (1967).

29 (2005) 1 SCC 496.

30 *Justice K.S.Puttaswamy v. Union of India*, AIR 2017 SC 4161.

public order concerns. One of the major issues identified in the Bill by various stakeholders is that on the basis of sovereignty or public order, the government can obtain data from government and private agencies at any time which might have potentially severe consequences. The Bill was based on the framework of General Data Protection Regulation (EU) however there are several important differences that dilute the privacy aspect of an individual.³¹ The Personal Data Protection Bill is not in consonance with the standards as laid down in Puttaswamy judgment.³²

The recent incident of Pegasus has made us to ponder over the aspect of data privacy which highlighted the need to deal with such issues with adequate legal framework. The personal data protection Bill, 2019 should be modified in the light of the above observation.

31 Anirudh Burman, "Will India's Proposed Data Protection Law Protect Privacy and Promote Growth?", *available at*: https://carnegieendowment.org/files/Burman_Data_Privacy.pdf (Visited on: August 22, 2021, 12:54 PM),
32 *Supra* note 3.

SOCIAL INEQUALITIES IN INDIA AND NEED FOR ACHIEVEMENT OF SUSTAINABLE DEVELOPMENT GOALS

Ram Kumar*

“Development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states.”

- Amartya Sen

INTRODUCTION

The development of a nation does not mean only the economic development and real progress should be measured in terms of human or social development. The social inequalities in India have been visible starkly and the economic progress did not alter the hard social realities in the way it was expected¹. The world has witnessed, in recent times, devastations caused by pandemic, natural calamities, terrorism and dictatorships coupled with increased disparity in income level between haves and have-nots. This suggests the need for adopting more philanthropic attitude at global level towards problems of under-privileged and marginalised people. The world leaders made a mutual commitment in 2015 for solving the serious socio-economic-environmental problems by achieving the seventeen sustainable development goals (SDGs) by 2030. But, in the prevailing economic scenario, the developed countries are also facing problem of tepid growth rate and increasing unemployment. The agenda of domestic development is overshadowing the requisite support for inclusive development at a much larger scale. The achievement of SDGs is a collective global responsibility, nevertheless, a State cannot place complete reliance on external support for achievement of SDGs. The realisation of SDGs is dependent on better utilisation of domestic resources, effective international collaborations, and empowerment of people. India has affirmed its commitment towards achieving the SDGs. However, the havoc caused by COVID-19 and poor growth of gross domestic products (GDPs) have severely affected the existing social infrastructure. The period of last one and half year has been one of the toughest times for marginalised population and severity of their problems urges for more constructive and inclusive solutions. One of relevant strategies may be alignment of

* Research Scholar, Faculty of Law, Jamia Millia Islamia University, New Delhi.

1 Amartya Sen, *Development as Freedom* 100 (Oxford University Press, Oxford, 1st edn., 2010).

corporate social responsibility (CSR) activities with the objectives set out in SDGs. This article is divided into six parts. After the introduction in part I, the problem of social inequality and its socio-economic context have been discussed in part II of the article. The legal developments, in terms of legislations, policies and judgements, have been dealt with in part III. In part IV of the article, the background and significance of the SDGs have been presented. Part V of the article is concerned with finding solutions of problem of social inequality in India through achievement of SDGs in timely and efficient manner. The conclusion of the article is contained in part VI of the article.

SOCIAL INEQUALITIES IN INDIA

The socio-economic problems in India have been in existence for centuries. For the purpose of this article, the term ‘social inequalities’ has been used to denote a condition or disability because of which a large section of our society is not able to access or afford food, shelter, drinking water, education, health and other basic necessities of the life. Poverty is one of the main reasons for social inequality and it was in existence in some form even in the prosperous kingdoms ruled by the great Kings². Even in modern times, the country was ruled by the British over a long period of time and the economic interests of India were compromised for serving the interests of the English economy. The independence in 1947 raised hopes of millions of Indians who had suffered for decades without any recourse and resource. The measures introduced by the Governments in early post-independence phase did not reduce poverty drastically. Since, the majority of population in India was living in rural part and the economy was primarily based on agriculture for a considerable duration, the disproportionate distribution of land and other assets did not help poor rural population even when the agriculture sector saw a positive growth³. The analysis of the early development plans implemented by the national Governments revealed that economic policies impacting income distribution largely benefitted the upper-income groups instead of the targeted population⁴. The Law Commission of India also recognised that “*poverty has been and remains a constructed social and economic reality*”⁵. The period of early nineties was a turning point for Indian economy as the policies of liberalisation, privatisation and

2 A.E. Punit, *Profiles of Poverty in India* 2-4 (B. R. Publishing Corporation, Delhi, 1st edn., 1982).

3 M. Govinda Rao (ed.), *Development, Poverty, and Fiscal Policy* 56 (Oxford University Press, New Delhi, 1st edn., 2002).

4 Abhijit V. Namerjee, Pranab Bardhan, et. al. (eds.), *Poverty and Income Distribution in India* 352 (Juggernaut Books, New Delhi, revised edn., 2019).

5 Law Commission of India 223rd report^{on} available at: <https://lawcommissionofindia.nic.in/reports/report223.pdf> (Visited on September 13, 2021).

globalisation were introduced leading to a higher economic growth and impact of the same was visible on extent of poverty also. The poverty ratio, combined for rural and urban India, reduced from 54.9% in 1973-74 to 36% in 1993-94 and 26.1% in 1999-2000⁶. Despite these positive outcomes, the poverty and the social inequalities in other forms are still existing in a significant manner. In fact, some studies have pointed out slowdown in pace of poverty reduction and increased unemployment despite increase in the GDP⁷. Empirical studies have also revealed that even in 21st century, India is having development concerns like hunger, food insecurity, illiteracy etc. which require constant attention by the stakeholders⁸. The vulnerability of workers in unorganised sector is a constant challenge for the government and policy makers as a sizeable chunk of population living below poverty line belongs to this class⁹. The uncertainties caused by pandemic and slowdown of economy have a destabilising effect on social development in the form of lack of food security, drinking water, shelter, healthcare, education and sanitation. The gap between rich and poor has widened¹⁰. Millions of children were not part of formal education system even before outbreak of Covid¹¹. Getting access to healthcare is another major concern¹² which is causing undue strain on the overall well-being of the society. India's poor ranking at human development index¹³ of United Nations (UN) indicates that much is desired to be achieved. The vigour needed for social development at right pace is the need of the hour to boost the level of confidence of the common people.

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- 6 K. Nageswara Rao (ed.), *Poverty in India: Global and Regional Dimensions* 201 (Deep & Deep Publications Pvt. Ltd., New Delhi, 1st edn., 2005). The information given by the author is based on the Economic Survey (2002-03).
 - 7 Ruddar Datt, Growth, *Poverty and Equity: Story of India's Economic Development* 13 (Deep & Deep Publications Pvt. Ltd., New Delhi, 1st edn., 2008).
 - 8 Amitava Mukherjee, *Hunger: Theory, Perspectives and Reality* 246 (Ashgate Publishing Limited, Aldershot, 2004).
 - 9 R. Nagaraj (ed.), *Growth, Inequality and Social Development in India* 102 (Palgrave Macmillan, Hampshire, 1st edn., 2012).
 - 10 Rahul Lahoti, Mrinalini Jha, et. al., What 2020 did to India's inequality, Mint, *available at*: <https://www.livemint.com/news/india/what-2020-did-to-india-s-inequality-11610982667419.html> (Visited on September 12, 2021).
 - 11 India Today Web Desk, 32 million Indian children have never been to any school: How can we reform education for the underprivileged? August 19, 2019, *available at*: <https://www.indiatoday.in/education-today/featurephilia/story/32-million-indian-children-have-never-been-to-any-school-how-can-we-reform-education-for-the-underprivileged-1582293-2019-08-19> (Visited on September 12, 2021).
 - 12 Aditi Tandon, Poor access to healthcare makes villages vulnerable, shows data, The Tribune, *available at*: <https://www.tribuneindia.com/news/nation/poor-access-to-healthcare-makes-villages-vulnerable-shows-data-239154> (Visited on September 12, 2021).
 - 13 PTI, India ranks 131 in United Nations' human development index, The Economic Times, *available at*: <https://economictimes.indiatimes.com/news/politics-and-nation/india-ranks-131-in-united-nations-human-development-index/articleshow/79763286.cms> (Visited on September 12, 2021).

LEGAL AND POLICY DEVELOPMENTS TO ADDRESS SOCIAL INEQUALITY

The theme of social welfare is well entrenched in part IV¹⁴ of the Constitution. The Directive Principles of State Policy provides for promotion of public welfare and elimination of inequalities,¹⁵. They also envisage that State policy should recognise certain basic principles of dignity and welfare of public¹⁶. Article 39A, 41, 42, 43 and 45 of the Constitution may also be referred to indicate the values and ethos for creation of an inclusive society. The fundamental rights under 14, 15, 16, 17, 19, 21, 21A, 23 and 24 also champion for equality, freedom and protection against exploitation. Different types of welfare laws were enacted by the Parliament to uplift the social status of poor people. These laws aimed to protect interests of labour, women, children and other weaker sections of the society¹⁷. In twenty first century, some commendable legislations¹⁸ have been enacted which may be regarded as instrument of social transformation. The Supreme Court has also played a very significant role in protection of under-privileged and downtrodden by giving a liberal and comprehensive interpretation of article 21 and other welfare provision of the Constitution in plethora of judgements¹⁹. In addition to legislative

14 Directive Principles of State Policy.

15 Article 38 of Directive Principles of State Policy. This Article provides for securing a social order and minimising the inequalities in income and eliminating inequalities in status, facilities and opportunities.

16 Article 39 of Directive Principles of State Policy. This Article provides for right of citizens to an adequate means of livelihood, equitable distribution of material resources of the community to sub-serve the common good, non-concentration of wealth and means of production to the common detriment, care for health and strength of works, men and women, and children and creation of an environment in which people are not forced, due to economic necessities, to undertake work not suitable to their age or strength, giving opportunities and facilities to children to develop in a healthy manner with freedom and dignity and protection of childhood and youth against moral and material abandonment.

17 Narayan Vasudeva, "Legal Intervention in Poverty Alleviation: Enriching the Poor through Law" 3 NUJS L. REV. 447 (2010), available at: <http://docs.manupatra.in/newslines/articles/Upload/987CA384-F64F-4B2A-B594-2005B66F48FA.pdf> (last visited on September 13, 2021). The author has mentioned Minimum Wages Act 1948, Workmen's Compensation Act 1923, Maternity Benefit Act 1961, Payment of Bonus Act 1965, Equal Remuneration Act 1976, Bonded Labour System (Abolition) Act 1976, Child Labour (Prohibition and Regulation) Act 1986 etc. as illustrations of social welfare legislations.

18 The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 and The National Food Security Act, 2013.

19 *Dipika Jagatram Sahani v. Union of India* (UOI) and Ors. [AIR2021SC523], *Prathvi Raj Chauhan v. Union of India* (UOI) and Ors. [AIR2020SC1036], *Gurusimran Singh Narula v. Union of India* (UOI) and Ors. [2020(6)ALT170] *Gujarat Mazdoor Sabha and Ors. v. The State of Gujarat* [AIR2020SC4601], *Tamil Nadu Medical Officers Association and Ors. v. Union of India* (UOI) and Ors. [2020(3)SCT336(SC)], *Ashwani Kumar v. Union of India* (UOI) and Ors. [(2019)2SCC636], *Swaraj Abhiyan and Ors. v. Union of India* (UOI) and Ors. [AIR2016SC2953], *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors.* [AIR1981SC746], *People's Union for Democratic Rights and Ors. v. Union of India* (UOI) and Ors. [AIR1982SC1473], *Bandhua Mukti Morcha v. Union of India* (UOI) and Ors. [AIR1984SC802], *Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors.* [AIR1986SC180], *Shantistar Builders v. Narayan Khimalal Totame and Ors.* [AIR1990SC630], *P.G. Gupta v. State of Gujarat and Ors.* [JT1995(2)SC373], *Chameli Singh and Ors. v. State of U.P. and Ors.* [AIR1996SC1051], *Consumer Education and Research Center and Ors. v. Union of India* (UOI) and Ors. [AIR1995SC922], *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan and Ors.* [AIR1997SC152].

measures, the Central Government has also introduced various welfare programmes, policies, schemes and guidelines for pushing the social development agenda. Some of these programmes²⁰ may be stated as under:

- 1) Integrated Rural Development Programmes, 1978²¹
- 2) National Rural Employment Programme, 1980²²
- 3) Rural Landless Employment Guarantee Programmes, 1983²³
- 4) Jawahar Rojgar Yojana, 1989-90²⁴
- 5) Training of Rural Youth for Self-Employment, 1979²⁵
- 6) Prime Minister's Rojgar Yojna, 1993²⁶
- 7) Rural Employment Generation Programmes, 1995
- 8) National Social Assistance Programme, 1995-96²⁷
- 9) Prime Minister's Integrated Urban Poverty Eradication Program²⁸
- 10) Swarna Jayanti Shahri Rozgar Yojana, 1997²⁹
- 11) Swarna Jayanti Gram Swarozgar Yojana, 1999³⁰
- 12) Indira Awas Yojana³¹
- 13) Jawahar Gram Samridhi Yojana, 1999³²

20 P. Anbalagan, Rakesh Kumar Singh (ed.), *Poverty Alleviation in India: The Unfinished Task and the Road Ahead* (Regal Publications, New Delhi, 1st edition, 2016); and S.B. Verma, R.D. Singh, et. al. (eds.), *Rural Poverty Alleviation and Employment* (Deep & Deep Publications Pvt. Ltd., New Delhi, 1st edn., 2006).

21 Evaluation Study of Integrated Rural Development Programme (IRDP), *available at*: <https://niti.gov.in/planningcommission.gov.in/docs/reports/peoreport/cmpdmpeo/volume1/134.pdf> (Visited on September 11, 2021).

22 7th Five Year Plan (Vol-2), Rural Development and Poverty Alleviation Programmes, *available at* <https://niti.gov.in/planningcommission.gov.in/docs/plans/planrel/fiveyr/7th/vol2/7v2ch2.html> (Visited on September 12, 2021).

23 *Ibid.*

24 JAWAHAR ROZGAR YOJANA: A QUICK STUDY, *available at*: <https://niti.gov.in/planningcommission.gov.in/docs/reports/peoreport/cmpdmpeo/volume1/147.pdf> (Visited on September 12, 2021).

25 *Ibid.*

26 *Available at*: <http://laghu-udyog.gov.in/publications/pmryprof/ABOUTPMRY.html> (Visited on September 12, 2021).

27 *Available at*: <http://www.and.nic.in/archives/rdpri/Pages/NSAP.php> (Visited on September 12, 2021).

28 *Available at*: <https://niti.gov.in/planningcommission.gov.in/docs/plans/planrel/fiveyr/9th/vol2/v2c2-2.htm#:~:text=The%20Programme%20has%20achieved%20the,Plan%20period%20in%2035%20towns.&text=1997%2C%20353%20towns%20and%204993,2.2> (Visited on September 12, 2021).

29 *Available at*: <https://pib.gov.in/newsite/PrintRelease.aspx?relid=80381> (last visited on September 12, 2021).

30 *Available at*: <https://tnrd.gov.in/schemes/sgsy.html> (Visited on September 12, 2021).

31 *Available at*: <https://pmayg.nic.in/netiay/IAY%20revised%20guidelines%20july%202013.pdf> (Visited on September 12, 2021).

32 *Available at*: <https://archive.pib.gov.in/archive/releases98/lyr2000/rapr2000/r27042000.html> (Visited on September 13, 2021).

- 14) Sampoorna Grameen Rozgar Yojana, 2001
- 15) Antyodaya Anna Yojana, 2000³³
- 16) Annapurna Yojana, 2000³⁴
- 17) Pradhan Mantri Gramodaya Yojana, 2000-01³⁵
- 18) Valmiki Ambedkar Awas Yojana, 2001³⁶
- 19) National Food for Work Programme, 2004³⁷
- 20) Public Distribution System³⁸
- 21) Mid-Day Meals Scheme³⁹
- 22) Mahatma Gandhi National Rural Employment Guarantee Scheme⁴⁰
- 23) Indira Gandhi Matriva Sahyog Yojana, 2010⁴¹

The policies and schemes introduced by the Government from time to time could not bring the respite to the miserable condition of the masses. The limited success of most of these programs may be because of implementation challenges, operational inefficiencies or inadequate coverage of the targeted population. Increasing urbanisation, shrinking share of agriculture in GDP and preference for technology and automation have posed more challenges for creation of employment and social infrastructure. The socio-economic goals set by the national Governments have to bring a synergy between resources available for development and real objectives to be achieved by the development process. Then only people centric and inclusive development will take place. Due to partial success of the development programmes and schemes implemented so far, there is an urgent need to introduce new development strategies. The new welfare initiatives of the Government like Direct Benefit Transfer Scheme⁴², Pradhan

33 Available at: <https://www.financialexpress.com/archive/antyodaya-scheme-many-states-yet-to-identify-poor/118030/> (Visited on September 13, 2021).

34 Available at: https://rural.nic.in/sites/default/files/NSAP_FAQ.pdf (last visited on September 13, 2021).

35 Available at: <https://niti.gov.in/planningcommission.gov.in/docs/plans/annualplan/ap2021pdf/ap2021ch5-2.pdf> (Visited on September 13, 2021).

36 Available at: https://niti.gov.in/planningcommission.gov.in/docs/aboutus/committee/wrkgrp11/wg11_housing.pdf (Visited on September 13, 2021).

37 Available at: <https://archivepmo.nic.in/drmanmohansingh/press-details.php?nodeid=81> (Visited on September 13, 2021).

38 Available at: https://nfsa.gov.in/portal/PDS_page (Visited on September 13, 2021).

39 Available at: http://mdm.nic.in/mdm_website/ (Visited on September 12, 2021).

40 Available at: <https://www.prsindia.org/theprsblog/mahatma-gandhi-national-rural-employment-guarantee-act-review-implementation> (Visited on September 12, 2021).

41 Available at: <https://pib.gov.in/newsite/PrintRelease.aspx?relid=101782> (Visited on September 13, 2021).

42 Direct Benefit Transfer (DBT) assures transfer of benefits of the welfare scheme in monetary form directly into the account of the beneficiary, as per the information available at: <https://dbt Bharat.gov.in/page/frontcontentview/?id=MTc=> (Visited on September 13, 2021).

Mantri Jan Dhan Yojana⁴³, Ayushman Bharat⁴⁴ are some progressive schemes which are relevant to the current problems faced by marginalised section of our society. The needs of the society are beyond the welfare measures under the existing schemes. The subsequent sections of the article discuss SDGs as one of the innovative tools for social development and removal of inequalities.

Sustainable Development Goals

The United Nations Conference on Environment and Development (UNCED)⁴⁵ was a turning point when global leader acknowledged “environment” and “sustainable development” as two main planks for progress of the mankind. The resolutions⁴⁶ passed by UNCED paved the way for sustainable development. UNCED adopted “Agenda 21” which provided a detailed framework for discussion on “social and economic dimensions of development, conservation and management of resources for development, strengthening the role of major groups and means for implementation of the agenda of social development.” There was a special session of the General Assembly in New York for reviewing, appraising and implementing Agenda 21⁴⁷. This was followed by a Millennium Summit in New York wherein 8 millennium development goals (MDGs) were decided⁴⁸. Thereafter, another United Nations Conference on Sustainable Development, took place in Rio de Janeiro wherein the consensus on developing SDGs, on the basis of progress made on MDGs, was reached amongst the member States⁴⁹. After that in the summit on sustainable development in 2015 in New York, the world leaders formally approved the new plan, for betterment of the humanity, comprising of 17 SDGs and 169 targets with a defined goal⁵⁰. The 17 SDGs⁵¹ chart out a course for amelioration of sufferings of a sizable world population.

All the goals covered in the SDGs have potential to transform the narrative of development. The

43 Available at: <https://financialservices.gov.in/financial-inclusion> (Visited on September 13, 2021).

44 It is a flagship scheme of Government of India, launched as recommended by the National Health Policy 2017, to achieve the vision of Universal Health Coverage. <https://pmjay.gov.in/about/pmjay> (Visited on September 13, 2021).

45 It is also known as the 'Earth Summit' and it was held in Rio de Janeiro, Brazil, from 3-14 June 1992.

46 Available at: [https://undocs.org/en/A/CONF.151/26/Rev.1\(vol.I\)](https://undocs.org/en/A/CONF.151/26/Rev.1(vol.I)) (Visited on September 12, 2021).

47 Available at: <https://www.un.org/en/conferences/environment/newyork1997> (Visited on September 12, 2021).

48 Available at: <https://www.un.org/en/conferences/environment/newyork2000> (Visited on September 12, 2021).

49 Ved P. Nanda, “The Journey from the Millennium Development Goals to the Sustainable Development Goals”, 44 *Denv. J. Int'l L. & Pol'y* 389 (2016).

50 Available at: <https://www.un.org/en/conferences/environment/newyork2015> (Visited on September 12, 2021)..

51 Available at: <https://sdgs.un.org/2030agenda> (Visited on September 12, 2021). These 17 SDGs are as under:

“Goal 1. End poverty in all its forms everywhere. Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture. Goal 3. Ensure healthy lives and promote well-being for all at all ages. Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all. Goal 5. Achieve gender equality and empower all women and girls. Goal 6. Ensure availability and sustainable

first SDG is to aims at ending poverty. Millions of people were facing extreme poverty in 2015 and fulfilling basic needs for them was an uphill task⁵². The COVID-19 pandemic is further pushing back millions of people into extreme poverty⁵³. The second SDG “zero hunger” is equally very important. There has been a lack of “regular access to safe, nutritious and sufficient food in 2019 to approximately two billion in the world”⁵⁴. Further, more than 690 million worldwide and especially in Asia and Africa were malnourished in 2019⁵⁵. There is a need for multi-dimensional approach for food security⁵⁶. Reducing inequality is one of the prominent SDG and worldwide people have faced discrimination on one ground or another⁵⁷. Each and every goal forming part of the SDGs carries lots of weight be it healthcare, education, gender equality, drinking water, energy, employment or climate. There is no doubt that COVID-19 pandemic is a serious setback to the agenda of achievement of SDGs by 2030. However, the world community should be mindful rather grateful that there is a common agenda for global development in the form of SDGs which has been acknowledged and recognised worldwide by the national governments.

SDGS AND REMOVAL OF SOCIAL INEQUALITIES IN INDIA

India has pledged to adopt and implement SDGs and it has developed a localisation model focussed on adopting, implementing and monitor these goals at the level of states and districts⁵⁸.

Some of the development programmes in India, localising SDGs, are set out below:

management of water and sanitation for all. Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all. Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. Goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation. Goal 10. Reduce inequality within and among countries. Goal 11. Make cities and human settlements inclusive, safe, resilient and sustainable. Goal 12. Ensure sustainable consumption and production patterns. Goal 13. Take urgent action to combat climate change and its impacts. Goal 14. Conserve and sustainably use the oceans, seas and marine resources for sustainable development. Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss. Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. Goal 17. Strengthen the means of implementation and revitalize the global partnership for sustainable development.”

52 Available at: https://www.un.org/sustainabledevelopment/wp-content/uploads/2016/08/1_Why-It-Matters-2020.pdf (Visited on September 13, 2021).

53 *Ibid.* The report on progress of SDGs indicates that the world was off track to end poverty by 2030 even before COVID-19 but the pandemic has pushed additionally 71 million people into extreme poverty by 2020.

54 Available at: https://www.un.org/sustainabledevelopment/wp-content/uploads/2016/08/2_Why-It-Matters-2020.pdf (Visited on September 13, 2021).

55 *Ibid.*

56 *Ibid.*

57 Available at: https://www.un.org/sustainabledevelopment/wp-content/uploads/2018/01/10_Why-It-Matters-2020.pdf (Visited on September 13, 2021). The SDG mission reports devastating effect of COVID-19 on the vulnerable population.

58 Available at: <https://sustainabledevelopment.un.org/memberstates/india> (Visited on September 14, 2021).

- i Sashakt Bharat⁵⁹
- ii Swachh Bharat⁶⁰
- iii Samagra Bharat⁶¹
- iv Satat Bharat⁶²
- v Sampanna Bharat⁶³

India's commitment towards achievement of SDGs may be gathered from the fact that for linking SDGs with the policies and programs operational at Central and State levels, NITI Aayog has "mapped the SDGs with centrally sponsored programs of different Central Ministries/Departments"⁶⁴. Constant efforts are being made to ensure that there is optimum coordination and cohesion amongst different divisions of the Government for implementation of the SDGs⁶⁵. A "National Indicator Framework (NIF)" has also been developed for national level monitoring of the SDGs and the NIF consists of "306 national indicators along with identified data sources and periodicity following due consultation process with concerned Ministries/Departments, UN Agencies and other stakeholders"⁶⁶. NITI Aayog has released "SDG India Index and Dashboard 2020-21" in which the performance of the states and union territories in achievement of SDGs is measured and ranked⁶⁷. While Kerala has topped the ranking, Bihar is on the bottom⁶⁸. However, at global level, the performance of India with respect to progress on achievement of SDGs is far from satisfactory and inconsistent⁶⁹. India's

59 *Ibid.* The programme has delivered result in terms of lifting millions of people out of multi-dimensional poverty by ensuring better access of amenities forming part of the basic needs..

60 *Ibid.* This programme has focus on sanitation, control on mortality rate of women and children and universal access to health.

61 *Ibid.* This aims at peoples' empowerment and use of DBT for better outreach of welfare programmes.

62 *Ibid.* The focus of the programme is on climate control and environment protect.

63 *Ibid.* This aspires to make India a leading economy of the world by 2025 and emphasises on inclusive development.

64 Sustainable Development Goals, National Indicator Framework, Progress Report, 2021, *available at*: http://mospi.nic.in/sites/default/files/publication_reports/SDG-NIF-Progress2021_March%202021.pdf (Visited on September 14, 2021).

65 *Ibid.* In the progress report, the objective of the Government towards achievement of SDGs has been emphasised by setting out the priorities and goals to be achieved by 2030. The focus of the Government is on achieving long term and sustained development by implementing a futuristic plans.

66 *Ibid.*

67 *Available at*: <https://pib.gov.in/PressReleasePage.aspx?PRID=1723952> (Visited on September 14, 2021). According to the press release, "the index has become the primary tool for monitoring progress on the SDGs in the country and has simultaneously fostered competition among the States and Union Territories".

68 *Ibid.*

69 PTI, India slips two spots on 17 Sustainable Development Goals adopted as 2030 agenda: Report, Mint, *available at*: <https://www.livemint.com/news/india/india-slips-two-spots-on-17-sustainable-development-goals-adopted-as-2030-agenda-report-11622969423986.html> (Visited on September 14, 2021).

transitioning from MDGs to SDGs has also been a challenging task⁷⁰. Another challenge is that localisation of the SDGs has been done at the state level and not at the city level⁷¹. For overall improvement in approach to achieve SDGs and elimination of social inequalities, following measures may be proposed:

1. The empowerment of local governments i.e. Panchayats and Municipalities by devolution of more powers and financial autonomy should be the priority of the Central and State Governments. Peoples' participation in decision-making process at grassroots will bring good governance, transparency and assist in implementation of development projects in an effective manner. While integration of the local governments in three tier governance structure is visible as there are representatives of these bodies and elections are being conducted on a regular basis. But, despite assistance received by allocation by the Central and State Finance Commission, these institutions of self-government are not in a position to develop system which help them in generating revenue on their own. A definite plan including financial budgeting is required for making these local bodies empowered for taking forward the agenda of SDGs.
2. CSR activities as specified under the Companies Act, 2013⁷² are substantially related with 17 SDGs. If the CSR activities by the corporate sector are undertaken keeping in mind the objectives of the SDGs, the tracking of performance of corporates' social development will become easier. Thus, alignment of CSR activities with SDGs is the need of the hour⁷³. We have seen that corporates are willing to spend money for social sector as this gives them more visibility and brand recognition along with meeting out requirements of statutory compliances. The corporates may be asked to map their CSR

70 Dr. Vipin Chandran K P and Dr. Sandhya, "Transition from Millennium Development Goals to Sustainable Development Goals: A Close Scrutiny from India" 8(5) IJR: Granthaalayah 78 (2020).

71 Geetam Tiwari, Samradh Singh Chauhan, et. al., "Challenges of localizing sustainable development goals in small cities: Research to action" 45(I) IATSS Research 3 (2021). The authors have pointed out that the cities need encouragement and national support to adopt and implement SDGs.

72 The Companies Act, 2013, s. 135 read with sch. vii.

73 Available at: https://assets.kpmg/content/dam/kpmg/in/pdf/2017/12/SDG_New_Final_Web.pdf (Visited on September 14, 2021).

activities with the SDGs and work with agencies which have focus on SDGs driven development in India.

3. Social entrepreneurs bring innovative solutions, at affordable cost, to the problems faced by poor and under-privileged segment of the society. There is need to encourage social entrepreneurship in India so that social development may get better push⁷⁴. By now, it is clear that no authority, government, public or private entity alone can complete the process of development of social infrastructure in India. It is a massive task which requires collaboration at several levels.
4. Public-private partnership in social development projects related to education, healthcare, housing, sanitation and food security etc. may bring better synergies in planning and implementation of the projects⁷⁵. While public sector has wider penetration and connection with people and community, private sector is more enterprising, efficient and makes use of resources judiciously. These two set of institutions with different set of capabilities may work together and bring rapid social transformation. The experience of infrastructure projects is a shining example in this regard. The partnership between public institutions and private organisations should not seen as a compulsion rather it is getting benefit of diversity in skill, resources and approaches to solve problems.
5. The general trend of development around the world indicates a pattern of more encouragement to investment in big projects which often undermines the ecological and human welfare concerns. The innovative techniques may be applied even in small size projects which are easy to manage and less intrusive to holistic development of humanity⁷⁶. Japan and many economies of the world focussed on their people and used human resources in such a way that

74 Dr. Surabhi Singh, Social entrepreneurship: A silent support for business and society, *available at*: <https://timesofindia.indiatimes.com/blogs/marketing-swan/social-entrepreneurship-a-silent-support-for-business-and-society/> (Visited on September 14, 2021).

75 "To meet sustainable development goals, India needs to fix its PPP framework", ET Prime, The Economic Times, *available at*: <https://economictimes.indiatimes.com/news/economy/policy/how-to-fix-our-infra-problems/articleshow/82202078.cms?from=mdr> (Visited on September 14, 2021).

76 E.F. Schumacher, *Small is Beautiful* (Vintage Book, London, 2011).

economic development does not become a threat in survival of the human beings. While technology, automation, artificial intelligence, robotic are solving many problems, they are also creating problem of redundancy of humans. How the vast population of the country can remain economically productive and continue to engage in business or employment gainfully, the policymakers, governments and other stakeholders should have serious deliberation on this aspect.

6. The engagement of civil society in monitoring of the SDG development projects will strengthen the process of social audit and make the public functionaries more accountable. The data of SDG projects and progress made therein should be placed in public domain on a regular basis. Lack of accountability, material information and concentration of powers and authority in hand of few functionaries work against democratic values and intended benefits of the welfare programmes do not reach to the targeted population. For necessary checks and balances, it is important that community's representatives and members of the civil society are able to track the progress of the development work in an effective manner.

CONCLUSION

The incubation of noble values of equality and dignity and mutual respect for all human beings in the psyche of a society demands dedication and commitment from all units forming part of the society. For protecting and cherishing human dignity, it is essential that community interests get utmost priority in the development agenda and general public is thoroughly engaged in the social development process at all stages be it planning, designing, implementation or audit. Inequalities of income and status can be removed only through strong determination of the state actors and by positive contribution by all stakeholders. It is really a matter of concern that despite being one of leading economies of the world, India has not been able to pass the benefits of its economic progress to the masses who are forced to survive in miserable condition especially after outbreak of COVID-19 pandemic. Ability to earn income through some business or employment and getting access to food, education, healthcare, housing, drinking water and sanitation should be considered as basic human rights essential for the dignity of the individuals. The declaration made in the Preamble of the Constitution will fail in absence of

social and economic justice to people who are significant in numbers but disregarded in counting of national wealth. The SDGs have given an appropriate opportunity to wipe out tears of the poor, downtrodden and helpless people of India. The achievement of the SDGs by 2030 will not be a victory on domestic front only but it will provide a global recognition and leadership position to India. The humanistic model of development will distinguish India from the countries which believe in 'rule by law' and not in 'rule of law'. There is a time of less than one decade for achievement of the SDGs and meeting such great goals need dynamic leadership, motivated bureaucracy, informed and dedicated citizens and unconditional support of all stakeholders.

LIVING ON THE EDGE: RECOGNITION AND REWARDS FOR STUNT ARTISTES VIS-A-VIS THE COPYRIGHT ACT, 1957

Rohan Cherian Thomas*

INTRODUCTION

In a 2019 documentary published by Al Jazeera on Indian stunt-artistes, several noteworthy individuals from the stunt fraternity opened up about their lives as stunt-artistes and stunt-directors. In it, Javid Gauri an experienced stuntman from the Indian Film Industry ('Bollywood') expressed his woes of how film-stars get all the credit and remuneration for the work he does.¹ On the other hand, Geeta Tandon, one of the few stuntwomen in Bollywood is just grateful to the industry for having given her a life.² She dreams of becoming a stunt-director so she can showcase her creativity.³ Jolly Bastin, a leading stunt-director in South India, laughingly admits that the risks are real when doing stunts in India as against Hollywood and he advises people against becoming a stuntman, saying for what it's worth, it isn't good enough.⁴ These observations provide a mixed bag of opinions about this fraternity.

Akshay Kumar calls stunt-artistes the real unsung heroes, realizing their worth having done many of his stunts himself.⁵ Christopher McQuarrie, director of many Mission-Impossible movies states that stunts require skill, are nothing short of a craft and the stunt team in that sense produces art.⁶ According to him, it requires skill and is nothing short of a craft in itself.⁷

Spotlight on stunt-directors has steered recognition in their corner. Filmfare Awards, Bollywood's biggest award stage started a category called 'Best Action' in 1992 awarded to

* Assistant Professor, Faculty of Law, National Law University, Jodhpur.

1 Al Jazeera, The Stuntmen of Bollywood, 2019, available at: <<https://www.youtube.com/watch?v=jqw4NX-NqL>>.

2 Haripriya Suresh, "Packing a Punch: How Geeta Tandon Became a Leading Bollywood Stuntwoman", Firstpost, June 18, 2016, available at: <<https://www.firstpost.com/living/packing-a-punch-how-geeta-tandon-became-a-leading-bollywood-stuntwoman-2828468.html>> (Visited on August 22, 2021).

3 *Supra* note 1.

4 *Ibid.*

5 "Akshay Kumar Honors Brave Stuntmen At An Award Show", *Times of India*, January 28, 2017, available at: <<https://timesofindia.indiatimes.com/entertainment/hindi/bollywood/news/Akshay-Kumar-honours-brave-stuntmen-at-an-Awards-show/articleshow/51256917.cms>> (Visited on August 22, 2021).

6 Sarah El-Mahmoud, "Christopher McQuarrie Has Some Blunt Opinions On What The Oscars Should And Shouldn't Do", *Cinema Blend*, November 26, 2018, available at: <<https://www.cinemablend.com/news/2462119/christopher-mcquarrie-has-some-blunt-opinions-on-what-the-oscars-should-and-shouldnt-do>> (Visited on August 22, 2021).

7 *Ibid.*

stunt-directors.⁸ Zee Cine Awards introduced a special award category in 2016 for the best stunt performer of the year.⁹ From its 64th edition, 2017, India introduced in its National Awards, a category for best stunt direction.¹⁰ In 2009, Zee5 produced a compelling biopic on the life of Reshma Pathan, India's first stuntwoman titled 'The Sholay Girl', which showcases her travails and exploits.¹¹

The Movie Stunt Artists Association ('MSAA'), Mumbai represents stunt-artists and stunt-directors. It sets out wages for its members, mandatorily payable by the producers and also sets out guidelines on shifts and protocol on injuries suffered on sets. A look at the wages shows that a stunt-artiste is paid differently for Hindi films and differently for foreign language films. While for a Hindi film he receives Rs. 4160 for one shift, it is Rs. 8320 for foreign language films.¹² Stunt-artistes I spoke to confirmed that they received amounts ranging between Rs. 5000-6000 for Hindi Films, which is the base wage along with conveyance and other allowance. The duration of these shifts has been clearly prescribed. Any risk which can pose danger to life or limb comes with more remuneration depending on the risk involved. Stunt-artistes inform me that this amount can vary from Rs. 20,000 – Rs. 1,00,000. As Sham Kaushalji, a veteran stunt-director tells me that the stunt fraternity is capable of taking care of its own people, that it has been doing so and will continue to do so.

Thus, questions of adequacy in recognition and remunerations persist. I seek to explore the nature of satisfaction/dissatisfaction in the stunt fraternity by interacting with its stunt-artistes and stunt-directors of Bollywood and in doing so, understanding the scope of MSAA's role. I look to The Copyright Act, 1957 ('The Act') and see whether stunt-artistes can be accommodated within its sphere of protection. I also seek out to find whether the introduction by

8 Filmfare Awards 1992 Winners, available at: <https://timesofindia.indiatimes.com/entertainment/movie-awards/filmfare-awards-winners/bollywood/1992/101> (Visited on August 22, 2021).

9 *Supra* note 5.

10. Pratibha Parameswaran, "Peter Hein: The Dangerous Life of the Man Who Plays Body-Double For All Top Tamil, Telugu Stars", *Hindustan Times*, July 19, 2017, available at: <https://www.hindustantimes.com/regional-movies/peter-hein-the-dangerous-life-of-the-man-who-plays-body-double-for-all-top-tamil-telugu-stars/story-AVw8oCyL2UBIc5xiFnLgdK.html> (Visited on August 22, 2021).

11 Arushi Jain, "The Sholay Girl Review: A Compelling Watch", *Indian Express*, March 13, 2019, available at: <https://indianexpress.com/article/entertainment/web-series/the-sholay-girl-review-bidita-bag-5618354/> (Visited on August 24, 2021).

12 Hindi Wages, Movie Stunt Artistes Association, available at: <http://www.moviesuntartistsassociation.com/Hindi-Wages.html> (last visited on August 25, 2021); English Wages, Movie Stunt Artistes Association, available at: <http://www.moviesuntartistsassociation.com/English-Wages.html> (Visited on August 25, 2021).

the 2012 Amendment to The Copyright Act, 1957 ('The Amendment') of the Right to Receive Royalties ('R3') can be extended to stunt-artistes and stunt-directors.

THE STUNT-ARTISTE: QUALIFICATION & HIRING

The British Stunt Register ('BSR') is one of the oldest stunt associations in the world. They claim to engage only professionals and meet exacting safety standards on sets. A course in drama recognized by the BSR, some experience in front of the camera and a minimum of 6 disciplines listed group wise such as horse-riding and martial arts, have to be satisfied for membership.¹³ Jim Dowdall, chair of BSR stated that membership doesn't guarantee work, comparing it to a driving license.¹⁴

The Indian system is dissimilar, considering its own socio-economic and cultural conditions. The MSAA does not prescribe any pre-determined qualification criteria. Stunt-artistes inform me, that training is provided by senior stunt-artistes or stunt-directors. MSAA would then test such trained artiste. In the current scheme, a stunt-artiste has to spend ten years before being elevated as an assistant to the stunt-director and if found worthy, can become a stunt-director in 2 years. Only MSAA registered stunt-artistes can do stunts in Bollywood. It is clear that this is not some type of stunt school certification but rather a bond of trust between stunt-artistes and their seniors.

My interaction with several stunt-artistes and stunt-directors have helped me understand that the bond so created between a senior and a registered stunt-artiste has a great role to play in his/her hiring. The stunt-director through his/her assistant hires MSAA registered stunt-artistes for the planned sequence. Based on the stunts to be performed, an appropriate bill is prepared by the stunt-director with the aid of his/her assistant and sent to the Production Company for payment. The Producer then makes the payment on the same day to MSAA from where the stunt-artiste collects his/her remuneration.

MSAA displays its wage structure which sets a minimum payment for shifts. As veteran stunt-director Hanif Khanji explains, for special performances stunt-artistes get paid extra. These specials can be breaking glass, jumping from cars etc. A stunt-artiste tells me, it is possible for a

13 The British Stunt Register, BSR Application Requirements 2019, *available at*: <http://www.thebritishstuntregister.com/wp-content/uploads/2019/09/BSR-Application-Requirements-2019-1.1-Appendices-A-and-B-included.pdf> (Visited on August 25, 2021).

14 Steve Rose, "Film Stunts Under Scrutiny After Deaths And Serious Injuries", *The Guardian*, July 26, 2019, *available at*: <https://www.theguardian.com/film/2019/jul/26/film-stunts-under-scrutiny-after-deaths-and-serious-injuries#maincontent> (Visited on August 26, 2021).

stunt-artiste to earn as much as Rs. 2 lakhs in two shifts. MSAA also has a system of Indoor and Outdoor payments. Indoor payments represent payment in Mumbai while outdoor payments are for performances in shoots outside Mumbai. Outdoor payments are higher than indoor. The stunt-director though, unlike a stunt-artiste, enters into a contract with the production house and thus usually directly receives his/her remuneration from them. A stunt-artiste informs me, the MSAA is capable of going on strikes, prevent the release of a film and even disallow members from its fraternity to collaborate with an errant production house.

STUNT-ARTISTES AS PERFORMERS

The producer is the person who initiates and facilitates making of the cinematograph film.¹⁵ This interpretation of a producer is really apt as without the producer, there is no film. It is his/her time, energy, effort and risk which results in the creative effort we see on the screen. The Act thus considers this person as the film's author.¹⁶ Lockean appropriation justification of intellectual property along with economic efficiency would consider the grant of market power to an entity in turn for the creation, making this status a reality.¹⁷ Considering the ease of copying which technology has provided, the process of recouping the cost of generating a cinematograph film can easily be overshadowed, leading to the necessity of strong protection.¹⁸

The Kantian justification for intellectual property is focussed on the actual maker of the work and his/her personality – the craftsman or the artist.¹⁹ These individuals are abundantly present in a film – Director, Scriptwriter, Choreographer, Cinematographer, Composer, Lyricist, Actor, Dancer, Singer and the list goes on. The insertion of R3 by The Amendment signals a significant shift in the Indian copyright jurisprudence where The Act took a turn towards fusing the Kantian justification with the Lockean justification. Prashant Reddy highlight this move in The Amendment which he says is focused on authors of works such as lyricists and composers not receiving their dues from producers.²⁰ Javed Akhtar who led this fight convinced lawmakers that the system was unjust and heavily tilted in favour of film producers.²¹ The Amendment sought to protect such author, by guaranteeing his/her royalty despite any assignment or license

15 The Copyright Act, 1957, s. 2(uu).

16 *Id.*, s. 2(d)(v).

17 Guy Pessach, "Israeli Copyright Law: A Positive Economic Perspective", 39 *Israel Law Review* 127 (2006).

18 *Ibid.*

19 Justin Hughes, "The Philosophy of Intellectual Property", 77 *Georgetown Law Journal* 331 (1988).

20 Prashant Reddy, "The Background Score to the Copyright (Amendment) Act, 2012", 5 *NUJS Law Review* 469 (2012).

21 *Id.*, at 471.

to the contrary. In other words, barring the single-payment system for a recurring-payment system.

The ignominy suffered by authors on account of a Supreme Court verdict in *Indian Performing Rights Society v. Eastern India Motion Pictures Association*²² was removed by the Indian Parliament. The incorporation of IPRS had unsettled producers of cinematograph films and sound recordings, who felt that the communication of their works was theirs to enjoy and IPRS had no rightful claim. As a result of this decision, authors of constituent works making up the cinematograph film could not control them anymore through a dubious reading of Section 17(b) and 17(c) of The Act which prescribes a manner of constructing ownership through valuable consideration and employment, respectively.²³ The proviso to Section 17 added by The Amendment, reversed this anomaly. The proviso is reproduced under:²⁴

“Provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section 1 of section 13.”

But The Amendment does not stop with authors. It extends this benefit to performers as well. R3 is present under Section 18 of The Act²⁵, which with necessary adaptations and modifications, Section 39-A extends to performers.²⁶ R3 has been recognised by The Delhi High Court in *The Indian Singers’ Rights Association v. Chapter 25 Bar and Restaurant*²⁷ in which the Indian Singers Rights’ Association (‘ISRA’) had sought remedy against hotel owners who exploited sound recordings without making any payment to them. On basis of evidence presented, ISRA could prove the communication of relevant sound recordings in the defendant’s establishment. ISRA had notified the defendant of the requirement of a performers’ rights clearance certificate from them, but was refused. The Court upholding the right of the singers, went on to state that R3 for performers is a distinct right which has received recognition in terms of the amendments to the Act in 2012.

The ISRA is the only registered Performers’ Society in India. Singers can successfully claim royalties because they are established ‘performers’ under The Act. This is sufficiently clear from

22 1977 SCR (3) 206.

23 The Copyright Act, 1957, s. 17(b) & 17(c).

24 *Id.*, s. 17 Proviso.

25 The Copyright Act, 1957, s. 18.

26 *Id.*, s. 39-A.

27 2016 (159) DRJ 244.

Section 2(qq) which indicates that singers are performers.²⁸ These are people making performances with their live acoustic presentations as per Section 2(q).²⁹ The examples provided in Section 2(qq) are illustrative and would apply when categorising a person as a performer under The Act. The phrase ‘any other person who makes a performance’ is extremely wide in its scope and can include any person making a live visual/aural presentation. Furthermore, the use of the term ‘live’ should not be construed to mean that the presentation happens before an audience. Even studio recordings are performances. This is clarified in the explanation to Rule 66 of the Copyright Rules, 2013 which deals with registration and management of performers’ societies.³⁰ The explanation is as under:

“Explanation 3 – For the purpose of this Chapter performance includes recording of visual or acoustic presentation of a performer in the sound and visual records in the studio or otherwise.”

The question then of a stunt-artist being a performer is a no-brainer. Even if we consider that not all live presentations can be performances lest they be original, stunts being performed by individuals without doubt require immense effort and creativity. Jumping from the thirteenth floor of a building even with a safety harness requires skill in not only keeping oneself safe, but also performing at the same time. Imagine a scene where a hero/heroine jumps to his/her death. The fall has to be believable. It would be helpful to note that while the scene may have been written by someone and directed by another, the performance is delivered by the stunt-artist. While the latter would be a performer, the former would be authors.

A performer in delivering a performance uses his/her faculties of expression to make a visual or acoustic presentation. In doing so, the performer infuses a part of himself into that performance. No one else can make that same performance. This is the reason why performers do not have a reproduction right. They can only control communication of their performance or its recording. But the stunt-artist’s performance is never truly his/hers. In the arena of films, in order to keep the magic of films alive, it is important that the hero/heroine remains a hero/heroine even if he/she isn’t. Arguably this should not have any bearings on the rights of the performer. Consider the case of playback singers; for the movie-watching audience, it would seem as if Amitabh Bachchan is singing, but in reality, it’s sung by Kishore Kumar. Singers as I pointed out are

28 The Copyright Act, 1957, s. 2(qq).

29 *Id.*, s.2(q).

30 The Copyright Rules, 2013, Rule 66.

recognised performers within The Act. The same logic should then be applicable to stunt-artistes.

A hero/heroine can jump from buildings, drive fast cars and dodge projectiles apart from delivering his/her dialogues. Barring few actors such as Akshay Kumar, many of these actors have stunt-doubles. This arrangement is favourable for the actor but unfortunate for the stunt-artiste who sacrifices his/her expression for another. While this swap helps in managing public perception of cinema, it doesn't lessen the value of the performance itself. A stunt-director tells me, that the audience has become more informed and knows that the stunts are being done by other people.

Apart from doubling for heroes/heroines, stunt-artistes find their way in organised action scenes such as fight sequences and even play character roles. Veteran stunt-artiste Suresh Devadigaji tells me that playing a character role brings a stunt-artiste outside the scope of the MSAA though unless there is some stunt involved.

The Proviso to Section 2(qq) ('The Proviso') inserted by The Amendment, has affected recognition of stunt-artistes as performer under The Act.³¹ There were no debates in the Parliament concerning the inclusion of this proviso. A close look at the proviso shows that it links industry practice and labour relations with intellectual property, making a casual worker in the industry considered unworthy of being acknowledged in the credits of a cinematograph film to not be a performer. The stunt-artiste is in fact in the nature of a casual worker, who receives wages per shift for work received and customarily has not been credited for his/her work. Thus, a person who may have fit the interpretation of a performer under Section 2(qq) read with Section 2(q) is now removed from its ambit.

I discuss in the following part, how the system of labour law provides for collection and distribution of revenue to stunt-artistes. We must remember that The Amendment has provided moral rights of attribution and integrity to the Indian performer. The Proviso only extends the moral right of integrity to the stunt-artiste. It leaves it completely upto the industry to provide attribution. This can be problematic as uniform manner of acknowledgement will remain absent even though the industry may be leaning towards increasing credits and recognition. A stunt-artiste revealed to me that non-recognition was in fact necessary due to the objective of a stunt-

31 *Supra* note 28, s. 2(qq) Proviso.

artiste's performance - to remain hidden. Another stunt-artiste pointed out that some movies are now crediting each and every stunt-artiste for his/her performance.

Collective Bargaining Protection for the Fraternity

I now look to the manner in which the stunt-artiste balances the huge power divide between himself/herself and the producer. While lead-actors in a film may have bargaining power to negotiate their remuneration, the same cannot be said for others who can be replaced without much difficulty. Therein lies the importance for such performers to stand united.

Leading up to the WIPO Beijing Treaty on Audiovisual Performances, 2012, the discussions of WIPO members before the WIPO Standing Committee for Copyright and Related Rights ('SCCR') proves quite important in understanding India's position on rights of performers in cinematograph films wherein their performance is incorporated. In the second session of the SCCR, India submitted its proposal for the treaty, which included the inclusion of the phrase 'but does not include performers whose performances are casual or incidental in nature, such as extras' for the definition of performers.³² In the same session subsequently, the Indian delegation gave an explanation on the background of this document, including opinions on feasibility of inserting such new rights.³³ A passage from Para 13 of this document is produced as under:

*"Document SCCR/2/9 was the result of a long consultation process and reflected the concerns of the film industry, the performers and the Government. The primary aim of protecting rights of performers could not be pursued in a vacuum. India's strong interest in its important film industry as well as the practices of relationships between performers and producers had to be considered; these relations were based on mutual trust, not on written documents. It was necessary to maintain the existing balance when granting new rights which should be meaningful."*³⁴

The SCCR notes how important labour organisations are, in extending rewards for performances. SCCR observations came through national and regional seminars held on the platform erected by WIPO on Protection of Audiovisual Performances. These observations

32 WIPO International Bureau, "SCCR/2/9 Proposal by India for an Audiovisual Performances Treaty" (Standing Committee on Copyright and Related Rights, April 28, 1999), *available at*: https://www.wipo.int/edocs/mdocs/copyright/en/sccr_2/sccr_2_9.html (Visited on August 29, 2021).

33 WIPO Standing Committee on Copyright and Related Rights, "SCCR/2/11 Report of Second Session" (May 11, 1999), *available at*: https://www.wipo.int/edocs/mdocs/copyright/en/sccr_2/sccr_2_11.pdf (Visited on August 29, 2021).

34 *Supra* note 32.

throw a lot of light on the situation of stunt-artistes in India. The SCCR categorically notes the important role both Labour Organisations and Copyright Societies play towards protection of performer's rights such as ensuring access to remuneration.³⁵

An institutional two-fold approach such as this, is a reflection of how a performance may simultaneously be considered in context of labour relation - a professional activity, and in context of intellectual property – a subject-matter.³⁶ Highlighted are factors which suggest preference of the labour framework for performers, as against authors:

1. It is usual for performers to collectively undertake activities, while authors are more individual-driven; and
2. Unlike authors who create for themselves, it is usual for performers to work under another, a relationship such as an employer-employee observable in Theatres, Films and TV.³⁷

As observed by the SCCR, hybrid models of Copyright Societies and Labour Organisations may exist in one jurisdiction, while exclusive administration by Copyright Societies or Labour Organisations may exist in another.³⁸ For the stunt fraternity in Bollywood, it is the exclusive model, with MSAA representing both stunt-artistes and stunt-directors. The presence of any particular model is representative of the specific Industry and there is nothing to indicate why it should not prosper. For instance, MSAA's success would mean removing R3 which would potentially cut into the producer's revenue from the film's commercial exploitation. Where fairness of treatment can be guaranteed, the system would stand justified. A hybrid system could potentially act as a conflict where intellectual property could prejudicially affect the delicate balance in place.

The IP system as a public policy tool for attaining net social benefit looks to achieve greater access to creative works and to reward a creator for his/her originality can be assisted by Human Rights in achieving its objectives.³⁹ Similar considerations can be extended to labour law and as a result thereto, the objective is the same – fair treatment of the performer. Employment relations

35 WIPO Secretariat, "SCCR/17/3 Summary of the Outcome of National and Regional Seminars on Protection of Audiovisual Performances", 5 (Standing Committee on Copyright and Related Rights, October 17, 2008), available at: https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=142872 (Visited on August 29, 2021).

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 Hannu Wager & Jayashree Watal, "Human Rights and International Intellectual Property Law", in Christophe Geiger, Research Handbook on Human Rights and Intellectual Property 159 (Edward Elgar Publishing, 2015).

are central to the conflict-of-interest intrinsic to capitalist societies, which involve capital owners – investors in productions, and workers – supplying labour.⁴⁰ Where employers would seek maximising returns on investment, workers would seek highest prices for labour.⁴¹ Legal regulations have to overcome obstacles to attain the goals of labour law, but rarely would this be effective as employers would resist imposition of extra cost and the worker would be reluctant to seek enforcement owing to fear of reprisal.⁴²

Kahn-Freund expresses in context of employment relations how it is an act of submission in its inception and a condition of subordination in its operation, even though the contract of employment may try its best to conceal it.⁴³ In such a structure, any mechanism which provides for maximum fairness in treatment would serve the purpose of the performer in question. In order to explore the nature of such a system in India, I sought answers from MSAA stunt-artistes.

THE GROUND REALITY

Performers such as actors or singers are in a position to break away from collective representation and argue purely on the merit of their work. They feel there is an artistic sense or a creative touch to their performances and therefore they can demand the monetary worth of their contributions. Stunt-artistes on the other hand are replaceable and serve as casual workers in the industry system i.e., they work on a fixed wage system, with no guarantee of work. To understand the stunt-artiste's perception of themselves and their work, I had the opportunity to interact with registered MSAA stunt-artistes. For my research I tried to get in touch with more than one hundred stunt-artistes registered with the MSAA out of a six hundred strong membership. Out of these, nineteen stunt-artistes, some through interviews and others through questionnaires answered the following queries raised by me. No reasons were given by the others for their non-participation. Almost all spoke to me or answered my questions on the guarantee of anonymity. The bar diagrams represent the answers received:

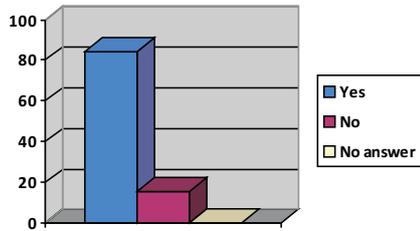
40 Hugh Collins, KD Ewing, et.al. (eds.), *Labour Law* 5 (Cambridge University Press, New York, 2012).

41 *Ibid.*

42 *Id.*, at 22.

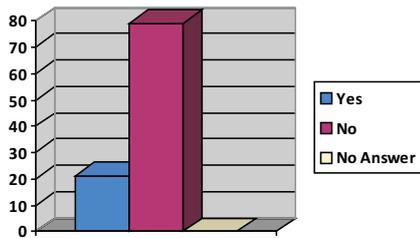
43 Paul Davies & Mark Freedland, *Kahn-Freund's Labour and The Law* 18 (Stevens & Sons, London, 1983).

1. As a Stunt-Artiste, are you a Performer?



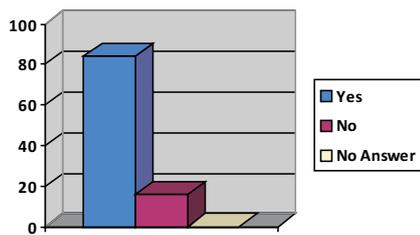
Graph 1

2. Are you aware of Performers' Rights in The Copyright Act, 1957?



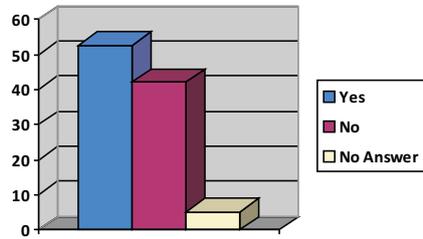
Graph 2

3. As a Stunt-Artiste are you an artist?



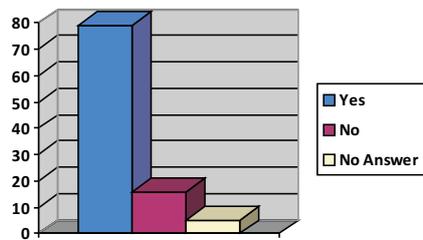
Graph 3

4. Do you receive sufficient credit for your work?



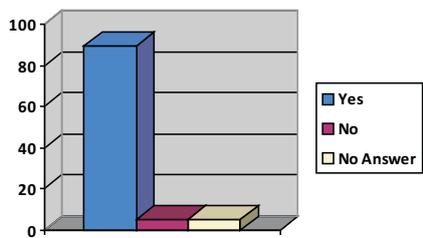
Graph 4

5. Do you receive sufficient pay for your work?



Graph 5

6. Is your association's support satisfactory?



Graph 6

These responses are illuminating and serve to describe the actual scenario of stunt artistes in Bollywood:

1st Inference: Majority of Stunt-Artistes Believe that they are performers and are doing something artistic but are majorly ignorant of performers' rights

Intellectual Property Rights awareness in India is one of the top priorities in the Indian National IP Policy. There are vast segments of public who are completely unaware of rights such as those of performers under The Act. It is important to note that while one may be aware of his/her creative contribution, he may not necessarily be receiving rewards for the creativity specifically. As in the case of stunt-artistes, it is the industry which is controlling dissemination of rewards to them based on professional work rendered. Efforts towards spreading awareness among this community may be helpful for informed discourse and possible inclusion under The Act.

2nd Inference: The unavailability of performers' rights has not had an impact on the nature of remuneration received by stunt-artistes

As noted under the 1st inference, the system of rewards is dependent on the industrial labour system. Through effective collective bargaining, the MSAA has been able to arrive at a negotiated wage structure with which stunt-artistes are satisfied. By establishing a proper channel of collection and distribution of wages, the MSAA along with the production houses seem to be providing a suitable system for the stunt fraternity in Bollywood. The wages thus seem commensurate with the risk taken.

3rd Inference: While a majority do feel that sufficient recognition is received by stunt-artistes for their performances, there is ample disagreement

With 42 percent of the respondents stating that the recognition received is not sufficient, the issue is real. From the interviews conducted, it is my understanding that much of the non-recognition is due to the nature of stunt performances in films. For a hero/heroine on screen to be perceived to be performing the stunts, the stunt performer will necessarily have to be in the background. Having said that, as pointed above, the industry has started providing recognition to stunt-artistes and these numbers may change.

4th Inference: The MSAA as an association is very strong and has the power to balance equations with production houses

With near perfect affirmation of MSAA's support mechanism for the stunt fraternity, it is undeniable that the MSAA has achieved a sustainable mechanism for revenue collection and distribution. Stunt-artistes swore by MSAA stating that right from setting of wages to speaking up for stunt-artistes, they were doing everything in the best possible manner. Any delay in payments is taken up by the MSAA with the concerned production house and the matter is resolved amicably. As one stunt-artiste told me, the MSAA is capable of going on strikes,

prevent the release of a film and even disallow members from its fraternity to collaborate with an errant production house.

NATURE OF STUNT DIRECTION

PLACING STUNT DIRECTION AS A DRAMATIC WORK

Literary works and dramatic works may seem similar and can confuse the inattentive. Both are fixated expressions and both seem capable of performance. What then is the difference between the two? For instance, when a person recites a poem, is he performing a literary work or a dramatic work? The answer to these questions posits a significant impact on stunt-directors.

The High Court of Delhi explains the nature of dramatic works in *Institute of Inner Studies v. Charlotte Anderson*.⁴⁴ While analysing whether representation of yoga postures can amount to a dramatic work, Justice Manmohan Singh refers to a passage from Copinger & Skone James on Copyright, a leading authority on the subject, reproduced as under:⁴⁵

“It is suggested that the essential feature of a dramatic work, as the term implies, is that it is capable of being physically performed. However, not all works which are capable of being performed are dramatic works. It is possible, in one sense, to perform a literary work (for example, by reciting a poem), or a musical work (for example, by singing a song) or an artistic work (for example, by creating a tableau vivant with human actors), but that possibility does not make such a work a dramatic work. To constitute a work a dramatic work something more is necessary than mere capability of performance in this sense. It is suggested that the work must have been created for the purpose of being performed, such purpose being a matter to be deduced from the form and nature of the work.

Furthermore, it is thought that the intended performance must be one which involves action. Works of dance and mime clearly predicate action in their performance, but a work consisting of words intended to be spoken or sung, would not, it is suggested, be a dramatic work unless the performance of the words is to be accompanied by action.”

The stunt-director or action director plans the stunt or action sequence. This sequence has to be planned with mathematical precision as any mistake can have a serious consequence. The sole

44 MIPR 2014(1) 129.

45 Kevin Garnett, Gillian Davies, et.al. (eds.), *Copinger & Skone James on Copyright* 76 (Sweet & Maxwell, London, 2005).

purpose of this design is performance which is both artistic and safe. Sham Kaushalji tells me that the stunt-director has to make such a design and then work with the director of the film and the director of photography to make it look real, believable and thrilling for the audience but at the same time it should be within the format of the story and characterisation.

When the performer puts life into the sequence, he is in fact performing an action. As deduced from the passage above, the two criteria for a work to become a dramatic work are fixation and capability of performance. As explained by Mahesh Kumar Dahiyaji, a stunt-director, the entire sequence is planned meticulously by him on a story board after receiving inputs from the director for the purpose of performance. The fixated sequence is thus a dramatic work making the stunt-director the author of his/her dramatic work.

The issue is deep-rooted in sound recordings, either standalone or in cinematograph films. Such is the impact of this background that when it came to granting equitable royalties, our lawmakers extended it only to literary and musical works. I draw the reader's attention to the 3rd and 4th proviso to the amended Section 18 which deals with assignment of copyright. These provisions are a clear reflection of this movement and showcase its victory. But, what it does in effect is not accord the same right to the author of a dramatic work.

Section 19(9) and 19(10) also state that no assignment can affect the right of an author to claim royalties. No segregation as made in Section 18 is made here. A confusion that may permeate, can easily be answered by shedding light on the focus of Section 19 – Mode of Assignment. In order to interpret the mode, we would necessarily have to look at the parent provision contained in Section 18. Therefore, only literary and musical works can be considered here as well.

The MSAA wage card shows that while there is no set wage for Hindi films, for foreign language films made by Indian producers or in collaboration with a foreign producer, a stunt-director is entitled to Rs. 1,04,200 for one shift.⁴⁶ This is no frugal amount and as confirmed by a stunt-director I interviewed, some stunt-directors can even be paid sixty to seventy lakh Rupees for the direction in lump-sum, immaterial of Hindi/foreign language production. Every stunt-director I spoke to was content with the existing system and praised the efforts of the MSAA in protecting the fraternity. The industrial system works in favour of stunt-directors in the same way as it does for stunt-artists.

⁴⁶ *Supra* note 12.

NON-APPLICATION OF R3

The Amendment is a result of a movement led from the front by Javed Akhtar. The issue is deep rooted in sound recordings, either standalone or in cinematograph films. Such is the impact of this background that when it came to granting equitable royalties, our lawmakers extended it only to literary and musical works. I draw the reader's attention to the 3rd and 4th proviso to the amended Section 18. These provisions are a clear reflection of this movement and showcase its victory. But, what it does in effect is not accord the same right to the author of a dramatic work. When we read Section 19(9) and 19(10), no such segregation on the base of works is made. These provisions though merely reflect the mode of making a valid assignment. In order to interpret these provisions, we would necessarily have to look at the parent provision on assignments in Section 18 which excludes works other than literary and musical works.

When we look at the wage card of MSAA, a stunt-director is entitled to Rs. 1,04,200 for one shift. This is no small sum and as confirmed by a stunt-director I interviewed; some stunt-directors can even be paid sixty to seventy lakh Rupees for the direction in lump-sum. Every stunt-director I spoke to was content with the existing system and praised the efforts of the MSAA in protecting the fraternity. The industrial system as pointed above works similarly in favour of stunt-directors as it does for stunt-artistes.

CONCLUSION

Stunt-artistes play with their lives in creating an artistic expression, so the negative impressions circulating in media led me to explore a possible solution in Intellectual Property Law. The Amendment's introduction of R3 and moral rights is a big boon for performers who could now seek payments based on the value of their work and receive due acknowledgement for their contributions. Information received from my interactions with the stunt fraternity on their treatment in Bollywood startled me and led me on a different path.

Stunt-artistes were largely happy with the payments they were receiving. MSAA as an association working for the stunt-fraternity is genuinely doing a remarkable job. The wage-system is a big win for collective bargaining, wherein payments are made on time and in full. Any delay in payments is taken up by the MSAA with the concerned production house and the matter is resolved amicably. With a stunt-artiste capable of earning upto 2 lakh Rupees for two shifts of shooting, arguably there is sufficiency in payment. The mantra of 'more risk, more money' means that the daring stunt-artistes remain in demand and get paid for their meritorious contributions. All this showed that the existing industrial system is working beneficially for

stunt-artistes. The need for protection under the intellectual property machinery does not then arise. Even if we were to try and include stunt-artistes within the purview of The Act, as noted above, we would not be able to.

Recognition was hard to come by for stunt-artistes due to the nature of their performance. It is heartening to see that the industry is acknowledging the contributions of these real-life heroes in both credits of films and award ceremonies. Like Javed Akhtar is to the music industry, Akshay Kumar is to Bollywood's stunt-artistes. His contributions towards the upliftment of this fraternity is incredible and acknowledged by every single stunt-artiste I spoke to.

Stunt-directors enjoy a special position in Bollywood. They fought their way to become stunt-directors with sheer grit and artistic ability. Bollywood movies showcase many action sequences and some actors have even built a reputation as action-heroes/heroines. Stunt-directors are well remunerated by production houses and receive incredible acknowledgement for their work. The Amendment seems to take this into account when providing for R3 to only literary and musical work authors. As authors of dramatic works, stunt-directors seem to be in harmony with the industrial system which is adequately protecting their interests.

PROTECTION OF RIGHTS OF HOME BUYERS UNDER INSOLVENCY AND BANKRUPTCY CODE IN INDIA: A CRITICAL ANALYSIS

Dr. R K Chopra*

INTRODUCTION

India enacted the Insolvency and Bankruptcy Code, 2016 on 11th May, 2016 with a primary focus to initiate insolvency resolution proceeding against the corporate persons, partnership firm and individuals to maximize the value of assets of such persons in order to keep the entity functioning and protect the interests of the financial and operational creditors, in a specified time frame as it will depreciate with the passage of time. While dealing with companies functioning in the real estate sector, the IBC, 2016 faced many hurdles and accordingly, it was modified to cover the ambiguities in the Code. Nevertheless, it can be said that the introduction of IBC has brought more authenticity and confidence amongst all stakeholders in the real estate sector of India for timely resolution of their dispute. It also uplifted the status of homebuyers. Recently, NCLAT also proposed a new concept of 'Reverse CIRP', which was added as a new tool for governing insolvency resolution processes particularly for real estate companies by taking care of interest of home buyers. As it can be seen that one of the core objectives of IBC is to emphasis on time value of money and therefore, it becomes essential that the negotiation between the various category of creditors and stakeholders should be conducted in such a manner which minimises the time taken for insolvency resolution. Here a question arises, whether all stakeholders have a control in the CIRP? if all stakeholders have no such control, there is a likelihood that in such cases their pre-insolvency rights may be impacted by the stakeholders having the control. This becomes relevant to examine the position of the class, which is vulnerable due to the fact that they have no control; such as home buyers.

In this paper an attempt has been made to examine the position of homebuyers and to what extent the Code has been successful in safeguarding their rights, including the coining of the concept of reverse corporate insolvency proceeding (CIRP) and analyze; how the various judicial

* Professor, School of Law, University of Petroleum and Energy Studies, Dehradun.

pronouncements by NCLT, NCLAT and Supreme Court has played a vital role in addressing the role of home buyer and also depict out, whether the existing Code sufficiently addresses the concern of homebuyer or requires suitable amends to address the current issues .

LEGAL PROVISIONS UNDER IBC CODE

If one looks at the code carefully, it does not provide with the definition of the word “homebuyers” and therefore for the purpose of the code, the definition of “allotee”¹ mentioned under the Real Estate (Regulation and Development) Act, 2016(RERA) is used here as well. The Code broadly mentions the term “debt”; which is categorised in Section 5 of the Code and defines the terms ‘financial debt’ and ‘operational debt’. It covers various type of claims against the corporate debtor, however, there may be other claimants as well; who do not fall in the ambit of either as a financial or operational creditors; but as other creditors. Regarding other creditors, their rights and obligations are covered in the subsequent heading.

STATUS OF HOMEBUYER FROM 2017 TO 2021BASED ON JUDICIAL PRECEDENTS

The Judicial Precedents on the subject has no doubt uplifted the status of homebuyers when banks and financial institutions (other creditors) were concerned about repayment of their instalments and the builders were unable to deliver the flat in time as can be seen in the subsequent part of this paper. Moreover, it can also be seen that here has been a constant tug of war between the developers/companies and the homebuyers since the inception of the code, which led to two major amendments in the Code.

To begin with the homebuyers are neither treated as financial creditor nor as an operational creditor, and therefore were not permitted to initiate CIRP or to be a participant in the Committee of Creditors (CoC). However, the IBBI² later on, amended its regulations wherein it permitted even “other creditors” to file their claims under CIRP³. However, it may be worth to note that this category of other creditors had neither any power nor any authority to initiate CIRP or even having the voting right as a member of CoC. This means the IBBI regulations (as amended) failed to address the concern of home buyers. Although, if we see the judicial precedents on the subject wherein the Courts have taken a pragmatic view by changing the status of homebuyer

1 The Real Estate (Regulation and Development) Act, 2016 s. 2(d).

2 The Insolvency Resolution Process is for Corporate Persons and do not apply to homebuyer.

3 Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), 2016, Regu. 9A.

from a mere creditor to financial creditor. It may also be noticed that in cases where the agreements provide for a guaranteed assured return, in the event the builder fails to deliver the flat as per agreed time, the homebuyers have been declared as financial creditors.

The conflict between developers and homebuyers started with *Nikhil Mehta's case*⁴ wherein NCLAT held that the appellants being the homebuyers are “Financial Creditor” within the meaning of Section 5(7) of the code. It further clarified that the amount paid by the appellants was against the “consideration of time value of money” and the transaction carried out by corporate debtor through raising the amount by way of sale purchase agreement is having a commercial effect of borrowing.

On perusal of the agreements pertaining to financial terms between home buyers and builders as well as the methodology supplying the fund by the buyers including the utilisation of funds by the builders clearly suggests that such agreements are for the purpose of delivering a flat to be constructed by the builder/developer as per terms of the agreements. Generally, this tenure varies roughly for a period of four to five years (4 to 5 years) and therefore, it is safe to construe that the demand so raised by the builder from the home buyer is used for financing the specific real estate project⁵. This is also corroborated by the observations of the Insolvency Law committee on the subject. There is also need to analyse that what happens when the builder fails to fulfil his commitment, as the common law principle suggests that the builder should pay back the money to homebuyer. But there is a need to understand that the homebuyer is not interested in the return of money but for having a flat, for this purpose the concept of reverse CIRP coined by NCLT has been examined in the subsequent part of this paper. Based on the explanation given, ILC correctly recommended that home buyers should be included as financial creditors so that objective of the code can be effectively implemented⁶.

Accordingly, the IB Code, 2016 was amended by second amendment in 2018, which modified the term “financial debt” wherein the amount raised from an “allottee” under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing, thereby placing

4 *Nikhil Mehta and Sons v. AMR Infrastructure Ltd., Company Appeal (AT) (Insolvency) No. 07 of 2017; Anil Mahindroo & Anr v. Earth Organics Infrastructure, NCLAT New Delhi, Company Appeal (AT) (Insolvency) No. 74/2017.*

5 Available at: https://www.ibbi.gov.in/uploads/publication/190609_UnderstandingtheIBC_Final.pdf. (Visited on September 15, 2021).

6 Insolvency Law Committee, Report of the Insolvency Law Committee, available at: http://www.mca.gov.in/Ministry/pdf/ILRReport2603_03042018.pdf. (Visited on September 15, 2021).

the homebuyer(s) within the statutory definition of the term “financial creditor” under the Code⁷. The homebuyers are now having a voting right and became voting members of the committee of creditors after the 2018 Amendment.

On homebuyer, it is important to understand that “normally, an ‘allottee’ of real estate comes within the meaning of ‘Financial Creditor’ after the 2018 amendment, but if an ‘allottee’ has not paid the full amount, he cannot allege default on the part of the ‘Corporate Debtor’⁸. If the ‘Corporate Debtor’ does not complete the work within time and the ‘allottee’ has agreed to pay the total amount or has paid the total amount then; only the ‘allottee’ can allege default by the corporate debtor. Likewise, in case, if an ‘allottee’ finds that completion has not been carried out by the ‘Corporate Debtor’ within time and if request to return the amount disbursed to the ‘Corporate Debtor’ is not responded and on failure to refund the amount; the allottee can claim the default on the part of the ‘Corporate Debtor’⁹. Nevertheless, it may be worth mentioning that merely on the grounds of being a homebuyer, shall not automatically bring the homebuyer within the purview of the term ‘financial creditor’. There has to be an actual debt that is owed to such homebuyer, payable by the infrastructure/builder company for the purpose of this Code.

Regarding safeguarding of interest of homebuyers, the Supreme Court in one of its judicial pronouncements mentioned that it is to be protected by the IPR (Insolvency Resolution Professional) it also added that, the homebuyers or their authorised representatives can participate in the meetings of Committee of Creditors¹⁰. Not only this, the Supreme Court also directed in *Bikram Chatterjee* case directed the builders, to construct the flats as per the timelines agreed in order to protect the interest of homebuyers. However, it is also essential to note that the Supreme Court in *Ajay Walia v. M/s. Sunworld Residency Private Limited*¹¹, the Supreme Court declared and clarified that the doctrine of subrogation is not a reversible process where in, the homebuyer took the loan from the bank and assigned his rights to the builder and therefore it was the duty of the builder to pay the instalments on behalf of the homebuyer as in this case, the homebuyer subrogated his rights to the builder. Unfortunately, the builder

7 Insolvency and Bankruptcy Code (Second Amendment Act), 2018 available at: [http://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20\(Second%20Amendment\)%20Act,%202018_2018-08-18%2018:40:34.pdf](http://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:40:34.pdf). (Visited on September 15, 2021).

8 *Supra* Note 6.

9 *Anil Kumar Tulsiani v. Rakesh Kumar Gupta, Company Appeal (AT) (Insolvency) No. 35 of 2019.*

10 *Chitra Sharma v. Union of India, Writ Petition (s)(Civil) No(s).744/2017.*

11 *Ajay Walia v. M/s Sunworld Residency Private Limited, CP (IB) 11/ALD/2018.*

defaulted in timely delivery of the flat and the homebuyer accordingly cancelled the booking as per the terms of the agreement. An application filed by the homebuyer to initiate the proceedings under NCLT for CIRP against the builder company was not permitted due to the fact that homebuyer now has no rights and therefore under such a situation, he cannot be treated as a financial creditor.

It may be worth noting here that even after the judicial precedents and amendments to IB Code, 2016 in 2018, the position of the homebuyers still remains dynamic and in 2019, an ordinance was issued, which imposed a condition for a minimum threshold of 10% or 100 allottees for initiating the resolution proceedings. Though the ordinance was repealed by the 2020 Amendment, however the minimum threshold imposed remains unchanged. As per the 2020 Amendment Act, inter-alia, Section 7 of the IBC was amended to the effect that the application for initiating the resolution process is to be filed jointly by at least 100 allottees or 10% of the total allottees under the said project, whichever is lesser. The Amendment also clarified that the disputes already filed by individual home buyers but not yet admitted by the adjudicating authority before the commencement of 2020 Amendment Act shall be dismissed if they are not modified to fulfil the minimum threshold requirement as stated, within 30 days from the commencement of the 2020 Amendment Act. The Amendment caused a hue and cry with an uproar and numerous petitions were filed in the courts on the grounds that the new amendment of 2020 violates Article 14 (equality before law), Article 19(1)(g) (right to trade, occupation and business) and Article 21 (right to life and personal liberty) of the Constitution.

The Supreme Court upheld the constitutional validity of the amendments in *Manish Kumar v. Union of India*¹² on 19th January 2021. The main issue in this case was the third proviso to section 7(1) which provides that the financial creditors mentioned under clause (a) and clause (b) of subsection (6A) of Section 21 (i.e., debenture holders and other security holders) and the allottees of real-estate projects can make application for initiation of CIRP against the corporate debtor only if the application has been made jointly by not less than 100 allottees of a particular project; or 1/10th of the total number of allottees of the particular project whichever is lower. The petitioners being real estate creditors contended that the amended Section 7 deprives the real estate creditors; their right to initiate proceedings as it violates article 14 of the Constitution

12 Writ Petition (Civil) No. 26 of 2020.

of India. Though the aim of the legislation was to facilitate ease of doing business but by introducing the amendment, puts restrictions on their rights. The Petitioners referred to the decision of the Supreme Court in the case of *Pioneer Urban Land and Infrastructure Ltd. And Anr. v. Union of India*¹³ where the court upheld the right of the creditors to initiate insolvency proceedings. In addition to this, petitioners stated that there are various factors like disparity in date of default, confirmation of numerical strength, information about fellow creditors etc.; which make it very difficult to meet a threshold and file a consolidated case. The principal argument was based on the fact that there is already a threshold limit of amount of default of Rs. 1 crore, and any further threshold limit would be discriminatory for the real-estate creditors, without any intelligible differentia; which should act as an estoppel on the State to introduce such amendment. However, the Supreme Court after hearing the arguments and contentions of parties, held that the amendments are not vague or arbitrary. Rather, the court agreed with the legislator that giving a single allottee the right to approach the tribunal to initiate the insolvency proceedings might lead to complete replacement of developer's company management; such a step by a single allottee might adversely affect the other allottees who still had faith in developer and had no grievances or pursuing different legal remedy.,¹⁴”

The Court observed that the allottees of a real estate project are a heterogeneous group. A majority of them may prefer to provide more time to the developer to complete the project. If several allottees of different projects prefers to lead a consolidated proceeding, then their complaints, remedies etc., might vary which will lead to a lot of confusion and will make a difficult process even more complex and cumbersome. The Court made it clear that there is a sound rationale behind the law's requirement that the 100 applicants should be from the same project and explained that “*The connection with the same real estate project is crucial to the determination of the critical mass... If it is to embrace the total number of allottees of all projects, which a promoter of a real estate project may be having, in one sense, it will make the*

13 Writ Petition (Civil) No. 43 of 2019.

14 *Supra* note 13. Also see; para 192 Justice KM Joseph. Justice Joseph pointed out the flaw in the working of the previous regime before the amendments and stated - “An individual allottee, out of the heterogeneous group, would throw the spanner in the works and bring the entire real estate project itself to a possible doom”. The court also pointed out that “There can be hundreds or even thousands of allottees in a project. If a single allottee, as a financial creditor, is allowed to move an application, the interests of all the other allottees may be put in peril... Other allottees may have a different take of the whole scenario. Some of them may approach the Authority under the Real Estate (Regulation and Development) Act of 2016 and others may, instead, resort to the Consumer Protection Act. The remedy of a civil suit is, no doubt, not ruled out. The 474-page judgment, based on petitions filed by allottees of real estate projects and money lenders who financed such property endeavours.

task of the applicant more cumbersome. It becomes a sword, which will cut both ways. This is for the reason that the complaints, relating to different projects, may be different”.

On the issue of estoppel, while relying on *Pioneer Urban Land and Infrastructure Ltd. And Anr. v. Union of India*¹⁵; the apex court clarifies that *“A supreme legislature cannot be cribbed, cabined, or confined by the doctrine of promissory estoppel or estoppel. It is incontestable that promissory estoppel serves as an effective deterrent to prevent injustice from a government or its agencies which seek to resile from a representation made by them, without just cause. (See para 54)”*. The court referred to the decision of *Union of India & Ors. v Godfrey Philips India Ltd. Etc.*¹⁶ wherein it was held the doctrine of executive necessity or future of executive action cannot be invoked to nullify the applicability of the doctrine of promissory estoppel against government in the exercise of its governmental, public or executive functions.

Further, the court dismissed arguments made by petitioners that the 30-day deadline was “manifestly arbitrary”. *The Court pointed out that “Prescribing a time limit in regard to pending applications, cannot be, per se, described as arbitrary, as otherwise, it would be an endless and uncertain procedure. The applications would remain part of the docket and also become a Damocles Sword overhanging the debtor and the other stakeholders with deleterious consequences also qua the objects of the Code,* However, the Supreme Court appreciated the creditors concern, for the demand for a period more than thirty (30) days. As regards arguments pertaining to practical difficulties, the Court held that *“the mere difficulties in given cases to comply with a law can hardly furnish a ground to strike it down”*, and as such, upheld the introduction of the proviso to section 7 (1) of the Code¹⁷. The issues in consideration, being economic reforms, the wider latitude given to the law giver is based on sound principle and tested logic over time. That being said, the Apex Court upheld the amendments introduced vide the Amendment Act as constitutional, and accorded certain filing relaxations to the real-estate creditors based on the clarified position of law.

Another question, which can arise in case of homebuyer is whether the corporate insolvency resolution process be treated as a reversible process? Answer to this can be seen from the precedent on the subject. It has been seen that in case of homebuyers, an approach of ‘Reverse CIRP’ was evolved, having its own implications is discussed in the subsequent heading.

15 *Supra* note at 14.

16 1986 AIR 806.

17 *Supra* note 13.

CONCEPT OF REVERSE CIRP

This concept has been coined by NCLT while dealing with real estate companies. It is therefore essential to examine whether the reverse CIRP is in accordance with the purpose and objective of the code or it dilutes the objectives of law or provides another methodology to homebuyers to settle their grievances ?. For this purpose, reliance can be placed on *Flat Buyers Association Winter Hills 77 v. Umang Realtech Ltd.*¹⁸ case; wherein the real estate developer (M/s. Umang Realtech Ltd.) could not deliver the possession of the promised flat to the two home buyers in time. These homebuyers were later on joined by other homebuyers which had the same issue and consequently formed 'Flat Buyers Association'. The real estate company also did not comply with its promise to pay compensation in case of delay in handing over possession of the said flat as promised in the original agreement between builder and homebuyer, thereby committing default. Thereafter, an application to invoke insolvency proceeding under section 7 of IBC was initiated by homebuyers before the NCLT¹⁹. Subsequent to the filing of the petitions, one of the promoters of the corporate debtors intervened and proposed to induct funds to complete the project and offered possession of the flats to the applicant/allottees, which was duly accepted by the homebuyer/applicant. Based on this development, the applicants were not interested in submission and approval of a third-party resolution plan as prescribed under the CIRP process. On this point, an issue came before the NCLAT; whether such a process could be adopted by the parties, i.e., the applicant and promoters, without approval of committee of creditors; which is nothing but reverse CRIP? Before dealing with the concept of reverse CIRP, it may be pertinent to mention that the basic objectives of IBC are to ensure equality for all, due to which the interest of all the stakeholders must be kept in mind while the real estate company is undergoing the CIRP²⁰. At this juncture, the claims of homebuyer (unsecured financial creditors) & claims of secured financial creditors should be treated at par and latter's claims shall not have preference over the former²¹. Secondly, the CIRP of any real estate company should project in specific so as to maximize the assets of that specific project. Say for instance, a real estate company having

18 Company Appeal (AT) (Insolvency) No. 926 of 2019.

19 The Insolvency & Bankruptcy Code, 2016, s.7.

20 *Parker Hannifin India Pvt. Ltd. v. Prowess International (P) Ltd.* (IA No. 226/KB/2017 in C.P. 150 of 2017) - NCLT Kolkata Bench, Kolkata

21 *Swiss Ribbons v. Union of India*, W.P (C) 99 of 2018, (Supreme Court, 25.1.19) available at: <https://taxguru.in/corporate-law/ibc-2016-section-12a-opportunities-obstacles-resolution.html>. (Visited on September 15, 2021).

three projects ongoing simultaneously and, in a case, it defaults in delivery of flat/apartment in one of the projects; then in such case, CIRP should not undergo on the entire company rather it should be limited to a particular project in default. This is due to the fact that the success or failure of a project in a real estate depends upon plethora of factors like labour, requisite permissions from the local authorities and most importantly land and money. Therefore, it will be incorrect; if the entrepreneurial spirit of the company is shattered due to failure of one of the projects in the allocated time²². Moreover, it would also disturb the rights of other homebuyers in other two projects, whose progress is on time by the developer. Taking these observations into consideration, NCLT permitted the promoter to act as a financial creditor or lender which is against the very spirit of Section 29A of IBC. However, before arriving at such a conclusion, there is a need to weigh the benefits of reverse CIRP vis-à-vis objectives of the Code.

Benefits of Reverse CIRP

A real estate company mainly gets its finances for a particular project through two sources i.e., Secured Financial Creditors (like Banks, Financial Institutions and Non-Banking Financial Creditor's) and the homebuyer who pay for the specific flat in the project. The NCLAT based on the submission by the parties, realized that there is a fundamental conflict of interest while propounding the principle of equality in Umang Realtech²³ judgment.

In case of default by the real estate company, the secured financial creditor would always prefer to enforce the security held by them i.e., the prospective flats for which they have financed the company whereas the homebuyers (unsecured financial creditors) sole interest being delivery or possession of the flat booked. In such a situation, the secured financial creditor would prefer to liquidate the company by voting against the proposed resolution scheme or plans in order to get preference in distribution of assets as envisaged under Section 53 of IBC²⁴; which does not seem to be a feasible solution due to inherent conflict of interest. Moreover, it is also against the very core principle of IBC i.e., to use liquidation as a last resort²⁵.

Based on above, it is safe to infer that the reverse CIRP can be beneficial to solve the conflict; as it balances the interest of both these class of creditors by allowing the corporate debtor to continue the project work which ensures that homebuyers reap the fruits of their investments

22 *Supra* note 19.

23 *Ibid.*

24 The Insolvency & Bankruptcy Code, 2016, s. 53.

25 *Supra* note 14.

while the RP (Resolution Professional) manages the company allowing the project to be completed in specific deadlines and in a specified manner and to continue the project. This judgment²⁶ also pointed out that the resolution applicants are generally not interested in an abandoned project due to complexity which they prefer not to present any resolution plan and very few resolution plans get accepted²⁷. Further, the *Umang realtech judgment*²⁸ recognized the basic fact that unlike other financial creditors, homebuyers do not have the commercial wisdom to evaluate which resolution plan is most advantageous to them. In such situation, CIRP may not provide a solution which the homebuyers are interested; as their first aim is to have a flat and in the event of no possibility, only then they are looking for the time value of money. The reverse CIRP throws a chance to promoters of real estate companies to continue/revive the project without removing them or their powers from the working of the company. It helps to maintain the status quo in the management of company and at the same time the resolution professional ensures that the promoter pools its additional funds to complete the project in question. The judgment also clarifies the fact that reverse CIRP should be limited to specific project in question leaving the other projects undertaken by company untouched as per IBC code; following CIRP so as to remove any conflict in these two aspects²⁹.

Applicability of Reverse CIRP

It is clear from the tribunal's decision³⁰ that this concept was introduced as an experiment by taking into account the facts and circumstances of this case; which cannot be used as an ideal solution in all cases, as each case need be examined on its own merits before deciding, whether reverse CIRP is applicable or not. And in case, it does not; then the conventional CIRP mentioned in the code shall apply. Reverse CIRP cannot be treated as a rule but an exception.

The applicability of this concept can be examined on three main grounds; whether by devising reverse CIRP, NCLAT violated the purpose of Section 29A under the code which was introduced through amendment; whether the order of NCLAT is ambiguous by creating a parallel machinery to CoC under the code and finally whether the project specific resolution process is

26 *Supra* note 19.

27 Dipak Mondal, 'IBC Code: Are Speculative Homebuyers Misusing the Insolvency Law' (Business Today, 2 October 2019) available at: <<https://www.businesstoday.in/current/corporate/ibccode-are-speculative-homebuyers-misusing-insolvency-law/story/382538.html>> (Visited on September 15, 2021).

28 *Supra* note 19.

29 *Supra* note 6.

30 *Ibid.*

against the spirit of Section 18 of the code. These issues are examined herein below:-

i) NCLAT Violated the Purpose of Section 29a of the Code

The basic purpose for which Section 29A³¹ was introduced was to debar certain category of persons such as promoters of the corporate debtor, undischarged insolvent, wilful defaulters to present a resolution plan³². As it has been seen in a number of cases that the promoters of corporate debtor participate through another legal entity as there was no bar and any person could participate in the bidding of resolution plan for corporate debtor's revival which many times resulted in fraudulent promoters regaining the control of corporate debtor by bidding heavy discounts³³. This promoted their backdoor entry and banks/financial institutions were left with no option but to take massive haircuts on their amount initially invested³⁴. It was with this reason, Sec 29A was introduced through an amendment to the Code. It also speaks of the principle that what cannot be done directly; cannot be done indirectly. As per IB Code, it is the duty of Interim Resolution Professional to call for invitations of resolution plan pursuant to section 25(2) (h) of IBC³⁵, but so far as reverse CIRP is concerned, it does not commence at the stage of inviting resolution plan. Under this process, CIRP does not make such invitation as mentioned above; thereby it excludes to entertain any third-party plans, rather the CIRP tries to settle the disputes internally within the company by throwing promoters a life boat or an opportunity to come back and finance the resolution plan with their money. And, if such a resolution plan fails; only then the normal CIRP process kicks in. Based on this analysis, it is clear that the reverse CIRP is a step prior to the conventional CIRP and it do not nullify the jurisprudence for introduction of section 29A. The Apex Court in Arcelor Mittal case pointed out that there is a need to do a purposive interpretation to section 29A of IBC³⁶. The objective of section 29 A has always been to prevent the recalcitrant promoter from entering or regaining control of the corporate debtor company.

31 Section 29 A of IBC was inserted in the code by a legislative amendment in November, 2017 through The Insolvency and Bankruptcy (Amendment) Ordinance, 2017.

32 Shivangi Pathak and Aherar Patel, 'Critical Analysis of Section 29A' (IBC Laws) *available at*: <<https://ibclaw.in/critical-analysis-of-section-29a-of-the-code/>> (Visited on September 15, 2021).

33 Aditi Bhaswr, 'Section 29A of Insolvency and Bankruptcy Code- Resolution over liquidation?' *available at*: '<https://signalx.ai/blog/section-29a-of-insolvency-and-bankruptcy-code-resolution-over-liquidation/>' (Visited on September 15, 2021).

34 Suraj Sharma, 'Eligibility of Resolution Applicant: Section 29A of IB Code, 2016' *available at*: <https://taxguru.in/corporate-law/eligibility-resolution-applicant-section-29a-ibc-code-2016.html>. (Visited on September 15, 2021).

35 The Insolvency & Bankruptcy Code, 2016, s. 25 (2) (h).

36 *Arcelor Mittal India (P) Ltd. v. Satish Kumar Gupta*, (2019) 2 SCC 1 [27].

The use of reverse CIRP in Uppal Housing (P) Ltd. do impact section 29A of IBC³⁷. Moreover, in the instant case, the Committee of Creditors (CoC) was not formed; however, in case if it had been formed, then the ineligible promoter would have not faced any difficulty in presenting its resolution plan as both homebuyer and the financial creditor wanted promoter to save the project by investing its money. No doubt the IB code provides wide powers to COC to examine the feasibility of any resolution plan submitted but that do permit to accept or approve a resolution plan which is barred by section 29A as ineligible resolution applicant³⁸.

In the instant case, NCLAT mentioned that one need to ensure that the “*promoter is to stay out of the CIRP order other than acting as a lender*”. This in other words mean that the promoter’s role is only to provide funds and it is the CIRP, who will have exclusive control over the management of corporate debtor and it is expected for the promoter to cooperate with CIRP during the whole process to ensure that reverse CIRP is successful.

The above-mentioned process implies that not only CIRP will be dependent on promoter for the finances but will also use promoter’s assistance in completing his task. This means that promoter will be a person who will give finances to CIRP and will remain involved with corporate debtor right from the starting till the completion of process. Here, one may argue that this process has destroyed the very spirit and purpose of introduction of Section 29A. However, NCLAT in its observations tried to justify this point by mentioning that is has added certain safeguards or conditions on promoters to use the company’s accounts³⁹, however, it depends how the safeguards suggested by NCLAT are sufficient or not can be seen in the long run. As a matter of fact, the Supreme Court in a somewhat similar situation vehemently denied to make an exception for allowing promoter to take control of the CIRP process⁴⁰. The court further emphasised that the legislature brought Section 29A to enhance the culture of effective corporate governance and waiving the bar of section 29A to allow a promoter to be a resolution applicant will affect the very purpose of the code⁴¹.

37 *Supra* note 19. In Uppal Housing Pvt. Ltd. (one of the outside promoters of Umang Realtech) agreed to act as a lender to the Corporate Debtor for completing the work undertaken and was promised by Umang Realtech to be paid from the remaining amount which was received from the home buyers of the project. Also see; Section 29 A (c) and (d), The Insolvency & Bankruptcy Code, 2016., ss. 29 A (c) and (d).

38 The Insolvency & Bankruptcy Code, 2016. Proviso, s. 30(4).

39 *Supra* note at 19.

40 *Supra* note at 11.

41 *Id.*

ii) Whether The Order of Nclat Is Ambiguous by Creating a Parallel Machinery to COC Under the Code?

One of the fundamental principles of IBCode is to provide control to the creditor(s). CoC represents the collective will of the creditors wherein they can put forth their demands in front of the CIRP. Thus, formation of CoC and giving them right is an important element of the whole CIRP process and taking it away from them does not sound a correct principle. In *Umang Realtech* case⁴², the financial creditor and the homebuyers were interested that the promoters should pool funds to revive the project; i.e., it is as per their interest the promoter is permitted to pool additional money to revive the project. But if the Creditors and homebuyers, prefer to have recovery of their monies spent then reverse CIRP will have no meaning. Therefore, unless and until the reasons and circumstances in which CIRP should be applicable is modified through an amendment will have a lacuna, which parties may try to take advantage.

iii) Project Specific Resolution Process v. Section 18, IBC

Section 18⁴³ of Code states that the resolution professional will take custody & control of all the assets of the company be it movable, immovable, tangible or intangible. In case of real estate industry, it is a very common practice to invest in the projects by making a Special Purpose Vehicle (SPV)⁴⁴. In *Uppal Housing Pvt. (L)*⁴⁵; a special purpose vehicle was created and due to non-fulfilment of its timely obligation to complete the project; insolvency proceeding was initiated against Umang Realtech. NCLAT in this case separated Winter Hills 77 project from other projects undertaken by Umang Realtech; as the project in question being an SPV and secondly, other projects undertaken by Umang Realtech were running right on their respective timelines; seems a correct segregation. However, there are possibilities wherein there is no SPV as project specific or there is plethora of real estate projects under a single SPV; in such cases whether derogating from section 18 is a feasible solution? The answer in these situations may not be same as in the instant case; as it may violate section 18 of IBC; as each case has to be tested, based on facts and circumstances of a specific case.

42 *Supra* note at 19.

43 The Insolvency & Bankruptcy Code, 2016, s. 18.

44 SPV is a separate entity having its own assets and liabilities which is formed by a parent company to take up projects which constitute high risk and avoid liability in case of failure except what is covered specifically. The SPV in the instant case was Umang Realtech Pvt. Ltd which further took over a project with name "Winter Hills 77". Shrija Agrawal, "Why SPV is preferred route for real estate investors" <https://www.vccircle.com/why-spv-preferred-route-real-estate-investors/> (Visited on September 15, 2021).

45 *Supra* note 19. Umang Realtech Private Ltd', (Prop Tiger) available at :<<https://www.proptiger.com/umang-realtech-102867>> (Visited on September 15, 2021).

Before incorporation of RERA 2016, it was a common practice in the real estate companies to divert their funds from one project to another project⁴⁶, but was stopped after introduction of RERA. As per RERA enactment, it is mandatory that 70 % of homebuyer's investment or funds must be compulsorily used for the purpose of purchasing land and financing construction of project⁴⁷. This ensured that homebuyer's money is not allocated to something which he does not wish to finance and the real estate company is not permitted to use the assets of one particular successful project to remedy the insolvency proceedings of the other failed project under the same company as it would affect the interest of homebuyers adversely. Therefore, if a real estate company does not have a SPV structure within itself; even then the funds or assets of one project must not be mixed with another project and for the purpose of CIRP, the project should be specifically maintained as per Section 42(1) (D) of RERA as can be evidenced from the company's books of accounts/balance sheets. This also implies that those funds which were not specifically allotted to a certain project and are attributable to the company's overall asset can be brought to use in the CIRP of any other project in accordance with section 18 of IBC.

EPILOGUE

Although the IB Code is in its nascent stages started from 2016; but has been able to take concern of the stake holders. It is also observed that in the real estate sector; the enforcement of IB Code faced many challenges and various amendments were introduced from 2017 to 2021 to remove ambiguities. Nonetheless, it is safe to say that the introduction of IBCode has brought more authenticity and confidence amongst all stakeholders in the real estate sector including homebuyers.

The Judicial precedents on the subject suggests that the home buyers were not treated as creditor in the initial stages and later on were given the status of creditor but without right to initiate the insolvency resolution process or participate in the process as members of the committee of creditors, which raised concern about safeguard of their interest and finally the home buyers have now been treated as financial creditors by amendment to the Code, and are now members of the committee of creditors. By 2020 amendment, a condition was imposed on homebuyers that an application has to be submitted jointly by not less than 100 allottees of a particular project; or

46 Sunil Dhawan, 'Builders Can Keep Funds in Separate Account instead of Escrow Account: Will RERA Prevent Misuse?' The Economic Times (19 April 2017) RERA: Builders can keep funds in separate account instead of escrow account: Will RERA prevent misuse? (indiatimes.com) (Visited on September 15, 2021).

47 The RERA, 2016, s. 4(2)(1)(d).

1/10th of the total number of allottees of the particular project; whichever is lower, so as to make a fine balance and also to take care of interest of real estate companies. This Amendment was upheld by the Supreme Court in Manish Kumar Case⁴⁸. The Supreme Court, while upholding the validity of the amendment clarified that the action of the legislature was not against an explicit directive of its own, or in the nature of a complete denial of rights of the real-estate creditors. The real-estate creditors, who may not satisfy the additional conditions imposed by the Amendment Act, shall still have recourse under other statutes like RERA. Therefore, in cases where the amendment is introduced to avoid the misuse of law by individual creditors, the principle of estoppel shall not apply.

The NCLAT while looking at the interest of homebuyers as well as real estate companies and the projects in specific in Umang Realtech case⁴⁹ devised the term reverse CIRP wherein it tried to minimize the drawbacks that arose from the conventional CIRP process under IBCCode, while adjudicating this case. Reverse CIRP can be understood as a modified CIRP process which is an innovative step by NCLAT. The Apex Court earlier held that NCLAT is not a court working on principles of equity and that court/tribunal must work within the legislative scheme which is sanctioned under IBCCode⁵⁰. However, in another judgment, it also mentioned that IBC is a relatively new and experimental legislation and innovation in its implementation is necessary to fulfil the objectives of IBC⁵¹. Although, the reverse CIRP does not find its mention in the Code, however, as per analysis above, it has immense benefits which creates a win-win situation for both homebuyers and real estate companies but still a clear demarcated boundary is required within the realm of IBCCode so that reverse CIRP can be used efficiently and efficaciously. The reverse CIRP although having certain limitations; but it has a fundamental benefit to harmonize the interest of both homebuyers and the financial creditor. The reverse CIRP despite having no mention in the IBCCode holds a good law as it has not been appealed. Moreover, there are cases; where reverse CIRP principle has been followed⁵². Therefore, it is suggested to introduce an amendment in IBC to cover reverse CIRP within the ambit of four walls of IBCCode and make the whole process streamlined. Since there is no legislative sanction behind this process at present,

48 *Supra* note 13.

49 *Supra* note 14.

50 *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*, 2019 SCC Online SC 1478 [79].

51 *Supra* note 22.

52 *Rajesh Goyal v. Babita Gupta, Company Appeal (AT) No. 1056 of 2019* (National Company Law Appellate Tribunal).

reverse CIRP may be misused due to lack of guidelines or criterion; which may hamper the legislative intent behind the IB code and to bring reverse CIRP well within the bounds of IBCode will also help in preventing violation of Section 29A. Moreover, it is suggested that the reverse CIRP should still have a committee of creditors whether or not all creditors are in complete agreement or not; since it has important function to supervise the work of the resolution professional as well as the whole resolution process; to protect the interest of creditors after invocation of CIRP⁵³.

Further, a default under IBCode is recognized when payment becomes due to the party i.e. the time which was decided under the contract for payment⁵⁴. Accordingly, NCLT under section 7, 8 or 10 of IBCode accept the application of insolvency by the creditor once it is satisfied that there is an outstanding debt⁵⁵. The Supreme Court has also mentioned that the court needs to determine the existence of debt but should not necessarily go into the question of extent or quantum of debt owed by one party to another⁵⁶. In *Pioneer Urban case*⁵⁷, the Apex Court mentioned that the purpose of IBC is to re-establish the corporate debtor by replacing the promoter with an IRP and a resolution plan. However, this process should have flexibility of alteration or modification when it comes to the admission of insolvency cases in real estate companies.

In real estate insolvency case(s) apart from acknowledging or identifying the debt owed; there should also be a room for corporate financial restructuring under the reverse CIRP process. Moreover, such inquiry about its re-structuring must be done within the stipulated time lines for admission of applications i.e., it should not exceed fourteen (14) days⁵⁸. The tribunal must not engage in the conventional long going pre-confirmation practice of identifying debt which defeats the purpose of IBCode⁵⁹. Having fact-based inquiry in RERA-Insolvency cases will help in demarcating NCLT and RERA jurisdiction and will also guide in reducing pendency of cases with NCLT.

Finally, to conclude it is worth to say that the real estate sector in India has contributed substantially to the national growth; but during recent pandemic of Covid19 in 2020 and 2021,

53 Ministry of Corporate Affairs, Report of the Insolvency Law Committee, 20th February, 2020 [24] (Report of the Insolvency Law Committee).

54 The Insolvency & Bankruptcy Code, 2016, s. 3 (2).

55 *SBI v. Western Refrigeration (P) Ltd.*, 2017 SCC Online NCLT 1766: CP (IB) NO 17/7/NCLT/AHM/2017 [17].

56 *Innovative Industries Ltd. v. ICICI Bank & Another Civil Appeal Nos. 8337-8338 of 2017.*

57 *Supra* note 24.

58 The Insolvency & Bankruptcy Code, 2016, s. 7 (4)

59 *Allahabad Bank v. Poonam Resorts Ltd., Company Appeal (AT) No. 13043 of 2019 [8]* (National Company Law Appellate Tribunal).

this sector has been drastically affected mainly due to lockdown, workers going back to their native places and for few months, it was just stand still leading to delays. Most of real estate projects have been delayed to a large extent. Apart from this; cases of frauds, defaults as well as mismanagement in this sector has also been noticed. Accordingly, the Govt. of India looking into the practical difficulties, enhanced the timeline to real estate companies to develop and finish their pending projects due to COVID 19. This has also increased the litigations between the home buyers and the real estate companies.

It is also suggested that all stakeholders be it a home buyer, real estate companies and the financial institutions to take a loss on themselves for revival and completion of real estate projects without further delay so that the litigation in NCLT or RERA be on back seat and progress of the project be on front seat, which will surely lead to win-win situation to all stakeholders.

THE CODE ON WAGES, 2019 – A NEW PATH FOR LABOUR REFORMS

Dr. Ravinder Kaur*

Prof. (Dr.) Jaspal Singh**

INTRODUCTION

In India, the industrial or labour law has always remained an intricate subject due to numerous factors whether due to its archaic laws, multiplicity of definitions and regulatory authorities, Central vs. State legislations and so on. Labour is a subject in the concurrent list where both the Centre and the State governments are competent to enact legislations subject to certain matters being reserved for the Centre. There are around 44 central and 100 State legislations that specifically deal with labour-related matters. It is noticed that not only there is a clash between the States and Central laws on the same subject but even in the Central law also, a single subject has been put in multiple laws for instance, maternity benefits. Since a long time, the Government of India has been planning to make labour reforms by consolidating various labour laws to transform obsolete labour laws, by expanding the scope of the law to encompass a larger working group, by ensuring compliance and ease of doing business in India, by bringing clarity by removal of multiple definitions and authorities, and by rationalizing penalties to increase implementation. Accordingly, on 15th October, 1999, the Government of India constituted the Second National Commission on Labour under the Chairmanship of Shri Ravindra Varma. The Commission was given a two-point terms of reference (i) to suggest rationalization of existing laws relating to labour in the organized sector; and (ii) to suggest 'umbrella' legislation for ensuring a minimum level of protection to the workers in the unorganized sector.¹ The Commission submitted its report on 29th June, 2002. The Commission had recommended the codification of existing laws in four to five groups and also suggested amendments to the existing laws. With the aim of consolidating and harmonizing various labour legislations, the Ministry of Labour and Employment introduced four bills in 2019 to amalgamate 29 central laws relating to labour. These bills have been codified and enacted as:

* Assistant Professor, School of Legal Studies, Central University of Punjab, Bathinda.

** Principal, Khalsa College of Laws, Amritsar, Punjab (Former Prof., & Head, Department of Laws, Guru Nanak Dev University, Amritsar).

1 Report of the Second National Commission on Labour with Emphasis on Rationalization of Labour Laws and Unorganized Labour, *available at*: https://labour.gov.in/sites/default/files/39ilcagenda_1.pdf, (Visited on August 23, 2021).

1. The Code of Wages, 2019
2. The Industrial Relation Code, 2020
3. The Occupational Safety, Health and Working Conditions Code, 2020
4. The Code on Social Security, 2020

The main motive of these Labour Codes is to transform the old and obsolete laws as per the need of the hour and make them more accountable and transparent. This will help in synchronization of the existing labour laws with the emerging economic scenario, reduction in the complexity by providing uniform definitions and reduction in multiple regulatory authorities under various enactments and in bringing transparency and accountability in implementation of labour laws. This in turn would definitely lead to ease of compliance, and enhancement in employment opportunities as well as its formalization along with ensuring safety, social security and welfare of workers.

THE CODE ON WAGES, 2019 – LEGISLATIVE HISTORY

Pursuant to the recommendations of the Second National Labour Commission and with the view to rationalize central labour laws relating to wages, the Ministry of Labour and Employment, Government of India framed the draft of Code on Wages, 2019 (hereinafter referred to as Code) in consultation with the government, employers and trade unions and the same was made available in public domain through Ministry's website. The Code on Wages Bill was introduced in the Lok Sabha on 10th August, 2017² and was referred to the Parliamentary Standing Committee on 21st August, 2017. On 18th December, 2018, the Committee submitted its report along with 24 recommendations out of which, the government incorporated 17 amendments into the Bill. However, the said Bill lapsed upon dissolution of the 16th Lok Sabha ahead of the 2019 general elections.³ The Code on Wages Bill was re-introduced in the Lok Sabha on 23rd July, 2019 and was passed by the Lok Sabha on 30th July, 2019 and by the Rajya Sabha on 2nd August, 2019.⁴ The bill received assent from President on 8th August, 2019 and was notified in the Official Gazette on the same date.⁵ The Code on Wages, 2019 has unified and subsumed four different Acts, namely, the *Payment of Wages Act, 1936* the *Minimum Wages Act, 1948*, the

2 Handbook on the Code on Wages, 2019, The Institute of Company Secretaries of India, November 2020., available at: https://www.icsi.edu/media/webmodules/Handbook_on_Code_on_Wages_7122020.pdf, (Visited on July 13, 2021).

3 *Ibid.*

4 *Ibid.*

5 The Code on Wages, 2019, available at: <https://egazette.nic.in/WriteReadData/2019/210356.pdf>, (Visited on July 13, 2021).

Payment of Bonus Act, 1965 and the *Equal Remuneration Act, 1976*. On 7th July, 2020, the Ministry of Labour and Employment issued draft rules under section 67 of the Act in the Official Gazette.⁶ The draft rules remained open for public feedback for 45 days and are expected to come into force soon. On 18th December, 2020, the Government of India in exercise of the powers under Section 1(3)⁷ of the Code by way of a notification⁸ has notified and brought into immediate effect certain provisions⁹ of the Code. The provisions which were brought into force relate to constitution of the Central Advisory Board by the Central Government. The Board is empowered to advise the Central Government on matters relating to the fixation or revision of minimum wages, providing increased employment opportunities to women etc.¹¹ The notification is essentially to enable the Central Government to form the requisite board to put on place the required mechanism for easy transition from extant enactments to the Code. The Ministry of Labour and Employment has notified the Code on Wages (Central Advisory Board) Rules, 2021 by notification¹¹ in the Official Gazette on 1st march, 2021 after considering the objections and suggestions received from the persons likely to be affected.

KEY CHANGES MADE BY THE CODE ON WAGES, 2019 – AN ANALYSIS

The preamble of the Code on Wages, 2019 reads, “An Act to amend and consolidate the laws relating to wages and bonus and matters connected therewith or incidental thereto”. The Code is an elaborate law comprising of a total of 69 sections that are spread into nine chapters. It has many new interesting facets. It is a significant revamp of India’s labour laws relating to wages and bonus. It emphasizes on compliance of its provisions by increasing the cost of non-compliance. The key changes made by the Code are discussed under the following points:

6 The Code on Wages (Central) Rules, 2020 *available at:*

<https://labour.gov.in/sites/default/files/gazette%20notification.pdf>, (Visited on July 21, 2021).

7 Section 1(3) of the Code on Wages, 2019: It shall come into force on such date as the Central Government may, by notification in the Official Gazette appoint; and different dates may be appointed for different provisions of this Code and any reference in any such provision to the commencement of this Code shall be construed as a reference to the coming into force of that provision.

8 Notification dated 18th December, 2020, Ministry of Labour and Employment, *available at:* <https://www.azbpartners.com/wp-content/uploads/Certain-Provisions-of-the-Code-on-Wages-gets-Notified-181220.pdf>, (Visited on July 15, 2021).

9 the Code on Wages, 2019. Sub-sections (1), (2), (3), (10) and (11) of Section 42; Clauses (s) and (t) of sub-section (2) of Section 67; and Section 69.

10 *Id.*, at s. 42(3)

11 Notification dated 1st March, 2021, Ministry of Labour and Employment, *available at:* https://labour.gov.in/sites/default/files/Code_on_Wages_%28Central_Advisory_Board%29_Rules%2C2021.pdf (Visited on July 15, 2021).

Wide coverage – The Code expands the coverage of previous laws to make them inclusive of the vast unorganised sector. It will apply to employees in the organized and un-organized sectors. While the Central Government will continue making wage-related decisions for employments such as railways, mines, oil fields, central public sector undertaking etc., the State Governments shall make such decisions for all other employments including for private sector establishments. *The Payment of Wages Act, 1936* applies in the first instance to the payment of wages to persons employed in any factory, to persons employed (otherwise than in a factory) upon any railway by a railway administration or, either directly or through a sub-contractor, by a person fulfilling a contract with a railway administration, and to persons employed in an industrial or other establishment specified in sub-clauses (a) to (g) of clause (ii) of Section 2.¹² Further, there is a wage ceiling and the Act¹³ covers only those employees who draw monthly wages of up to Rs 24,000.¹⁴ Thus, the Act is applicable only to certain defined/notified industries and to persons within the salary threshold. However, the Code by expanding the scope of its coverage is applicable to all industries and the salary threshold has also been removed as the Code makes no mention of any such threshold and it appears that the payment of wages provisions in the Code will be applicable to all employees across the board. Similarly, the *Minimum Wages Act, 1948* is to applicable scheduled establishments and industries. The Code removes the concept of scheduled employments and it is made applicable to all. As far as the Payment of Bonus Act, 1965 is concerned, it is applicable to (a) every factory; and (b) every other establishment in which twenty or more persons are employed on any day during an accounting year.¹⁵ Further, there is also a salary threshold and only those

12 The Payment of Wages Act, 1936, s. 1 (4).

13 The Payment of Wages Act, 1936.

14 Section 1(6) of the Payment of Wages Act, 1936 : This Act applies to wages payable to an employed person in respect of a wage period if such wages for that wage period do not exceed twenty four thousand rupees per month or such other higher sum which, on the basis of figures of the Consumer Expenditure Survey published by the National Sample Survey Organisation, the Central Government may, after every five years, by notification in the Official Gazette, specify.

The Ministry of Labour and Employment, Government of India, pursuant to its notification bearing no.

S.O.2806(E) dated 28 August 2017 has widened the applicability of the Payment of Wages

Act, 1936 to cover employees receiving wages upto INR 24,000 per month from the existing wage amount of INR 18,000 per month. Prior to this notification the Act was applicable to persons who were receiving wages of not more INR 18,000 per month for a wage period.

15 The Payment of Bonus Act, 1965. s. 1 (3).

employees who draw a monthly salary not exceeding Rs 21,000 are covered by the Act.¹⁶ The position under the Code remained unchanged and the Chapter on payment of bonus is applicable to such establishment, in which twenty or more persons are employed or were employed on any day during an accounting year¹⁷ and to such employees who fall under the threshold limit.¹⁸ *The Equal Remuneration Act, 1976* is applicable to every employer and there is no limitation on industry, number of employed persons or salary paid to them. The Code makes no change in this regard. However, it widens the scope of its applicability by prohibiting the discrimination among employees on the ground of gender in matters relating to wages by the same employer, in respect of the same work or work of a similar nature done by any employee.¹⁹ Thus, it covers all genders including transgender while the Act²⁰ 1976 covers only men and women. Thus, all the consolidated enactments are restrictive in their application. The Code envisages uniform applicability of the provisions of timely payment of wages and minimum wages to all employees irrespective of the wage ceiling and sector.

Uniform definitions –One of the important changes made by the Code is that it provides uniform definitions in contrast to multiple definitions under various laws which the Code amalgamated. Some of the important terms that have been given uniform definitions under the Code are wages, establishment, employer and employee. All the laws²¹ defined these terms to various extents covering many parts and moving out certain aspects. This definitely, therefore, led to uncertain implication, ambiguous interpretation and doubtful applicability. The Code aims to harmonize many terms which are common to various laws by giving them a uniform definition. For instance, the term “establishment” is defined under the *Payment of Wages Act, 1936 and the Payment of Bonus Act, 1965* with certain variation. While under the former Act only

16 Section 2(13) of the Payment of Bonus Act, 1965 provides, “employee” means any person (other than an apprentice) employed on a salary or wage not exceeding twenty-one thousand rupees per mensem in any industry to do any skilled or unskilled manual, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied.

17 The Code on Wages, 2019 s. 41 (2).

18 The Code on Wages, 2019. The threshold to determine the payment of bonus to employees is yet required to be notified by the appropriate government, s. 26 (1)

19 The Code on Wages, 2019, s. 3 (1).

20 Equal Remuneration Act, 1976

21 The Minimum Wages Act, 1948; The Payment of Wages Act, 1936; and The Equal Remuneration Act, 1976.

eight defined industries are considered as establishment²², the latter Act talks about all sorts of establishments including public sector as well as all private sectors²³. This widely variation meant that for an employer there is a requirement on one hand to keep track of all the different types of establishments that have been identified under the *Payment of wages Act, 1936* while with the *Payment of Bonus Act, 1965* they have to provide bonus to all employees. With the definition of establishment being changed under the Code such confusion would definitely go away. The term ‘establishment’ under the Code means any place where any industry, trade, business, manufacture or occupation is carried on and includes Government establishments.²⁴ Thus, it covers all businesses, industries and trade; all locations (factory, office, warehouse, etc.) not only restricted to mines, oilfields, etc.; and every type of ownership (private or public/government).

Other term which has been unified under the Code is of “employee” which has been defined differently under the amalgamated laws.²⁵ The Code gives a very conclusive and inclusive definition of this term as compared to the amalgamated laws. As per the definition, the term “employee” means any person (other than an apprentice engaged under the Apprentices Act, 1961), employed on wages by an establishment to do any skilled, semi-skilled or unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and also includes a person declared to be an employee by the appropriate Government, but does not include any member of the Armed Forces of the Union.²⁶

The term “wages” has been defined differently in various laws.²⁷ The Code seeks to provide a single uniform definition of “wages” as applicable to minimum wages, payment of wages and payment of bonus. As per Code, the term ‘wages’ means all remuneration whether, by way of salaries, allowances or otherwise, expressed in terms of money and includes basic pay; dearness allowance; and retaining allowance if any.²⁸

22 The Payment of Wages Act, 1936, s. 2 (ii).

23 The Payment of Bonus Act, 1965. s.2

24 The Code on Wages, 2019, s. 2 (m).

25 The Payment of Bonus Act, 1965; Section 2(ia) of the Payment of Wages Act, 1936; and Section 2(i) of the Minimum Wages Act, 1948, s. 2 (13).

26 The Code on Wages, 2019, s. 2 (k).

27 The Minimum Wages Act, 1948; Section 2(vi) of the Payment of Wages Act, 1936; and Section 2(21) of the Payment of Bonus Act, 1965, s. 2 (h).

The Code lays down the list of exemptions which do not form part of the term ‘wages’ which inter alia includes bonus payable under any law, the value of house accommodation, supply of electricity, water, medical attendance or other amenity, contributions paid by the employer to a pension or provident fund, any conveyance allowance or the value of any travelling concession, sums paid to defray special expenses, house rent allowance, remuneration payable under any award or order of a court/tribunal or settlement between parties, overtime allowance, commission payable to the employee, gratuity payable on termination of employment, retrenchment compensation or other retirement benefits payable to the employee or any ex gratia payment made to him on the termination of employment.²⁹ It is to be noted that the term ‘wages’ has been defined in the same manner as in other Labour Codes.³⁰

The fourth term which has been unified under the Code is of employer.³¹ Under the Code the term “employer” means a person who employes (directly/indirectly) employees in his establishment.³² In the case of Government establishments or its departments, employer means the authority specified, by the head of such department, in this behalf or where no authority, is so specified the head of the department and in relation to an establishment carried on by a local authority, the chief executive of that authority.³³ It is interesting to note that in relation to a factory, the Code includes only the occupier or manager of the factory³⁴. The Code excludes owner, agent of the owner and the legal representative of the owner of the factory from the ambit of employer in contrast to various amalgamated laws³⁵. It would be of great help to the owners who leased out their factories as they are made liable under the existing laws on the basis of vicarious liability principle on the ground of non-compliance of various statutory

28 The Code on Wages, 2019, s. 2 (y).

29 *Ibid.*

30 Section 2(zq) of the Industrial Relations Code, 2020; Section 2(88) of the Code on Social Security, 2020; and Section 2(zj) of the Occupational Safety, Health and Working Conditions Code, 2020.

31 The term ‘employer’ has been defined differently under Section 2E of the Minimum Wages Act, 1948; Section 2(ib) of the Payment of Wages Act, 1936; Section 2(14) of the Payment of Bonus Act, 1965; and Section 2C of the Equal Remuneration Act, 1976.

32 The Code on Wages, 2019, s. 2 (1).

33 *Ibid.*

34 The Code on wages, 2019, s. 2 (1).

35 The amalgamated laws include owner, agent of the factory and legal representative of the owner of the factory within the definition of employer.

provisions by the occupiers of factories. Now, they are not to worry about the sword hanging over their heads and it is crystal clear that only occupiers and managers of the factories are covered under the definition of the term employer.

Separate definitions for employee and worker – The Code provide separate definitions for the “worker”³⁶ and “employee”³⁷. By making an analysis of the definitions it becomes clear that the definition of “employee” is broader than the “worker”. While the

former includes individuals in supervisory capacity (drawing wages exceeding fifteen thousand rupees per month), managerial and administrative roles, the latter excludes such individuals, by expressly including working journalists and sales promotion employees. However, the Code only refers to “workers” and not “employees” under the provision concerning the factors of fixation of minimum wages,³⁸ thereby it creates confusion. From the definition, “workers” seems to be the subset of “employees” and it can be said that under the Code all workers are employees but all employees are not workers. This overlapping and interchangeable nature of the definitions has further exacerbated the confusion.

Determination of Minimum Wages in the line of National Minimum Wage/Floor Wage - “Minimum wage” plays a key role in the labour market instrument in improving the living standards of the wage earners. Minimum wages have been defined as the minimum amount of remuneration that an employer is required to pay wage earners for the work performed during a given period, which cannot be reduced by collective agreement or an individual contract.³⁹ Minimum wages set the lowest limit below which the wages cannot be allowed to sink in all humanity.⁴⁰ A minimum wage was considered a necessary catalyst to advance the social status of the worker even according to our ancient law, and treated as an obligation of the State.⁴¹ This is a gauge to measure the economic progress and social justice in a country. Since independence,

36 The Code on Wages, 2019, s. 2 (z).

37 *Id.*, at s. 2(k).

38 *Id.*, at s. 6.

39 ILO Minimum Wage Policy Guide, available at: <https://www.ilo.org/global/topics/wages/minimum-wages/lang--en/index.htm>, (Visited on August 26, 2021).

40 *Kamani Metals and Alloys Ltd. v. Their Workmen*, AIR 1967 SC 1175.

41 Government of India, "Report of the National Commission on Labour" 1366, (Ministry of Labour, 2002).

ensuring minimum wages to the vast segment of informal workers has remained one of the crucial priority areas for the Government of India. Accordingly, the Minimum wages Act, 1948 was enacted to ensure that workers in low-paid informal jobs were paid the minimum wage. The object of the Act is to fix minimum rates of wages for certain scheduled employments.⁴² The Act set up the framework for the minimum wage machinery and laid down its procedures. However, the Act failed to provide the exact norms/criteria for fixing the minimum wages. The lacuna has been filled by the ILC, 1957,⁴³ and the Supreme Court's milestone judgment in 1992⁴⁴. These guiding principles are accepted standards for calculating the minimum wage in India.⁴⁵

Under the Code, the procedure for determination of minimum wages by the appropriate Government is in line with the provisions of the *Minimum Wages Act, 1948*. However, some significant changes have been introduced by the Code in the concept of the minimum wages. One of the such change is that the under the Act⁴⁶ the appropriate government considers only the cost of living in fixing the minimum wages, while under the Code there are some additional points for consideration in fixing the minimum wages like skills of the workers, geographical areas, arduousness of work etc.⁴⁷

Another significant change in the Code is the introduction of the concept of floor wage/National Minimum Wage, which is to be determined by the Central Government after taking into account the minimum living standards of workers in a manner to be

42 The Minimum Wages Act, 1948, Preamble.

43 The 15th Session of the Indian Labour Conference held at New Delhi in July 1957 stated that the minimum wage should be need-based and ensure the minimum human needs of the industrial worker. It accordingly formulated five norms to serve as a guide for all wage-fixing authorities, in order to help them calculate the 'minimum wage'. These norms consist of: (i) three consumption units for one wage earner without incorporating the earnings of women, children and adolescents; (ii) a minimum food requirement of 2,700 calories per adult person per day; (iii) clothing requirements at 72 yards per annum for an average working family of four; (iv) a house rent corresponding to the minimum area provided for under the Government's Industrial Housing Scheme; and (v) 20 per cent of total minimum wage for fuel, lighting and other miscellaneous items.

44 *Workmen Represented by Secretary v Reptakos Brett & Co. Ltd.*, (1992) 1 SCC 290. In this case, the hon'ble Supreme Court expressed the view that the criteria recommended by the Indian Labour Conference may not suffice. It held that an additional component for children's education, medical requirements, minimum recreation including festivals/ceremonies, and contingencies such as old age and marriage should constitute 25% of total minimum wages.

45 Report of the Expert Committee on Determining the Methodology for fixing the National Minimum Wage, Ministry of Labour and Employment, Government of India, January 2019, p. 21, available at: https://labour.gov.in/sites/default/files/Committee_on_Determination_of_Methodology.pdf, (Visited on July 5, 2021).

46 The Minimum Wages Act, 1948.

47 The Code on Wages, 2019, s. 6 (6).

prescribed, which may be different for different geographical areas.⁴⁸ The appropriate Governments under no circumstance shall fix a minimum wage rate which is lower than the floor wage determined by the Central Government.⁴⁹ However, if the existing minimum wages fixed by the appropriate Government is higher than the floor wage, they cannot reduce the minimum wages.⁵⁰

The Code does not define or outline the methodology for fixing an adequate minimum wage. It completely ignores the formula, which was unanimously recommended by the Indian Labour Conference (ILC) in 1957 and reiterated in the 44th and 46th session of the ILCs in 2012 and 2015, respectively.⁵¹ The formula formed the basis of the Supreme Court ruling in the *Raptakos Brett* case of 1992.⁵² Additionally, the setting of different state-level minimum wages in the hands of respective state governments, so long as they do not place their minimum wages below the floor wages set by the central government for that state or region might lead to a race to the bottom between states that are competing with one another to lower wage rates and bring in greater investments.⁵³ The consequence of this competitive federalism, based on labour cheapening between states, would be repressed wages throughout the country as well as a violation of the spirit of the constitutional provision establishing “labour” as a concurrent subject.⁵⁴

Provisions relating to wage period and time for payment of wages - The Code expressly provides that the employer shall fix the wage period for the employees on a daily, weekly, fortnightly or monthly basis,⁵⁵ and stipulates the time limits for payments by the employer under each of such wage periods.⁵⁶ In this era of the gig-economy where monthly basis payments are less relevant and increasingly more number of employees are migrating out of the formal sector, this is a welcome inclusion. This scheme departs from the one under the Payment of Wages Act, 1936 which merely

48 The Code on Wages, 2019, s. 9(1).

49 *Id.*, s. 9(2).

50 *Ibid.*

51 Nivedita Jayaram, “Protection of Workers’ Wages in India: An Analysis of the Labour Code on Wages, 2019”, *Economic and Political Weekly*, available at: <https://www.epw.in/engage/article/protection-workers-wages-india-labour-wage-code>, (Visited on June 21, 2021).

52 *Workmen Represented by Secretary v. Reptakos Brett & Co. Ltd.*, (1992) 1 SCC 290.

53 *Ibid.*

54 *Ibid.*

55 The Code on Wages, 2019, s. 16.

56 *Id.*, s. 17.

mentions that a wage period shall not exceed one month, and prescribes two different time limits for payment of wages based on the number of employees in an establishment.⁵⁷ Further, the Code inserts a new clause facilitating the payment of wages through digital mode.⁵⁸

Payment of Bonus – Under the Code the provisions relating to the computation of bonus are consistent with the terms of the Payment of Bonus Act, 1965. The list of disqualification for receiving bonus under the Code is in line with the Act.⁵⁹ However, it is to be noted that the Code additionally provides that dismissal from service due to conviction for sexual harassment would also be considered as a ground for disqualification for receipt of bonus under the Code.⁶⁰

Equal Remuneration - The Code prohibits discrimination amongst the employees based on gender in matters concerning payment of wages⁶¹ and based on sex in matters concerning recruitment (except where it is prohibited or restricted under law) by the same employer, in respect of the “same work or work of a similar nature done by any employee”⁶² The code expanded the scope of “same or similar work” by taking into account the experience of the employees, along with skill, effort and responsibility.⁶³ While *Equal Remuneration Act, 1976* prohibited discrimination between “men and women workers”, the Code prohibits discrimination on a wider ground of “gender”. However, the traditional binary classification emanating from Article 39(d) of the Indian Constitution and the presumption of genders as only consisting of man and woman, may act as an obstacle in ensuring gender neutrality in such employment-related matters, thereby proving to be detrimental to the rest of the disadvantageously placed genders.⁶⁴ But prohibition in employment based on caste, religion or social origin, is still missing under the Code.⁶⁵

57 The Payment of Wages Act, 1936, ss. 4, 5.

58 The Code on Wages, 2019, s. 15.

59 The Payment of Bonus Act, 1965.

60 The Code on Wages, 2019, s. 29 (d).

61 *Id.*, s. 3(1).

62 *Id.*, s. 3(2)(ii).

63 *Id.*, s. 2(v).

64 Adarsh Dubey, “A Critical Analysis of Code on Wages, 2019”, *International Journal of Law Management & Humanities*, Volume 3 Issue 4, 2020, pp. 1970-1677 at p. 1672, *available at*: <file:///C:/CODE%20ON%20WAGES/A-Critical-Analysis-of-the-Code-on-Wages-2019.pdf>, (Visited on July 15, 2021).

65 *Ibid.*

Inspector-cum-Facilitator - The erstwhile enactments had the concept of inspectors to carry out inspections and examinations to ensure compliance of the enactments.⁶⁶ The Code has replaced the inspector regime with Inspector-cum-Facilitator who shall be a facilitator towards compliance and not just an inspecting authority.⁶⁷ They would have dual functions - providing compliance advisory to employers and workers and conducting inspections.⁶⁸ The appropriate government may lay down an inspection scheme which may also provide for generation of a web-based inspection and calling of information relating to the inspection electronically.⁶⁹ It is to be noted that inspectors have now been termed “facilitators” the term itself making a mockery of their regulatory and enforcement authority. The task of facilitators to “supply information and advice to employers and workers concerning the most effective means of complying with the provisions of the code,” takes a more benevolent approach to wage violations by employers.⁷⁰ Further, state inspection schemes provide for web-based inspections through an automated system due to which inspectors cannot conduct surprise checks after receiving information about suspected violations, make inquiries about employers or their agents, or enter workplaces as they please.⁷¹

Records, Returns and Notices - The Code mandates the employers to maintain a register containing details with regard to persons employed, muster roll, wages and such other details in the manner to be specified in the rules by the appropriate government.⁷² This would help in doing away with the redundant procedure of maintaining separate records under different laws. There are about ten registers maintained under the various amalgamated laws, whereas under the Code only two registers are required to be maintained i.e., Employee Register under Form-IV and Register of Wages, Overtime, Fines, Deductions for damage and loss under Form-I.⁷³

Such records can be maintained electronically as the Code has not prescribed the form

66 The Payment of Wages Act, 1936; Section 19 of the Minimum Wages Act, 1948; Section 27 of the Payment of Bonus Act, 1965, s. 14.

67 The Code on Wages, 2019, s. 51

68 *Id.*, s. 51(5).

69 *Id.*, s. 51(2).

70 Nivedita Jayaram, “Protection of Workers’ Wages in India: An Analysis of the Labour Code on Wages, 2019”, *Economic and Political Weekly*, available at: <https://www.epw.in/engage/article/protection-workers-wages-india-labour-wage-code>, (Visited on June 21, 2021).

71 *Ibid.*

72 The Code on Wages, 2019, s. 50(1).

73 The Draft Rules on the Code on Wages, Rule 51(3).

and manner of maintenance of the register. This provision helps in adapting to the present trends towards digitalization and makes it easier for employers to maintain records. The Code also provides for the display of a notice on the notice board at a prominent place at the establishment containing the abstract of the Code on Wages, category-wise wage rates of employees, wage period, day or date and time of payment of wages and the name and address of the Inspector cum Facilitator having jurisdiction.⁷⁴ There is also a provision for issuance of a wage slip.⁷⁵

Revamped provisions for offences and penalties - The Code has provided an impetus for trade unionism by allowing a registered trade union to make complaints for offences under the Code.⁷⁶ The Code provides for a graded penalty system for contraventions under the provisions of the Code.⁷⁷ It specifies penalties for offences committed by an employer, such as (i) paying less than the due wages, or (ii) for contravening any provision of the Code.⁷⁸ Penalties vary depending on the nature of offence, with the maximum penalty being imprisonment for three months along with a fine of up to one lakh rupees. Under the Code, the Inspector-cum-Facilitator is required to afford an opportunity to the employer before initiating prosecution proceedings in cases of first contraventions.⁷⁹

Payment of undistributed dues on account of death of an employee or his whereabouts not being known- The Code provides for payment of dues to the persons nominated by the employee, upon his death, or where his whereabouts cannot be known. However, if there is no nomination or if the amount cannot be paid to the nominated person, then it will be deposited with the specified authority under the rules.⁸⁰

Limitation Period enhanced - The period of limitation for filing of claims by a worker has been enhanced to three years, as against the existing time period varying from six months to two years.⁸¹ This would provide employees more time to protect their statutory rights under the Code on Wages.

74 The Code on Wages, 2019, s. 50(2).

75 *Id.*, s. 50(3).

76 *Id.*, 52(1).

77 *Id.*, s. 54.

78 *Ibid.*

79 The Code on Wages, 2019, s. 54(3).

80 *Id.*, s. 44.

81 *Id.*, s. 45(6).

CONCLUSION

The Code is an encouraging and progressive move towards the labour reforms. It aims to make a balance between the interests of the employers and employees. Even though the Code retains a considerable portion of repealed laws, yet it makes a remarkable attempt to replace their obsolete provisions. The Code carries with it both the positive and negative facets. Apart from removing complexity and ambiguity by providing uniform definitions, the separate and overlapping definitions of “employee” and “worker” within the Code leaves room for confusion. It makes easier not only for the employers to comply with the statutory provisions but also for the labour authorities to enforce the same. By including the unorganized sector, comprising 92% of Indian labour force, within the ambit of the Code and by introducing the concept of national level floor wage for minimum wages, the Code turned to be a path-breaking for a labour-intensive country like India. However, the limit of five years for the revision of the minimum wages does not fit with the rising rates of inflation that have been a regular feature during the pandemic, as this provision may be interpreted by the States literally. The Code attempts to replace the concept of “Inspector Raj” perception with the “Inspector-cum-Facilitator” instead of merely inspectors. However, the web-based inspection may prevent the conduct of surprise checks. The ease of compliance is also expected to promote setting up of more enterprises catalyzing the creation of more employment opportunities. In order to achieve the digitalization goals in governance, the Code encourages technology adoption in matters such as mode of payment of wages and inspection procedures. The Code extends extra benefits to the employees by providing electronic method of payment as the employers would be bound to abide by a time limit to make payment of wages. It is stated with deep respect that creation of one statute by consolidating four labour laws and reducing compliances is unlikely to address the larger problems such as growing unemployment, the skill shortage in India or the never-ending litigation. Though the codification of the labour laws was the need of the hour, but the time will only tell if the Code on Wages will withstand the test of time.

REFUGEES DURING PANDEMIC: NEED FOR A GLOBAL HEALTH RESPONSE

Dr. Shilpa Jain*

Mr. Abhinav Kumar**

INTRODUCTION

Refugee's Hysterical Past of Facing atrocities

This July, the 1951 Refugee Convention³ turns 70. As the central focal point of refugee protection, and in the face of rising global displacement, the Convention, along with the 1967 Protocol, remains a relevant legislative instrument at the global level. However, with this unprecedented intervention in the form of the COVID-19 pandemic, it becomes supervening duty for a researcher to engage in an academic discourse with a viewpoint to make the necessary difference in identifying the gaps and suggesting new measures and outcome-based research study.

The global COVID-19 pandemic has been described repeatedly as unprecedented, necessitating emergency measures by states that would ordinarily be unacceptable. Framed as a 'crisis'⁴ its exceptionality has justified special restrictions and exclusions. How an issue is framed matters because 'it determines how a phenomenon is understood and responded to - both normatively and pragmatically'.⁵ Indeed, the 'placement of the problem is a necessary founding act'.⁶

One of the most unparalleled and pervasive responses to the COVID-19 public health crisis has been worldwide border closures and travel restrictions. These have curtailed people's movement

* Associate Professor of Law at Dharmashastra National Law University (DNLU), Jabalpur, Madhya Pradesh, India. Email id-shilpajain@mpdnlu.ac.in

** Research Scholar, Dharmashastra National Law University, Jabalpur. Email id-abhinav6292@gmail.com

3 Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1A(2) ('Refugee Convention'), read in conjunction with the Protocol Relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

4 Charlesworth critiques international law's obsession with 'crisis', arguing that it -promotes a narrow agenda for international law': Hilary Charlesworth, 'International Law: A Discipline of Crisis' 65(3) *Modern Law Review* 377, 386 (2002).

5 Jane McAdam, 'The Problem of "Crisis Migration"' 19(3) *Australian Journal of Human Rights* 7-8 (2013).

6 Kenneth Hewitt, 'The Idea of Calamity in a Technocratic Age' in Kenneth Hewitt (ed), *Interpretations of Calamity from the View point of Human Ecology* 13 (Allen & Unwin, 1983).

across the globe, creating inconvenience for many but potentially life-threatening risks for would-be refugees. The prevention of cross-border movement - which is a threshold requirement for legal recognition as a refugee- presents a fundamental challenge for the international protection regime.

The mobility challenges posed by the COVID-19 pandemic sound an alarm bell for another context as well. As the Secretary General of the Pacific Islands Forum observed so astutely: 'The COVID-19 public health emergency and its ensuing humanitarian and economic fallout offers us a glimpse of what the global climate change emergency can become - if it is left unchecked and if we do not act now'. While the risks may be less imminent, they are no less profound.

This article explores what the twin crises of COVID-19 and climate change reveal about the capacity and limits of the international refugee law of protection. As we approach the 70th anniversary of the adoption of the 1951 Convention Relating to the Status of Refugees ('Refugee Convention'), one of the oldest human rights treaties in the post-World War II order, we reflect on its capacity to assist people in need of protection whose movement is restricted.⁷ We also consider the tension in broader human rights treaties to accommodate an emergency while also upholding fundamental rights. Central to this analysis is the notion of 'crisis', and how this affects the speed, nature and duration of responses, as well as the capacity for international cooperation and inclusion.

Part II briefly outlines the core challenges posed to protection by the pandemic, noting both positive and negative state practices. Part III examines the international legal framework and its ability to accommodate a state of emergency, considering both the Refugee Convention and the 'International Bill of Rights' (the International Covenant on Civil and Political Rights ('ICCPR'))⁸ and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'))⁹. Part IV then widens our perspective by moving away from the immediacy of the current crisis, to consider the future of international protection in the context of climate change. We comment on that a challenge for international law and policy is how to harness the sense of urgency generated

7 Dame Meg Taylor, 'COVID-19 and Climate Change: We Must Rise to Both Crises', Pacific Islands Forum Secretariat (Feature Article, April 17, 2020).

8 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

9 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

by COVID-19 for the long-term 'climate crisis', without resorting to the familiar emergency mechanisms of reactive, short term, restrictive, and exceptional measures.¹⁰

It was put under estimation that by April 2020, that around 39% of the population of the world or some three billion people – were found to be living in states that had sealed their jurisdictional borders to all non- citizens and non-residents, with very limited exceptions¹¹. When combined with measures to prevent citizens from leaving their own country, and the shutdown of much of the global aviation industry, 'the limitations on the right to seek asylum' were profound. According to the United Nations High Commissioner for Refugees ('UNHCR'), as at 11 March 2021, 57 states' borders were completely shut, 31 states had no COVID-19 related border restrictions, while 81 had imposed restrictions but made exceptions for asylum seekers.¹²

The challenges posed to refugee protection by the pandemic are profound. To be a refugee, a person must have crossed an international border. This element is well established in international law¹³, and a constant reminder of the limits of the refugee definition and international protection. This notion of alienage¹⁴ is also encapsulated by the principle of non-refoulement, the cornerstone of the protection regime, which prohibits removal to any place where a person faces a real risk of persecution or other serious harm.¹⁵ Hence, for refugees, 'mobility is an essential, even a life-saving act'¹⁶, and COVID-19 affects refugees 'at the most fundamental level - their ability to seek protection in another country' However, faced with a pandemic that 'knows no boundaries', states have adopted numerous and significant additional emergency measures to slow or halt movement more generally. Border closures have been a common and preferred response by states, followed by health requirements, changes to visa

10 Crisis narratives 'translate into, and justify, short-term, ad hoc responses instead of pre-emptive, integrated approaches': Elodie Hut et al, 'COVID-19, Climate Change and Migration: Constructing Crises, Reinforcing Borders', Environmental Migration Portal (Blog Post, 2020)

11 Phillip Connor, 'More than Nine in Ten People Worldwide Live in Countries with Travel Restrictions amid COVID-19', Pew Research Centre (1 April 2020). A smaller number of states shut their borders entirely, including in Central Asia and Ecuador. See also, 'COVID-19 Civic Freedom Tracker', International Center for Not-For-Profit Law.

12 Refugee Convention, art. 1(A)(2).

13 Andrew E Shacknové, 'Who is a Refugee?' 95(2) *Ethics* 274-283 (1985).

14 See, eg, Refugee Convention, art. 33; ICCPR arts. 6-7.

15 Laura Hammond, 'Mobility and Immobility in the Time of Coronavirus: Reflections from Long-Term Study of Migration and Displacement' (Annual Elizabeth Colson Lecture, University of Oxford, June 24, 2020).

16 Chris Uhlmann, 'This Pandemic Has Revealed the Authoritarian Streak in Australian Governments', *Sydney Morning Herald* (online, 19 August 2020); see 'COVID 19 and the Border: Leaving Australia', Department of Home Affairs (WebPage, August 28, 2020).

conditions, and entry restrictions for certain nationalities.¹⁷ By July 2020, 219 states and territories had implemented 71,589 restrictive measures, predominantly relating to borders and entry. Additionally, at least 99 states had made no exception for people seeking asylum. Search and rescue operations in the central Mediterranean were temporarily suspended, and UNHCR and International Organization for Migration ('IOM') announced an unprecedented temporary freeze on global resettlement. While these agencies have since announced the resumption of resettlement departures for refugees, Australia - the third largest resettlement country - halted its resettlement program in March 2020, with no indication as to when it may resume. Restrictions on refugees' mobility are not new. Over the past three decades, in particular, states have adopted widespread measures of containment, detention, interception, pushbacks and so on, designed to obstruct people from seeking asylum in the very first place, or to prevent their attempts to do so.¹⁸ Thus, while the border restrictions imposed on account of COVID-19 are extreme, they are a stark reminder of the extant 'global mobility divide'. Even prior to the pandemic, much of the world's population could not travel freely. The privilege of mobility belongs to relatively few: many people do not hold passports, which also makes visas (and thus many countries) inaccessible. This necessarily impacts on people's ability to access protection from persecution or other serious harm, whether on account of conflict, general violence or disasters. Refugees' particular vulnerabilities have been further exacerbated by the impossibility of maintaining physical distancing and other COVID-19 safety measures in overcrowded camps and detention centres. Movement restrictions have impeded access to livelihoods and access to basic services, such as social protection, public health, education, child protection, income support, and social networks to manage periods of self-isolation. In some cases, refugees have been explicitly excluded from them.¹⁹ For example, in Australia, asylum seekers have been denied pandemic-specific social security support. Yet, as UNHCR has observed, 'the virus does not distinguish

17 *Ibid.* See also, 'Coronavirus: Travel Restrictions, Border Shutdowns by Country', Al Jazeera (online, 3 June 2020)

18 IOM, Integrating Migration into COVID-19 Socio-Economic Response: A Toolkit for Development Partners (Report, August 2020) (Integrating Migration)

19 Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press, 2018) 44-6. See generally, Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20(4) *European Journal of Migration and Law* 452; Cathryn Costello, 'Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?' (2018) 30(4)

'Extraterritorial Migration Control and Deterrence' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, forthcoming) ch 27; and Violeta Moreno-Lax, 'Protection at Sea and the Denial of Asylum' in Costello, Foster and McAdam (eds) (n39) ch 26.

between nationals or migrants, and having a two-tiered system in place to access [for example] essential medical service during this health crisis serves no one's interest.

At the same time, the urgency of the pandemic opened up possibilities for states to respond in more inclusive ways. Indeed, UNHCR noted that 'adaptability' is a sign of a quality asylum system, and several states continued to register asylum seekers and issue documentation to ensure their legal stay and access to services. More novel approaches included Portugal's granting of 'temporary citizenship' to all people in its territory whose asylum or residency applications were pending. Jordan agreed to consider Asylum-Seeker and Refugee Certificates issued by UNHCR as valid until the end of 2020, even if the certificates technically expired sooner. Malta, Azerbaijan, and the United Kingdom implemented 'innovative approaches', such as allowing online applications for asylum, appeals, and/or documentation. Canada announced that it would provide a pathway to residence with permanent status for asylum seekers who had been dealing and extensively working in the health-care sector during the unfortunate times of COVID-19 pandemic, provided that various conditions were met. In Ireland and Latvia, older refugees and those with underlying medical conditions were guaranteed increased medical attention. A number of states, including Belgium, Mexico, Spain, Switzerland, United Kingdom, and the United States, began to release asylum seekers from detention to reduce the number of people in closed facilities, and to establish alternatives, particularly for children, families, and more vulnerable refugees. Finally, across the globe, refugee-led initiatives provided vital community-based services and support.²⁰

REFUGEE LAWS IN THE STATE OF EMERGENCY: AN OVERVIEW

As is clear from the above, notwithstanding some positive state practice, the pandemic has posed challenges to the core of refugee protection, which is predicated on mobility. Since a person cannot meet the international definition of 'refugee' until they leave their country, the right to leave is paramount. Further, since almost no state provides for an 'asylum seeker visa' to be lodged from outside the putative state of asylum, movement to seek and obtain protection is crucial.

Despite movement being central to the Refugee Convention, the treaty is reflective of the fact that it has remained silent on the vector of right to leave. That kind of a legal provision is instead found in the much popular provision under article 13(2) of the Universal Declaration

²⁰ Protection Principles' (n31) principle 4.

of Human Rights ('UDHR') and article 12(2) of the widely ratified ICCPR, which expressly mentions that 'everyone shall be free to leave any country, including his own'. Given its wide ambit, the right is not confined to those wishing to flee their countries of origin but extends to refugees in intermediary countries or otherwise en route to seeking asylum.

There is a large literature on states' attempts to obfuscate the right which provides you to leave the place and, with it, the right to seek asylum. The current crisis, however, raises the pertinence of permitted exceptions to the right to leave in a more pressing manner than may previously have been the case. Article 12(3) of the ICCPR provides that the right to leave "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

This right may also be the subject of derogation under article 4(3) of the ICCPR, although the United Nations Human Rights Committee ('UN Human Rights Committee') has warned states that in the context of the pandemic, derogation is not necessary in relation to rights such as article 12 of the ICCPR that already facilitate states to 'attain their public health or other public policy objectives by invoking the possibility to restrict certain rights'. It is important to note that while some other widely ratified human rights treaties permit similar restrictions on the right to leave, article 18(1)(c) of the Convention on the Rights of Persons with Disabilities ('CRPD'), ratified by 182 states parties, permits no limitations on or violation from the vector of the right to leave. This has been largely overlooked in the discussion of the pandemic, yet it is estimated that between 15 and 30% of refugees may meet the treaty's definition of 'persons with disability'; hence, it is not an insignificant issue.

In terms of article 12(3)'s limitation, given that public health is a legitimate restriction, and assuming that relevant measures are imposed by law, an analysis of state practice turns on the question of necessity, proportionality, and consistency of the measure with other ICCPR rights. To this end, blanket prohibitions or limitations rarely meet these requirements. As international law experts recently observed in the context of COVID-19 mobility restrictions:

Where necessary to protect public health, border closures should be subject to exceptions for compelling humanitarian and compassionate needs and that ensure that a State's international obligations can be respected (including the right to seek and enjoy asylum).²¹

21 Kate Ogg, 'COVID-19 Travel Bans: The Rights to Seek Asylum When You Cannot Leave Your Homeland', Kaldor Centre for International Refugee Law (Blog Post, April 16, 2020).

Ogg rightly notes that prohibiting exit in the context of asylum may violate the 'right to life (article 6(1) ICCPR) and the right to be free from torture or cruel, inhuman or degrading treatment or punishment (article 7 ICCPR)' where a person is at risk of such harm within their own state.²² Of course, a practical issue arises as to the efficacy of humanitarian exceptions to a prohibition on flight where the state is the persecutor and yet also needs to grant permission to leave.

In lieu of a positive and enforceable right to asylum, protection against refoulement is regarded as the fundamental norm of refugee protection. There is widespread agreement that it has attained the status of customary international law, and there is a strong case for its recognition as *jus cogens*.

Under article 33 of the Refugee Convention, the primary obligation is framed widely: a state may not return 'in any manner whatsoever' a refugee to the 'frontiers of territories where his life or freedom would be threatened.'" Near universal support exists for its extraterritorial application, meaning that it is relevant to 'externalization' and containment practices that have been strengthened during the crisis. Most relevantly, however, the absolute ban imposed by many states on non-citizens' entry, without any exception for asylum seekers, and the concomitant pushback and return policies implemented by some states during the crisis (eg Greece to Turkey, Malta to Libya, and the United States to Mexico), clearly implicate article 33.²³

Unlike its equivalent in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT')²⁴ and the ICCPR,⁷⁵ the prohibition against refoulement in article 33(1) is not absolute. No state may make a reservation in relation to article 33 of the Refugee Convention,⁷⁶ but article 33(2) provides that:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

As an exception to a fundamental norm, this provision must be read narrowly. On its own terms,

22 Henley&Partners, Henley Passport Index and Global Mobility Report 30 (Report, 2019).

23 *Ibid*; Max J Andrucki, 'The Visa Whiteness Machine: Transnational Motility in Post-Apartheid South Africa' in France Winddance Twine and Bradley Gardener (eds), *Geographies of Privilege* 121 (Routledge, 2013).

24 UNHCR, Global COVID-19 Emergency Response (Report, August 11, 2020) 3 ('Global COVID-19 Emergency Response').

it is not relevant to the pandemic since a public health risk can neither come within the concepts 'danger to the security of the country' nor 'danger to the community' (and the latter in any event only applies in the case of a conviction). As UNHCR has emphatically stated, 'denial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk'. Further, article 33(2) clearly envisages an individuated assessment; blanket prohibitions cannot be justified.²⁵

The notion that an emergency may impact on refugee rights is not new. Significant global events producing large-scale movements have raised the question whether states can suspend obligations in situations of 'mass influx' or other equally challenging contexts, particularly in the Global South, which disproportionately bears responsibility for 85% of the world's refugees. Yet, even in that context, the obligation to respect non-refoulement is held to be sacrosanct.²⁶

As outlined before, serious human rights issues have been raised in connection with the treatment of asylum seekers and refugees during the pandemic, ranging from inadequate public health measures, especially in closed detention, through to exclusion from welfare support. When it comes to the movement of refugees within a country, the Refugee Convention protects freedom of movement for those who are lawfully present. States may restrict the movement of refugees who have arrived without prior authorisation, but only where such restrictions do not amount to penalties, are 'necessary', and only 'until their status in the country is regularized or they obtain admission into another country'.

This is supplemented by the ICCPR's protection of freedom of movement, prohibition of arbitrary detention, and its requirement that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. Immigration detention, including of asylum seekers, is still common and states that do not ensure detainees have appropriate protection against COVID-19 are arguably in violation of these obligations. Indeed, the UN Human Rights Committee has emphasized in relation to the pandemic that states may not derogate from their duty to treat all persons, including persons deprived of their liberty,

25 IOM, Integrating Migration into COVID-19 Socio-Economic Response: A Toolkit for Development Partners (Report, August, 2020) (Integrating Migration).

26 See, eg, in the *United Kingdom, R (SML) v. Secretary of State for the Home Department* [2020] 5 WLUK 148. Shah notes that in the United States, as at the end of June 2020, 'more than 100 lawsuits have been filed in federal courts seeking relief on behalf of non-citizens in ICE custody at the heightened risk of serious illness or death due to the virus': Aditi Shah, 'The Role of Federal Courts in Coronavirus-Related Immigration Detention Litigation', Lawfare (Blog Post, June 29, 2020).

with humanity and respect for their human dignity, and must pay special attention to the adequacy of health conditions and health services in places of incarceration, and also to the rights of individuals in situations of confinement ...

As mentioned above, while some states have released asylum seekers and refugees from detention as a precautionary measure, this has at times resulted from specific court orders.²⁷ However, in states without a bill of rights or domestically incorporated international human rights obligations (such as Australia and New Zealand), litigation to seek the release of immigration detainees due to concerns about COVID-19 has so far had very limited success.' Indeed, in Australia, the numbers of people held in immigration detention has risen - not declined - in recent months, 102 and their conditions have been made more challenging due to the suspension of the immigration detention visitor program on 24 March 2020, which in Victoria, has been further expanded to include a bar on the personal delivery or collection of 'gifts, property and other items' to persons in detention.²⁸

Denial of access to welfare and other social support directly engages the Refugee Convention. It requires states to accord to 'lawfully staying' refugees the 'same treatment with respect to public relief and assistance as is accorded to their nationals', and 'the same treatment as is accorded to nationals' in respect of 'social security', including unemployment benefits. These rights may not be suspended pursuant to article 9 where a person has been found to be a refugee, and in any event cannot be suspended on a group basis. The question of whether a refugee is 'lawfully staying' is more complex, yet this term must be given an autonomous meaning independent of the policies of certain states, such as the provision of only 'temporary' visas to recognized refugees.

Under the ICESCR, the non-discrimination obligation applies 'to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons and migrant workers' and is not subject to progressive realization. Further, the ICESCR has no derogation clause. As such, the Committee on Economic, Social and Cultural Rights has urged the treaty's 171 state parties, as 'a matter of urgency', to adopt 'special, targeted measures, including through international cooperation, to protect and mitigate the impact of the pandemic on vulnerable groups such as ... refugees!.' Hence, there is no justification for excluding asylum seekers, refugees, or stateless

27 'COVID-19 and the Border: Immigration Detention', Department of Home Affairs (WebPage, August 11, 2020).

28 By 5 August 2020, UNHCR reported that national asylum systems were fully operational in 57 states and partially operational in 53: UNHCR, Global COVID-19 Emergency Response (n43).

persons from protective economic and social measures during the pandemic; indeed, as Schein in points out, some human rights treaties, such as the CRPD, 'call for heightened protection in situations of crisis'²⁹

Finally, the ICCPR contains a freestanding equality and non-discrimination clause in article 26 which 'is not limited to those rights which are provided for in the Covenant'. While it is possible for states to derogate from some ICCPR rights 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed' this power is closely circumscribed. Any derogation measures must: (1) only extend to what is strictly required by the exigencies of the situation; (2) not be inconsistent with states' other obligations under international law; and (3) not involve 'discrimination solely on the ground of race, color, sex, language, religion or social origin'.³⁰ An 'unprecedented' number of states have lodged formal notices of derogation in response to COVID19, but none has purported to justify the exclusion of vulnerable groups, such as asylum seekers, from special safety net measures. Indeed, such an attempt would be unlawful in light of the non-discrimination requirement, pertinent to derogation, which includes 'race' and 'social origin'. In all circumstances, derogations are envisaged as 'exceptional and temporary'. Reflecting the principle of proportionality, they are limited 'to the extent strictly required by the exigencies of the situation', and 'must, as far as possible, be constrained in duration, the demographic coverage and the material dimension it possesses'. The predominant objective is to restore 'a state of regularity where full integrity and respect for the Covenant can again be secured', which means that, where possible, 'States parties should replace COVID19-related measures that prohibit activities relevant to the enjoyment of rights under the Covenant with less restrictive measures'. Additional derogation notifications are required if a state extends the duration of a state of emergency.³¹

The analysis above suggests that the problem lies not with the normative framework: the

29 Immigration, Refugees and Citizenship Canada, 'Pathway to Permanent Residency Recognizes Exceptional Service of Asylum Claimants on Front Lines of COVID-19 Pandemic' (New sRelease, August 14, 2020).

30 Inter-Agency Standing Committee, COVID-19: Focus on Persons Deprived of Their Liberty 3 (Interim Guidance, March, 27, 2020).

31 UDHR (n 11) art 14; Vladislava Stoyanova, 'The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law' (2020) 32(3) International Journal of Refugee Law 403. See also Andrew Wolman, 'The Role of Departure States in Combating Irregular Migration in International Law: An Historical Perspective' (2019) 31(1) International Journal of Refugee Law 30; Mariagiulia Giuffrè and Violeta Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder Singh Juss (ed), Research Handbook on International Refugee Law (Edward Elgar, 2019).

Refugee Convention, despite its longevity, is particularly attentive to the need to account for the legitimate interests of states in delivering refugee protection, including in the context of emergencies, and human rights treaties similarly permit flexibility. Yet, the invocation of the language of crisis appears to have given many states carte blanche to act in violation of international refugee law.³²

PERMANENT CRISIS- CLIMATE CHANGE OR HEALTH EMERGENCY

Crises are not just one-off events but can encompass slower processes of change or deterioration as well. Understanding this is important, because it lifts our gaze beyond the here and now to contemplate policy responses over the longer-term. The challenge is to overcome the human tendency to give 'overwhelmingly Higher importance ... to events or effects which will take place in the short term compared to the long term - an approach that effectively guarantees future emergencies and their attendant restrictions on human rights.³³ How might the emergency generated by COVID-19 help to drive more measured, considered and sustainable policies to address the 'slow motion' crisis of climate change?

If we think about crisis in an extended timeframe, we can identify interventions now that could avert future shocks. Many of the measures taken during the pandemic, for instance, are relevant to preparing for the impacts of climate change: 'the need to identify vulnerable populations, assess the capacity of public health systems, develop and invest in preparedness measures, and emphasise community resilience and equity'. But whereas COVID-19 has resulted in unprecedented measures of containment, the impacts of climate change will contribute to widespread displacement. Disasters - many of which are exacerbated by climate change - accounted for 75% of all new global internal displacement (24.9 million people) in 2019. Cross-border movement is anticipated to rise as well, especially since internal displacement may transform into displacement across borders if people cannot find safety and security in their own

32 Inter-Agency Standing Committee, COVID-19: Focus on Persons Deprived of Their Liberty 3 (Interim Guidance, March, 27, 2020).

33 UDHR (n 11) art 14; Vladislava Stoyanova, 'The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law' (2020) 32(3) *International Journal of Refugee Law* 403. See also Andrew Wolman, 'The Role of Departure States in Combating Irregular Migration in International Law: An Historical Perspective' (2019) 31(1) *International Journal of Refugee Law* 30; Mariagiulia Giuffrè and Violeta Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar, 2019).

country.³⁴

Existing international protection mechanisms offer an incomplete and imperfect solution for those seeking to escape the longer-term impacts of climate change. There are a number of reasons for this, including that some effects will take years to manifest at a sufficiently harmful level to satisfy the requisite thresholds in international refugee law and international human rights law.³⁵ The challenge for international lawyers - and international law - is whether those bodies of law can evolve dynamically to offer solutions, as they have done historically as 'living instruments' of protection.

Certainly, as understandings of the nature of mobility in the context of climate change and disasters have improved, our analysis of the capacity of existing. This undermines the need for proactive policies to help build resilience within affected communities and provide lawful opportunities for movement. While the current rate of global warming means that some displacement is inevitable, the scale of displacement - and attendant economic, social and human costs - could be radically reduced if strategic policy measures were taken now.³⁶ A World Bank Report posits that robust mitigation and adaptation measures could cut global internal displacement by almost two-thirds by 2050. Indeed, mitigation might be understood as the climate change equivalent of a COVID-19 vaccine. In addition, disaster risk reduction, increased opportunities for lawful migration, more systematic humanitarian responses to displacement, and selective planned relocations could help avert future displacement and enable people to make real choices about whether they stay in their homes, or move elsewhere. As the United Nations Office for Disaster Risk Reduction has estimated, there could be a 60-fold return for each dollar spent on preparing for disasters.³⁷ The climate crisis is an unfolding process, and

34 Human Rights Committee, Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic, UN Doc CCPR/C/128/2 (24 April 2020) [2(c)] ('Statement on Derogation'). See also Human Rights Committee, General Comment No 29: States of Emergency (Article 4), 72nd sess.,

35 Mailman School of Public Health at Columbia University, Migration and Human Rights Program at Cornell Law School, and the Zolberg Institute on Migration and Mobility, 'Human Mobility and Human Rights in the COVID-19 Pandemic: Principles of Protection for Migrants, Refugees, and other Displaced Persons' (Web Page, 2020) 4 ('Protection Principles'); endorsed by 1,000 legal experts: 'Mobility in the Time of COVID-19', Zolberg Institution on Migration and Mobility (Web Page, 2020).

36 Migration and Health: Key Issues, WHO Regional Office for Europe, *available at*: https://www.euro.who.int/__data/assets/pdf_file/0005/293270/Migration-Health-Key-Issues-.pdf (Visited on March, 30 2022).

37 Zsofia Pusztai, Ivan Zivanov, et al, Refugee and migrant health – improving access to health care for people in between, *available at*: <http://uu.diva-portal.org/smash/get/diva2:1304618/FULLTEXT01.pdf> (Visited on March 28, 2022).

interventions must be contemplated over longer time frames, with new combinations of institutional actors, partnerships, and sustainable funding models. Indeed, without such interventions, the climate crisis 'could prove far lengthier and far more disruptive than what we currently see with the coronavirus'.¹⁴⁵ The challenge lies in generating support for policy change now to avert devastating consequences in the future, heeding the advice of scientific and other experts. Whereas with COVID19, 'the consequences from inaction can be seen relatively quickly, as hospitals are overwhelmed by patients infected several weeks ago', with climate change, 'it will take decades to see the full extent of the damage'.³⁸ On the one hand, this longer timeframe offers an opportunity for greater international cooperation towards a coherent response than emergency (and often exclusionary) measures allow. On the other hand, it may (and often does) mean that the crisis is perceived as a problem of the future alone, rather than one that is already having far-reaching human rights consequences.

REFUGEES AND THE HEALTH PROBLEMS IDENTIFIED: A COBWEB OF CONCERN

The health problems of the people in question i.e. refugees and migrants are no different than the rest of the population. In fact, the central point of concern remains that failure to access of healthcare facilities and awareness related to the health issues, which makes the refugees even more volatile and exposed to the infections.

The most visible and identified health problems of newly arrived refugees and migrants are worth revisiting and showcasing in our discussion. The identified ones are the injuries caused by accidents, burns, gastrointestinal issues, cardiovascular complaints, diabetes and hypertension. Female refugees and migrants face pregnancy and other reproductive complications especially related to newborn and child health is a cause of concern.¹ The object worth highlighting is the vulnerable nature of the migrants and the refugee group. The women and children are specifically exposed to the new environment and climate with unrelatable conditions which makes them more prone to health issues. For instance, the children population are mostly exposed to the infections relating to respiratory tracts and gastrointestinal illness because of a

³⁸ *Ibid.*

poor livelihood, a sub-par hygiene and depriving them during their movement when they specifically need a pertinent health service. One of the notable cases is that of the number of casualties seen among the refugees and migrant population crossing the infamous Mediterranean Sea has seen a rapid increment. The numbers have gone up and 3100 people are estimated to have died or gone missing in and around the coast in the first 10 months of 2015, as per the report from the United Nations High Commissioner for Refugees (UNHCR).

Some of the most prominently identified health issues and diseases plaguing the refugee and migrant population is that of tuberculosis, HIV infection and viral hepatitis, Influenza and Middle East respiratory syndrome coronavirus (MERS-CoV). These health diseases have increased the burden on European countries and the Middle east nations which are mostly the witness and the bearers of this population. The healthcare systems need to be reorganized, re-conceptualized and re-framed in such a way that every legislation, government and the agencies/entities involved are able to decentralize the burden and such risks that are imposed on the country as a whole due to such influx of the population. With such decentralization, the tasks, healthcare services and utilities would be distributed and divided in such a way that every region of the territory is able to accommodate such rising concerns.

One of the notable case studies² from the history which reflects such crisis is from the land of Serbia after the closure of the humanitarian corridor in 2016. During the latter half of 2015 and the first quarter of 2016, it was more than 920, 000 refugees and migrants - originating from Afghanistan, Syria and Iraq which passed through Serbia while on their way to the region of Central Europe. This was considered as an unprecedented number, people were seen rapidly passing through the country's territory which resulted in the collapse and questioning of health system's response. During the time, it was mostly limited to emergency care and it was absolutely not ready to accommodate so many incoming refugees and migrants and provide them with even basic health care amenities. The situation saw a transition and became a further cause of concern after the closure of the western Balkans migration route in March 2016. This closing down of one of the only routes resulted in nearly 8, 000 people left stranded in the country with no information of any particular framework or any assessment. The nation's health care system needed to respond to the new challenges emerging out of the situation. It became imperative to address these humanitarian challenges due to the influx of the refugees. The healthcare services were seen in a diminished form and there was heavy reliance on the NGO

work and not on the actual institutionalized mechanisms. A national healthcare system was deeply missing which could address a concern as basic as shelter as many refugees hid themselves as they were sans any sanitation and hygiene. The health officials couldn't communicate with the refugees due to language concern specifically with reference to mental health support. There was an intervention of WHO regional office in Serbia which could set some strategic and action plan for the future course of mitigation. The WHO found out the need for developing a framework for collaborative action, to address the social determinants of health, preventing communicable diseases and reducing the risks posed by non-communicable diseases, ensuring effective health screening and assessment. ³ The intervention by WHO was somehow able to neutralize the condition but a lot remains to be done for the globalized world to be prepared with the sudden inflow of refugee and migrants. There is a clear demarcation in the approach by these national institutions when they tackle a healthcare issue for their own nationals as compared to the migrants. For instance, the mental health and psychological support is a huge issue in the current health crisis faced by the refugees. The similar disparity is seen in the vaccination of the refugees where a particular legal framework has still gone missing. If any vaccine or health product and service needs to be procured, there should be an inclusion of the migrant and refugees who could be a part of the requirement of such facilities. In dire situations, the health systems must be so strong and resurrected that we are able to avoid and resolve such situation before they take shape of a 'health crisis'.

CONCLUSION: A HEALTHIER TOMORROW

Movement and non-movement are not black and white. As some state practice during the pandemic has shown, mobility may be restricted, but still permitted. Quarantine and testing can reduce the risk of virus transmission, enabling people in some of the most vulnerable circumstances to be assisted. This article has shown the continuing relevance of the Refugee Convention (and other human rights treaties) in the context of emergencies such as COVID19, in particular, by acknowledging the legitimate interests of states in refugee protection. However, when faced with a crisis that is unfolding over a longer timeframe, such as climate change, , the question is whether this body of law will evolve dynamically beyond emergency measures to greater international cooperation, without losing the sense of urgency and making it a problem for the future alone. It is also important that the narrative of crisis does not lead to paralysis

because the policy challenges are perceived as insurmountable. For this reason, emphasizing proactive measures that can avert future catastrophes - as detailed in the preceding section - may engender a more solutions-oriented approach.

As the UNHCR has significantly shown, it is only by respecting human rights that 'we will build better responses for the emergency today and solutions for recovery in the longer term'.³⁹ This requires greater international collaboration, responsibility sharing and cooperation, as promised by states when they adopted the twin Global Compacts on Refugees and Migration in late 2018.⁴⁰ "To date, however, these commitments have

not withstood the pandemic crisis, despite efforts by the UNHCR, IOM, and others to show how these instruments can assist, rather than hinder, responses." Whether this is a temporary aberration or hardens into a permanent pattern remains to be seen. COVID19 has demonstrated that a 'large-scale, comprehensive response' is 'the only way to withstand and manage any future unprecedented health and climate crisis', and that we do, in fact, have 'the technology, scientific understanding, financial means and human resourcefulness' needed to address it. We can only hope, therefore, that the United Nations Secretary-General's ambition for COVID-19 to offer an opportunity to 'reimagine human mobility' comes to be exemplified by protection, and not exclusion.

The globalized world and the current covid situation has re-awaken the world to be prepared locally, regionally and escalate into an integrated universal health care system where every nation-state is self-sufficient to tackle and mitigate such circumstances. The healthcare system must borrow the precautionary approach and be well-prepared with pre-emptive actions and mechanisms to make a coherent and channelized health services which could be inclusive of any such contingent challenges which the world community may put upon us. The idea of this paper is to re-iterate the saying of 'vasudhev kutumbham' which essentially stands for 'the earth is one country and mankind its citizens'. To uphold this motto, we as a family of nations have to integrate the migrants and refugees too in our system of governance where they are not devoid of any economic, social and cultural rights. The thinking of inclusiveness, hospitality, due care and accessibility should be preached by the national institutions, government agents and above all, the citizens themselves so that every helping hand can contribute to the human rights, humanitarian and health care protection.

GHOSTS OF BREARD, LAGRAND AND AVENA HAUNTING JADHAV- INDIA V. PAKISTAN: AN UNSETTLED HUMAN RIGHT

SUBASH P*

INTRODUCTION

On May 8, 2017, India initiated a case against Pakistan to peacefully settle their dispute regarding the egregious violation of consular access before the International Court of Justice (Herein after referred to as the 'ICJ').¹ Also, India requested the Court to indicate provisional measures to save Jadhav from imminent threat of death sentence ordered by the Military Tribunal.² India acknowledged the existence of local remedies i.e. appellate remedies but it denies its effectiveness due to non-transparency in the entire trial process and non-availability of case documents.³

Moreover, Article 36 creates dual right i.e. right to the State of nationality to contact its nationals in abroad and to give necessary assistance to safeguard its national's interest.⁴ Also, this is a part of diplomatic protection regime.⁵ Secondly, the arrested person has a right to contact his State of nationality for any assistance.⁶ This article clearly establishes double or two way communications between the arrested foreign national and the sending State. Thus, India based its jurisdiction on its own right and on behalf of Jadhav as *parens patriae*. Since, India invoked this case on its own right, there is no need to wait for Jadhav to exhaust his all available local remedies.⁷

* Research Scholar, Department of International Law and Organisation, The Tamil Nadu Dr. Ambedkar Law University, Chennai.

1 Statute of the International Court of Justice, 1945, art. 40 (1), Rules of the Court, 1974, art. 38 and Optional Protocol to the VCCR, 1963, art. 1. Also refer similar cases on consular access disputes before the ICJ, Case Concerning the Vienna Convention on Consular Relations (*Paraguay v. United States of America*) (Provisional Order) [1998] I.C.J. Rep. 248, 1-14 (April 9), La Grand Case (*Germany v. United States of America*) (Judgment) 2011 I.C.J. Rep. 466, pp. 1-55, Case Concerning Avena and Other Mexican Nationals (*Mexico v. United States of America*) (Judgment) [2004] I.C.J. Rep. 12, pp. 1-65 and Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (*Mexico v. United States of America*) (Judgment) [2009] I.C.J. Rep. 3, pp. 1-54. For detailed case analyses see, Mustan Arora, "Commentary on the Kulbhusan Jadhav- Explaining the Rules of the Vienna Convention on Consular Relations" 13 NUJS Law Review 89-141 (2020).

2 Statute of the ICJ, 1945, art.41 and Rules of the Court, 1974, art. 73, 74 and 75.

3 Jadhav, (*India v. Pakistan*) (Oral Statement) [2017] I.C.J. Rep. 12.

4 Vienna Convention on Consular Relations, 1963, art. 5 (a).

5 See Generally, Biswanath Sen, *A Diplomat's Handbook on International Law and Practice* (Martinus nijhoff: Hague, Netherlands, 1st edn., 1965).

6 John Quigley, William J Aceves, S. Adhele Shank (eds.), *The Law of Consular Access: A Documentary Guide* (Routledge Taylor & Francis Group, Oxon, 1st edn., 2010).

7 Jadhav (*India v. Pakistan*) (Application Instituting Proceedings) [2017] ICJ.

BACKGROUND OF THE CASE

On March 3, 2016, Mr. Jadhav was allegedly captured and arrested in Pakistan with a 'fake authenticate passport' in the name of Hussein Mubarak Patel. Since then, he is languishing in Pakistan prison. On March 25, 2016, Pakistan alleged Jadhav made confessional statement about his criminal activities and informed India about the arrest of Jadhav. Incessantly, India requested consular access but there was no response from Pakistan. Thereafter, India sent persistent and numerous consular access requests but Pakistan brazenly remained silent on these requests. On April 8, 2016, a FIR was filed on Jadhav based on his criminal activities in Pakistan. This FIR confirmed the nationality of Jadhav as 'an Indian'. On January 23, 2017, India received request from Pakistan regarding assistance for investigating Jadhav case. The entire trial was based on the coerced purported confession made by Jadhav before the Pakistani Military Court.⁸ Also, Indian strongly questioned his treatment and whether he was truly present in Pakistan at the time of his arrest. But India maintained that after retiring from Navy, he was doing business activities in Iran.⁹ On March 21, 2017, Pakistan linked the India's request of consular access with Pakistan's request regarding assistance in investigation.¹⁰ This conditional consular access is not permitted in the VCCR treaty law. On April 10, 2017, Jadhav was sentenced to death penalty for spying and terrorist activities.

India claimed that Jadhav was conducting his business activities in Iran and obviously he was kidnapped from Iran and not from Pakistan. However, Pakistan alleged that he was arrested in Baluchistan region where he was conducting spying and destabilising activities against Pakistan. The Field General Court Martial sentenced death penalty, this was confirmed by COAS, General Qamar Javed Bajwa. To note, a law qualified Field Officer was assigned for assisting Jadhav to defend his case before the Military Court. This appointment itself is biased in nature. There shall be no neutrality because everyone in this Military Court is army personnel and there is a militarily hostile relationship between the two States.

On April 17, 2017, the spokesperson of Pakistan informed that Mr. Jadhav was not eligible for consular access. This once again confirmed the violation of Article 36. On April 19, 2017, India requested Pakistan to submit the following documents. They are (1) Charge sheet; (2)

⁸ *Supra* note 3.

⁹ *Ibid.*

¹⁰ *Ibid.*

Proceedings of the Court of Inquiry; (3) Summary of evidence; (4) Judgment; (5) Procedure for the appeal; (6) Appointment of defence lawyer; (7) To provide medical reports and (8) To issue visas for Jadhav family to travel to Pakistan.¹¹

Jadhav family filed an appeal under Section 133 B and a petition to the Federal Government under Section 131 of the Pakistan Army Act, 1952.¹² Since, Pakistan failed to pass on the original copies of documents related to the case, it is not possible to effectively defend Jadhav and that too in a hostile State. Thus, the appeal process will be as farcical as the trial. The process of Military Court is summary in nature. Also, the appeal lies before the Tribunal consists of military personnel either General Bajwa or his sub-ordinate officers. So, the probability of reversal of Military Court judgment is very low. Also, this appeal is like case is passed from Caesar to Caesar. Thus, it violates Article 14 of the International Covenant on Civil and Political Rights, 1966 too. Finally, India pleaded the ICJ to direct Pakistan to immediately stay the execution of death sentence, for the restitution in integrum i.e. to restart the trial process from the very beginning, to order Pakistan not to execute Jadhav and finally, if Pakistan is unable to annual the judgment then to release Jadhav.

QUESTION OF JURISDICTION:

India invoked the ICJ's jurisdiction through Article 36 (1) of the Statute of the ICJ, 1945 (**Hereinafter referred to as the "Statute"**) and Article 1 of the Optional Protocol of the VCCR (Hereinafter referred to as the 'OP').

Article 1 of the OP, VCCR states:

"Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol".¹³

Any disputes relating to interpreting or applying the VCCR provisions lie within the ICJ's compulsory jurisdiction. Any parties to the disputes may resort to the ICJ by an application. India pleaded the ICJ to immediately suspend the death sentence of Jadhav. Further, India pleaded to order *restitutio in integrum* because the death sentence contravenes the fundamental

11 Jadhav (*India v. Pakistan*) (Memorial of India) [2017] ICJ.

12 Jadhav (*India v. Pakistan*) (Judgment) [2019] ICJ Rep. 418.

13 Optional Protocol, Vienna Convention on Consular relations, 1963, art. 1.

international human rights, particularly Article 14 of the ICCPR; to restrain and to annul the death sentence and if unable to do so, to release and facilitate free passage to India.

India claimed that Pakistan failed in three counts. They are (1) to inform India about its national's arrest without delay; (2) to inform Jadhav of his right to contact Indian consular officer and (3) denial of consular access and its related rights of visit, conversation and correspondence and to make legal representation on behalf of Jadhav.

Alternatively, India argued to annul the military Court judgment and to re-conduct the trial before the ordinary civilian Court excluding the confession which was obtained without providing consular access. Also, India claimed to give full compliance to Article 14 of the ICCPR and to make legal representations on behalf of Jadhav. The Court noted that the jurisdiction was raised via Article 1 of the OP. So, India's claim to give effect to Article 14 of the ICCPR was rejected and sole reliance was provided to the VCCR provisions.¹⁴

Pakistan opposed the admissibility on three grounds. They are (1) Abuse of procedural process; (2) Abuse of rights and (3) Unlawful conduct or Doctrine of clean hands or *ex turpi causa non oritur actio*. However, the ICJ rejected all these objections and held that the Court has jurisdiction over the claim advanced by India.

Abuse of Process:

Abuse of process is defined by Prof. Robert Kolb as

*“a principle consists of the use of procedural instruments or rights by one or more parties for the purpose that are alien to those for which the procedural rights were established”.*¹⁶

Pakistan objected the Court's jurisdiction because India abused the procedural rights or simply abuse of process. Jadhav would have got 150 days to file clemency petition and might have got 150 days of assured protection of non-execution. Also, India failed to notify Pakistan about the existence of disputes between them.¹⁷ Also, India failed to comply with Article II and III of the OP.

However, the Court held there is no clarify and lot of uncertainty in the clemency and other appellate proceedings and its time factor. So, it's clear that Jadhav may be executed at any time.

14 Application of the Convention on the Prevention and Punishment of the Crimes of Genocide (*Croatia v. Serbia*) (Judgment) [2015] I.C.J. Rep. 3.

15 Jadhav (*India v. Pakistan*) (Counter Memorial of Pakistan) [2017] ICJ.

16 *Ibid.*

17 Obligation Concerning Negotiation Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Island v. India*) (Preliminary Objection) [2016] I.C.J. Rep. 255.

The Court also rejected the second argument of pre-conditions must be fulfilled before resorting to the ICJ. There is no pre-condition for approaching the ICJ under VCCR or VCDR.¹⁸ The arbitration and conciliation mode of dispute settlement was provided as an ‘optional substitute’ for the compulsory dispute resolution mechanism of the Court.¹⁹ The ICJ in exceptional situations shall reject “a claim based on valid title of jurisdiction”.²⁰

Abuse of Rights:

Prof. Kolb defined the concept of abuse of rights in his book ‘Good Faith in International Law’. “The concept of abuse of rights has many facets. The core point is that a subjective rights or a competence is exercised in some way that the legal order disapproves”²¹.

Pakistan based its second objection on three fold basis. Firstly, India refused to provide Jadhav’s original passport as a proof for his nationality. Secondly, India failed to engage with Pakistan in its criminal investigation against Jadhav. Thirdly, India authorised Jadhav to conduct espionage activities and to destabilise Pakistan.

There is no doubt on the question of Jadhav’s nationality. Since, both the parties agreed Jadhav as an Indian national. For second argument, India said that there is no Mutual Legal Assistance Treaty between India and Pakistan.²² So, there is no legal obligation on India to extend any support for investigation to Pakistan. The ICJ viewed that those above discussed three arguments belongs to merits and so cannot be a ground for inadmissibility of the case. Also, Pakistan relied on UNSC Resolution 1373 (2001) relating to terrorism but the Court did not elaborate much on this resolution.

Doctrine of Clean Hands:

The doctrine of clean hands is expressed in the maxim *ex turpi causa non oritur actio or ex injuria jus non oritur*. In the case of *Gabcikovo-Nagymaros*, the PCIJ held that “one Party cannot avail himself of the fact that the other has not fulfilled some obligation, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question”.

18 United States Diplomatic and Consular Staff in Tehran (*United States of America v. Iran*) (Judgment) [1980] I.C.J. Rep. 3.

19 Case Concerning United States Diplomatic and consular Staff in Tehran (*United States of America v. Iran*) (Judgment) [1980] ICJ Rep. 3.

20 Certain Iranian Assets (*Islamic Republic of Iran v. United States of America*) (Preliminary Objection) [2019] I.C.J. Rep. 7, p.39, Para. 113. Also refer, Immunities and Criminal Proceedings (*Equatorial Guinea v. France*) (Preliminary Objection) [2018] I.C.J. Rep. 292.

21 *Supra* note 15 at para. 152.

22 *Supra* note 12 at para. 53.

Pakistan alleges that India by refusing to cooperate in its investigation against Jadhav and by issued 'fake Cover original passport' India acted in an unlawful manner. The Court noted in the *Certain Iranian Assets case* that "even if it were shown that the Applicant's conduct was not beyond reproach, this would not be sufficient per se to upheld the objection to admissibility raised by the Respondent on the basis of the 'clean hands' doctrine"²³.

PROVISIONAL MEASURES

The ultimate aim of provisional measures is to safeguard the disputed rights between the parties till the case is finally disposed of.²⁴ The Court will render provisional measures, if the plausibility test is answered in affirmative.²⁵ Also, an effective link must exist between the claimed rights and the requested measures.²⁶ Article 41 of the Statute authorise the ICJ to avoid irreparable prejudice to the disputed rights.²⁷ To note, there must be an element of urgency i.e. it should be an imminent and real risk to the disputed rights.²⁸ This condition of urgency is fulfilled, when the act likely to cause irreparable prejudice at any time before the case reaches its finality.²⁹

India requested provisional measures invoking Article 41 of the Statute and Article 73, 74 and 75 of the Rules of the Court, 1974 (Hereinafter referred to as the "Rules").³⁰ In this stage, India pleaded the Court to mandate Pakistan not to execute Jadhav and also to report back the actions taken by Pakistan.³¹ Lastly, India pleaded that no prejudice shall be caused to the rights of either India or to Jadhav.

India pleaded that Jadhav may be execute at any time. So, it fulfills the essential component of 'extreme urgency' or 'immediacy of the threat' or 'greatest urgency'. Also, India requested the President of the Court to use the inherent power under Article 74 (4) of the Rules. This provision

23 *Certain Iranian Assets, (Islamic Republic of Iran v. United States of America)* (Preliminary Objection) [2019] I.C.J. Rep. 7, para. 122.

24 Refer generally, Fulvio Maria Palomino, Roberto Virzo, et. Al. (ed.), *Provisional measures Issued by International Courts and Tribunals* (Asser Press, Hague, 2021). Also refer, Cameron Miles, *Provisional Measures Before International Court and Tribunals* (Cambridge University Press, UK, 1st edn., 2017).

25 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* (Provisional Measures) [2019] I.C.J. Rep. 558.

26 *Ibid*, para 64.

27 *Jadhav (India v. Pakistan)* (Provisional Measures) [2017] I.C.J. Rep. 231.

28 *Ibid*, para. 50.

29 *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (Provisional Measures) [2018] I.C.J. Rep. 1148, para. 90.

30 Andreas Zimmerman Christian J Tomuschat, Karin sellers-frahm (Editors) *The statute of the International Court of Justice: A Commentary* (Oxford University Press: New York. 1st edn., 2006).

31 *Supra* note 27 at para. 5.

empowers the President to direct States to act in a manner that will enable the Court to adjudicate the case on merit.³² In consequence to request of India, the President ordered Pakistan to act in such a manner to provide effects to Provisional Order.

In order to obtain provisional order, India needs to prove the prima facie jurisdiction of the Court. It can be proved by scrutinising its invocation of Articles claiming jurisdiction. There is no need to satisfy in definitive terms.³³ The Court need to decide whether the disputed rights passes the test of ‘at least plausible’³⁴. To note, a link must also exist between the rights claimed and the measures requested. Thus, India’s plea of non-execution of Jadhav clearly establishes the mandatory link criterion.

Prima Facie Jurisdiction:

The Court will render provisional measures only if the requesting party is able to prove the prima facie jurisdiction of the Court. The prima facie jurisdiction can be found out from the provisions relied by the Applicant State.³⁵ In this case, India relied upon Article 36 (1) of the Statute and Article 1 of the OP. Both the States are parties to the VCCR without reservation.

Article 36 of the Statute states:

*“The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and convention in force”.*³⁶

Article 36 clearly empowers the State parties to the Statute to institute a case in the ICJ by three ways. They are (1) Reference of the case by the parties to the ICJ; (2) If it is provided under the Charter of the United Nations and (3) If it is provided in the treaties and conventions in force between the parties.³⁷

India solely relied on Article 1 of the OP for establishing jurisdiction and not on the Declaration made under Article 36 (2) of the ICJ’s Statute. So, the Court must decide whether Article 1 provides prima facie jurisdiction. India viewed that where treaties provide for the jurisdiction of

32 Rules of the Court, 1978, art. 74 (4).

33 Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v. Russian Federation*) (Provisional Measures) [2017] I.C.J. Rep. 104, para. 17.

34 *Ibid*, para. 63.

35 *Supra* note 27 at para. 15.

36 Statute of the International Court of Justice, 1945, art. 36 (1).

37 *Ibid*.

the Court, Declaration under Article 36 (2) including reservation are not applicable.³⁸ However, Pakistan alleged reservations to the Declarations made by both India and Pakistan to exclude the jurisdiction. To note, India reserved to exclude the compulsory jurisdiction between the two Commonwealth Countries and Pakistan exclude cases relating to national security issues. Further, Pakistan held that the consular access obligation does not applicable to persons accused of terrorism, destabilising and spying activities. Pakistan heavily relied on 2008 Agreement especially Sub-Paragraph (vi) which states “in case of arrest, detention or sentence made on political or security grounds, each side may examine the case on merits”³⁹. In this way, Pakistan objected the prima facie jurisdiction of the ICJ.

Article 73 (2) of the VCCR states:

“Nothing in the present Convention shall preclude States from concluding international agreements conforming or supplementing or extending or amplifying the provisions thereof”.

The terms ‘conforming’, ‘supplementing’, ‘extending’ and ‘amplifying’ denotes the concept of VCCR plus regime. There is no question of restrictive application or limited interpretation of VCCR provisions can be made under this Article.

Article 1 of the OP, VCCR states:

“Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the disputes being a Party to the present Protocol”.

India claimed that a legal dispute exist between them regarding interpreting or applying the VCCR provision. Thus, it becomes imperative to understand the terminology ‘disputes’⁴⁰. To note, India claims that there is no exception whatsoever to the consular communication and access mechanism. This is proved by the travaux preparatoires. Also, India argued that the 2008 bilateral agreement has no effect because it dilutes the application of Article 36 which is prohibited by Article 73 of the VCCR. It allows for amplification and supplementation of VCCR rights and obligation through bilateral engagement. There is no such limitation prescribed by the

38 *Supra* note 12 at para. 34.

39 Refer, Agreement on Consular Access Between the Government of the Islamic Republic of Pakistan and the Government of the Republic of India, May 21, 2008.

2008 Agreement.⁴¹ The Court held that “when jurisdiction of the Court is founded on particular treaties and convention in force based on Article 36 (1) of the Statute, it becomes irrelevant to consider the objections to other possible bases of jurisdiction”⁴². Thus, the objections raised by Pakistan were rejected. The Court also noted that there exists a dispute at the time of institution of the case regarding the question of consular assistance, communication and access.

In addition to prima facie jurisdiction, the ICJ needs to ascertain its *ratione materiae* jurisdiction under OP.⁴³ The ICJ found that this dispute is under the ambit of the VCCR *ratione materiae*.⁴⁴ Also, the ICJ viewed that the real risk of irreparable prejudice happens only if any event permanently damaged the core right or issues at hand.⁴⁵

The Court reaffirmed the binding character of its provisional measures and it creates international legal responsibility to whom it is addressed.⁴⁶ Also, this order of provisional measures is not to be considered as prejudging the issues at hand.⁴⁷ The parties are free to raise the question of jurisdiction or admissibility in the merits. Moreover, Pakistan failed to disprove to the Court the plausibility test based on 2008 Agreement and prove the exemption of spying accused from consular access obligation.⁴⁸

INTERPRETATION OF CONSULAR ACCESS RIGHT

The central objective of Article 36 is to create standard of conduct in dealing with communication and access with the arrested nationals in abroad. This will develop friendly relations between States.⁴⁹ This Article was elaborated in the LaGrand judgment.⁵⁰ The ICJ upheld that this Article creates an interrelated regime for the facilitation of consular protection.⁵¹

40 The term ‘dispute’ is discussed by the ICJ in the Marshall Island case. Refer, Obligation Concerning Negotiation Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Island v. India*) (preliminary Objection) [2016] ICJ Rep. 255.

41 *Supra* note 27 at para 33.

42 Appeal Relating to the Jurisdiction of the ICAO (*India v. Pakistan*) (Judgment) [1972] I.C.J. Rep. 46, pp. 60, para. 25. Also refer, Territorial and Maritime Disputes (*Nicaragua v. Columbia*) (Preliminary Objection) [2007] I.C.J. Rep. 832, Para. 132.

43 *Supra* note 27 at para. 30.

44 *Ibid.*

45 Immunities and Criminal Proceedings (*Equatorial Guinea v. France*) (Provisional Measures) [2016] I.C.J. Rep. 1148, para. 90.

46 Refer, LaGrand Case (*Germany v. United States of America*) (Provisional Measures) [1999] ICJ Rep. 9. LaGrand Case (*Germany v. United States of America*) (Judgment) [2001] ICJ Rep. 466.

47 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. United Arab Emirates*) (Provisional Measures) [2018] I.C.J. Rep. 406, para. 78.

48 *Supra* note 27 at para. 43.

49 See Generally, Declaration on Principles of International Law Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Resolution 2625, Oct. 24, 1970.

50 La Grand (*Germany v. United States of America*) (Judgment) [2001] I.C.J. Rep. 466.

51 *Ibid.*, para. 74.

Also, it contains basic principles of consular communication, access and modalities for consular notification. In the Avena case, once again the ICJ interpreted Article 36 and held that there are three separate but interrelated rights.⁵² They are (1) the right of the individual to be informed of his consular access right; (2) The consular post must be informed of its national's arrest 'without delay' and (3) If the arrested foreign national wishes to address communication to the consul of his nationality, it must be sent 'without delay'.⁵³ Thus, the rights under Article 36 create corresponding international legal obligation or responsibility on the host State. If the individual's rights are violated it will affect the connected rights of the sending State and vice versa. This is clearly pinpointed in the Avena Judgment:

*"Violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violation of the rights of the latter may entail a violation of the rights of the individual".*⁵⁴

Article 36 (1) (a) states:

*"Consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State".*⁵⁵

The consul has the communication and access right to its arrested nationals in abroad. This right shall be free from any kind of intervention and interference. Thus, it includes right to privacy within its scope. However, the absoluteness of this privacy right is questionable in face of accused charged on national security laws of the receiving State. This contact and communications right is also extended to the arrested nationals. Thus, there is a dual or double way of communication rights between the consular officer vis-a-vis its detained nationals.

Article 36 (1) (b) states:

"If he so request, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in any prison, custody or detention shall also be forwarded by the said

52 Avena and Other Mexican Nationals (*Mexico v. United States of America*) (Judgment) [2004] I.C.J. Rep. 12, para. 61

53 *Supra* note 52 at para. 61.

54 *Ibid.*

55 Vienna Convention on Consular Relations, art. 36 (1) (a).

*authorities without delay. The said authorities shall inform the person concerned without delay of his right under this sub-paragraph*⁵⁶.

The plain reading of sub-Para (b) clearly provided that the arrested foreign national shall be informed of his right of consular access. The phrase “if he so request” places the arrested national in the driver seat for the exercise of consular protection by the sending State.⁵⁷ If he is unaware of this right, it is an obligation on the foreign State to inform the arrested nationals of this right. So, he can decide whether to exercise this right or not. If he sends any communication to his consular post, it shall be send immediately without delay. Further, once the foreign nationality becomes obvious, the competent authorities shall inform the concerned consular post ‘without delay’. In the Avena case, the Court upheld that the phrase ‘without delay’ do not mean immediately after arrest. However, it becomes an obligation to inform this right, once the foreign nationality of the arrested person is known or suspected.

Article 36 (1) (c) states:

“Consular officer shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment, Nevertheless, consular officers shall refrain from taking action behalf of a nation who is in prison, custody or detention if he expressly opposes such action”⁵⁸.

The primary function of a consular officer is to preserve the rights of its nationals in abroad.⁵⁹ This objective can only be achieved through the visitation, conversation and correspondence rights as envisaged in Article 36 for the welfare of an arrested foreign national and to make arrangement for his legal defence.⁶⁰ The phrase “right to visit ‘any nationals’ of the sending State” clarifies and confirmed the mandatory character of Article 36. Also, there is no exception whatsoever in Article 36. To observe, if the arrested person request not to exercise consular access then the consular officer shall not take any action on behalf of that national.

Article 36 (2) states:

56 *Supra* note 55.

57 *Ibid.*

58 *Ibid.*

59 *Ibid*, art. 5 (a).

60 *Ibid*, art. 36.

“The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving States, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended”⁶¹.

This provision tried to balance the right to consular access with the internal laws of the host State. However, the internal regulations must enable the exercise of consular access and consular access should not be denied per se.

Finally, the Court held that Pakistan violated three rights under Article 36. They are (1) Jadhav’s right to know his right of consular access; (2) India’s right to information about Jadhav’s arrest and (3) India’s right to access and contact Jadhav and to make his legal representation.⁶² As mentioned above (1) and (2) creates internationally wrongful act of continuing character. Hence, the Court ordered Pakistan to immediately provide consular access and let Jadhav know his rights.⁶³

ESPIONAGE AS AN EXCEPTION

There is no exception whatsoever in the VCCR regime for the consular access right. Pakistan denied the applicability of Article 36 for espionage activities on three grounds. They are (1) Article 36 prima facie does not applicable to espionage activities; (2) It is governed by customary law and not VCCR and (3) The case should be governed by 2008 Agreement and not VCCR.

Pakistan claimed that persons charged of espionage and national security offences are not entitled to consular access right. It amounts to justifiable limitation for the breach of receiving State obligation towards the concerned individual and the sending State. The Court noted that the espionage was discussed during the drafting of the VCCR, especially clubbed with the term ‘without undue delay’⁶⁴. This term was modified by the UK proposed term ‘without delay’⁶⁵. The term ‘undue’ may provide a discretionary time gap to the detaining authorities to give consular notification and to fulfill other rights under Article 36. Therefore, abuses may happen and prejudice the life and wellbeing of the concerned individuals in foreign jails.

61 *Supra* note 55.

62 *Supra* note 12 at para. 133.

63 *Available at* :Generally, Responsibility of States for International Wrongful Acts, annexed to UNGA Res. 56/83, Dec. 12, 2001. Also refer, John Quigley “The Law of State Responsibility and the Right to Consular Access” 11 *Willamette Journal of International Law and Dispute Resolution*.

64 Draft Article on Consular Relations, with Commentaries, 1961.

65 *Supra* note 52 at para. 80.

There is no reference to espionage either in Article 36 or other provisions of the VCCR. So, any method of interpretation in its context, in the light and objects and purpose of the VCCR does not create any exception i.e. every person is entitled to consular access right.⁶⁶

From the International Law Commission, there was no suggestion to add espionage as a possible exception to the consular access obligations. They noted the system of *incommunicado* followed by many countries for criminal cases to find out the criminal gang and networks. The ILC member mentioned a situation may arise as not to inform consular officer of its nationals arrest in order to catch the other criminals of the network. So, he proposed to omit the word 'without delay'. However, the Chairman of the ILC said that it would open the floodgate to restart the entire work on consular protection and communications and it would not be possible to foresee all conceivable cases.⁶⁷

Further, the Court rejected Pakistan's second and third arguments and held that consular access is solely governed by Article 36 and not under customary international law. Also, the 2008 Agreement cannot derogate Article 36 and "it can only conform, supplement, extend and amplify the provisions of the VCCR".⁶⁸

HUMAN RIGHT V. STATE RIGHT

Pakistan argued that the 2008 agreement signed between India and Pakistan is the sole basis for adjudicating the Jadhav case. This argument is not sustainable because the VCCR prohibited incompatible application to the VCCR regime.⁶⁹ The objective of the 2008 agreement is for "furthering the objective of humane treatment of nationals of either country arrested detained or imprisoned in the other country"⁷⁰. Article 73 of the VCCR permits bilateral treaties to supplement VCCR provisions but cannot derogate it. Article 41 of the VCLT, 1969 also confirms this interpretation i.e. VCCR cannot be derogated by bilateral treaty mechanisms. Article 41 states that multilateral treaty can be modified by the Parties through an agreement, if such modification is permitted by the treaty or if it is not prohibited by the treaty or it is not derogating the very sole objective of the treaty as a whole or it does not affect the other States rights under that treaty.

66 Vienna Convention on Law of Treaties, 1969, art. 31-32..

67 *Supra* note at paras. 79-80.

68 *Supra* note 55 at art. 73 (2).

69 *Ibid.*

70 *Supra* note 7 at Para 45.

The 2008 Agreement is an extension of the VCCR provisions. The objective of this agreement is to ensure humane treatment for the detained foreign nationals. It provides mechanism to be followed by both the Parties. They are as follows: biannual exchange of prisoners list, immediate notification of arrest to the respective High Commissions, expeditious information on sentences awarded to the foreign national, consular access within three months, sending back the nationals within one month from the confirmation of nationality and completion of sentence, arrest made on political and security grounds shall be decided on the merit of the case and finally in special cases which calls for the consideration of compassion and humanitarianism, the Parties may decide using their available discretionary powers under the laws which regulates the release and repatriation of persons.⁷¹

Unfortunately, the ICJ failed to look into the human right aspect of consular access right claiming jurisdictional hurdles. But, the Inter-American Court of Human Rights declared that the right of consulate access is a human rights which is indispensable for the detained foreign nationals who languishes in alien legal system and judicial process.⁷² So, it is essential to see consular access as human right for the promotion and protection of human rights.⁷³ It is also a proof of humanisation of international law, particularly humanisation of consular law.⁷⁴

EFFECTIVE REVIEW AND RECONSIDERATION AS AN EFFECTIVE REMEDY?

India argued violation of Article 36 of the VCCR consequently violated Article 14 of the ICCPR which contains international due process norms to be followed in any trial process. India pointed out that Jadhav case is different from LaGrand and Avena cases. These two cases were happened in the United States where due process norms are compliant. In Jadhav Case, the trial conducted by the Military Court and the two States are in perpetual hostile military conflict. Thus, there cannot be a just and unbiased trial process in the Pakistani Military Court for an ex-Indian Navy personnel Jadhav. Therefore, the review and reconsideration as lay down under LaGrand and Avena cases will be ‘extremely inadequate’.

71 Subash P, International Law on Consular Access: Emerging Trends (2020) (Unpublished LLM dissertation, The Tamilnadu Dr. Ambedkar Law University).

72 The Right to Information on Consular Assistance in the Framework of the Guarantee of the Due Process of Law, Advisory Opinion) [1999] Inter American Court of Human Rights, pp. 1-84, available at: https://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf (Visited on February 14, 2022).

73 Antonio Augusto Cancado Trindade, “The Humanisation of International Law: The Human Person as Subject of the Law of Nations” Revisita da Faculdade de Direito da Universidade Federal de Minas Gerais, 25-66 (2014).

74 Antonio Augusto Cancado Trindade, “The Humanisation of International Law: The Impact of Advisor Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case-Law and Practice” 65 *Chinese Journal of International Law*, 1-16 (2007).

Pakistan viewed India's request to release Jadhav would transform the ICJ as the appellate criminal Court. The Court held in consular cases that it does not sit as a court of appellate jurisdiction.⁷⁵ Thus, the appropriate remedy is 'review and reconsideration' taking into account the damages caused to Jadhav's defence due to the denial of right to consular assistance vis-à-vis consular access. Pakistan pinpointed the effectiveness of judicial review by ordinary Courts over Military Orders and clemency proceedings.

Once again, the Court reiterated its stand in *Avena* case that the trial and sentence is not per se inconsistent with IL but certain obligations emanate from treaty need to be fulfilled prior to trial process.⁷⁶ The Court failed to take into account the relevance of Article 14 of the ICCPR. It viewed its jurisdiction is restricted within the bounds of the VCCR framework itself. The Court noted that "partial or total annulment of sentence is not necessary and cannot be a sole remedy".⁷⁷ However, it is a principle of IL that "any breaches of an engagement involve an obligation to make reparation and that reparation must as far as possibly wipe out all the consequences of the illegal act".⁷⁸ Also, it is a principle of international law that "the breach of an engagement involves an obligation to make reparation in an adequate form".⁷⁹

However, the Court upheld the remedy of effective review and reconsideration.⁸⁰ It directs Pakistan to duly consider its refusal of consular access and its all potential consequences in the trial process and outcome. The choice of means left to Pakistan to decide its ways and means of review and reconsideration process. The Court emphasised the principle of fair trial and it is of cardinal importance to the review mechanism ordered by the Court.

CONCLUSION

To observe, the World is highly connected due to technological growth, we are diverse in many ways. Also, it is extremely difficult, if a person got arrested in foreign jurisdiction with unfamiliar language and legal system. Thus, it is highly essential to provide consular access to the detained foreign national for protecting his human right and wellbeing. Further, we cannot oversee the refugee problem vis-à-vis consular assistance. If such a person is arrested and he refused to tell his nationality and there is no documents with him. Then, there is no possibility of

75 *Supra* note 12 at para. 129.

76 *Supra* note 52 at paras. 122-123.

77 *Ibid*, para. 123.

78 *Factory at Chorzow (Germany v. Poland)* (Judgment) [1927] P.C.I.J. (Ser. A) No. 09.

79 *Ibid*, para. 119.

80 *Supra* Note 12 at para. 147.

providing consular access to him. This grey area is left uncovered in the VCCR.

Even though, Pakistan allowed Jadhav's mother and wife to visit him on humanitarian grounds along with Indian representatives. Till now, no proper consular access provided to Jadhav as envisaged by the consular Convention and no case materials were provided either to India or Jadhav. Thus, the strong connection between consular access right and due process right under Article 14 of the ICCPR cannot be overlooked. Definitely, consular access right is one of the minimum standards of human rights which must be complied with and respected for the promotion of friendly relations between States and also for the promotion of human rights.

The ICJ as a World Court failed to utilise this opportunity to rectify its prior error of not answering consular access as a human right. This aspect is rightly captured by the Inter-American Court of Human Rights in its most cherished advisory opinion sponsored by Mexico indirectly against the United States.⁸¹ Further, the use of advisory opinion for solving contentious case is on the rise.⁸² Also, the Court failed as one of the principal organ of the UN to fulfill the Charter principles and purposes i.e. promotion and protection of human rights. Finally, the Inter-American Court rightly pronounced the human right character of consular access. It is a pioneering judgment among the world of jurisprudence because even the so-called torch bearers of human rights Court refused to answer this aspect.

81 *Supra* note 72.

82 *Available at*: Legal Consequences of the Separation of the Chagos Archipelagos (Advisory Opinion) [2019] ICJ Rep. 95, pp. 1-50. Also, refer, Dissenting Opinion of Judge Donoghue, Legal Consequences of the Separation of the Chagos Archipelagos (Advisory Opinion) [2019] ICJ, pp.

A CASE FOR REGULATION OF CRYPTO CURRENCIES IN INDIA

T H Vishnu*

INTRODUCTION

The 21st century has been described as the century of technological revolution. The world is witnessing the sprouting of new technologies and innovations one after the other. From our daily chores, to work, to sleep and many other things which would seem mundane have been revolutionized to a great extent. One such interesting area where technology is continuously transforming is in the realm of money.

The invention of money took place before the beginning of written history.¹ In the ancient world, people engaged in the system of barter. The increase in trading activity and the subsequent economic growth resulted in the decline of barter system and demanded a uniform medium of exchange. This resulted in the emergence of the standardized coinage where, coins made from metals were used as medium of exchange. The first official currency was by King Alyattes of Lydia around 600 BC in modern day Turkey. Coins then evolved to paper currency around 1661 AD mostly due to the ease of doing business because it could be mass-produced without relying on raw materials such as gold or silver.² This discovery of paper notes was then followed by the discovery of e-money by Western union in 1860 AD where electronic fund transfer via telegram. This was subsequently revolutionized with the discovery of credit cards and mobile banking in the 20th and 21st century. With the discovery of laptops and smart phones, the world witnessed a completely new change from paper notes and coins (fiat currency) to digital money. Just when it was thought that the innovation with regards to monetary transactions has reached its zenith, on October 31st, 2008, a new invention took the world by storm when an unidentified person, calling himself as Satoshi Nakamoto (translated as 'God's Wisdom'), created the first ever cryptocurrency called as "Bitcoins".

* Guest faculty, Law & Political Theory, Multi Disciplinary Academic Staff, National University of Advanced Legal Studies, Kochi.

1 Denise Schmandt-Besserat, 'Tokens: their Significance for the Origin of Counting and Writing', Denise Schmandt-Besserat, *available at*: <https://sites.utexas.edu/dsb/tokens/tokens/> (Visited on March 2, 2021).

2 Pete Rogers, 'The History of Money: From Barter to Bitcoin', Welford Management and Consulting, *available at*: <https://www.welfordmanagement.com/the-history-of-money-from-barter-to-bitcoin/> (Visited on March 2, 2021).

Since few people were ready to accept Bitcoin as a means of payment, it was initially unfamiliar and had limited practical utility. However, Bitcoin's distinct properties, as well as the perceived benefits of Bitcoin payments over payments in traditional currency, have aided in its meteoric increase in popularity.³ This resulted in the birth of many new cryptocurrencies such as Ethereum, Litecoin, Binance Coin etc. The rising popularity of cryptocurrencies has also led to the establishment of entirely new marketplace facilitating its transactions among the users.

Although cryptocurrencies were well received by people around the world, it received mixed response from various governments. Some countries such as China, Bolivia, Ecuador have banned the use of cryptocurrencies. In USA, Canada, Singapore, South Korea, although, it is not yet considered as legal tender, it has been made legal for the purpose of establishing cryptocurrency exchanges. Recently, on June 9, 2021, El Salvador became the first country in the world to adopt bitcoin as legal tender.⁴ In contrast, some countries have opted to remain silent, leaving the legal status of the same unclear.

In India, the regulatory authorities have shown a trend to discourage the use of cryptocurrencies despite its growing popularity of the same among her citizens.⁵ In the past, The government had issued press releases cautioning people about its potential risks stating virtual currencies are like Ponzi schemes and are not a legal tender.⁶ R.B.I had already issued notifications stating the potential risks of the same three times in December, 2013, February 2017 and December 2017.⁷ Thereafter, R.B.I issued press releases and notification on 6th April 2018 prohibiting institutions governed by R.B.I from dealing in virtual currencies.⁸ However, on March 4, 2020, after much uncertainty in the minds of cryptocurrency exchanges and investors, the Supreme Court, in *Internet and Mobile Association of India v. Reserve Bank of India*⁹ lifted the ban imposed by the above R.B.I notification. In 2019, a committee set up by the Indian government had suggested a

3 Kevin V. Tu; Michael W. Meredith, "Rethinking Virtual Currency Regulation in the Bitcoin Age" 90 *Washington Law Review* 271 (2015).

4 Reuters, "In a world first, El Salvador makes bitcoin legal tender, *The Hindu*, June 10, 2021, available at <https://www.thehindu.com/news/international/in-a-world-first-el-salvador-makes-bitcoin-legal-tender/article34775947.ece> (Visited on March 5, 2021).

5 There is no official data, but industry analysts reckon there are 15 million crypto investors in India holding over 100 billion rupees (\$1.37 billion), Nupur Anand, "Leading Crypto exchanges scout entry into India despite potential ban", *The Hindu*, available at: <https://www.reuters.com/world/india/leading-crypto-exchanges-scout-entry-into-india-despite-potential-ban-2021-06-09/> (Visited on June 10, 2021).

6 Press Information Bureau, available at: <http://www.pib.nic.in/PressReleaseDetail.aspx?PRID=1514568> (Visited on March 2, 2021).

7 *Ibid.*

8 Reserve Bank of India - Notifications, available at: <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=11243>. (Visited on April 5, 2021).

9 2020 SCC Online SC 275.

draft legislation, Banning of Cryptocurrency & Regulation of Official Digital Currency Bill, 2021 (hereinafter referred to as the 'cryptocurrency bill') which recommended a complete ban on cryptocurrencies making its mining, buying, holding, selling, dealing in, issuance, disposal or use of cryptocurrency illegal. However, there is no clarity as to when the bill will become law. Recently, the government indicated that the bill might face a delay since "5-6 bills related to finance ministry are in the que"¹⁰. Therefore, at the present, there is no law regulating cryptocurrencies in India and in the future, the regulatory authorities are proposing to prohibit the use same.

The researcher argues against the present position taken by the regulatory authorities in India. The argument here is that, *instead of focusing only on its vices, there is a need to break up cryptocurrencies separately into its virtues and vices*¹¹. That there is a dire need to *legislate a substantive regulatory framework on cryptocurrencies. That the legislation should ensure the promotion of its virtues at the same time discourage its vices and that such a regulation, promoting the use cryptocurrencies, will be more economically efficient than its prohibition as proposed by the cryptocurrency bill.*

Therefore, this paper analyses the need to promote the use of cryptocurrencies from an *interdisciplinary perspective of law and economics*. For the same purpose, the researcher analyses *the economic efficiency of three different scenarios* with respect to regulation of cryptocurrencies: the current scenario (hereinafter referred to as the 'pre – regulatory scenario') wherein there is an absence of regulatory framework; the scenario as proposed by the cryptocurrency bill (hereinafter referred to as the 'prohibited scenario') and the scenario wherein cryptocurrencies are promoted (hereinafter referred to as the 'promoted scenario'). The analysis is carried out by analyzing the costs - benefits attached to cryptocurrencies and applying the rational choice model of crime as propounded by Gary.S.Becker in all these scenarios.

It is to be noted that the study *does not go into how cryptocurrencies should be regulated*. Rather, it is limited to why they should be regulated and the problems that will arise if it is unregulated.

10 Bill to regulate cryptos is likely to face delay", *The Hindu Business Line*, , March 16, 2021, available at: <https://www.thehindubusinessline.com/money-and-banking/bill-to-regulate-cryptocurrencies-likely-to-be-delayed/article34083902.ece> (Visited on April 6, 2021).

11 Omri Marian, "A Conceptual Framework for the Regulation of Cryptocurrencies"⁸² U. *Chicago Law Review* Dialogue 53 (2015-2016).

WHAT IS CRYPTOCURRENCY?

*“Cryptocurrency is a digital currency in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds, operating independently of a central bank.”*¹²

A cryptocurrency is a medium of exchange that uses cryptography to manage the creation of new units as well as secure the transactions.¹³ One of the most striking features of cryptocurrency is that it weeds out the need for a trusted third party such as a governmental agency, bank, etc.¹⁴ According to Satoshi Nakamoto, Bitcoin is a software-based online payment system and introduced as open-source software in 2009.¹⁵

FEATURES OF CRYPTOCURRENCY

Blockchain

The unique technological innovation common to most cryptocurrencies is a public ledger that functions as a decentralized system for recording ownership and value transfers.¹⁶ This public ledger is known as ‘*Blockchain*’ in which certain blocks are created whenever a transaction involving bitcoins take place between parties. Any person having a public key to blockchain can access the public ledger and view all the transactions that have ever taken place till now since the inception of blockchain.¹⁷ It consists of a “permanent, distributed, digital ledger, resistant to tampering and carried out collectively by all the nodes of the system.”¹⁸

Mining

As noted above, unlike fiat currency, cryptocurrency is not backed by any centralized authority and operates in a decentralized network of computers called ‘nodes’. Cryptocurrencies are created by a process called ‘mining’. The idea of mining is simple; whenever a person wants to transfer cryptocurrency, the transaction is verified on the blockchain by a this process called ‘mining’.¹⁹ A group of miners competes amongst themselves to finish the verification process

12 Lexico, *available at*: <https://en.oxforddictionaries.com/definition/bitcoin> (Visited on June 20 20, 2021).

13 Andrea Castillo. Jerry Brito, Bitcoin: A Primer for Policymakers (MercatusCenter, 2013).

14 Satoshi Nakamoto, Bitcoin: ‘A Peer-to-Peer Electronic Cash System,’ Bitcoin, *available at*: <https://bitcoin.org/en/bitcoin-paper> (Visited on March 20, 2021).

15 *Ibid*.

16 *Supra* note 11.

17 Mario Iskander, “Blockchain: The Future of All Data” 22 *Intellectual Property & Technology Law Journal*. 1, 18 (2017).

18 *Id.*, at 19.

19 *Id.*, at 20.

by verifying the details of the transfer and of the ownership.²⁰ The miner who finishes first is rewarded with a new batch of cryptocurrencies automatically from the software.²¹

Decentralized Network

Cryptocurrency relies on peer-to-peer (P2P) decentralized networks, means that transactions involving cryptocurrency can be done directly between persons without relying on any intermediaries.²² It does not rely on a central bank to issue it, a commercial bank to store it, or a credit card company to transfer it.²³ Instead, users interact with each other directly and anonymously, without third-party intervention and hence, can bypass the entire financial systems.²⁴

Anonymity

Even though, all the transactions are recorded publicly in blockchain, these transactions are not recorded in the name or email of the person but is recorded in the digital address of that person, which is a set of alphabets and numbers. This feature of cryptocurrency keeps the identity anonymous.

Irreversibility of Transactions

Another important feature attached to cryptocurrency is that the transactions recorded in blockchain are irreversible.²⁵ This means that, once the transactions are recorded, it cannot be altered or modified, unless, all the previous blocks are also modified, which is a next to impossible.

These features of cryptocurrencies offer its users tremendous economic as well as social benefits such as reduction in transaction costs, authentic data collection and storage, raising funds through initial coin offerings, financial etc. – all of them and also further benefits are discussed further. These unique features of anonymity, decentralization, bypassing the entire traditional financial systems, etc. makes cryptocurrencies a suitable tool for committing illicit activities as well.²⁶

20 Craig K. Elwell, M. Maureen Murphy, and Michael V. Seitzinger, Bitcoin: “Questions, Answers, and Analysis of Legal Issues”, Congressional Research Services, *available at*: <http://fas.org/sgp/crs/misc/R43339.pdf>

21 *Ibid.*

22 European Central Bank (ECB), *available at*: <http://www.ecb.int/pub/pdf/other/virtualcurrencyschemes20121Oen.pdf> (Visited on March 10, 2020).

23 Nicholas A. Plassaras, “Regulating Digital Currencies: Bringing Bitcoin within the Reach of IMF” 14 *Chicago Journal of International Law*. 377 (2013).

24 *Id.*, at 378.

25 *Id.*, at 379.

26 Omri Marian, “Are Cryptocurrencies Super Tax Havens” 112 *Michigan Law Review*. 38, 48 (2013-2014).

THE BENEFITS AND COSTS OF CRYPTOCURRENCY

In order to better understand the need to promote cryptocurrencies and not prohibit the same, we need to first understand various benefits and costs attached to cryptocurrencies. Even though it is not possible to discuss all the benefits and costs attached to cryptocurrencies, this limitation will not affect the study as the study proposes, regardless of whatever benefits and costs exists, regulation will reduce the cost and help us extract the benefits.

Benefits Attached to Cryptocurrency

Cryptocurrencies has tremendous amounts of benefits to offer. With the advent of cryptocurrencies, transactions can be completed anytime anywhere efficiently in no span of time. For transacting in cryptocurrencies, overseas or otherwise, one just needs a public and private key to their account, does not have to rely on bank accounts and financial intermediaries and hence, can transact in a peer-t-peer model.²⁷ Therefore, using cryptocurrencies in transactions increases the ease of doing business.

Inclusion of an intermediary for production, transportation and handling of physical currencies leads to the participants incurring huge costs.²⁸ For instance, it costs an estimated \$60 billion each year to handle central bank currency in the US, including the costs of processing and accounting of money, storage, transport, and security.²⁹ The substitution of physical currency with cryptocurrency, at least to some extent, can reduce this cost.

The presence of intermediaries in the traditional financial system increases the cost of transaction fees up to 1% - 3% of every sale, depending on whether debit or credit card is used.³⁰ “Extrapolating from the 2 percent estimated average fee for credit- and debit-card payments and from the whopping \$11 trillion in payments that Visa and MasterCard processed in 2013—about 87 percent of the global market—we estimate these operations cost merchants \$250 billion that year.³¹ Securing and distributing all this cash costs countries between 0.5 percent and 1.5 percent of their GDP”, says Ajay Banga, CEO of MasterCard Inc. offering an estimate that runs as high as \$1.4 trillion when applied to the entire world³². Therefore, the use of cryptocurrency would make such transactions much cheaper than transacting in physical currency.

27 *Supra* note 3.

28 *Supra* note 11

29 Paul Vigna & Michael J. Casey, *The Age of Cryptocurrency: How Bitcoin And Digital Money Are Challenging The Global Economic Order* (St. Martin's Press 2015).

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

Cryptocurrency transactions are recorded in blockchain. Such transaction recorded is traceable and irreversible and hence, are the conclusive evidence of the same³³.

Cryptocurrencies have numerous investment prospects such as Initial Coin Offering (ICO). An ICO is a vehicle designed by blockchain start-ups to raise early-stage capital.³⁴ The concept of ICO is very similar to the traditional concept of Initial Public offering (IPO). Similar to an IPO, in ICO, the blockchain start up raise funds by inviting interested parties to purchase crypto tokens. Once purchased, the parties will gain some voting power depending upon the proportions of the token purchased like an IPO.³⁵ The absence of intermediaries and the usual evils attached to IPOs which involves frauds, money laundering, etc., can be eliminated since the transactions which are irreversible is recorded in the blockchain and publicly available.

For the investors, ICOs provide unprecedented returns of thousand percent increases in value and better liquidity than investment in traditional start-ups.³⁶ Vishal Gupta, the founding member of DABFI emphasized that “there are around 400,000 to 500,000 people who have bought or sold Bitcoin, and that the total market size is approximately Rs 2,000 crore a year in India.” Therefore, there exist a potential cryptocurrency market in India which can be capitalized by using methods such as ICOs which will be huge economic benefit to the country.³⁷ Another major economic benefit arising from the cryptocurrency regime is the revenue received by taxing cryptocurrencies. Cryptocurrencies are taxed across jurisdictions like U.S.A, U.K, Japan, etc. Taxing cryptocurrencies can serve two purposes. First, receiving revenue by taxing transactions involving cryptocurrencies or taxing after treating them as property. Second, considering it is difficult to keep a track on people/entities dealing in cryptocurrencies, the government, through taxation, will be able to keep a record on people and business entities dealing in cryptocurrencies. For instance, the German government categorized Bitcoin as a financial instrument, legalizing its use for the trade of commodities and stocks in the market which resulted in a traceable, verifiable exchange that can also be taxed.³⁸

33 *Supra* note 11.

34 Kastelein, Richard, “What Initial Coin Offerings Are, and Why VC Firms Care” *Harvard Business Review*, March 22, 2017, available at: <https://hbr.org/2017/03/what-initial-coin-offerings-are-and-why-vc-firms-care> (Visited on May 21, 2021).

35 *Ibid.*

36 *Ibid.*

37 Aparajita Choudhury, “Will Self-regulation By Bitcoin Players Spur Rbi To Authorise Use Of Virtual Currencies?” *Yourstory* April 17, 2017, available at: <https://yourstory.com/2017/04/bitcoin-dabfi>.

38 Kleiman, Jared A. “Beyond the Silk Road: Unregulated Decentralized Virtual Currencies Continue to Endanger US National Security and Welfare” 4 *National Security Law Brief* (2013).

Usage of cryptocurrencies can hugely benefit small business in cities as well as in remote areas where there is no proper access to banks and other financial institutions.³⁹ To transact in cryptocurrencies, one does not even require a smart phone but only a feature phone, which can receive text messages which can be plugged into a computer system to deliver cryptocurrencies. Hence, it leads to financial inclusion of the underbanked sections of the society.⁴⁰

Also, cryptocurrency creates a platform for micro-payments, enabling small businesses to profit from cheap goods or services dealt on the Internet like, downloading of games or songs.⁴¹ Cryptocurrencies can be an effective weapon to fight corruption and other misuse of currency by the government as well as others such as counterfeiting of currencies easily by substituting paper currency with cryptocurrency.⁴²

The above discussed benefits are not exhaustive. These benefits can lead to huge monetary gains both to the government as well as the citizens, especially in a developing country like India. It is to be noted that these benefits can be extracted out of cryptocurrencies, only if, the usage is promoted with a substantive regulatory framework.

Costs Attached to Cryptocurrency

Although cryptocurrencies offer multitudinous virtues, it is not free from its vices. The unique features attached to cryptocurrencies makes it a suitable tool to carry out illicit activities.

Two important reasons why cryptocurrencies are a suitable weapon to commit criminal activities is that: first, the blockchain, though a public ledger, does not record the name and address of the wallet holder but only the account key which is a set of alphabet and number, thereby providing anonymity to the holder; second, our financial – regulation system heavily relies on intermediaries to identify and interrupt illicit activities. Cryptocurrencies can be transacted bypassing this entire regulatory mechanism established for disrupting such misconducts.⁴³

39 Peter Twomey, “Halting a Shift in the Paradigm: The Need for Bitcoin Regulation” 16 *Trinity College Review* 6 (2013).

40 *Supra* note 19.

41 Virtual currencies – Key Definitions and Potential AML/CFT Risks, 17 (2014). Available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf> (Visited on May 20, 2021)

42 Chris Wellisz, “Technology offers weapons for the battle against corruption”, Finance & Development, 55(1) held on March 2018 available at: <https://www.imf.org/external/pubs/ft/fandd/2018/03/wellisz.htm> (Visited on May 6, 2021)

43 *Supra* note 11.

The crimes which have benefited the most with the advent of cryptocurrencies are organized crimes such as tax evasion, money laundering, drug trafficking, terrorist financing, hacking and extortion etc. The costs involved in committing these crimes using the traditional currency was exorbitant when compared to the use of cryptocurrencies in such crimes.⁴⁴ The fact that cryptocurrency transactions take place entirely and independently in the cyber space wipes out all the middlemen involved with traditional currency for the committing these crimes.

For instance, in 2013, within 4 years of the birth of bitcoins, 'Silk Road' which transacted exclusively in bitcoins for selling and buying drugs and weapons around the world was busted.⁴⁵ Silk Road operated as a 'The Onion Router' (TOR) hidden service, a software which provides anonymity to its users to escape from the radar of the enforcement agencies. The anonymity provided by bitcoins further added to the benefit of the customers over the already existing anonymity provided by TOR.

Another cost attached to cryptocurrencies is that it offers certain features of tax havens: income from cryptocurrencies is not subject to taxation and the identity of the payer remains anonymous. Since, cryptocurrencies can function without the support of government and intermediaries, it helps the evaders to stay out of the clutches of the government. Also, considering cryptocurrency transactions take place in the digital world entirely, there is no particular jurisdiction in which it takes place. Thus, offshore tax evasion is made much easier with the advent of cryptocurrencies.⁴⁶

Further, with the advent of cryptocurrencies, the problem of money laundering has grown significantly.⁴⁷ The traditional path of money laundering was to take assistance, directly or indirectly, from banks and other financial institutions.⁴⁸ The money had to be moved, physically or digitally, through numerous networks which made it a costly and laborious process. Now, a cryptocurrency wallet which can be opened with zero costs would do the same job as a swiss

44 *Supra* note 27.

45 Rolf van Wegberg, Jan-Jaap Oerlemans & Oskar van Deventer, "Bitcoin money laundering: mixed results? An explorative study on money laundering of cybercrime proceeds using bitcoin" *Journal of Financial crime* (2018).

46 Jojarth, Christine. "Money Laundering: Motives, Methods, Impact, And Countermeasures." *In Transnational Organized Crime: Analyses Of A Global Challenge To Democracy* 17-34 (Transcript Verlag Publishers, March 2014).

47 *Id.*, at 35.

48 Heidi Wilder, Cracking the Code: Tracking The Bitcoins From a Hamas Terrorist Fundraising Campaign, Elliptic available at: <https://www.elliptic.co/our-thinking/tracing-bitcoin-terrorism>. (Visited on 21 March, 2021).

bank does in a more efficient and beneficial manner.⁴⁹ The costly and laborious pathway is substituted with a number of 'clicks' in a peer-to-peer model ensuring anonymity which almost diminishes the possibility of such illicit money coming directly under the radar of the enforcement authorities.

Similarly, another major crime which got benefited from the birth of cryptocurrencies is terrorist financing. The traditional channels through which terrorist financing used to take place were arduous as they involved physical movement of tons of hard cash across borders. Now, with cryptocurrencies, this long and risky process is just a click away.

The Izz ad-Din al-Qassam Brigades, a sister concern of Hamas, an organization designated as terrorist group by the U.S government started a fundraising campaign by encouraging the supporters to contribute bitcoins to a particular bitcoin address.⁵⁰ There are other evidence of terrorist groups such as Al-Sadahaq, Mahamlal Tactical etc. using cryptocurrency for this purpose.⁵¹

Another major cost attached to cryptocurrency is its *price volatility*.⁵² On February 25, 2019, one bitcoin was valued at \$3767.31 dollars and within 3 months, in May, the price shot up to \$8203.97 dollars.⁵³ Thus investments in cryptocurrencies can make one rich and the other bankrupt in a day's time because of the price volatility of cryptocurrencies, especially bitcoins.

ECONOMIC ANALYSIS OF THE REGULATION OF CRYPTOCURRENCY

This section deals with analysis of the need for regulation to promote the use of cryptocurrencies in India. For the same purpose, the researcher is analyzing and comparing three different scenarios, pre – regulatory scenario, prohibited scenario and promoted scenario, by analyzing the costs and benefits attached to cryptocurrencies and applying the rational choice model of crime propounded by Gary S. Becker in all the above-mentioned scenarios. The analysis is carried out to show that the promoted scenario is the most economically efficient alternative amongst the three.

49 Steven Stalinsky, "The cryptocurrency-terrorism connection is too big to ignore" *The Washington Post* 26 April, 2019 available at: https://www.washingtonpost.com/opinions/the-cryptocurrency-terrorism-connection-is-too-big-to-ignore/2018/12/17/69ed6ab4-fe4b-11e8-83c0-b06139e540e5_story.html?utm_term=.a9399e0da4ab. (Visited March 22, 2021).

50 Kapoor, Rishabh. "Regulating the Bitcoin Ecosystem." Delft University of Technology, 0AD, 01–88. (2021) available at: <https://repository.tudelft.nl/islandora/object/uuid%3A114d5e17-8389-4f1c-87e2-b175bb3830e1> (Visited on May 23).

51 4.49% - The Bitcoin Volatility Index, available at: <https://bitvol.info/>. (Visited on May 23, 2021).

52 Becker, G., "Crime and Punishment: An Economic Approach" 76(2) *Journal of Political Economy* 169-217. (1968).

53 *Id.*, at 218.

CRIME, RATIONALITY AND UTILITY – RELATIONSHIP

The latter half of the 20th century witnessed the growth of the modern criminal deterrence research through an economic angle which laid down for a substantial amount of further literature on economic analysis of crime and punishment. The first statement of this theory in the modern times was given by Gary. S. Becker in 1968 in his paper ‘Crime and Punishment: An Economic Approach’⁵⁴. This economic analysis saw the potential criminal as a ‘rational person’⁵⁵. The economic analysis of crime is founded on the basic principle that criminals would rationally choose only those opportunities which would satisfy their preferences the most.⁵⁶ Economists assume that “the criminal is rational in that her preferences are complete, reflexive and transitive, and the individual will choose the opportunity that yields the greatest utility according to her preferences.”⁵⁷

This utility, in simple terms is the cost – benefit analysis of the opportunity of that crime. The essence of Becker’s analysis of crime is that “the rational potential criminal faces a gamble – she can either choose to commit the crime and thereby derive benefits or not to commit the crime thereby not receiving any benefits but is risk free.”⁵⁸ If the benefits of committing the crime, outweighs the costs of crime such as the fear of getting caught, severity of punishment, then the rational criminal, finding utility in the same would decide to commit the crime and vice-versa. That is, crime is worthwhile so long as its expected utility exceeds the utility from abstention.⁵⁹

The criminal justice system can successfully impose costs on crimes through its regulation by increasing the resources in the society that functions for arrest, conviction and punishment of a criminal.⁶⁰ One of the major objectives of any penal statutes or regulations providing punishments and other resources is for deterring or preventing a possible crime. Therefore, regulating a crime by imposing costs which would outweigh the benefits attached to that crime would reduce its utility and thereby deter a rational potential criminal from committing the crime. This is the relationship between crime, utility and rationality.

54 Dau-Schmidt, K.G., “An economic analysis of the criminal law as a preference-shaping policy”. Duke LJ, (1990).

55 H. Varian, *Intermediate Microeconomics* 35 (Springer India Pvt. Ltd. India 1987).

56 Cook, P.J. “Research in criminal deterrence: Laying the groundwork for the second decade” 2 *Crime and Justice* 211-268. (1980).

57 Klevorick, A.K., “On the Economic Theory of Crime”, in Pennock, J. Roland and Chapman, John W. (eds.), 289-312 *Nomos XXVII: Criminal Justice* (1985).

58 *Id.*, at 313.

59 *Supra* note 11.

60 *Supra* note 61.

THE RATIONAL CHOICE MODEL OF CRIME AND CRYPTOCURRENCY

As seen in the rational choice model of crime, imposing costs on crimes to outweigh the benefits offered by such crimes, would diminish the utility of committing that crime and therefore, would deter the potential criminal committing the same. The argument made here is not that the existence of a substantive regulatory framework providing costs for committing crimes using cryptocurrencies will reduce the current level of utility but that it will reduce the increase in utility brought by the usage of cryptocurrencies.

Even before the birth of cryptocurrencies, crimes such as tax evasion, money laundering were committed by criminals. This means that they had already calculated the utility of committing such crimes and as and when the benefits outweighed the costs, the crime was committed. Now, with the advent of cryptocurrencies, the potential criminal is offered with a new opportunity to calculate the utility of such crimes. Earlier, a criminal who calculated negative utility from engaging in the criminal activity might now calculate positive utility with the usage of cryptocurrencies.⁶¹ The fact that cryptocurrencies offers anonymity, reduces the cost of committing crimes, bypasses the entire financial regulatory mechanisms, reduces tremendously the possibilities of coming under the radar of the enforcement authorities tremendously adds up to the benefit of the criminal while parallelly reducing his/her costs which was associated with the usage of traditional currency in such crimes. Additionally, the fact that cryptocurrency transactions can be completed in a click without breaking the transactions immensely helps the criminals to avoid detection by the enforcement authorities, thereby reducing the costs.⁶² Therefore, criminals are deriving positive utility from committing crimes using cryptocurrencies, thereby, increasing the utility attached to crimes.

THE ANALYSIS

As mentioned above, the purpose here is to compare three alternatives before the authorities with regards to regulation of cryptocurrencies and to find out which scenario is the most economically efficient and preferable one against the others – meaning, that in which scenario we can reduce the criminal utility associated with cryptocurrencies as well as extract tremendous economic benefits offered by the same.

61 Cohen, L.E. & Felson, M. "Social change and crime rate trends: A routine activity approach" 44 (4) *American Sociological Law Review* 588-608 (1979).

62 Clarke, R.V. & Cornish, D.B 'Modelling offenders' decisions: A framework for research and policy. *Crime and Justice* – 6 *An Annual Review of Research* 147-185 (1985).

PRE – REGULATORY SCENARIO

As seen in the Rational Choice model, developing a regulatory framework imposing costs and thereby outweighing the benefits of the potential criminal will reduce the utility of the criminal in the eyes of the criminal.

According to the rational choice model of crime, “there are three major elements in a given criminal opportunity – a) a likely offender, b) a suitable target and c) the absence of suitable guardian.”⁶³ In a pre - regulatory scenario, the number of likely offenders (for instance, money launderers) aiming to commit crime using a suitable target (cryptocurrencies) are very high since there is an absence of suitable guardian (regulatory framework) which would deter them from committing the same. Therefore, there is an increase in utility brought by cryptocurrencies in certain crimes which was traditionally done using physical currencies.

To illustrate further, consider the case of money laundering. The traditional way of money laundering involved large physical movement of currencies, overseas or otherwise and finally to a safe haven in which the launderer can hide and clean the ‘dirty money’ into a ‘clean’ one. This movement of traditional currency involved a intermediary to facilitate the movement. This led to higher risks for the launderer to come under the radar of the enforcement authorities. With the advent of cryptocurrencies, these costs are minimized to a minute level. The dirty currency can be moved across borders with one click and can bypass the entire financial system thereby escaping the radar of the enforcement authorities. And in a pre – regulatory scenario, the absence of a regulatory framework further reduces the costs faced by the launderer. Thus, there is a huge increase in utility brought by cryptocurrencies in committing certain crimes which was traditionally committed using physical currencies.

Moreover, criminals are always looking for newer and safer methods of committing crimes.⁶⁴ Increasing numbers of potential offenders are growing their interest in the increase in criminal utility provided by cryptocurrencies.⁶⁵ When criminals are already using the laborious method of physical currency transactions to commit economic offences, opportunities provided by cryptocurrencies which are safer, less costly and have a wider reach without any jurisdictional restrictions is very appealing.⁶⁶

63 Kleemans, E.R., Soudijn, M.R.J., & Weenink, A.W. ‘Organized crime, situational crime prevention and routine activity theory’ 15 *Trends In Organized Crime* 87-92. (2012).

64 Maras, M-h. *Cybercriminology* (New York: Oxford University Press, 2016).

65 Garoupa, N, “Behavioral economic analysis of crime: A critical review” 15 *European Journal of Law and Economics* 5-15 (2003).

66 Richard A. Posner, “An Economic Theory of the Criminal Law” 85 *Colum. L. Rev.* 1193 (1985).

Thus, the efficient way to make this environment imperfect is to make the crimes attached to cryptocurrencies costlier.⁶⁷ As mentioned above, increasing the resources that provides for arrest, detention, imprisonment and other forms of deterrence will result in the reduction of crimes by increasing the costs attached to the crime.⁶⁸ Offenders who are deterred from committing crime in the first place do not have to be identified, captured, prosecuted, sentenced, or incarcerated.⁶⁹

Thus, the absence of a substantive regulatory framework creates a perfect environment for the criminals to carry out illicit activities. Therefore, there is a dire need to break the regulatory inertia and develop a regulatory framework for cryptocurrencies in India.

Addressing the criticism

One of the major criticisms faced by this theory is the assumption of rationality in criminals.⁷⁰ The critiques argue that not all crimes are committed after a cost – benefit analysis of the opportunity and there are ‘n’ number of other factors which may influence a person for committing crimes. Crime of passion, crime on provocation etc. are such examples which does not involve a cost – benefit analysis.⁷¹

Even though this criticism may stand sound against the theory, the researcher would like to argue that, since crimes related to cryptocurrencies are financial crimes or drug crimes, there tend to be a cost – benefit analysis on the part of the criminals of the opportunity of the crime. Crimes of money laundering, tax evasion, drug trade etc. has to involve a cost – benefit analysis of the opportunity of the crimes and may not involve passion or provocation aspect as put forth by the critiques, since it usually involves a huge network of people, resources and money.

Even assuming that all criminals engaged in financial crimes are not rational persons there is always some portion of criminals – large or small – who might think rationally, and a substantive regulatory framework will help in deterring such criminals. Therefore, it results in the deterrence of overall criminal behaviour in the society.⁷²

67 *Ibid.*

68 Jacob, H., “Rationality and criminality”. 59(3) *Social Science Quarterly* 584. (1978).

69 Freeman, R.B. “The Economics Of Crime”. *Handbook Of Labor Economics*. 3529-3571 (1999).

70 *Supra* note 11.

71 *Ibid.*

72 Nilesh Christopher, “Bitcoin: No research backing RBI’s move to ban cryptocurrencies” *The Economic Times*, Jun 13, 2018 available at: <https://economictimes.indiatimes.com/industry/banking/finance/banking/no-research-backing-rbis-move-to-ban-cryptocurrencies/articleshow/64567826.cms?from=mdr>. (Visited on May 23, 2021).

Now, the regulatory authorities have two alternatives before them; prohibit and penalize the use of cryptocurrencies, as proposed in the cryptocurrency bill (the 'prohibited scenario'), or to promote its use (the 'promoted scenario') while penalizing illicit activities connected with the same.

PROHIBITED SCENARIO V. PROMOTED SCENARIO

While a pre - regulatory scenario is a boon for the criminals, a prohibited environment would impose costs on the criminal in the form of penal provisions and other mechanisms which would increase the risk of getting caught, the certainty of punishment and so on. Thus, the application of the rational choice model of crime suggests that prohibiting the use of cryptocurrencies and penalizing the same would act as a sufficient deterrence to engage in illicit activities and thereby reduce the increase in utility brought by cryptocurrencies in committing certain crimes.

However, the researcher would like to argue that the cryptocurrency bill is less economically efficient than the alternative of the promoted scenario - enabling and promoting legitimate uses and prohibiting illegitimate uses of cryptocurrencies.

Prohibiting the dealing of cryptocurrency does not actually create a great impact in discouraging the usage or dealing of cryptocurrency by the people. This is because cryptocurrencies are uniquely suited to facilitate harmful behaviors, even in a prohibited environment due to its unique features.

As noted above, one of the main features of cryptocurrency is that it is decentralized, and it does not rely on banks or any other financial intermediaries. This means that two parties can transact in cryptocurrencies in Peer-to-Peer model, i.e., directly between each other without relying on any intermediaries. Thus, it is self-sufficient system and eliminates governmental support systems and intermediaries to carry out transactions. With the cryptocurrency bill prohibiting cryptocurrencies, the possibility of transactions, illicit or otherwise, which would have come under the radar of financial institutions, will be nil as they are also prohibited from dealing in transactions related to cryptocurrencies. Therefore, the reporting authorities will itself be isolated from the potentially illicit transactions involving cryptocurrencies.

Even though all the transactions are recorded in the blockchain, what is recorded is not the name or address of the account holder but just a set of alphabet and numbers constituting the public address of the holder.⁷³ This ensures anonymity in zero cost.

⁷³ *Supra* note 30.

Therefore, if cryptocurrencies are prohibited, there is indeed a decrease in the utility derived by a criminal in committing crimes in relation to a pre-regulatory scenario. However, this decrease is not considerable since its unique features continue to enable a potential criminal to deal in cryptocurrencies with certain level of anonymity in a peer-to-peer model completely outside the radar of the authorities. It is also to be noted that, unlike traditional crimes, crimes attached to cryptocurrencies are highly technical in nature and committed by a person who knows the nuances of the technology. Such a person will be capable of committing crimes using cryptocurrencies even in a prohibited scenario especially considering the above-mentioned unique features of the same.

However, in both the previous scenarios, when our country is incurring costs associated with cryptocurrencies, we are missing out on the tremendous economic benefits associated with the same.

Prohibiting the use of cryptocurrencies will also prevent its use for legitimate purposes. The argument here is that there is a *need to break up cryptocurrencies into its virtues and vices* and there is a need to develop a substantive regulatory framework ensuring the promotion of its virtues at the same time *discouraging its vices*.⁷⁴

Both the government as well as the citizens will be able to extract benefits out of cryptocurrencies if the legitimate use of the same is promoted and the illegitimate use is penalized. Only if there are legitimate transactions substituting fiat currency to some extent with cryptocurrency, everyone can enjoy the benefits arising out of the same. Regulating cryptocurrencies will boost the confidence of people to use cryptocurrencies for legitimate purposes, such as an investment.

The increased legitimate use of cryptocurrencies means maximum number of transactions coming under the radar of the government thereby reducing the possibilities of illicit transactions; more savings as there is now less transaction costs compared to transactions in fiat currencies; increase in revenue in the form of taxation; sprouting of new business ventures in the form of cryptocurrency exchanges or blockchain start-ups; increase in investments through ICOs and other forms of investments; no counterfeiting of currency and other fraudulent and manipulative aspects attached to fiat currency and numerous other economic benefits.

⁷⁴ *Ibid.*

The researcher emphasis here that a regulatory framework promoting legitimate use of cryptocurrencies will also be coupled with provisions deterring its illegitimate by penalizing the latter. Ensuring that, if not all, maximum number of transactions come under the radar of the enforcement agencies; ensuring disclosure norms; incorporating sufficient penal provisions for crimes committed using cryptocurrencies; keeping record of transactions etc., will help the authorities to detect crimes and deter the criminals from engaging in crimes related to cryptocurrencies.

It is true that the deterrence imposed by such regulation will be more or less the same as the cryptocurrency bill prohibiting the use of cryptocurrencies, however, it comes with the additional advantage of tremendous economic benefits.

Further, in regulating any new technology, especially cryptocurrencies, there are numerous additional costs involved in the form of expenses on research and development, building suitable infrastructure, training and recruiting personnel to maintain the cryptocurrency ecosystem, establishing infrastructure for deterring and detecting crimes etc. However, the researcher would like to argue that these factors should not deter the regulatory authorities from promoting the use of cryptocurrency.

Cryptocurrency revolution is inevitable. Around the world, new business, innovations and applications of cryptocurrencies are sprouting day by day. Taking a back seat and not regulating cryptocurrencies will only run counter - productive to the interest of the nation as a whole when other countries are moving forward in usage of cryptocurrencies and extracting benefits out of the same.

Therefore, the promoted scenario is more economically efficient and hence, preferable than the prohibited scenario.

CONCLUSION

The reason for R.B.I's notification discouraging the use of cryptocurrencies and the government's proposal to prohibit the same is mainly that they haven't understood the technology completely.⁷⁵ They are apprehensive of the cost of regulating the technology and the cost of the potential misuse of the technology. Further, the government is skeptical because cryptocurrency was born out of a crypto-anarchist vision of a decentralized, government-free society, a sort of encrypted, networked utopia where it would subvert the nexus of power which

⁷⁵ *Supra* note 5.

they believed only the central banks and the government agencies maintained in the service of their clients and would re-empower citizens.⁷⁶ While focusing on the costs and disadvantages associated with cryptocurrencies, the government is turning a blind eye to the benefits attached to the same.

As seen from the analysis above, the most economically efficient alternative before the regulatory authorities with regards to the regulation of cryptocurrencies is the promoted scenario. In the first alternative, pre – regulatory scenario, the cost attached to cryptocurrencies in the form of crimes are much higher than the benefits compared to the other scenarios. This scenario is not preferable. In the second alternative, prohibited scenario, costs are less and the benefits are higher relatively to the pre – regulatory scenario. However, we will not be able to extract the tremendous economic benefits attached to cryptocurrencies since the use of the same is prohibited. In the third alternative, promoted scenario, although the costs are more or less the same as prohibited scenario, the benefits are much higher than both the other scenarios. This is so because the legitimate use of cryptocurrencies will be promoted and thereby, we will be able to extract the tremendous economic benefits offered by cryptocurrencies and hence, the preferable alternative.

Cryptocurrencies are here to stay, and its revolution is inevitable. This is very evident from the global trend in the cryptocurrency market. Even in India, we have seen establishment of numerous cryptocurrency exchanges despite the proposal for prohibiting the use of the same. There is no official data, but industry analysts reckon there are 15 million crypto investors in India holding over 100 billion rupees (\$1.37 billion). Also, according to a recent report by Reuters, global cryptocurrency exchanges are exploring ways to establish their business in India.

In the light of these considerations, the cryptocurrency bill will push India to a backseat in the global race of cryptocurrencies. This will only run counter - productive to the interest of the nation as a whole when other countries are moving forward in usage of cryptocurrencies and extracting benefits out of the same.

Therefore, a regulation promoting the use of cryptocurrencies is economically efficient to the national as a whole rather than leaving it unregulated or prohibited.

⁷⁶ *Ibid.*

EFFICACY OF THE PREVENTION OF CORRUPTION (AMENDMENT) ACT, 2018: AN APPRAISAL

Dr. Tejinder Kaur*

INTRODUCTION

India has slipped six places from 80 to 86 place among 180 countries in corruption perception index (CPI) 2020 as per Transparency International Index.¹ Although corruption is a global phenomenon but it has become one of the main impediments for developing India. Corruption in India has affected development policies, depriving the citizens of their economic and social rights. The right to corruption-free facilities demands good governance, integrity and righteousness in administration from those in power. While corruption in all forms whether political, administrative, bureaucratic, and corporate is rampant and has steadily increased in the last fifty years, our political system has by and large been stable. But this cannot be taken for granted.² It is conceivable that shattered social expectations, mal administration, and poor governance policies over a period of time, would endanger the rule of law and the social fabric of the society.³ Corruption not only inflicts wrongs which are difficult to redress, but it undermines the structure of administration as well as public life.⁴ Thus, corruption has become a menace that has serious consequences for both protecting the rule of law and ensuring access to justice.

A cursory reading of history would reveal that corruption has always existed at any stage of civilization and bribery, nepotism and black-market economy have thrived well benefiting and profiting a select segment of the society. As a result, the majority of the population has suffered. When economies were reforming through privatization and liberalization in the 1980s, corruption was understood in terms maximizing office income in a context of monopoly power. Now the corruption proliferates from top to bottom level and as a result of this the poor innocent people are becoming victim of this corruption. In today's time except very few people who are living with their principles and values, remaining all are indulging in corruption in one or other

* Principal, Army Institute of Law, Mohali.

1 Corruption Perceptions Index ranks countries and territories based on how corrupt their public sector is perceived to be according to expert and business people and indicates its position relative to the other countries and territories in the index. The index uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean, available at: <https://www.transparency.org/en/cpi/2020>, (Visited on September 6, 2021).

2 Upendra Baxi, *Liberty and Corruption* (Eastern Book Co., Delhi, 1989).

3 Ram Ahuja, *Social Problems in India* 499 (Rawat Publication 3rd edn., 2014).

4 Krishna K. Tummala, "Corruption in India: Control Measures and Consequences" 10 *AJPS* 43 (2002).

way around by misusing their powers or positions. At the top level, the corruption is in the form of scams⁵ and in the bottom level the corruption is in the form of bribes. Although the corruption at the bottom level is low but it accumulates as bigger as a scam because at the bottom level crores of people are indulging in corruption. The induced amount may be mere thousand rupees but the consolidated amount is much higher. So, the bottom level corruption in India is also a major issue to be resolved. Another aspect that needs concern is that earlier people use to give bribe/corruption to get some kind of favour from the administrative authorities, but now people are forced to give bribe for simply getting their routine work done. Although corruption is an age-old phenomenon, but can be seen everywhere now a days. According to a study by Transparency International, a Berlin based NGO working against corruption, seven out of ten people in India had to pay a bribe to access public services.⁶

In this paper an attempt has been made to analyse the problem of corruption - a white collar crime that has made the people so immune that they have learnt to live with the system even though it has damaged the basic structure of the society and reforms required to fight corruption in India.

CONCEPTUAL FRAMEWORK

In simplest terms it may be described as an act of bribery. The Webster's Dictionary defines corruption as "dishonest or illegal behavior especially by powerful people (such as government officials or police officers); inducement to wrong by improper or unlawful means (such as bribery) the corruption of government officials".⁷ Black's Law Dictionary defines corruption as "the act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others, a fiduciary or official use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others."⁸ In 1997, the World Bank in their anti-corruption strategy defined corruption as the "use of public office for private gain" and called for the Bank to address corruption along four dimensions: 1) Preventing fraud and

5 Few reported scams: Hawala Scam,1990; BOFORS Scam,1990; Abhishek Verma arms deals scandal 1997; Telgi Stamp Paper Scam,2002; 2G Spectrum Scam, 2008; Satyam Scam, 2010; Commonwealth Games Scam,2010; Augusta West Land Chopper Scam,2010; Adarsh Housing Society Scam, 2011; Wakf Board Land Scam,2012; Coalgate Scam, 2012; Chopper Scam, 2012; Tatra Truck Scam, 2012; IPL Scam,2013; Vijay MallyaScam,2016;NiravModiPNBScam,2019.

6 Available at: https://www.transparency.org/news/feature/corruption_perceptions_index_2016.

7 Available at: <https://www.merriam-webster.com/dictionary/corruption#:~:text=1a%20%3A%20dishonest%20or%20illegal,the%20corruption%20of%20government%20officials.>

8 Available at: <http://alegaldictionary.com/corruption>.

corruption in Bank projects; 2) Helping countries that request Bank assistance for fighting corruption; 3) Main streaming a concern about corruption in Bank work; and 4) Lending active support to international efforts to address corruption.⁹ Transparency International's defines corruption as "abuse of entrusted power for private gain".¹⁰ DH Bailey a renowned sociologist has explained corruption as the misuse of authority as a result of consideration of personal gain which need not be monetary. Abuse of public office for private gain, eventually inhabits potential investment and thus increases inefficiency. Like inflation, it also hurts poor people more than anyone else, as they are struggling for basic wage goods and minimum levels of existence and livelihood. Thus, corruption is perceived as the abuse of public office for private gain in a way that constitutes a breach of law or a deviation from the norms of society.

Corruption in any system or society depends on three factors. The first is the set of individuals sense of values, the second is the set of social values which is accepted by the society as a whole and third, the system of governance or administration.¹¹ Corruption is spread over in the society in several forms. Of these, the major ones are: bribe (money offered in cash or kind or gift as inducement to procure illegal or dishonest action in favour of the giver); nepotism (undue favour from holder of patronage to relatives); misappropriation (using other's money for one's own use); patronage (wrong support/encouragement given by patron thus misusing the position); and favouritism unduly preferring one to other). Thus, in its broadest sense corruption is the lack of integrity whether moral or financial.¹²

CAUSES OF CORRUPTION

Corruption has gradually increased and is now widespread in our society. The causes of corruption are multifaceted and numerous such as:

- Emergence of political elite class which believes in interest oriented rather than nationoriented programmes and policies.
- High cost of election which is funded by the big corporates to seek personal favour.
- Corruption is caused as well as increased because of the transformation in the value system and ethical qualities of the administrative authorities.

9 Available at: <https://openknowledge.worldbank.org/handle/10986/19753#:~:text=The%20anti%20Dcorruption%20strategy%20the,that%20request%20Bank%20assistance%20for10www.transparency.org> (Visited on May 2, 2021).

11 Upendra Baxi, *Liberty and Corruption* (Eastern Book Co., Delhi, 1989).

12 Ram Ahuja, *Social Problems in India* 500 (Rawat Publication 3rd edn., 2014).

- Tolerance of corruption by general public allows corruption to ruin their people.
- Complex laws, procedures and lack of awareness deter common people from seeking justice.
- Delay in justice and punishment imposed under the law is inadequate.

EFFECTS OF CORRUPTION

- Corruption creates social and economic inequality in the society. Those who indulge in corruption become rich and the common people who suffer due to corruption become poor, hence gap between them widens.
- Retarded economic growth rate of the country is another effect of the corruption. In spite of mass production, the country shows low growth rate. Even if per capita income and average growth shows upwards trends for the country, but it will not be overall growth.
- Loss of public property and life by the service providers by using low quality material to gain profit in the projects and to meet the demand of the corrupt officials.
- Public wealth is getting converted into black money by the corrupt authorities.
- Inefficiency, nepotism and indiscipline in the administration.
- Corruption has diminished morality and destroyed the individual character.

LEGAL FRAMEWORK

Before the enactment of the specific codified law to deal with corruption, the offences committed by public servants involving corruption and corrupt practices were dealt under The Indian Penal Code, 1860. To deal specifically with the problem of corruption in public life Prevention of Corruption Act 1947 was enacted. The Act was amended first by the Criminal Law Amendment Act, 1952 and by the Anti-Corruption Laws (Amendment) Act, 1964 based on the recommendations of the Santhanam Committee report. Santhanam Committee constituted in 1962 observed in its report that corruption cannot be eliminated or even satisfactorily reduced unless preventive measures are planned and implemented in a sustained and effective manner. Preventive action may also include administrative, legal, social, economic and educative measures¹³. Committee suggested following ways to control corruption.

- a) Strict implementation and uniform application of laws irrespective of caste, creed, religion, economic status, political status, official status etc to curb corruption.

13 Rao Shankar C, *Social Disorganization and Social Problems* 635 (S Chand and Company Ltd. 1st edn., 2015).

- b) Recruitment process should be centralized and it should be free from all political compulsion
- c) Commission should terminate the right to contesting in any election for next 10 years those who are violating election norms.
- d) Government should take guidance from those countries where no corruption is exists.
- e) All corruption allegations should be settled fast within a month and should be put behind the bars for the duration as according to the law.
- f) In each and every department there should be 'corruption information box' and let the public put their experience of corruption in those department. All those information should be genuinely checked by the Head of the Department and a copy of action by the Head should be placed in the notice board of concerned office and it should also be published through daily newspaper for the information of general public.¹⁴

It was on the basis of the recommendations of this Committee that the Central Vigilance Commission was set up in 1964 for looking into the cases of corruption against the central government and other employees.

Later in 1988 a comprehensive legislation The Prevention of Corruption Act 1988 was passed and also established law enforcement institutions such as Central Bureau of Investigation (CBI) and Anti-Corruption Bureau (ACB) with the powers to investigate crimes relating to corruption more efficiently and effectively. The Act was passed to prevent corruption in Government departments and to prosecute and punish public servants involved in corrupt practices.

The other law that can be used against corruption is the Right to Information act 2005. This act empowers citizens to request for information from Govt officials about anything that the official is responsible or accountable. An ombudsman is also an anti-corruption organization in the states of India. Based on the ombudsman concept of Scandinavian countries the Lok Ayukta is a three-member body headed by three retired judges of Supreme or High court of India and including other members who act as a vigilance commission in the states. The notion of Whistle-blowers in India is new where people have revealed such facts of corruption and other negative

14 Available at: https://cvc.gov.in/sites/default/files/scr_rpt_cvc.pdf (Visited on September 7, 2021).

aspects from their experience. But still there is no protective law for the Whistle-blowers¹⁵.

Since India has ratified the United Nations Convention against Corruption (UNCAC) international practice on treatment of the offence of bribery and corruption in 2011 a need was felt to review the Act. Hence, to meet the country's obligations, Prevention of Corruption (Amendment) Act, 2018 was passed to fill in perceived gaps in the existing anti-corruption law. Thus, amendments have been made from time to time to check the problem of corruption in the fast-moving society.

Recently Fugitive Economic Offenders Act 2018 law was enacted to provide for measures to deter fugitive economic offenders¹⁶ from evading the process of law in India by staying outside the jurisdiction of Indian courts, to preserve the sanctity of the rule of law in India. Law empowers authorities for attachment and confiscation of proceeds of crime and properties and assets of a fugitive economic offender who has left the country to avoid criminal prosecution or judicial processes.

MEASURES TO CONTROL CORRUPTION UNDER THE ACT, 2018.

The Prevention of Corruption Act, 1988 was passed to prevent corruption in Government departments and to prosecute and punish public servants involved in corrupt practices. The main objective to enhance transparency and accountability of the Government. With the objective of reviewing the existing the Prevention of Corruption Act, 1988 has been amended by the Prevention of Corruption (Amendment) Act, 2018, which has come into force with effect from July 26, 2018.

In the case of *State of M.P. v. Ram Singh*¹⁷ Supreme Court observed that the object of the Prevention of Corruption Act, 1988 was to make effective provisions for prevention of bribe and corruption amongst public servants which was not otherwise understood in common parlance and it is a social legislation to curb illegal activities of public servants and should be liberally construed so as to advance its object and not construed to be in the favour of the accused.

In the case of *State of Gujarat v. Mansukhbhai Kanjibhai Shah*¹⁸ the Supreme Court has

15 Available at: <http://www.india-seminar.com/2011/625.htm>.

16 Fugitive economic offender means any individual against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India, who—(i) has left India so as to avoid criminal prosecution; or (ii) being abroad, refuses to return to India to face criminal prosecution.

17 (2000)5SCC88.

18 2020(2)RCR(Criminal) 544.

explained the language of Section 2(b)¹⁹ that any duty discharged wherein State, the public or community at large has any interest is called a public duty. While interpreting the word 'Public Servant' in the case of *CBI. v. Ramesh Gelli*²⁰ the Supreme Court held the employees of Bank whether in Public or private are considered public servants under Section 2(C)²¹ for the purposes of prosecution under the Prevention of Corruption Act 1988. The court further observed that the object of the Act depicts that the legislature intended to strengthen the anticorruption laws by widening its ambit of the definition. The judicial mind behind it was to give effect to the spirit and intent of the Act. In *P.V. Narsimha Rao v. State*,²² the Supreme Court observed that a Member of Parliament comes under the ambit of public servant under section 2(c) (viii) of Prevention of Corruption Act, 1988, as it states that any person who holds an office by virtue of which he is authorized or required to perform any public duty.

19 "Public duty" means a duty in the discharge of which the State, the public or the community at large has an interest; Explanation. -In this clause "State" includes a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956.

20 (2016) 3SCC 788.

21 "Public servant" means- (i) any person in the service or pay of the Government or remunerated by the Government by fees or commission for the performance of any public duty; (ii) any person in the service or pay of a local authority; (iii) any person in the service or pay of a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956; (iv) any Judge, including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions; (v) any person authorised by a court of justice to perform any duty, in connection with the administration of justice, including a liquidator, receiver or commissioner appointed by such court; (vi) any arbitrator or other person to whom any cause or matter has been referred for decision or report by a court of justice or by a competent public authority; (vii) any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election; (viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty; (ix) any person who is the president, secretary or other office-bearer of a registered cooperative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or a State Government or from any corporation established by or under a Central, Provincial or State Act, or any authority or body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956; (x) any person who is a chairman, member or employee of any Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board; (xi) any person who is a Vice-Chancellor or member of any governing body, professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University and any person whose services have been availed of by a University or any other public authority in connection with holding or conducting examinations; (xii) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government, or local or other public authority.

Explanation 1.-Persons falling under any of the above sub-clauses are public servants, whether appointed by the Government or not.

Explanation 2.-Wherever the words "public servant" occurs, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

22 998 CriLJ 2930.

Under the Amendment Act there is a provision for appointment of Special judges by the Central and State Governments and also procedure is given for cases triable by a Special Judge where speedy trial takes place on a day-to-day basis.²³ The Act provides that trial by the special judges under the PCA will be conducted on a day-to-day basis, with an endeavor to complete such trial within a period of two years. This period may be extended by an additional six months at a time, for reasons to be recorded in writing. However, in aggregate, the proceedings should ordinarily be concluded within four years.

Main offences and the penalties under the amended Act includes for any public servant being bribed²⁴; taking undue advantage to influence public servant by corrupt or illegal means or by exercise of personal influence,²⁵ offence relating to bribing of a public servant²⁶; Public servant obtaining undue advantage without consideration from person concerned in official functions or

23 The Prevention of Corruption (Amendment) Act, 2018, ss. 3-6.

24 Section 7 - Any public servant who,— (a) obtains or accepts or attempts to obtain from any person, an undue advantage, with the intention to perform or cause performance of public duty improperly or dishonestly or to for bear or cause forbearance to perform such duty either by himself or by another public servant; or (b) obtains or accepts or attempts to obtain, an undue advantage from any person as a reward for the improper or dishonest performance of a public duty or for forbearing to perform such duty either by himself or another public servant; or (c) performs or induces another public servant to perform improperly or dishonestly a public duty or to for be a rperformance of such duty in anticipation of or inconsequence of accepting an undue advantage from any person, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Explanation 1.—For the purpose of this section, the obtaining, accepting, or the attempting to obtain an undue advantage shall itself constitute an offence even if the performance of a public duty by public servant, is not or has not been improper.

Illustration.—A public servant, 'S' asks a person, 'P' to give him an amount of five thousand rupees to process his rout ineration card application on time. 'S' is guilty of an offence under this section.

Explanation 2.—For the purpose of this section,—

(i) the expressions “obtains” or “accepts” or “attempts to obtain” shall cover cases where a person being a public servant, obtains or “accepts” or attempts to obtain, any undue advantage for himself or for another person, by abusing his position as a public servant or by using his personal influence over another public servant; or by any other corrupt or illegal means;

(ii) it shall be immaterial whether such person being a public servant obtains or accepts, or attempts to obtain the undue advantage directly or through at hird party.

25 Sections 7A, PCA, 1988 - Whoever accepts or obtains or attempts to obtain from another person for himself or for any other person any undue advantage as a motive or reward to induce a public servant, by corrupt or illegal means or by exercise of his personal influence to perform or to cause performance of a public duty improperly or dishonestly or to forbear or to cause to forbear such public duty by such public servant or by another public servant, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

26 Section 8 (1) Any person who gives or promises to give an undue advantage to another person or persons, with intention— (i) to induce a public servant to perform improperly a public duty; or (ii) to reward such public servant for the improper performance of public duty; shall be punishable with imprisonment for a term which may extend to seven years or with fine or with both: Provided that the provisions of this section shall not apply where a person is compelled to give such undue advantage:

Provided further that the person so compelled shall report the matter to the law enforcement authority or investigating agency within a period of seven days from the date of giving such undue advantage:

Provided also that when the offence under this section has been committed by commercial organisation, such commercial organisation shall be punishable with fine.

on public duty²⁷ Punishment for abetment of offences²⁸ criminal misconduct by a public servant.²⁹ Hence, a public servant obtaining, accepting or attempting to obtain any undue advantage will be held guilty. Prior to the amendment, a bribe giver could be penalized under the PCA only for abetment of an offence committed by the bribe receiver. The Amendment Act has now made the act of giving any undue advantage to another person directly or through a third party to induce or reward any public servant to perform or improperly perform any public duty, an offence by itself.³⁰ The immunity available under Section 24 of the PCA, 1988 from prosecution to the person who gave bribe has been abolished.

Under the Amendment Act 2018, a new clause has been added to check the corruption and business scams and frauds relating to bribing a public servant by a Commercial organisation. Now a commercial organization will be liable, if any person associated with it offers any undue advantage to induce or reward any public servant in exchange of any advantage for the business or conduct of the business.³¹ The criteria to determine an associated person in respect of a commercial organization would be by reference to all the relevant circumstances and not merely

Illustration.—A person, 'P' gives a public servant, 'S' an amount of ten thousand rupees to ensure that he is granted a license, over all the other bidders. 'P' is guilty of an offence under this sub-section.

Explanation.—It shall be immaterial whether the person to whom an undue advantage is given or promised to be given is the same person as the person who is to perform, or has performed, the public duty concerned, and, it shall also be immaterial whether such undue advantage is given or promised to be given by the person directly or through a third party.

(2) Nothing in sub-section (1) shall apply to a person, if that person, after informing a law enforcement authority or investigating agency, gives or promises to give any undue advantage to another person in order to assist such law enforcement authority or investigating agency in its investigation of the offence alleged against the later.

27 The Prevention of Corruption (Amendment) Act, 2018, s. 11.

28 Section 12 - Whoever abets any offence punishable under this Act, whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than three years, but which may extend to seven years and shall also be liable to fine.

29 Section 13-(1) A public servant is said to commit the offence of criminal misconduct,—

(a) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or any property under his control as a public servant or allows any other person so to do; or

(b) if he intentionally enriches himself illicitly during the period of his office.

Explanation 1.—A person shall be presumed to have intentionally enriched himself illicitly if he or any person on his behalf, is in possession of or has, at any time during the period of his office, been in possession of pecuniary resources or property disproportionate to his known sources of income which the public servant cannot satisfactorily account for.

Explanation 2.—The expression “known sources of income” means income received from any lawful sources.

30 The Prevention of Corruption (Amendment) Act, 2018, s. 8.

31 Section 9 (1) Where an offence under this Act has been committed by a commercial organisation, such organisation shall be punishable with fine, if any person associated with such commercial organisation gives or promises to give any undue advantage to a public servant intending— (a) to obtain or retain business for such commercial organisation; or (b) to obtain or retain an advantage in the conduct of business for such commercial organisation:

by reference to the nature of relationship between such person and the commercial organization. Further, where the offence is committed by a commercial organization with the consent or connivance of any director, manager, secretary or any other officer of such commercial organization, pursuant to the Amendment Act, such persons will also be liable to face punishment with imprisonment and fine. Commercial organizations may prove innocence by demonstrating that it had adequate procedures which were in compliance with prescribed guidelines to prevent persons associated with it from undertaking such conduct³².

The Amendment Act 2018 also grants the ability to the Government to attach or confiscate any money or property which has been procured by means of an offence under the PCA, in accordance with Criminal Law Amendment Ordinance, 1944.³³ As per section 29 of the

Provided that it shall be a defence for the commercial organisation to prove that it had in place adequate procedures in compliance of such guidelines as may be prescribed to prevent persons associated with it from undertaking such conduct.

(2) For the purposes of this section, a person is said to give or promise to give any undue advantage to a public servant, if he is alleged to have committed the offence under section 8, whether or not such person has been prosecuted for such offence.

(3) For the purposes of section 8 and this section,—(a) “commercial organisation” means—(i) a body which is incorporated in India and which carries on a business, whether in India or outside India; (ii) any other body which is incorporated outside India and which carries on a business, or part of a business, in any part of India; (iii) a partnership firm or any association of persons formed in India and which carries on a business whether in India or outside India; or (iv) any other partnership or association of persons which is formed outside India and which carries on a business, or part of a business, in any part of India;

(b) “business” includes a trade or profession or providing service; (c) a person is said to be associated with the commercial organisation, if such person performs services for or on behalf of the commercial organisation irrespective of any promise to give or giving of any undue advantage which constitutes an offence under sub-section(1).

Explanation 1. —The capacity in which the person performs services for or on behalf of the commercial organisation shall not matter irrespective of whether such person is employee or agent or subsidiary of such commercial organisation.

Explanation 2.—Whether or not the person is a person who performs services for or on behalf of the commercial organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between such person and the commercial organisation.

Explanation 3. —If the person is an employee of the commercial organisation, it shall be presumed unless the contrary is proved that such person is a person who has performed services for or on behalf of the commercial organisation.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offence under sections 7A, 8 and this section shall be cognizable.

(5) The Central Government shall, in consultation with the concerned stakeholders including departments and with a view to preventing persons associated with commercial organisations from bribing any person, being a public servant, prescribe such guidelines as may be considered necessary which can be put in place for compliance by such organisations.

32 Section 10 - Where an offence under section 9 is committed by a commercial organisation, and such offence is proved in the court to have been committed with the consent or connivance of any director, manager, secretary or other officer shall be of the commercial organisation, such director, manager, secretary or other officer shall be guilty of the offence and shall be liable to be proceeded against and shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Explanation.—For the purposes of this section, “director”, in relation to a firm means a partner in the firm.

Amendment Act the scheduled offences under the Prevention of Money Laundering Act, 2002 now include within its ambit, the offences listed under Sections 7 to 14 of the PCA (including the offence of bribing of public servant and the offence of bribing of public servant by a commercial organization).

No official/authorities ever goes to jail despite vast evidence because Anti-Corruption Branch (ACB) and CBI directly come under the government. Before starting investigation or prosecution in any case, they have to take permission from the seniors, against whom the case has to be investigated. As per the act there is a requirement to take a prior sanction of the Govt before taking action against the public servant. In the case of State through AntiCorruption Bureau, Government of Maharashtra, *Bombay v. Krishanchand Khushalchand Jagtiani*³⁴, the Supreme Court observed that the requirement of obtaining sanction is to ensure that no public servant is unnecessarily harassed. Such protection is, however, not absolute or unqualified while a public servant should not be subjected to harassment, genuine charges and allegations should be allowed to be examined by court. In another case of *Manzoor Ali v. Union of India*,³⁵ while dealing issue of the validity of Section 19 of the Prevention of Corruption Act, 1988 court held that while it is not possible to hold that the requirement of sanction is unconstitutional, the competent authority has to take a decision on the issue of sanction expeditiously as already observed. A fine balance has to be maintained between need to protect a public servant against mala fide prosecution on the one hand and the object of upholding the probity in public life in prosecuting the public servant against whom prima facie material in support of allegation of corruption exists, on the other hand. Further to this Section 20 of the Act deals with the presumption when a public servant accepts any undue advantage.³⁶ It has been further clarified that, obtaining, accepting, or the attempting to obtain an undue advantage will itself constitute an offence by a public servant, even if the performance of public duty is not improper by the public servant.

33 The Prevention of Corruption (Amendment) Act, 2018, s. 18.

34 AIR1996SC1910.

35 (2014)7SCC32.

36 Section 20. - Where, in any trial of an offence punishable under section 7 or under section 11, it is proved that a public servant accused of an offence has accepted or obtained or attempted to obtain for himself, or for any other person, any undue advantage from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or attempted to obtain that undue advantage, as a motive or reward under section 7 for performing or to cause performance of a public duty improperly or dishonestly either by himself or by another public servant or, as the case may be, any undue advantage without consideration or for a consideration which he knows to be in adequate under section 11.

CONCLUDING REMARKS

Corruption is pervasive in the system of governance in India, undermining the effectiveness of all institutions of governance. Progress of the country is seriously hampered by all pervasive corruption. It is a problem that has serious implications for both protecting the rule of law and ensuring access to justice. Since independence, successive governments have attempted to take numerous measures to reduce the levels of corruption in the country, including legislative and institutional measures. However, absence of the political will and sincerity in taking concrete steps to eliminate corruption has resulted in most of these measures not achieving the results that were intended. Getting rid of corruption today is a major challenge before the government.

The amended anti-corruption framework which is in line with the UN convention against Corruption, 2005, is a positive and much awaited move to check violations especially by the commercial organizations. Giving Bribe to a Public Servant is now a Direct Offence. The obligation of a public servant has been explicitly delineated such that the public servant deters from violating a statutory duty or any set of rules, government policies, executive instructions and procedures. Intentional enriching by public servants will be construed as criminal misconduct and possession of disproportionate assets as proof of such illicit enrichment. But still too much emphasis is on the criminal justice system for dealing with the malaise, though that system is itself facing a crisis due to corruption and other problems. Fighting corruption is also essential for restoring the people's faith in the Indian criminal justice system.

It may not be possible to root out corruption completely at all levels but it is possible to contain it within tolerable limits. Proper implementation of the law is the need of the hour. The legal strategies should focus more on the promotion of transparency and accountability in governance. Empowerment of the individuals' needs is the basis for legal and institutional reforms to diminish corruption in the society.

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