Volume 1 July-December 2015 Number 1

NLUALR

NLUA LAW REVIEW

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NATIONAL LAW UNIVERSITY, ASSAM

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MESSAGE FROM THE PATRON

It is a momentous step for the National Law University, Assam to come up with the first issue of its Students' Journal – NLUA Law Review (NLUALR). NLUA Law Review is a bi-annual, student-run peer review Journal focusing on the inter-disciplinary and multi-disciplinary approaches of legal writing. It is going to be one of the flagship journals of National Law University, Assam. It has been established with the objective of becoming a formidable instrument in taking the standard of legal research in country up by several notches. The Journal aims to publish articles, case comments, book reviews on all aspects of law and related issues. It aims at giving the opportunity to legal academia, research scholars, students, advocates and activists working for enhancement of legal scholarship. I sincerely hope that, the Journal will serve as the platform for innovative thought sharing and will aim at contributing in dynamic growth of legal knowledge.

I also believe that this Journal will help in fostering different disciplines with law and thereby making an immense contribution towards further evolution of already developed society. This is the one reason to believe that this Journal is a unique and first of its kind in the North-Eastern part of India, and it will certainly contribute towards better understanding of society and its multi-disciplinary mechanisms.

Quality legal research and standard publications constitute one of the important mandates of growing law schools like NLUA. Far reaching changes are taking place in the field of legal academia, legal profession and policy making process. This Journal is an attempt to provide an intellectual platform for contemporary and philosophical academic discourses across the globe. We welcome our multidisciplinary-legal fraternity to contribute the piece of their intellectual property towards the fulfilling the goal of human development. I hope readers would find this first issue of NLUA Law Review (NLUALR) interesting and thought-provoking. A special mention of the immense efforts and patience invested by the First Editorial Team towards accomplishing the publication of First Student Law Journal of the University is necessarily required. With their hard work and pro-active approach they made the arduous journey simple, beautiful and fruitful. I would like to congratulate the Editorial and Faculty Advisory Team and extend my best wishes in their endeavor of developing this Law Journal.

(Vijender Kumar)
Vice-Chancellor

MESSAGE FROM FACULTY ADVISORY BOARD

National Law University, Assam has come out with its first publication of student run peer reviewed Journal. This has been one of the flagship events in our University that could help in providing a concrete ground for the legal fraternity to put forth their views and thoughts in a more pragmatic way. The Journal is a compilation of outstanding papers from numerous disciplines submitted by legal academicians, students and scholars associated with legal disciplines and its related disciplines.There are various challenges in the harmonious functioning of society, where Law can play a very distinct role in maintaining and regulating the society in all spheres. As knowledge is an aspiration of *right* form of development, it is very important that different stakeholders unite and collaborate on issues which confront the society and its growth. Hence one of the key objectives of research should be its utility and implementation for the societal and individual upliftment. This journal attempts to document and spark a debate on the research focused on law in context of its emerging and changing paradigms. The multidisciplinary approach could range from jurisprudence, personal laws, history, science, medicine, intellectual property regime, environment, international relations, economics and business etc.

The Journal is first endeavour of the University in incorporating different ideas into one single platform. It is expected of this journal to achieve its end while making immense contribution in the field of legal academia and policy formulation.

Here we would like to acknowledge the guidance of our Vice Chancellor, who has always been the pillar of support and inspiration during this intellectual endeavor. We would also like to acknowledge the hard work and dedication with which the Editorial Board has worked day and night to bring out this fledgling journal. The Editorial Board members were capable enough to handle the task themselves for which they were selected and also successfully could plan strategies for the development of journal. The task of the editorial board becomes even more appreciable on the ground that despite them being first editors, they could, without any difficulties, bring a successful end to the entire task regarding the Journal. Further we think that the Journal provides the platform to students from 1st year to Final year along with researchers and academicians.

Since the Journal has been published, it is now up to the readers to decide its destiny and help us discover if something more is needed to be done. We strongly encourage our readers to kindly provide us with suggestions and their viewpoints on the necessary modifications and comments on contributions to better the prospects of our Journal. We shall await your valuable feedback and contributions.

Faculty Advisory Board

EDITORIAL

The initiation of thought process is an inevitable part of educational cycle. A proper and reliable catalyst to initiate is by providing a proper platform to represent one's ideas and thoughts. This cannot be served better than by the way of bringing out a Journal. National Law University Assam has therefore come up with its first publication in this regard to provide an adequate platform to the national and international scholars and publicists to put forward their ideas in a concrete form.

The conceptualization confronted numerous difficulties, as it was the first time that the University had decided to come up with a Journal. It became immensely important to draw a clear strategy and process to give a proper form to it. At its initial stage, the approach adopted by the board members was to make a general attempt of including wide range of topics. However, with the change in perception it was felt that with such a narrow approach, addressing the intended objective would be difficult.

One of the mammoth tasks was undoubtedly to shortlist the article and other contributions. The Editorial Board had received hundreds of contributions with wide ranging topics from across the country and other parts of the world. As such, it became imminent on board's part to peruse through each contribution and decide upon whether to accept or to not accept the contributions. For this purpose, the four members of Editorial Board under the guidance of faculty advisors extensively worked in selecting the contributions. We had at this stage categorized different types of contribution at two-tier system. In the first tier contributions were shortlisted on the basis of original works of the author. Following which, there was a thorough and extensive review of the selected articles. The articles were circulated amongst the Editors and Faculty Advisors for their recommendations. Greater emphasis was laid on those articles, which particularly dealt with the contemporary issues and there analytical aspects. After having crossed second stage, where we selected thirteen such contributions, the Editorial Board then proceeded to do required modifications to come out with its first publication. A short discussion of the contributions from our side is thus necessary to acknowledge author's scholarly work.

Vijender Kumar in his paper, *Shared Parental Responsibility: Need of the Hour,* argues that in situations where there are no extended family support for childcare, a proper legal framework will define the roles and responsibilities of parents. This is essential to safeguard the welfare principle and the interests of the children.

Irene Fokum Sama-Lang in paper, *Arbitration in the Cameroonian Labour Code 1992: The Road Not Taken* highlights some flaws in the labour arbitral process in Cameroon and recommends complete overhaul in tandem with classical arbitral process. At the same time author has tried to compare Indian perspective on the matter.

Keshav Vijayan's *Transfer Pricing of Intangibles: Analyzing the Concept and the Chequered History of Its Application in India* highlights the Indian Government's evolving stand on the concept of Transfer pricing of Intangibles, its implications and also on the inflow of foreign investment into the country and the resultant challenges arising out of the same.

Tokmem Doming's *Re-Considering Notion of Organized Crime and Implementing Proactive Mechanism for Its Prevention* deals with conceptual definitions and understanding of organized crime which is then followed by implementing policies keeping in mind the nature of organized crime.

Utkarsh Pandey in his paper N*JAC Controversy: Curtailing or Expanding Justice Delivery Mechanism* presents a research work on NJAC system and extensively discusses the merits and lacunae in the existent system while also covering various jurisprudential questions alongside.

Rupesh Aggarwal in his paper *Critically Analysing the Whistle blowers Protection (Amendment) Bill 2015: Is The Change A Step Towards Regression?* discusses various shortcomings in the Bill and also suggests the future possible ways that can be adopted to rejuvenate the conceptual framework of whistleblowers.

Stuti Toshi's *Do the Courts Interpret or Modify the Contract? ONGC v. Rai Coastal: A Case Study* deals with the issue that whether section 74 of the Indian Contract Act gives power to the court to interpret and thus modify the terms of the contract.

Ritu Gupta in her paper *On Regulation of Celebrity Endorsing the Brands in India* tries to highlight some major policy implications arising out of the celebrities endorsing the brand and where a possibility of misleading and dubious advertisements arises.

Kankana Baishya in her paper *Legal E-Resource and Copyright Issues* puts forward a comprehensive analytical report of various online libraries and journal service providers. She also deals with the issues arising out of it in light of Copyright Act and Indian Information Technology Act.

Navya Jannu and Elizabeth Dominic in their paper *The Language of Reform: Feminist Engagements with Cases of Sexual Offenses* critically

analyses the judgments from the feminist perspective and reflect on the inadequacies of the substance of such judgments and the societal implications of the language used therein.

Rudraditya Khare and Sakshi Malhotra presents a case comment on *Mohit Manglani v. M/s Flipkart India Private Limited and others* highlights some major policy issues arising out of competition laws application to the e-commerce activities.

Vidhi Singh has reviewed the book *Legal Methods* by G. P. Tripathi and Ajay Kumar. Here reviewer has beautifully articulated the different segments of book, its importance along with shortcomings.

Nichinka Upadhyaya has reviewed the book *Intellectual Property, Human Rights and Competition: Access to Essential Innovation And Technology* by Abbe E. L. Brown where she extensively examines the theories and methods given in book to evolve new principles in interconnecting different topics on which the book deals with. Reviewer also provides her perspective of book as to how far will it be relevant for Indian application.

The Journal, in the light of the foresaid initiative includes a diverse range of comprehensive and properly scrutinized research materials ranging from research articles to notes / comments to case reports. The Journal attempts to provide a better platform for the ideas to be maneuvered deep into the society in general and amongst legal fraternity in particular. Since, it is a unique Journal, being first of such sort in the North Eastern region, the Journal will also make an attempt to incorporate a more precise understanding of various customary practices in the region, its conflict and its harmonization with general law. Hence, in the light of this aspect, the Journal will also provide a strong and well-structured base for formulating ideas and suggestions to harmonize differences in such regional customary laws vis-à-vis general statutory laws.

With great enthusiasm, we strongly believe that once this Journal takes off the ground, it will establish a unique relationship with its readers and help construct certain viewpoint. For this end, we hope that readers respond to the contributions and make suggestions to us. This started, as an initiative to contribute in spreading ideas has only been half done, the destination has not yet been reached and it could be only possible through the support of our readers.

Editorial Team

SHARED PARENTAL RESPONSIBILITY: NEED OF THE HOUR

*Vijender Kumar**

ABSTRACT

A parent is the most important person in the life of a child. The concept of who is a parent is a vast and subjective concept. In common parlance, a parent is the father or the mother of a child who takes care of the child, raises him / her up and provides him / her with love, care and affection. In the legal sense, the term parent may be interpreted in various ways. However, defining who is a parent becomes imperative in deciding the purview of parental responsibility and protecting the rights of a child as well. With the increase in the breakdown of marriages, joint family systems and the increased number of divorces, the worst impact falls on the children. The concept of parental responsibility has acquired importance in this background and there is a need to enact a suitable legislation and / or amend the existing laws which govern the custody and guardianship matters to fill the vacuum created in the society and must provide new norms towards shared parental responsibility. In light of the present situation where there is no extended family support for child care anymore; having a legal framework defining the roles and responsibilities of parents is essential to safeguard the welfare principle and the interests of the children.

Keyword: Parental Responsibility, Family, Social Norm, Child Rights.

INTRODUCTION

A parent is perhaps the most important person in the life of a child. He/she nurtures and cares for the child and protects him/her from worldly evils. The role played by a parent is very important in shaping and honing a child's personality as a perfect human being. Hence, emphasis must be laid on responsible parenting. Parents are responsible for the conception and birth of a child and are hence automatically responsible for their children biologically, socially, economically and legally for their children's well-being.

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In common parlance, a parent is the father or the mother of a child who takes care of the child, raises him/her up and provides him/her with love, care and affection. However, in the legal sense, the term parent maybe interpreted in various ways. According to Black's Law Dictionary[1] a parent may be: (a) Either the natural father or the natural mother of a child; (b) Either the adoptive father or the adoptive mother of a child; (c) A child's putative blood parent who has expressly acknowledged paternity; and (d) An individual or agency whose status as guardian has been established by a judicial decree. In English law, parental status based on any criterion may be terminated by judicial decree. In other words, a person ceases to be a legal parent if that person's status as a parent has been terminated in a legal proceeding.[2]

The concept of who is a parent is a very vast and subjective concept. The classification of parents helps in the legal sphere to decide cases and understanding of the scope of parentage in a better manner. However, defining who is a parent becomes imperative in deciding the purview of parental responsibility and protecting the rights of a child as well.

Traditionally in India, the responsibility of care and protection of children has been with families and communities. A strong knit patriarchal family that is meant to look after its children well has seldom had the realisation that children are individuals with their own rights.

In today's age with the increase in the breakdown of marriage, joint family systems and the increased number of divorces, the worst impact falls on the children. While the Constitution of India guarantees many fundamental rights to children, the approach to ensure the fulfilment of these rights within the family framework is more needs based rather than rights based. The transition to the rights based approach in the government and civil society is still evolving. Even within the safe haven of parents, many times children are vulnerable. Hence, there is an immediate need to bring in laws regulating the responsibilities of the parents towards their children.

PRESENT POSITION IN INDIA

The present laws in India do not define 'parental responsibility' in any of the family law statutes. The current understanding of responsibilities and obligations of parents *per se* is what is socially and culturally understood to be or is ordained by the religious and customary practices. Where the law does concern itself with the

1 Bryan A Garner (ed.), Black's LAW DICTIONARY, 8th ed. 2004, p. 1144.

2 Ibid.

responsibilities and obligations of parents, it is mainly concerned with custody and guardianship of children in cases of broken marriages.

The closest we come to the concept of parental responsibility is that of guardianship and custody as provided for in the Guardians and Wards Act 1890, the Hindu Minority and Guardianship Act 1956, the Juvenile Justice (Care and Protection of Children) Act 2000 and Muslim personal law. The word 'custody' as used in Section 25[3] of the Guardians and Wards Act 1890, refers not only to actual but also constructive custody. The word 'custody' must be taken to mean any form of custody, actual or constructive, or in other words, physical or legal. The word 'care' in Section 4(2)[4] of the Hindu Minority and Guardianship Act 1956 is wider than 'custody'. While 'custody' is only physical keeping, 'care' indicates looking after. In the spirit of the Hindu Minority and Guardianship Act also the term 'guardian' has been so defined as to give more emphasis on the word 'care'. Thus, unless a child is in 'care' of a person, he/she cannot be taken as the guardian. Section 8[5] of the Hindu Minority and Guardianship Act only mentions the powers of a natural guardian with respect to the minor's

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3 Section 25-title of guardian to custody of ward : If a ward leaves or is removed from the custody of a guardian of his person, the court, if it is of opinion that it will be for the welfare of the ward to return to the custody of the guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

For the purpose of arresting the ward, the court may exercise the power conferred on a Magistrate of the first class by Section 100 of the Code of Criminal Procedure 1882.

The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.

4 Section 4(b)–'guardian' means a person having the care of the person of a minor or of his property or of both his person and property.

5 Section 8-Powers of natural guardian :

The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate, but the guardian can in no case bind the minor by a personal covenant.

The natural guardian shall not, without the previous permission of the court,- mortgage or charge, or transfer by sale, gift, exchange or otherwise any part of the immovable property of the minor; or lease any part of such property for a term exceeding five years, or for a term extending more than one year beyond the date on which the minor will attain majority.

Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.

estate but there is no mention of the responsibilities he/ she has towards the welfare and day to day care of the child. Section 2(j)[6] of the Juvenile Justice (Care and Protection of Children) Act defines 'guardian' to mean his natural guardian or any other person having *the actual charge or control over the child* and recognised by the competent authority as a guardian in course of proceedings before that authority. Whereas Muslim law has three categories of guardians who are supposed to work in the best interest of the child: guardian of the person of a minor for custody (*hizanat*), guardian of the property and guardian for purposes of marriage (*jabar*) in case of minors.

The legal doctrine followed by the Indian courts is '*best interest of the child'* doctrine. It is rightly observed that 'the court should keep in mind three parameters while taking a final decision in the custody matters. These three parameters are '*doctrine of welfare of the child*', '*doctrine of care and protection*' and '*wishes of the child*'. It has been seen that the court either satisfies the parties on the basis of '*doctrine of welfare of the child*' or on '*doctrine of the care and protection*', or on the basis of the evidence furnished by or on behalf of the child, if the child is a grown one, or is of capable of submitting his/her evidence. But nowhere has it been seen that the court has satisfied all these three parameters. It is desirable on the part of the court to take a holistic

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No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity or for an evident advantage to the minor.

The Guardians and Wards Act 1890, shall apply to and in respect of an application for obtaining the permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular—proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4-A thereof; the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of section 31 of that Act; and an appeal lie from an order of the court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

In this section, 'Court' means the city civil court or a district court or a court empowered under section 4-A of the Guardians and Wards Act 1890, within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

6 Section 2(j) - 'guardian' in relation to a child, means his natural guardian or any other person having the actual charge or control over the child and recognised by the competent authority as a guardian in course of proceedings before that authority.

approach in matters relating to custody of the child.[7] While taking holistic approach in the matter, the Supreme Court of India in *Githa Hariharan v. Reserve Bank of India*[8] held that:

> *… a rigid insistence of strict statutory interpretation may not be conducive for the growth of the child, and welfare being the predominant criteria, it would be a plain exercise of judicial power of interpreting the law so as to be otherwise conducive to a fuller and better development and growth of the child.*

It should be recollected that the legal guardianship and custody are not one or synonymous to each other but distinct concepts and there is appreciable difference between the two. Custody is granted specifically on terms usually as a concomitant to matrimonial relief decreed to a parent.[9] Whereas guardianship of the person or property of the minor exists in law though it cannot be conferred by the court in guardianship proceedings under certain conditions as the person who is the guardian may or may not have custody and yet by virtue of his guardianship, he may still exercise powers regarding marriage, education and move the court, if need arises. Hence, guardianship is a term, which is more comprehensive and connotes more valuable right than mere custody.

SHARED PARENTAL RESPONSIBILITY

Shared parental responsibility in most jurisdictions[10] across the world is defined as a court ordered relationship wherein both the parents retain all the parental rights and responsibilities with respect to their minor child, and in which both parents discuss the major decision affecting their child's welfare jointly.

The responsibilities can vary from making day-to-day decisions regarding the child's care, maintenance, and welfare to taking

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7 Vijender Kumar, 'Custody of Child: A Critical Appraisal', M.D.U. Law Journal, Vol. XI, Part-I, (2006), p. 78 (Rohtak).

8 (1999) 2 SCC 228 : AIR 1999 SC 1149.

9 Section 26 of the Hindu Marriage Act 1955 reads as: In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes. Wherever possible, and may after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

10 US, UK and Australia for instance.

decisions on questions of religious upbringing, discipline, financial, moral, social, recreational, and legal matters, school and educational programs, changes in social, recreational and legal matters, changes in social environment, and non-emergency health care, both medical and dental. Both the parents are expected to have an active role in providing a sound moral, socio-economic, and educational environment in making future plans consistent with the best interest of the child and in amicably resolving any disputes that arise.[11]

A parenting plan is an agreement that sets out parenting arrangements for children as between the two parents. A parenting plan must be a written document that is dated and signed by all parties. It must be made free from any threat, duress or coercion. The areas which a parenting plan can possibly cover include the day-to-day responsibilities of each parent, the practical considerations of a child's daily life, and the long-term issues/interests relating to a child etc.

In Florida for instance, a parenting plan means 'a document created to govern the relationship between the parents relating to decisions that must be made regarding the minor child and must contain a time-sharing schedule for the parents and child. The issues concerning the minor child may include, but are not limited to, the child's education, health care, and physical, social, and emotional well-being. In creating the plan, all circumstances between the parents, including their historic relationship, domestic violence, and other factors must be taken into consideration.'[12] It has to be developed and agreed to by the parents and approved by the court or alternatively established by the court.[13] In Australia, a parenting order is one which deals with the following:

(a) The person or persons with whom a child is to live;

(b) The time a child is to spend with another person or other persons;

(c) The allocation of parental responsibility for a child;

(d) If two or more persons are to share parental responsibility for a child—the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;

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11 Modelled on the chapter on Dissolution of Marriage; Support; Time-sharing in the Florida Statute, F.S.61.046(14); http://www.jud6.org/generalpublic/RepresentingYourself/CourtInfoAndResource/SharedPR.htm Last seen on 10/9/2014.

12 Florida Statute, F.S.61.046(14).

13 Ibid.

(e) The communication a child is to have with another person or other persons;

(f) Maintenance of a child;

(g) The steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:

(i) A child to whom the order relates; or

(ii) The parties to the proceedings in which the order is made;

(h) The process to be used for resolving disputes about the terms or operation of the order; and

(i) Any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.[14]

In India, a parenting plan that was approved by the Bombay High Court[15] required that it should consider the best interest of the child, the extent to which both parents have complied with their obligations in relation to their child. It should also be a detailed plan listing the practical decisions that are to be taken with respect to the child's upbringing. Madhya Pradesh High Court has also approved the parenting plan which was earlier approved by the Bombay High Court.[16] In custody matters, the paramount consideration has been welfare of the children.[17] However, in case both the parents are working, they have to pay maintenance to the child in proportion of their salaries.[18]

The existing laws on shared parental responsibility in India (as approved by Bombay and Madhya Pradesh High Courts) and other jurisdictions only cover separated/divorced couples.

UNMARRIED PARENTS' PARENTAL RESPONSIBILITY

There is no law or rule which talks about the parental responsibility of unmarried couples. Because they are not married, the mother becomes the natural guardian of the child. But according to our laws viz., the Hindu Minority and Guardianship Act and the Guardians and

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14 Section 64B (2) of the Australian Family Law Act 1975.

15 'Parenting Plan', Bombay High Court, A (Spl.)/ Misc./9/2012 Date: 7 February, 2012.

16 http://www.mphc.in/pdf/ParentingPlan-040312.pdf Last seen on 09/06/2014.

17 *Sarita Sharma v. Sushil Sharma* 2000(3) SCC 14; *Sardar Bhupendra Singh v. Jasbir Kaur* AIR 2000 MP 330.

18 *Padmaja Sharma v. Ratanlal Sharma* AIR 2000 SC 1398.

Wards Act, the father is the natural parent of the child and then the mother. This discrepancy has to be resolved. However, the Supreme Court in *Githa Hariharan's* case[19] has tried to liberally read the provision in Section 6(a) of the Hindu Minority and Guardianship Act[20] so as to allow the mother to be the natural guardian of the child. The judgement construed 'after' as:

> *The word did not necessarily mean after the death of the father, on the contrary, it [means] 'in the absence of' be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise.*

The fact that the parents did not marry should not remove the child completely from the father. The child needs both the parents for a holistic development. The father cannot be a stranger in the case and also not to be completely absolved from his responsibilities. In India we do not have any law that requires the father to give child support in case he is not married to the mother of the child. Also, his responsibility does not end at just providing monetarily. In many other jurisdictions, a natural father who was not married to the mother of the child can get guardianship (though custody may be with the mother) by several ways.

In England, a father who was not married to the child's mother when the child was born can acquire Parental Responsibility in any one of the following ways:

- *By marrying the mother.*
- *By agreement with the mother to share Parental Responsibility with her. Both father and mother can sign a Parental Responsibility Agreement in which the mother agrees to share PR with the father.*
- *By applying to the court for a Parental Responsibility Order. The court will generally award PR to a father who has been involved in the child's life, unless it can be shown that there are good reasons why the order should not be made.*
- *By applying for and being granted a Residence Order or a Shared Residence Order, where PR will automatically be awarded to the father and will continue even if the Residence Order ends.*

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19 *Githa Hariharan v. Reserve Bank of India* (1999) 2 SCC 228: AIR 1999 SC 1149.

20 Section 6 (a) in the case of a boy or an unmarried girl-the father, and *after* him, the mother.

- *By being appointed as the child's Guardian, when the guardianship comes into force.*

While taking progressive step, the Supreme Court of India on July 6, 2015 in *ABC v. The State (NCT of Delhi)*[21] case held that having received knowledge of a situation that vitally affected the future and welfare of a child, the court below could be seen as having been derelict in their duty in merely dismissing the petition without considering all problems, complexities and complications concerning the child brought within its portal, hence, this court allowed the appeal and the guardian court is directed to recall the dismissal order passed by it and thereafter consider the appellant's application for guardianship expeditiously without requiring notice to be given to the putative father of the child. In brief the facts of the case are as that the appellant, who adheres to the Christian faith, is well educated, gainfully employed and financially secure. She gave birth to her son in 2010, and has subsequently raised him without any assistance from or involvement of his putative father. Desirous of making her son her nominee in all her savings and other insurance policies, she took step in this direction, but was informed that she must either declare the name of the father or get a guardianship/adoption certificate from the court. She thereupon filed an application under Section 7 of the Guardians and Wards Act 1890 before the guardian court for declaring her the sole guardian of her son. Hence, an unwed mother is provided with the natural guardianship right over her child, this step needs to be appreciated in today's society as a true example of women empowerment.

STEP-PARENTS' PARENTAL RESPONSIBILITY

Step-parents do not naturally obtain parental responsibility over the children of their spouse on marriage. There are steps that need to be taken to get parental responsibility in such cases. The father/mother wanting parental responsibility will have to go through the process of adoption for the child and approach the court. Their responsibilities too have to be decided by the court while keeping in view the welfare and best interest of the ward. In the recent past, a lot of cases of breakdown of marriages have been noticed, where children from the previous marriage suffer a lot while the woman and the man marry again and the new father and/or mother does not accept the child from the previous marriage of his wife/husband.

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21 Special Leave Petition (Civil) No. 28367 of 2011, decided by the Division Bench of the Supreme Court of Indian on July 6, 2015.

NEED FOR LEGISLATING PARENTAL RESPONSIBILITY

In today's times, with increase in urbanisation, modernisation and changes in the society, the divorce rates in India have increased drastically. With increasing sense of equality among men and women, the financial independence of women nowadays is at par with men. To a large extent women in earlier times had no other option but to stay within the four walls of their matrimonial home for lack of an alternative. As society has matured, the situations have changed now; they no longer seek a man for financial support. Women are well educated and can fend for themselves without a man in their lives. The family unit has also disintegrated from a traditional joint family system to a nuclear family system for reasons of women's enlightenment, shift from an agriculture based society to an industrialised, individualised and techno-savvy society. A broader impact of social welfare legislations has brought in a balance in the rights of men and women. However, this change has resulted in the withdrawal of the support and care children used to get in a joint family/ traditional family set up. The change in status of women has been viewed positively in terms of empowering them and challenging the patriarchal setup but it cannot be denied that children of broken marriages, single parents, nuclear families suffer the most, for the institution which was the strength of traditional child care no longer exists.

The concept of parental responsibility has acquired importance in this background and there is a need to enact a suitable legislation and/or amend the existing laws which govern the custody and guardianship matters to fill the vacuum created in the society and must provide new norms towards shared parental responsibility. In absence of social norms to care, protection and shared responsibility for the children, law needs to interfere and protect the rights of the child and determine the rights and responsibilities of the parents. In light of the present situation where there is no extended family support for child care anymore; having a legal framework defining the roles and responsibilities of parents is essential to safeguard the welfare principle and the interests of the children.

CONCLUSION

Having analysed the situation on shared parental responsibilities above, the Law Commission of India realised the disadvantage the children are placed due to non-availability of legal provisions regarding parental responsibility in the Hindu Minority and Guardianship Act and the Guardians and Wards Act and hence, called responses on the consultation paper titled 'Adopting a Shared Parentage System in India'

displayed on the commission's website in November 2014 from the experts such as an academician, members of the bar and the bench and social workers etc. After receiving several responses in the form of comments on the consultation paper from the public, the commission has set up a sub-committee to study the legal provisions pertaining to shared responsibility. The sub-committee besides having several meetings with experts also deliberated in detail on the issues and identified the provisions in the present laws need to be amended. Finally, after several rounds of discussions and deliberations, the commission prepared its 80 pages 257th report on 'Reforms in Guardianship and Custody Laws in India' and submitted by its Chairman the same to the Hon'ble Minister for Law and Justice, Government of India on May 22, 2015. The report made several recommendations and these recommendations centre around that (i) strengthening the welfare principle in the Guardians and Wards Act 1890 and emphasize its relevance in each aspect of guardianship and custody related decision making; (ii) providing for equal legal status of both parents with respect to guardianship and custody; (iii) providing detailed guidelines to help decision makers assess what custodial and guardianship arrangement serves the welfare of the child in specific situations; and (iv) providing for the option of awarding joint custody to both parents, in certain circumstances conducive to the welfare of the child.

While analysing guardianship and custody related issues from different angles, the law commission of India, in addition to the recommendations made in this regard, also drafted the Hindu Minority and Guardianship (Amendment) Bill 2015 and the Guardians and Wards (Amendment) Bill 2015 where the commission emphasised for amendment to Sections 6(a), and 7 of the Hindu Minority and Guardianship Act 1956, Sections 17, 19, and 25 of the Guardians and Wards Act 1890 and recommended further to insertion of new chapter IIA in the Guardians and Wards Act 1890 which deals with custody, child support and visitation issues.

The Hindu Minority and Guardianship Act 1956 and the Guardians and Wards Act 1890 are having explicit provisions relating to the guardianship and custody issues only, they lack provisions for the protection of a child of a broken marriage/single parent and shared parental responsibility and hence, often these cases are left to the discretion of the court. It has also been noticed that in some of the cases, the courts have given the custody of children to the grand-parents with no specific guidelines towards parental responsibility. Therefore, the commission took up the responsibility to facilitate the creation of a suitable legislation and made these recommendations

for amendments into the existing laws which will provide overall upbringing of a child with defined parental responsibility. The concept of parental responsibility needs to be defined and given a definite meaning so that at all levels of administration of justice systems, parental responsibility can be implemented and justice can be done in favour of the child.

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ARBITRATION IN THE CAMEROONIAN LABOUR CODE 1992: THE ROAD NOT TAKEN

*Irene Fokum Sama - Lang**

ABSTRACT

The value of a justice system lies in the effect of the decision arrived at in court. The decision's real value depends on whether justice[1] is seen to have been done. Clearly, to determine this in labour actions, one needs to evaluate the arbitration process adopted by the Labour Code 1992. Informed by the Growth and Employment Strategy Paper, the reference framework for Government Action over the period 2010-20, Cameroon intends to be an emergent state by 2035 and to achieve this, not only must there be a viable private sector, but the labour justice system which has adopted the successive process of conciliation followed by arbitration must be in tandem with international standards. This paper highlights some flaws in the labour arbitral process in Cameroon and recommends complete overhaul in tandem with classical arbitral process.

Keyword: Cameroon Labour Code 1992, Growth and Employment Strategy Paper, Arbitration and UNCITRAL.

INTRODUCTION

By the nature and complexity of labour relations emanating from the contracts of employment, disputes are inevitable.This is so, where one of the parties especially the employer seeks to act opportunistically by taking advantage of a change in circumstances, uncertainty in the contract or in the substantive law. These disputes even though inevitable are not only a waste of valuable time and financial resources[2], they end up damaging the confidence, reputation and trust earned, that are very central to the employment relationship.

According to Cameroon Labour Code 1992[3], there are two types of disputes; individual disputes which according to section 131 of the

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1 Justice in this context is the "constant and unceasing will to render to each one his due." Elegy, J.M., *Jurisprudence,* Lagos: Spectrum Law Publishing, 1994, p.360.

2 R., Bradgate, *Commercial Law,* Oxford: Oxford University Press, 3rd edition, 2005, p. 866.

3 The Cameroonian Labour Code Law No. 92/007 of 14the August, 1992 (repealing Law No. Law No. 74/14 of 27th November 1974 to institute the Cameroo-

Labour Code are disputes emanating from employment contracts involving a worker and his/her employer and a collective dispute, which is conceived in section 157(1) of the labour Code as a dispute that concerns a group of wage earning workers irrespective of whether they belong to a trade union who have a collective interest at stake. Where this collective labour dispute as defined above occurs, it shall fall outside the jurisdiction of the ordinary courts of law and shall become the matter of combination of ADR; conciliation and then arbitration[4] in case of partial or non-conciliation[5].

It can be gleaned from above that arbitration under the labour code is not a product of consensus and that it is mandatory irrespective of any collective agreement only where there is a collective labour dispute as conceived in section 157[6] of the code. Adopting doctrinal research method, this paper seeks to critically assess whether the non-consensual mandatory arbitration imposed on disputants in labour relations in Cameroon is not a breach of the right of the disputants to access the courts and choice of method of dispute resolution. It further examines the nature and procedure for resolution of collective labour disputes whether it is in tandem with classical arbitration.

CONTEXTUAL FRAMEWORK

The adversary system has often been thought to be inappropriate to the needs of employment relations as it is often protracted with a lot of procedural manoeuvring in order to gain tactical advantage that ends up being too expensivefor a worker thereby frustrating his quest for justice. In the interest of justice and efficient use of resources, especially for a worker, the machinery provided for dispute resolution ought to be expedient, simple and most beneficial to the parties.

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nian Labour Code and Law No. 68/LF/20 of 18th November, 1968 (Cameroon) prescribing the form of setting up a Trade Union is the statute that regulates the substantive and procedural law of employment in Cameroon.

4 It is noted here that arbitration is sometimes not seen as an alternative dispute resolution mechanism but a form of adjudication since its award is binding on the disputants.

5 See The Cameroonian Labour Code 1992, Section 157(2).

6 It has been argued by professor Pougoue that the conceptualisation in section 157 of collective dispute is to a certain extent misleading as a labour dispute which is individual in nature may give rise to collective dispute. He pointed out that an infringement of a worker's right to trade union activities which is an individual grievance can lead to a collective dispute since it amounts to an infringement of the freedom of association, a right which is collectively exercised. The implication of this is that the workers in the face of such a problem may not know which type of action to institute. See generally Pougoue, P-G., *et al, Code du travail Cameroonais Annote,* (Yaounde: PUA), 1997, 227.

The refusal whether rightfully or wrongfully conceived of the labour justice system that obtains in Cameroon, to allow aggrieved parties to approach the courts directly without necessarily going through the alternative dispute resolution is no doubt a breach of their fundamental right to court trial as provided for in Art. 8 of the Universal Declaration of Human Rights 1948 for this reason may be ill advised for a judicial system in a modern democracy like Cameroon.

This notwithstanding, perhaps it is in tacit recognition of this and the fact that employment contracts are relational, based on trust and confidence that the Labour Code 1992 has adopted mandatory conciliation before a labour inspector for the resolution of labour disputes. This in a bid to quell down tempers and attempt a settlement which will repair the bruised egos and restore the damaged trust and confidence that are requisite[7] ingredients for the continuance of employment relationship. It is only after this fails that the disputants can resort to litigation in the case of individual dispute as ordained in sections 132-133 in special labour tribunals in the competent magistrate or high court and mandatory arbitration for collective disputes.[8] This is commendable for at first glance it is seemingly in line with the main theme of Alternative Dispute Resolution (ADR), which is not on winning but on settling[9] (i.e. compromise).

To further buttress the support of worker's labour justice, the whole procedure for labour justice (from conciliation at the labour office to litigation or arbitration) is cost free as provided for in section138(2) of the Labour Code. However, on the other hand the worker will have to pay for the cost of hiring counsel. This in a way punctures the very intention of ADR, which is to see the end of litigation,[10] which is not only contentious in nature but also to discourage parties from being legally represented, thereby creating cheap and speedy justice. By including the litigation in the event of failure of conciliation may make

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7 Interview with Raymond Tabe (Regional Delegate of labour South West Region) interviewed on 7/12/14.

8 The Cameroonian Labour Code 1992, Section 161-162. The simplest and most beneficial which is negotiation is often contained the collective agreements of some corporations like the Cameroon Development Corporation where in the case of disputes the aggrieved worker must first try to negotiate before resorting to the conciliation and litigation or arbitration as the case may be.

9 Bowers, J., & Gill, M., 'Employment Dispute', in *ADR and Commercial Disputes,* Russel Caller (eds), London Sweet & Maxwell, 2002, p. 49.

10 It is a fundamental precept of Roman Law that it is in the interest of the state to see an end to litigation to preserve and enhance personal and employment relationships. See generally Brown, H.J., & Mariott, A.R., *ADR and Practice,* Sweet & Maxwell, second edition, 2002.

access to justice especially to some workers difficult if not impossible as the greatest obstacle to access to justice is often economic. As observed by Aguda:

> *How can a poor citizen existing at bare starvation level hope to have equal opportunity of success in any litigation between him and the state which has in its payroll a large number of seasoned lawyers paid from public funds. The position is not much different if a poor man is engaged in litigation against a millionaire able to engage the best brains the legal profession is capable of providing.*[11]

This observation though not directly on employment relations, aptly depicts the plight of workers irrespective of whether they are in an individual or collective dispute.

Thus conceived, is the machinery of ADR, put in place in Cameroon especially the arbitral process good enough to protect the worker's labour justice? An assessment of the system of arbitration is therefore imperative as pointing at the substantive and procedural lapses will enable the researcher to explore and adduce evidence to the fact that road taken might not have been the correct one as the outcome points to something notwithstanding the name used in the statute.[12]

CONCEPTUAL FRAMEWORK OF ARBITRATION

There is apparently no acceptable definition of what arbitration in common law.[13] That notwithstanding, as observed by Scrutton L.J, though it is incapable of definition, just like an elephant it is easily recognised.[14] In this light, arbitration may be defined as a private mechanism for the resolution of disputes between two or more parties pursuant to an agreement. These consenting parties agree to be bound by the decision of a neutral adjudicator of their choice whose decision in most cases is one tier and final.

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11 Aguda, T.A., 'A Plea for Equal Justice', in Elegido, J.M., *Jurisprudence* Spectrum Law Publishing, 1994, p. 192.

12 The system in the Labour Code is more of an employment tribunal ratherthan an arbitration. One is not by this insinuating that employment tribunals do not dispense proper labour justice but an alternative to litigation is quite different notion from arbitration which is better placed to dispense speedier and more acceptable settlement.

13 H.J., Brown & A.L., Marriot, *ADR Principles and Practice,* London: Sweet & Maxwell, 2nd edition, p. 49.

14 Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England,* 2nd edition, 1989, p.41.

Black's Law Dictionary defines it as a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding. This clearly distinguishes arbitration from other ADR mechanisms especially when analysed in line of the binding effect of its decision(s) on the parties as opposed to conciliation, negotiation, mediation, that are often used in resolving individual labour conflicts.

It can be *ad hoc* as against institutional. It is *ad hoc* like the Uniform Act of Commercial Arbitration (UA) where the parties appoint a neutral arbitrator who controls proceedings within the limits and the law set by the consenting parties. The procedure adopted maybe determined by the parties or an institution (where the parties to the dispute may choose the UA with Common Court of Justice and Arbitration rules) or a body with no arbitral function like the United Nations Commission on International Trade Law (UNCITRAL). *Ad hoc* arbitration is preferred as it is cheaper, quicker and avoids administrative charges as is in the case of institutional arbitration. It also gives the parties total control as to who can arbitrate and the procedures to be used in case where the choice is not left with an institution. Institutional arbitration like CCJA is one in which the parties agree to surrender disputes in the hands of an independent neutral whom the parties appoint and the procedures leading to the award is in accordance with the rules of the institution. It is advantageous in that its procedures are precise, time limits respected and rewards enforceable.

There is also domestic as against international arbitration. Domestic arbitration is a situation where the seat of arbitration is in the country with its own specific legislation on arbitration and none of the parties to the arbitration agreement is resident, managed or controlled outside the state. A good example is the United Kingdom Arbitration Act 1996. As per Art. 1(3) of UNCITRAL, it is international if the place of business of the disputant is in different states or where the place of arbitration or part of the obligation of the commercial relationship is performed outside where the parties have their business or parties have expressly agreed that the subject matter of arbitration relates to more than one country In the UA, this distinction does not exist.

It could be private where the arbitration stems from an agreement or statutory if the arbitration is imposed by statute for example in the United Kingdom, the County Court Scheme now make all claims of less than 5000 pounds to be heard by arbitration. It can be conventional if the arbitration emanates from an international convention between the disputants. Example could be given of The

Tananarive Convention between former states of OCAM and also the Cameroon- Mali Convention.

It could be contractual and jurisdictional. It is contractual when '*danslesquels un tiers intervient pour aider les parties a parvenir a un accord ou transaction ou a completerun contract*'. It is jurisdictional when '*l'arbitrage confere a un tiers le pouvoir de trancherune contestation enrendantune decision juridictionelle ayant un caractere obligatoire pour les parties.*' In this light the UA has opted for jurisdictional arbitration.

Arbitration is not a typical alternative dispute resolution *per se* in the sense that the disputants are legally bound by the arbitrator's award which is not the case with the alternative dispute resolution. It is none the less an alternative to litigation and could be viewed as an alternative dispute resolution (ADR) if the awards are not legally binding.

NATURE OF ARBITRAL SYSTEM IN THE LABOUR CODE 1992: THE ROAD NOT TAKEN

To better assess the arbitral process in the Labour Code, a synopsis of arbitration as conceptualised as an alternative to litigation is required. This is to discern whether section 158 sets a proper arbitral process for labour justice. Arbitration[15] in the main is an alternative to litigation, born out of a consensual agreement, in which the parties agree to submit their differences to a third party neutral which could be an individual or a body for a binding decision when a dispute arises[16] or the parties may agree after the dispute has arisen to submit to arbitration. The third party intercessor is an impartial, neutral and independent umpire whose role is to determine the rights of the parties in a judicial manner in the light of the evidence and representation the disputants submit to him and not his/her own subjective

15 It is difficult to give a comprehensive definition of what arbitration is, but like an elephant though incapable of definition, is not incapable of recognition. See generally, Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England,* 1989, p. 38-52 in Brown, H.J., & Mariott, A.R., *ADR and Practice, op. cit,* at p. 49. It is defined in English law as a private mechanism for the resolution of disputes which takes place in private, pursuant to an agreement under which the parties agree to be bound by the decision to begiven by the arbitrator according to law and such a decision is enforceable at law. In French Law, De Boisseson defines it as 'the institution by which the parties entrust to arbitrators, freely chosen by them the task of resolving their dispute.' *Le droit de l'arbitrage,* second edition 1990, p.5 in Brown, H.J., & Mariott, A.R., *op.cit* p. 49.

16 Arbitration will not be a typical ADR if the disputants are not bound by the award. See generally, Brown, H.J., & Mariott, A.R., *op.cit* p. Bradgate, R., *Commercial Law,* Oxford University Press, 2005, p.895.

discretion. The proceedings are less formal, more flexible and the parties have control over proceedings. It is bound by rules of evidence or procedure applicable in court proceedings and/or as decided by the parties. Once the arbitrator is appointed, there is an implied contract between him/her and the disputants because of this, the proceedings are not merely private but are confidential.

The importance of consensual agreement lies in the fact that it shows the willingness of the parties to resolve their dispute by arbitration and it is therefore a typical exemplification of all contracts; that is the expression of the will of the parties and on the basis of party autonomy, which is indestructible even if this consent is unilaterally withdrawn by one of the parties. It therefore is an independent obligation separable from the rest of the contract. This is not the case with the Labour Code Procedure.

It is gleaned from above and the definitions from both civil law and common law that arbitration is a product of consensual agreement by parties in industrial disputes that has a legally binding effect on parties who have submitted themselves to it. The Labour Code 1992 does not see arbitration in that light. It prescribes a cumulative procedure of conciliation followed by arbitration should the parties fail to reach a settlement in case of a collective labour dispute[17] and not for individual labour disputes.[18] The latter commences when the competent labour inspector is immediately notified by the most diligent

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17 It is defined in The Cameroonian Labour Code 1992 section 157 (1) (a) as an intervention by a group of wage–earning workers irrespective of whether the aid workers are organised in a trade union. As provided for in the Cameroonian Labour Code 1992 section 157(1)(b) their interest must be collective in nature. So that an arbitration is available only in case of disputes involving group of workers whose collective interest is at stake and not a cumulation of individual dispute. So that was seen in the Supreme Court of Cameroon case of *Total Fina Elf v. Nounda Martin* Appeal No. 146/S/02-03 of 10 January 2002 where the Supreme Court held that individual labour suits filed separately by aggrieved workers for the same grievance and treated by the Court of Appeal as a collective labour dispute was not correct. However, as pointed out by Pougoue, an individual grievance arising from a breach of a worker's right to participate in trade union activities may amount to a breach of a collective right/freedom to participate in trade union activities.

18 Defined in Section 131 of the Labour Code 1992 as disputes arising from a contract of employment between workers and their employers or from a contract of apprenticeship. Such shall not be the subject of arbitration but will fall within the jurisdiction of the competent court should the parties fail to reach total conciliation. It can be gleaned from this, that arbitration has no place in individual labour disputes as conceived in section 131 of the Labour Code. The snag with this is that in some circumstances, it may be difficult to clearly ascertain whether a dispute so regarded as individual is in fact collective warranting the adoption of a different procedure.

party if conciliation is required by the collective agreement in the absence of which the labour inspector on his own motion can attempt a settlement by way of conciliation. By this,158(1) of the Labour Code 1992, simply requires the settlement of disputes by the Labour Inspector once he is notified by the most diligent party[19] to see if a settlement by way of conciliation can be reached.[20] Whether or not the parties agreed to resort to arbitration, it is imposed as a procedure in collective labour dispute thereby killing the consensual nature of arbitration, which is central to the functioning of the process as an alternative to litigation and to freedom of contracts which have been preserved by section 23 (2) of the Labour Code. Where then does the arbitration board which seats in the Court of Appeal get its authority to act? In order words can statute impose arbitration where there is no agreement (or a clause) requiring a submission or compromise?

The prima facie, rule is that where there is non-consensual[21] agreement there cannot be any arbitration. In the case of the Uniform Act,[22] neither the Common Court of Justice and Arbitration (CCJA) Rules nor the Treaty make agreements in writing a pre-condition for arbitration although it is advisable. For if there is no prima facie arbitration agreement between the parties, and the defendant objects to arbitration, or fails to respond to requests to arbitrate within 45 days, the CCJA may refuse that the arbitration hold.[23] Drawing inspiration from this, the absence of consensus has reduced the arbitration board set up by section 161 to nothing more than an

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19 This implies that if none of the disputants is diligent enough to notify the competent labour inspector, justice will either be completely denied. The workers may come too late when the dispute between the parties would have degenerated even further to a crisis level as was seen in the Cameroon Tea Estate crisis where the competent labour inspector was notified by the workers five years after the collective dispute had ensued.

20 According to section 158(3) of the Labour Code, the labour inspector has powers to impose sentence on defaulting parties to a fine of not less than 50, 000 FCFA and not more than 5,00,000 FCFA, therefore giving very wide powers to a labour inspector in a civil suit to impose a criminal sanction which can only be imposed by a competent court.

21 Goldman contends arbitration is a matter of consensus and not coercion and that a party cannot be compelled to arbitrate in the absence of consensus a long standing tenet of arbitration on which the entire arbitral framework depends on for legitimacy. See Goldman, W., "Arbitration, Consent and Contractual Theory: The Implications of EEOC V. Waffle House," 8 Harvard Negotiation Law Review, 2003, p.307.

22 See Art 1 of CCJA Rules.

23 The New York Convention on the Recognition and Enforcement or Arbitral Awards 1958 to which Cameroon has ratified, only applies to written arbitration agreements. Oral agreements are however enforceable at common law as an agreement to submit to arbitration and to be bound by the award like any other

employment tribunal for it does not have the hall marks of an arbitral process. The absence of a consensual agreement might have contributed to the parties not being committed to the arbitration, even though the award is final and binding on them. To the workers, the whole process is seen only as a procedure for starting off strikes and lockouts which are legitimate only after the arbitration has been exhausted and has failed.[24] This is wasteful to all the parties as strike actions or lockouts are not solutions to the dispute especially after wasting so much time. It is doubtful that the parties would want to put all the effort, time and money to end up with a strike as their gains.

Furthermore, the prima facie requirement of an agreement to arbitrate does not only evince consensus arrived at by the parties but it is also the source of power to arbitrate by the arbitration body. It is what gives it its legitimacy. It therefore delimits the jurisdiction of the arbitration that is *Kompetenz-kompetenz*.[25] It also acts as a source of the parties' choice of law and procedural rights and duties. In fact arbitral awards are not only based on substantive and procedural arbitration, but are given *ex aequoet bono* and *amiable compositeur*. In *Channel Tunnel Ltd v. Balfour Beatty Construction Ltd*[26] it was held that principles common to French law and English Law can be applied in the absence of which, principles of international trade laws as has been applied by national and international laws are applicable.[27] Although, this is not a case in employment law but in international trade, the relevance to this paper lies in the principle in the case, not in the subject matter of the dispute. The Labour Code in section 162(3)

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contract. In Britain for example, although there is need for a written arbitation agreement, it need not be signed to be enforceable. The requirement of writing is satisfied by an exercise of communication in writing, a written record evincing a prior agreement produced with authority of both parties by either of them or by a third party, an exchange of written submissions in arbitral proceedings or litigation in which an arbitration agreement is alleged by one party and not denied by the other.

24 See section 165 Labour Code 1992.

25 It is a principle that as a matter of law, where an arbitration clause is incorporated into a contract, it gives rise to a contract separate from the main contract in which it is contained so that the clause is not invalidated by the invalidity of that contract. See for example the decision in *Harbour Assurance (UK) Ltd v. Kansa General International Insurance* which is instructive on this. See generally Bradgate. R., *op.cit* at p. 884.885. See also, Brown, H.J., & Mariott, A.R., *op.cit*p. 66-67. Goode.R., *Commercial Law*, Penguin Books, 2004, p. 1183.

26 [1993]AC 334 and also *DSK v. Raknoil* [1987] 2 All ER767. See also Brown, H.J., & Mariott, A.R., *op.cit* p. 60-61.

27 See generally Bradgate, R., *op. cit* at p.887.

has usurped this fundamental right which emanates from consensual agreements, by providing that the arbitral board;

> *.... shall give its award in equity in other disputes, particularly those relating to wages or conditions of employment if the latter are not determined by legislative provisions, regulations, collective agreements or company agreements currently in force, and in disputes relating to negotiations or revision of clauses or collective agreements.*

This therefore denies the disputants the rights and privileges of benefitting from *ex aequoet bono* and *amiable compositeur* since in the first place there was no arbitration clause defining procedure. Even if the collective agreements require a submission to arbitration the labour code does not have comprehensive hallmarks of arbitration which are consensual agreements, high degree of party autonomy, independence, neutrality and impartiality of the arbiter, fairness, very limited technicality, informality, flexibility, efficiency and speed. This affects the type of justice that is dispensed as other criteria not limited to equity in its simple meaning of natural justice would have been considered to arrive at a fair and better award which may not need the workers in a collective dispute to resort to strike, their last weapon against an unyielding employer.

Besides usurping the parties' autonomy to choose which law will apply in their arbitral process, the code has also imposed the choice of arbitrator and members. Since the arbitration board seats in the court of appeal, the arbitrators are therefore judges of this court. The disputants have no power therefore to choose the neutral umpire who is rather imposed on them.[28] What distinguishes arbitration from litigation is the parties' freedom to choose their tribunal except they agree to surrender the right to a third party. The choice of a chairman and two assessors is commendable but a quick perusal of cases shows that the assessors whose expert contributions are needed to arrive at better decision are scarcely present, leading to several adjournments. The Code has rather in section 133(3) provided that in case the assessors fail to appear after being communicated twice the chairman can seat on the board alone. This affects the quality of the award given and the extent to which the assessors give relevance to the vital role they are supposed to play in the dispensing of labour justice. The award is by this therefore reduced to the chairman's subjective predisposition and particular characteristics. The ultimate award, thus gleaned may be biased.

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28 See section 161(1)(a) of the Labour Code 1992.

In addition, arbitration is meant to be speedier and less formal than litigation, but the procedure prescribed makes this process lengthy as a combination of the successive procedure of conciliation by the labour inspector followed by arbitration by the competent arbitration board only after the competent labour inspector has forwarded a signed copy of the statement of non-conciliation to arbitration board which must be endorsed by the president of the court of appeal. It is only then that the arbitration process is enforced as provided for by section 159 of the Labour Code 1992. This is compounded by the fact that no fixed time limits are prescribed by the code for the duration of each process. This therefore gives the opportunity for most often the employers to use all kinds of gimmicks particularly such lapses in the legislation and their relationship with the government in power to delay the process as was seen in the *Tole Tea Saga* which is still on-going. This delay therefore delays the speedy justice desirous by the disputants.

The choice of the Court of Appeal as the seat of the Arbitral board is not good for the worker who is seeking justice. The idea of a courtroom defeats the informality and privacy needed in ADR. ADR strives to reach a settlement away from court rooms, its technicality and environment which may not be 'comfortable' for ADR.

The arbitral awards in the Labour Code are not final for as provided for by section 163(2) the award becomes effective after eight days only if there is no stay of execution. Besides, section 164(2), compounds the situation by allowing a legally instituted trade union or employers' association to institute any proceeding out of the conciliation or agreement award in respect of which no application has been made for stay of execution. These become valid only when acknowledged by the competent labour inspector[29] creating not only a kind of judicial 'merry go round' but also judicial insecurity to the worker especially. It is quite unclear why the legislature would require that a civilian like the labour inspector should give validity to a stay of execution from an arbitral board which seats at the court of appeal before it can become enforceable. Is a judge of the court of appeal at superior officer to a labour inspector not competent to do so?

The most worrisome is that the arbitration in the Labour Code is silent as to where appeals will lie leaving everything to chance. Even though section 164(2) of the Labour Code makes provision for any interested party to institute any proceedings arising therefrom,

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29 The Cameroonian Labour Code 1992, Section 163 (3).

30 *Les Collectif des Employes Retraites de la BAT Cameroun c/La British American Tobacco,* Decision No. 113/SOC/CC du 13/5/2009 (unreported).

the statute failed to state where the proceeding is to be instituted. Because of this lacuna most counsel(s) lodge the appeals from the arbitral board in the registry of the Court of Appeal to the Supreme Court[30] which does not have powers to entertain such suits. It seems therefore from a quick reading of section 165 that the end result of arbitration is to give the workers with collective labour dispute a right to go on strike, rather than strict enforcement of the arbitral award. The latter seem to hold sway as portrayed by the *Tole-tea Case.* This runs contrary to one of the significant features of arbitration which is enforcement of arbitral award. As opined by Redfern[31] an award incapable of enforcement remains morally binding with no legal effect. This most likely may explain the paucity of collective labour dispute claims at the arbitral Boards. What will it serve the workers to go through the whole process and end up with a right to strike instead of enforcement by the courts of the decision by the boards?

CONCLUDING REMARKS

The arbitration scheme contemplated in the Code is a far cry from what arbitration ought to be. It is more an employment tribunal because of the manner it is constituted and because of lack of consensual agreement from which all arbitration take their power. It is submitted that the provisions on arbitration be revised to put it on the same pedestal like arbitration in modern employment relations. This will greatly enhance the type of justice dispensed. Perhaps, the type of alternative contemplated by the Code is not the best for employment relations for the first thing to ascertain in order to dispense proper justice is to shop for the best ADR. This can only be done through consensus of the parties which is not only the basic tenet of arbitration but is the source of its legitimacy. A revision of the procedure and process in case of labour and collective disputes will not only enhance the justice system but will take away the legal insecurity. The paucity of collective dispute at the Arbitration Board is testimony to the lack of faith in the ADR taken by Cameroon. The fact that the *Tamajong Case*[32] has taken more than 11 years (from 2004 till date) and is still unresolved attests to this fact. There is need to consider the creation of an independent industrial court or Labour tribunals to determine industrial actions with its own appeals tribunal independent.

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31 *Op.cit* at page 9.

32 Suit No. CASWR/L.14/2009.

TRANSFER PRICING OF INTANGIBLES: ANALYZING THE CONCEPT AND THE CHEQUERED HISTORY OF ITS APPLICATION IN INDIA

*Keshav Vijayan**

ABSTRACT

The following research paper is dedicated to the concept of transfer pricing, specifically the transfer pricing of intangibles. This is done through an elucidation on the laws governing the same in India and thus, a reflection on the Indian Government's attitude towards the concept. The most commonly encountered cases of such intangibles being advertising, marketing and publicity expenses, a large portion of this paper is dedicated to understanding the various legal conundrums inherent in the transfer pricing of intangibles through an analysis of the treatment of such 'AMP' expenditure in India. This analysis is done by way of a breakdown of various cases involving some extremely well-known names in the consumer's market. The ultimate purpose of this paper is to highlight the Indian Government's evolving stand on the concept, the implications of the same on not merely transfer pricing, but also on the inflow of foreign investment into the country and the resultant challenges arising out of the same.

***Keywords*:** Transfer Pricing, Intangible Resources (Intangibles), AMP Expenditure, Arm's Length Price (ALP), Associated Enterprise, Bright Line Test, Brand Value.

TRANSFER PRICING: AN INTRODUCTION

Rapid advances in technology, transportation and communication have given rise to a vast number of multi-national enterprises (MNEs) that have the structural flexibility and expansionist tendencies to spread their activities to anywhere in the known world. A superficial understanding of the same would lead one to believe that the same is motivated primarily by the prospect of using an untapped market to generate increased revenue to fund continued expansion and growth of the enterprise. However, the fact is that a significant volume of global trade nowadays consists of international transfers of goods and services, capital and intangibles (such as 'intellectual property') within the same MNE group. Such transfers are referred to as 'intra-group' transactions. In the 21st century, intra-group trade has grown steadily

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and arguably accounts for over 60% of all international transactions today. Furthermore, transactions involving intangibles and multi-tiered services constitute a rapidly growing proportion of an MNE's commercial transactions and have greatly increased the complexities involved in analyzing and understanding such transactions.[1]

Transfer pricing is the setting of the prices ('transfer price') at which transactions involving the transfer of property or services between associated enterprises forming a part of the same MNE group. Such transactions are referred to as 'controlled transactions (as distinct from uncontrolled transactions which are between companies that are not associated and can be assumed to operate independently i.e. 'on an arm's length basis in reaching terms for such transactions). The various business relationships that could result in arrangements that fall within the parameters of transfer pricing are the subject of various nation-specific regulations that lay down the same. In India, Section 92A of the Income Tax Act, 1961 (hereinafter 'Act') enumerates the various relationships, legal and otherwise that would constitute an associated enterprise within the meaning of the Act. Section 92B elaborates and details the various transactions that fall within the meaning of 'international transactions' according to the Act including both tangible and intangible property. Examples of such transactions according to the Act include the sale, purchase, lease or transfer of tangible property like equipment and machinery; purchase, sale, lease or transfer of intangible property of intangible property like trademarks, patents and copyrights; capital financing; provision of services ranging from repair to marketing etc.[2]

The purposes of transfer pricing are broadly three and they are the following:

1. When product is transferred between profit centers or investment centers within a decentralized firm, transfer prices are necessary to calculate divisional profits, which then affect divisional performance evaluation.

2. When divisional managers have the authority to decide whether to buy or sell internally or on the external market, the transfer price can determine whether managers' incentives align with the incentives of the overall company and its owners. The objective is to achieve goal congruence, in which divisional

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1 Chamber of Tax Consultants, '*Practical Guide to Indian Transfer Purchasing*', 1 (2010).

2 *Taxmann's Income Tax Act,* 1.539 (56th ed., 2012).

managers will want to transfer product when doing so maximizes consolidated corporate profits, and at least one manager will refuse the transfer when transferring product is not the profit-maximizing strategy for the company.

3. When multinational firms transfer product across international borders, transfer prices are relevant in the calculation of income taxes, and are sometimes relevant in connection with other international trade and regulatory issues.[3]

Now, the economic rationale for associated entities charging transfer prices for intra-group trade is to be able to measure the performance of individual entities in a multinational group. Transfer pricing helps determine the profitability of such individual entities by treating them as profit centers. Rationally an entity having a view of its own interests as distinct legal entities would only acquire products or services from an associated enterprise if the purchase price was lesser than or equal to prices being charged by unrelated suppliers. The same would apply conversely in relation to an entity providing the product or service. Therefore, on this basis, prices are required to gravitate towards the standard or average price which unrelated parties would agree to in the same or similar transaction. This price is known as the 'Arm's Length Price' (ALP).

Perhaps of most intrigue is the legality of its use as a means to take advantage of favorable income tax regimes in various countries. In the most simplistic terms, this is done by way of the transfer of taxable profits from a company to its AE or subsidiary in a country with less invasive income tax regulations by way of transfer pricing transactions. However, if left unchecked, transfer pricing may be used to reduce income tax margins on profits earned by an MNE through the setting of exorbitant transfer prices to divert greater portions of revenue out of the country to avoid their taxation by the State. Transfer pricing regulations the world over seek to enforce the ALP to ensure the non-occurrence of the same. These regulations provide that the transfer prices so set are not to deviate far beyond or under the ALP arrived at through an appraisal of similar uncontrolled transactions. The determination of this ALP is relatively uncomplicated when the transaction in question involves corporeal goods and services of a generic or prominent nature. It is in the determination of an ALP in a transaction involving intangibles that grounds for debate arise and have indeed arisen, especially in India.

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3 Dennis Caplan; *'Management Accounting: Concepts and Techniques'* available at http://classes.bus.oregonstate.edu/fall06/ba321/Caplan/BAWintertableofcontents.htm, last seen on 10/07/2015.

TRANSFER PRICING OF INTANGIBLE PROPERTY

The term intangibles in the context of transfer pricing is used to broadly define a variety of assets that are not tangible or corporeal in nature but nonetheless have a profound bearing on the profitability and overall revenue of a venture. These include for the most part, intellectual property of various kinds ranging from artistic copyrights on literary works; technology related patents; marketing related intangible assets including trade names, brands and logos etc. along with human capital related intangible assets such as a trained and organized workforce, union contracts; goodwill either professional or, personal or institutional etc. Section 92B (ii) of the Act enumerates 11 common properties that take the form of 'intangible property' within the meaning of the Act.

The most common intangibles encountered in transfer pricing include goodwill of an entity or enterprise and brand-building activities by way of advertising, marketing and publicity (AMP) for the product/ enterprise. The goodwill of a product derives from its established existence and use as a brand that inspires loyalty and repeated usage of the same by the customer base. The AMP seeks to develop a brand so as to generate such good will and expand the customer base. One might go so far as to say that the latter is one of the ends of the former. However, AMP expenditure is not always directed at the development of a new or relatively obscure brand. Often times these AMP expenses are utilized by a subsidiary or AE to take advantage of the established goodwill of a brand in order to bolster sales domestically. Such goodwill and brand fame does not necessitate the established domestic presence of a brand. Often the international repute of a brand is such that it gains prominence in a country among the strata of society most likely to serve as its client base. This is most commonly seen in luxury clothing brands, high-end fast food chains and the hospitality industry.

Consider the example of the Starbucks chain of coffee shops owned and operated by way of a joint venture between Tata Global Beverages and Starbucks Corporation. Owing to the tremendous goodwill and fame enjoyed by the Starbucks brand of coffee shops in India (among its most likely customer base i.e. the cosmopolitan and urbanized), outlets set up in India marketed under the well-established Starbucks brand name hit the ground running so to speak immediately. However, by marketing the same as a 'Tata Alliance' and ensuring that such outlets were stocked with and sold locally sourced Tata coffee products, the relatively less-known Tata sought to not merely generate revenue but also capitalize on the publicity of the internationally acclaimed Starbucks brand to establish its own in the coffee shop and manufacturing industry to great effect. 2014 saw the opening of the 50th Starbucks store in India all in the brief span of a year.

The above example is one of an established brand accessing a hitherto untapped market by way of the involvement of a domestic partner that sought to establish its own brand through shared spotlight with the former. The less ambitious and a more conventional arrangement would involve the simple licensing or franchising of an established brand to a subsidiary or associated enterprise that utilizes the same to generate greater revenue domestically such as in the case of fast food empires McDonald's, KFC, Dunkin Donuts etc. Thus the most prevalent form of transfer pricing arrangements involving intangibles are ones where a brand is sought to be developed individually in a new market or an established brand is licensed to a domestic company that it may enter the market with a proverbial head start on its competitors.

It is in the accurate determination of the ultimate consequences of AMP expenditure i.e. brand-building or brand capitalization, accurate valuation of intangible assets generated by such expenditure and the utilization of marketing intangibles that legal dispute most commonly arises especially in India.

TRANSFER PRICING OF INTANGIBLES IN INDIA: ASSESSEE VERSUS INCOME TAX DEPARTMENT

In India, the transfer pricing of intangibles is one that is subject most often to legal dispute and query owing to most recurrently the problem of setting the transfer price and valuation of such intangibles accurately. However, these disputes are not merely confined to economic considerations; rather they involve multiple considerations including the public good, protection of domestic industry and the prevention of wealth escaping India. At its heart, these legal disputes are a conflict between the individual interests of the domestic assessee and the public interests of the Income Tax Department ('the Department').

The assessee in most cases is one that is concerned only with the sustenance of its business, the generation of revenue and the creation of an ever-increasing profit margin. Thus, it can be said that the assessee is chiefly concerned with the maximizing of its own potential and the protection of its own individual interests by outmaneuvering and outperforming its rivals in the market. The Department, however, seeks to simply ensure that any and all wealth generated in India, as far as is legally possible, stays and circulates within the country. Here, the mistrust harbored by the Department towards assessee is backed by foreign AEs becomes plainly evident.

The Department prefers to ignore the assessee as economic owner of the revenue generated and instead holds that such revenue is one that ultimately belongs to the legal owners i.e. the parent

company or AE in cases where profit is derived from the usage of a licensed brand. While in theory correct, in practice, the assessee retains these profits for reinvestment into itself through expansion of its activities and base within the country viewing increasing profits as an indicator of its growth potential within the domestic market.

In ensuring that profits generated by the assessee remain within the country, the Department does not merely seek to deprive the AE any chance of enjoying the revenue generated by the domestic assessee, but also seeks to ensure that greater income can be attributed domestically to the assessee. India being a developing nation, the Department and State believe that income generated in India should not be destined to fill the coffers of foreign AEs from already developed nations. Rather, such income so generated would be better off serving to bolster the myriad development initiatives of said nation. The Department's actions seek to secure adequate funding is available for the nation to not merely overcome and eliminate its economic obstacles but also to continue and even accelerate the progress of the nation. This ensures that greater income is available for taxation within the country thus increasing income tax revenue for the State which can be utilized towards fulfillment of development goals and the initiation of development activity for the benefit of the nation as a whole.

Based on the same logic, the Department promotes the converse of the above and frequently attempts to attribute larger portions of domestic expenditure by the assessee to the foreign AE to reduce the expenditure of the assessee and increase its profit margin and taxable income in India. The transfer pricing controversy in India arises from just such a scenario. To summarize the foremost argument of the Department with respect to the transfer pricing issue, their contention has been that since the Indian assessee incurs expenses which benefit the foreign AE, the assessee should be reimbursed for such expenses. In fact, the proposition has been that by promoting the brand in India, the Indian subsidiary is providing a service to the foreign AE, for which it should receive due compensation (which could be the recovery of expenses incurred plus an appropriate mark-up over and above such expenses). It is contended by the Department that such AMP expenses resulted in creation of marketing intangibles which belong to the AE and appropriate compensation for such advertisement and brand promotion expenses was required to be made by the Foreign AE to the assessee.[4]

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4 Tarunkumar G. Singhal, '*Transfer Pricing: The Concept of the Bright Line Test*' available at https://www.bcasonline.org/articles/artin.asp?1122, last seen on 10/07/2015.

The stand taken by the Department above is evident in the case of *Maruti Suzuki India Ltd. v. ACIT* before the Delhi High Court.The facts of the case are similar to the illustration detailed earlier. Maruti-Suzuki were the proprietors of the joint trademark 'Maruti-Suzuki'. Earlier the logo 'M' (signifying Maruti,) was used in front of their cars was subsequently replaced by the 'S' Suzuki logo. The Transfer Pricing Officer (TPO) on coming to know of the replacement alleged that the trademark 'Maruti' had been assigned to Suzuki and therefore attributed to the same a consideration of Rs. 4420 crores. This was in ignorance of the fact that Suzuki already had a stake in excess of 50% in Maruti Suzuki India Ltd and hence could control both trademarks 'Maruti' and 'Suzuki'. Furthermore, the TPO held the same in ignorance of the fact that the Trademarks Rules, 2003 put forward an established procedure for the assignment of trademark which was absent in the present case. Thereafter, the TPO claimed that the Suzuki trademark had piggy backed on the existing goodwill of the Maruti trademark and further claimed that Maruti had developed marketing intangibles for Suzuki in lieu of brand-building for Suzuki at its own cost due to its excessive AMP expenditure.

The attitude of the Department is hence, one that seeks to protect the assessee from being placed at a disadvantaged position in its dealings with the foreign AE by ensuring that the assessee gets what the Department believes is owed to it based on a valuation of the services provided. However, in doing so, the Department may generate short-term increments in income tax revenue but in the long run its stand is one that is as untenable as it is counter-productive. In viewing MNEs with distrust and seeking to hold them liable for expenditure by depriving them access to profits generated from such expenditure and subsequently, subjecting the resultant higher profit margin to taxation, the Department risks discouraging MNE expenditure in the country. While a developing economy with tremendous potential, India is not the only developing market available to MNEs.

Now, certain steps to ensure that any dealings with MNEs are ultimately advantageous to the developing nation as a whole; this cannot be done to the complete non-consideration of the MNE. By treating MNEs as something akin to a cash cow from whom as much revenue as possible is to be extracted by subjecting them to various legal procedure and formalities with the additional expenses that follow, the State risks making investment in India economically unviable owing to any return being significantly dented by the mandatory expenditure in various forms demanded by the taxation and legal regime of the nation. Such discouragement of MNE investment results in the non-availability to the domestic assessee and the industry of

the additional resources, assets and expertise that such an association would bring and consequently, the heightened revenue that the same might generate. Without the prospect of growth and greater income generation domestic entrepreneurial initiative could reduce causing income tax revenue to potentially stagnate in the long run.

Although superficially liberalized post-1991, the tax and licensing regimes in India are such as to cause maximum inconvenience to an MNE seeking to enter the domestic market. Inconvenience being in the number of a number of individually minor expenses that, when viewed cumulatively, are exorbitant to say the least. The possibility that MNEs will choose to pass on the Indian market looms larger everyday given that justifying such enormous expenses on the mere possibility of return becomes more and more difficult. It is imperative that MNEs are treated not merely as short term income sources to be kept at a distance but rather as long term allies in development.

The need of the hour is thus, that there should be a reconciliation of the interests of the assessee with that of the Income Tax Department that is mutually beneficial and advantageous to all in the matter of transfer pricing of intangibles between foreign AEs and domestic assessees. In order to arrive at this middle ground it would be pertinent to consider the primary sources of the transfer pricing controversy i.e. determination of the ALP in AMP expenditure and brand-building inherent in such AMP expenditure in light of various case laws.

HIGH AMP EXPENDITURE: EXERCISE IN BRAND-BUILDING

With respect to AMP expenditure by assessees liaising with a foreign AE, the stand taken by the Department has been relatively unchanging. The Department has uniformly held in all cases questioning a higher AMP expenditure that such expenditure contributes directly to the building of the brand owned by the foreign AE and therefore such expenditure in sofar as it exceeds the ALP range must be attributed to the foreign AE.

In the *Maruti Suzuki* case for example, the High Court noted that where the AMP expenditure does not deviate too far from the ALP range determined from an independent comparable company, then there can be no creation of a deemed marketing intangible asset for the foreign joint owner. The Court also held that such creation of marketing intangibles i.e. brand-building must necessarily be proved through clear and cogent evidence, the onus of which is on the TPO. Subsequent judgments by various Income Tax Tribunals have upheld the Maruti judgment and have even done away with this need for evidence of brand-building by the TPO. It has been held that where

the AMP campaign of the assessee centers around, incorporates or makes direct reference to the brand of the foreign AE, whether by design or as a consequence of the promotion of its own product, then any excess AMP expenditure beyond the ALP is to be borne by the AE as such an activity is one necessarily involving development of the brand in India.[5] The onus has shifted onto the assessee to show that there has been no brand-building brought about by its AMP activities. This stand has been succinctly expressed in the L.G Electronics Case[6] wherein the Delhi bench of the Income Tax Appellate Tribunal (ITAT) held that:

> *There can be no scope for inferring any brand building without there being any advertisement for the brand or logo of the foreign AE, either separately or with the products and name of the assessee. The A.O/TPO can satisfy himself by verifying if the advertisement expenses are confined to advertising the products to be so sold in India along with the assessee's own name. If it is so, the matter ends. The AO will have to allow deduction for the entire AMP expenses whether or not these are proportionately higher. But if it is found that apart from advertising the products and the assessee's name, it has also simultaneously or independently advertised the brand or logo of the foreign AE, then the initial doubt gets converted into a direct inference about some tacit understanding between the assessee and the foreign AE on this score. As in the case of an express agreement, the incurring of AMP expenses for brand building draws strength from such express agreement; in the like manner, the incurring of proportionately more AMP expenses coupled with the advertisement of brand or logo of the foreign AE, gives strength to the inference of some informal or implied agreement in this regard.*[7]

In the same case, the ITAT listed 14 questions have considerable bearing on the question of determination of the cost/value of the international transaction of brand/logo promotion through AMP expenses incurred by the Indian assessee for its foreign AE. These include questions as to the nature of the arrangement between the parties whether for manufacturing or distribution, whether merely for the purposes of providing technical expertise or for utilization of the brand/logo of the AE. Arguments presented by the assessee against such allegations of brand-building center around two generic points of logic.

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5 *BMW India v. ACIT*, (2013) 37 CCH 102 DelTrib.

6 *L.G Electronics India Pvt. Ltd v. ACIT*, Income Tax No. 5140 of 2011, Delhi Bench [Income Tax Appellate Tribunal, 08/12/2014].

7 Ibid.

Non-Existence of Express Agreement

The first argument is that there existed no prior express arrangement between the assessee and AE for the purposes of brand promotion and development within the nation. In such cases, the Department has rightly pointed out that the lack of an explicit arrangement for the same does not preclude the existence of an oral understanding or an implied arrangement for the same. Considering the 14 questions enumerated in the L.G Electronics case for example, where an arrangement is determined to be merely for manufacture or distribution of a product within a nation then there is no implication that such an arrangement is for AMP or brand development as such activities do not fall within the genus of the activities specified in the arrangement. However, where an arrangement is one for the use of a marketable trademark by way of a name or logo belonging to the AE in the sale and distribution of the products of an assessee, then in such a case, although not expressly stated, there is an implied understanding that such an activity would involve active marketing campaigns and publicity for the logo resulting in an increase in the celebrity of the brand within the domestic market of the assessee (where such AMP activities are confined to the nation).

Consider the German car manufacturing company, Volkswagen and its wholly owned subsidiary Lamborghini that is engaged in the manufacturing of high-end sports cars. While there may exist an international transfer pricing transaction between the two for the purpose of providing machinery, equipment or even intangibles such as technical expertise, human capital and engineering patents, so long as Lamborghini advertises its products under the brand Lamborghini alone without any reference to the Volkswagen brand, no inference can be made of brand-building for any brand but the Lamborghini brand. This is an example of an arrangement centered on the providing of 'backstage assistance' as it were as opposed to prominent association.

As compared to this, in the case of Ford India, the parent company, Ford, licensed to the assessee its brand including its logo and trademark as a marketing intangible asset along with technical knowhow to manufacture its products. Every such product was to necessarily carry the Ford logo as per the agreement. Therefore, the advertising campaign undertaken by the assessee prominently featured the brand and logo of the foreign AE. Thus the natural inference from the same is that the AMP expenditure of the assessee resulted in the penetration of the foreign brand into the Indian market and built the Ford brand in India.

In cases such as the above stated Ford case, to state that the AMP activities do not involve inviting publicity on to the brand of the AE is not altogether viable. The question of pertinence in such cases is then whether such AMP activities result in the brand building alleged by the Department or whether the vice versa is the case.

'Piggybacking' Existing Brand Value

The assessee may claim that the utilization of the foreign brand serves not to develop it but rather to capitalize on its existing value and goodwill in the market to gain a head start on the competition and generate larger sales revenue. The Department and Tribunal reject this argument on the grounds that such an advantage might have existed in the initial stages but beyond a certain period of time there arises a need to penetrate deeper into the market which can only be accomplished through AMP activity. Thus the Department holds that despite the 'piggybacking' of the foreign brand in the initial stages, the same would be short-lived and subsequent brand-building is inevitability.[8]

However the argument made by the Department is one of incomplete logic. The attribution of AMP expenditure to the AE is predicated on the belief that such expenditure when in excess of the ALP is for the purposes of brand-building. By conceding that there may be cases where an existing brand is sought to be harnessed in the initial stages, it is implied then that at such stages no brand-building activity is taking place. Rather, any excess AMP expenditure is merely to utilize existing brand value to the maximum possible effectiveness and efficiency. Such a campaign would center not so much on the excellence of the product as compared to others but rather on the mere availability of the product in the country. Therefore, at such a stage there can be no attribution of AMP expenditure to the foreign AE. Such an attribution can only be made subsequently where further penetration of the brand is sought in the country and then too only if there is a continued push in AMP expenditure which is dependent on multiple factors including on the introduction of new products or brands deriving from the foreign brand and on whether or not the revenue generated from the initial stages met or were below expectations etc. Only in the latter case will such AMP expenditure be required as it is indicative of a lack of knowledge of the brand and a need to further inform the public of the same indicating that the initial reliance on existing brand value to be misguided.

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8 *Ford India Pvt. Ltd v. Assessee*, Income Tax Appeal No. 2089 of 2011, Madras Bench (Income Tax Appellate Tribunal, 29/04/2013).

Additionally, the Department in emphasizing brand building through AMP expenditure overstates the impact of the same on the overall value of a brand. Brand value derives from multiple factors including quality of products and services provided, history of the brand, associated enterprises etc. While some part of the AMP expenditure can be attributed towards brand-building, it can only be a small part as AMP serves only to bring a brand to the attention of the public, but to retain their notoriously fickle attention there is a need to focus on quality in the long term. AMP expenditure is primarily focused on the generation of greater sales and therefore, larger profits for the company.[9]

The question of whether or not brand building is a result of such AMP activities can only by monitoring the progress of the brand in cornering an increasing share in the market for its products. However, even such evidence cannot be credited to excessive AMP expenditure alone as the sustained growth of such a market share would require the same to be offset by quality products and service as noted above. To attribute the growth of the brand to the AMP alone is to invite further dispute and investigation into the factors that contributed to such growth which is time and resource consuming. Apart from the most exceptional of cases, for example brand development believed to have been carried out through illegal or coercive means, where a thorough investigation would be necessary, the solution first proposed by the Delhi High Court in the Sony Ericsson case is one that bears consideration.

A simple survey or analysis of the public as a whole or specific sections of the market by a competent government or independent data processing unit to determine the extent of a foreign AE's brand value in such a market prior to entering into an arrangement with the assessee would allow the AE to take an informed decision as to the form of agreement that would be most in keeping with their immediate requirements vis-à-vis the Indian market. In this way, for example, foreign clothing brands may determine whether there already exists a demand for their product that can be taken advantage of through the mere supply of the same or whether there is a lack of awareness regarding the foreign brand in the market that would entail AMP expenditure to develop the brand in the market. Furthermore, the creation of a database of foreign brands with the most goodwill and fame within the national market despite their absence from the same would allow the Department to monitor the entry of such brands into the market and ensure that such entry is done by way of an

9 *Sony Ericsson Mobile Communications India Pvt. Ltd v. Commissioner of Income Tax*, Income Tax Appeal No. 16 of 2014 (Delhi High Court, 16/03/2015).

agreement that is not merely fair but also mutually beneficial to both assessee and AE. Such a database would require regular updating and maintenance by an efficiently functioning data processing and collecting unit that would operate under the supervision of the Department.

In the light of the above it can be seen that there exist certain cases where the implication of brand-building activity is apparent. The point of conflict and focus in such cases then shifts beyond the labelling of the activity as brand-building or not. There is a need to ensure that arrangements between assessee and foreign AE are in keeping with the Department's primary objectives of preventing the outflow while promoting the flow of wealth into the country and ensuring that arrangements between assessee and foreign AE (that operates, perceivably, from a position of power) are advantageous to the assessee and mutually beneficial to both.

BRIGHT LINE TEST: DETERMINATION OF THE ARM'S LENGTH PRICE

The origin of the conflict with respect to higher AMP expenditure is predicated on the determination of the ALP i.e. the industry standard expenditure on the same in India. Therefore, in order to accurately determine the same, rule 10B of the Income Tax Act, 1961 lays down certain tests that are to be followed in order to arrive at the Arm's Length Price including:

1. Comparable Uncontrolled Price Method (CUP Method)
2. Resale Price Method
3. Cost Plus Method
4. Profit Split Method
5. Transactional Net Margin Method (TNMM)

It also, in addition to the above five, allows for any other method as prescribed by the Central Board for Direct Taxation (CBDT). In India the most common methods for calculation of the ALP have been the CUP method and TNMM. However, in recent times there has been an alarming preference shown to the 'Bright Line Test' (BLT) method of ALP calculation.

Explaining Bright Line Test

The BLT as a method of ALP calculation originated in the United States of America out of the judgment in the case of DHL USA before the Tax Court that marked the genesis of the transfer pricing controversy relating to marketing intangibles. This was primarily on account of the 1968 US Regulations which propounded an important theory relating

to 'Developer-Assister rules'. As per the rules the developer being the person incurring the AMP spends (though not being the legal owner of the brand) was treated as an economic owner of the brand and the assister (being the legal owner of the brand), would not be required to be compensated for the use or exploitation of the brand by the developer. The rules lay down four factors to be considered:

1. the relative costs and risks borne by each controlled entity
2. the location of the development activity
3. the capabilities of members to conduct the activity independently
4. the degree of control exercised by each entity.

The principal focus of these regulations appears to be equitable ownership based on economic expenditures and risk. Legal ownership is not identified as a factor to be considered in determining which party is the developer of the intangible property, although its exclusion is not specific. However, the developer-assister rule were amended in 1994, to include, among other things, consideration of 'legal' ownership within its gamut, for determining the developer/owner of the intangible property, and provide that if the intangible property is not legally protected then the developer of the intangible will be considered the owner. However, the US TPR recognize that there is a distinction between 'routine' and 'non-routine' expenditure and this difference is important to examine the controversy surrounding remuneration to be received by the domestic AE for marketing intangibles.

In the context of the above regulations, the Tax Court in the case of DHL coined the concept of a 'Bright Line Test' (BLT) by differentiating the routine expenses and non-routine expenses. In brief, it provided that for the determination of the economic ownership of an intangible, there must be a determination of the non-routine (i.e. brand building) expenses as opposed to the routine expenses normally incurred by a distributor in promoting its product. An important principle emanating from the DHL ruling is that the AMP expenditure should first be examined to determine routine and non-routine expenditure and accordingly, if at all, compensation may be sought possibly for the non-routine expenditure. In this context, the US Tax Court noted that routine expenditure would be the AMP expenses incurred by uncontrolled comparable distributors and such an amount would be considered the 'Bright Line' limit. Expenditure over the same would be considered to be towards the creation of market intangibles i.e. brand development which would belong to the owner of the brand.

Application of BLT in India

Although the BLT originated in USA, it is in India that its application began to take shape with alarming consequences. In the Maruti Suzuki case for example, the assessee Maruti paid lump sum amount along with running royalties to Suzuki by way of royalty for licenses received from Suzuki for the manufacture and sale of automotive vehicles bearing the Suzuki logo. Maruti incurred considerable AMP expenses in promoting its products and therefore, the Department sought to protect the assessee from paying excess amounts to the foreign AE in this case by attributing the part of the AMP to the AE on account of the benefit that was being derived by way of brand promotion through the AMP activities of the assessee.

In order to do so, the TPO wrongly compared the AMP expenses of three companies involved in the auto vehicular manufacturing industry even though the three companies all significantly differed from the assessee in terms of client base and target market despite carrying on similar activities. However, inspite of correcting the error of the TPO, the Delhi High Court erroneously held that the considerations involved in selecting comparable companies should be on the basis of functional similarity between the assessee and other comparable domestic companies.

In this case the validity of applying was not considered. However, the application of the BLT was questioned but subsequently upheld by the Delhi Bench of the ITAT in the LG Electronics case by reading the application of this test into the wording of Rule 10B which provided for any other method that would be appropriate given the circumstances. Rationalizing the usage of the BLT, the Bench held that the test was applied not to determine ALP but to determine the non-routine expenditure arising out of the international transaction entered into between the domestic assessee and the foreign AE involving AMP expenditure. It was further noted that the application of such a method came only after the failure of the assessee to supply to the TPO documentation showing ALP calculation in order for the TPO to satisfy itself that the assessee had made the demarcation between AMP expense incurred routinely and expense incurred for the creation of marketing intangible asset i.e. non-routine expenditure.

Thus, the BLT method has been applied by the TPO only on the failure of the assessee to differentiate between routine and non-routine expenditure itself. This application has been upheld beyond the LG Electronics case in the cases of BMW India[10] and Ford India[11] as well.

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10 Supra n. 8.

11 Supra n. 5.

Objections to the BLT

The chief objection to the BLT method of valuation is in the parameters that have been evolved by judicial decision in India in selecting comparables for the determination of routine and non-routine expenditure. The LG case notes that there is a need to identify similar domestic companies in terms of functional similarity alone in order to determine the amount of routine expenditure involved in AMP. The ITAT and Department have rejected utilizing similar companies having dealings with foreign AEs on two beliefs namely, that in order to accurately determine routine expenditure it is necessary that a domestic uncontrolled transaction be taken into account firstly and secondly, the misguided belief of there being a collusion between companies involved with foreign entities to ensure that any comparison made would be mutually beneficial in terms of computation of ALP. Furthermore, the domestic companies sought to be compared are often not in the same revenue bracket as the company in question making any comparison untenable. For example it would be difficult to reconcile the AMP expenditure of an assessee company earning over Rs. 100 crore in revenue yearly with a domestic company earning Rs. 2 crore yearly.

The LG Electronics case also alludes to the fact that the BLT test is similar if not the same as the Cost Plus Method of ALP calculation. This comparison is unfounded as the Cost Plus Method does not take into account comparables. The ALP is set after adding the direct and indirect costs of production to the normal gross profit mark i.e. the amount of profit necessary to ensure continued functioning of the business. The BLT seeks to differentiate expenditure into routine and non-routine expenditure on the basis of a comparison with domestic companies engaged in uncontrolled transactions carrying out operations that are functionally similar.

However, the most perilous aspect of the continued application of the BLT test is that it grants far too extensive power to the Department in terms of determination of ALP. By way of the BLT test, the Department may seek to attribute larger portions of AMP expenditure to foreign AEs in order to ensure that a greater part of the income is available in India for taxation. It grants to them undue discretion in determining what expenditure is routine and what is not which is only augmented by the extremely vague guideline put forward by the ITAT in selecting comparables for such determination. Given the Department's well documented mistrust of foreign AEs it leaves very little scope for such companies to function free from procedural inconvenience and expense. It allows the Department to

take an active hand in creating a climate that is detrimental to the prospect of long-term investment of foreign AEs in India which in turn jeopardizes the long-term wealth generation abilities of domestic assessees bolstered as they are by their interactions with foreign AEs.

THE WAY FORWARD: 'SONY ERICSSON' JUDGMENT AND BEYOND

The period post the Maruti Suzuki judgment was one marred by uncertainty and controversy owing to the misguided introduction of the BLT method in India as a veiled attempt by the Department to ensure greater availability of taxable income and prevention of outflow of wealth. The actions of the Department were an excessive response to the phantom threat of foreign AEs making off with wealth generated in India and a failure to recognize the mutual benefit inherent in dealings between foreign AEs and domestic assessees in the long term. The stand taken by the Department ran the risk of alienating the Indian developing market at a crucial juncture when it is being viewed as one of the largest untapped markets among the developing nations of the world today. It is then with tremendous relief that the shadow boxing of the Department has been brought to a halt by the elaborate common judgment made by the Delhi High Court in the Sony Ericsson case.[12]

The application of the BLT method by the Department and TPO as has been upheld in various decisions highlighted above, specifically the L.G Electronics judgment has been overturned by the landmark common judgment of the Hon'ble Delhi High Court covering multiple appeals and cross-appeals involving questions of the applicability of the BLT method to determine excesses in AMP expenditure and other questions pertaining to the ALP. The judgment, known colloquially as the Sony Ericsson judgment, acknowledges the various misgivings created by the BLT method and serves to disavow the same as a valid method of ALP determination.

In its judgment the Court did away with the geographical limitations on the selection of comparables placed by the LG Electronics judgment for a more practical and studied approach. The Court pointed out that a comparable would be acceptable, if based upon comparison of conditions a controlled transaction is similar with the conditions in the transactions between independent enterprises. In other words, the economically relevant characteristics of the two transactions being compared must be sufficiently comparable. This entails and implies that difference, if any, between controlled and uncontrolled

12 Supra n. 9.

transaction, should not materially affect the conditions being examined given the methodology being adopted for determining the price or the margin. When this is not possible, it should be ascertained whether reasonably accurate adjustments can be made to eliminate the effect of such differences on the price or margin. Therefore, it follows that the choice of the most appropriate method would be dependent upon availability of potential comparable keeping in mind the comparability analysis including befitting adjustments which may be required. As the degree of the comparability increases, extent of potential differences which would render the analysis inaccurate necessarily decreases.

With respect to the issue of excess AMP expenditure over and above the ALP determined in the above manner, the Court impliedly denounced the attribution of the same to the AE to be compensated to the assessee and instead noted that the same should be set off either by way of a reduction in the amount of royalty to be paid to the AE as licensing fees or by charging a lower purchase price. The Court however did not disallow the direct payment of compensation to the assessee. Although not stated in the judgment, it would also be feasible to provide for a systematic reduction in royalty payments based on an analysis of the impact of the assessee on the development of the brand of the AE. Such an impact might be construed based on the share of the assessee in the overall sales turnover of the MNE or the rate of growth of such sales within the market of the assessee.

However, the most significant development brought about by this judgment was the overturning of the LG Electronics judgment insofar as it upheld the BLT as an appropriate and reliable method for the determination of ALP and segregation of expenditures. The Court held that the method did not have any statutory mandate and rejected the segregation of income into routine and non-routine expenditures as the same was based on the potentially subjective selection of comparables by the Department rather than objective selection. At the same time, the Court upheld the Cost Plus Method of determining ALP as distinct and separate from the BLT and a reliable method with statutory backing which was to be followed in the appropriate situations depending on the circumstances.

The judgment concluded with a reiteration of the objective of transfer pricing adjustment i.e. to ensure that the controlled taxpayers are given tax parity with uncontrolled taxpayers by determining their true taxable income.

In addition to the findings of the High Court with respect to the handling of transfer pricing transactions involving intangibles, the

findings of the N Rangachary Committee on transfer pricing are pertinent. The Committee was constituted under the leadership of N Rangachary to address some of the transfer pricing issues faced by IT industry by the Indian Government on 30th July 2012. In its report, the Committee recommended the institution of a 'Safe Harbour' Concept along the lines of the OECD guidelines. These guidelines explain that a 'safe harbour' can be any statutory provision or regulatory approach directed at simplifying transfer pricing compliance. The OECD lists two kinds of 'safe harbours':

1. The first kind allows certain transactions to be completely excluded from the scope of transfer pricing provisions. Hence, the safe harbour provision demands no transfer pricing compliance of the taxpayer to the extent a transaction falls in the excluded category.
2. The second kind allows simplification of rules applied to certain categories of taxpayers. Usually, subject to satisfaction of certain profitability thresholds, taxpayers may have no or significantly reduced documentation/compliance burden with limited audit or scrutiny.[13]

In the Indian IT sector, for example, the Committee recommended that in cases where the taxpayer engaged in providing software development services, with insignificant risk, to a foreign AE, where the aggregate value of the international transactions does not exceed Rs.100 crores, then in such cases if the operating profit margin on operating expense was 20 percent or more, transfer prices set by way of a controlled transaction would be exempt from transfer pricing regulations in India and must be accepted.

Along the lines of such a concept, in order to prevent transfer pricing litigation, it might be prudent to determine situations revolving around intangibles wherein transfer pricing transactions would be exempt from the operation of regulations provided there was clear proof of an acceptable profit margin. This would ensure not only that the Department is able to generate the income tax revenue as it desires but also that the assessee and AE strive to achieve such acceptable profit margins and avoid the interference of the Department and the State in the distribution of their revenue.

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13 Organization for Economic Co-operation and Development, *Transfer Pricing Guidelines for Multinational Enterprises & Tax Administrations,* Chapter IV, Sec. E available at http://www.oecd.org/ctp/transfer-pricing/transfer-pricing-guidelines.htm, last seen on 15/07/2015.

It is evident that recommendations for reform are anchored on the accurate calculation of a variety of numbers and on processing and collecting of large amounts of data. The Department alone is ill-equipped and lacks the expertise to carry out such activity effectively and efficiently. Therefore, it might serve to accelerate the functioning of the Department and the approval of the transfer pricing process by the Department by setting up a Technical Committee comprised of a panel of analysts and experts skilled in this regard to carry out activities such as the selection of comparables based on an appraisal of their economic character, determination of ALP, calculation of taxable income and acceptable profit margins etc. Such a focused Committee might also bring with it the processing flexibility necessary to keep up with the dynamic and constantly shifting economy to periodically alter transfer pricing rates and margins based on a regular appraisal of the state of the domestic and international economy. This would serve to ensure that the taxation regime in the country is one that is always in a position that is conducive to the interests of both the State and individual assessees/MNEs.

Transfer pricing of intangibles as a concept is one that is grounded in numbers in that it is dependent on factors such as brand valuation, pricing of assets, nature of asset etc. Although subject to the operation of the law, it is ultimately based in the dynamic and constantly fluctuating realm of economics. While certain general principles may be developed to anticipate economic trends, it is essential that when dealing with a beast as wilful as market economics that one have the flexibility to be able to alter one's stance and course of action to accommodate changes in market dynamics. The law brings with it an element of rigidity that makes it difficult to keep it abreast of these fluctuating economic trends. Thus the role of the law in dealing with concepts as volatile as transfer pricing of intangibles should be regulatory alone rather than actively participative. The law would serve all interests best by ensuring that such transfer pricing activities are regulated so as not to get out of hand and cause irrevocable damage to not only individual parties but also the economy as a whole.

There is a need for the Department and the judiciary to acknowledge the concept as a dynamic and fluctuating one that has to be dealt with actively by those skilled at economic analysis and that this dynamism should be regulated by the law but not made inflexible by the institution of tax law and rigid legal parameters. Perhaps, therefore, there is a need for a re-evaluation of the role played by the Department in such transactions as a precursor to any further elaborate change in the application of the concept in India.

CONCLUSION

While transfer pricing of intangibles as an area of study is necessarily vague owing to the fluctuating nature of the assets involved, in a developing nation such as India, this vagueness has led to the parties involved in such transactions to fill in the gaps in a manner that is most conducive to their own interests. However, there is a need for all the parties involved in such transactions namely, the foreign AE, domestic assessee and the Department representing the will of the State to reconcile their interests with each other. By undermining the interests of the other any benefit gained is merely short term in nature. For example, as already pointed out earlier, were the Department to needlessly inconvenience the assessee-AE relationship by attributing expenditure away from the nation while retaining income within to generate greater taxation revenue, it would serve to discourage foreign investment in India. It is well settled that it is only in the opening up of the national market to international participation that domestic industries will develop at an accelerated pace. In terms of the assessee, by sacrificing the needs of the nation as a developing economy in order to ensure maximum individual profitability, the industry would stagnate placing a ceiling on the growth of the market and consequently on the growth of the assessee.

Ultimately, the transfer pricing debate boils down to the reconciliation of the capitalist motivations of the assessee and AE with the socialist ideology of the State represented by the Department so as to create a mixed economy that is capable of accommodating the needs of both. While the Department must necessarily give due regard to the profit motive that governs the functioning of the assessee and its associated MNE, the companies must also give due recognition to the motivations and requirements of the Department as the supervisors of a developing economy.

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RE-CONSIDERING NOTION OF ORGANIZED CRIME AND IMPLEMENTING PROACTIVE MECHANISM FOR ITS PREVENTION

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ABSTRACT

Criminal organization today has been reorganizing into sprawling transnational networks. Recent disclosure of organized criminal activity confirms that organized crime has scattered indistinctively and crime rates have increased indescribably. It is often arduous to get a strong hold on criminal networks reason being, the network is enormously vast and such criminal networks work in virtually undetectable nexus. Hence, this paper is an attempt to realize how this network could be conked out by introducing proactive measures like intelligence led policing, community policing and witness protection program. The first half of this paper deals with conceptual definitions and understanding of organized crime which is then followed by implementing policies keeping in mind the nature of organized crime in the second half.

Keyword: Criminal Organisation, Community Policing, Network, Intelligence, Witness Protection.

INTRODUCTION

'Everything has been said already, but as no one listens, we must always begin again'. Andre Gide, (French Thinker and Writer)

Very true stands the above quote specially in context with organized crime.

Recent disclosure of Swiss Government agency has revealed commission of offence of money laundering, 'As per Money Laundering Reporting Office, Switzerland (MROS), as many as 1,411 Suspicious Activity Report (SARs) were received by this central agency during 2013, involving suspicious assets worth a record high amount of nearly 3 billion Swiss francs (over Rs 20,000 crore)'.[1] Disregarding the

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1 '*Swiss Flag -Organized crime link in India money laundering Trail*', Indiatimes.com(3006/2014), available at http://articles.economictimes.indiatimes.com/2014-06-30/news/50974572_1_mros-money-laundering-act-laundering-reporting-office-switzerland last seen on 18/09/2015.

International condemnation and rejecting the eleventh hour pleas for clemency, the Indonesian Government executed eight drug convicts including seven foreigners, the executed prisoners from different nations were shot by police firing squad on 22nd April 2015.[2]

Drug related offenses consist of 23 percentage of crime rate every year.[3] After Homicide and rape offenses under IPC, NDPS Act holds high punishment. Under NDPS Act a person can be imprisoned rigorously for 10 years and repeated offenders can be imprisoned for life but the concept of deterrence or prevention is defeated and is reflected by the number of occurrence of crime rate.

The above statistics have been provided to study the cognitive of human defying the laws. The law in Indonesia may seem extremely harsh and not in proportionality with the principles of just punishment. The act of Indonesian Government may be contrary to Aristotle's view of moral censure which has gradually taken root as a principle of punishment-namely, punishment is justified only when the offender is properly to blame for the action, and in other words the punishment must fit the crime. Punishment for organized crime fits into the landscape of three structures of criminal law that is 'Act based, Guilt based and Actor based' and is in accordance with principles of legality.[4] There are three perspective of crime: duty, harm and norms. Duty based system focuses on criminal and his or her personal bond to the source of duty on the contrary harm based way of thinking focuses on the importance of victim as a central figure in the theory of crime and punishment. Harm accrues to the interest of the state, the legal system or just anyone or everyone. Understanding organized crime in context of harm and duty based criminal law is essential for the purpose of penalization.

Now if we look at the nature of organized crime, we find that one has forsaken both duty and concept of doing no harm to others and hence the notion of just punishment is justified. The philosophical foundation of punishment in context with organized crimes has always been at the justifiable mode and perhaps understanding manifestations not definitions of organized crime would be an answer to the incessant offence.

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2 Joe Cochrane, 'Indonesia Executes 8, Including 7 Foreigners, Convicted on drug Charges' The New York Times (28/04/2015) available at http://www.nytimes.com/2015/04/29/world/asia/indonesia-execution.html?_r=1 last seen on 18/09/2015.

3 National Criminal Record Bureau, Ministry of Home affair, Government of India, Crime in India 2014 Statistics available at http://ncrb.gov.in/CD-CII2014/CII_2014_Tables/FILES/Statistics-2014-rev5.pdf last seen on 17/05/2015.

4 G. P. Fletcher, '*The Grammar of Criminal Law*', 21 (1st ed., 2007).

Organized crime by definition means crime planned and committed by people under a network. Perhaps here manifestation of organized crime as provided by United Nations Office on Drugs and Crime (UNODC) in furtherance of Resolution passed by General Assembly[5] would be more appropriate.

Transnational organized crime manifests in many forms, including as trafficking in drugs, firearms and even persons. At the same time, organized crime groups exploit human mobility to smuggle migrants and undermine financial systems through money laundering. The vast sums of money involved can compromise legitimate economies and directly impact public processes by 'buying' elections through corruption. It yields high profits for its culprits and results in high risks for individuals who fall victim to it. Every year, countless individuals lose their lives at the hand of criminals involved in organized crime, succumbing to drug-related health problems or injuries inflicted by firearms, or losing their lives as a result of the unscrupulous methods and motives of human traffickers and smugglers of migrants.[6]

Apart from the definition provided by the UN Convention, the European Union too has carved a niche by defining *'trafficking in human beings' as transferring, recruiting & harbouring and receipt of human in vulnerable position by means of using unlawful force.*[7]

The above definition reflects that the criminal organization today is reorganizing into sprawling transnational networks. Organized crime has scattered indistinctively and crime rates have increased indescribably. It is often arduous to get a strong hold on criminal networks reason being, the network is enormously vast and such criminal networks work in virtually undetectable nexus. Organized crime is the integral and natural outgrowth of complex social forces. It acts as a threat to the nation as it destabilizes the criminal justice

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5 U.N. General Assembly, *United Nations Convention against transnational organized Crime*', Res.55/25, Sess.55, U.N Document (A/55/383, (08/01/2001) available at https://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf last seen on 15/09/2015.

6 Report of United Nations office on Drugs and Crime on Transnational Organised Crime and the protocols thereto September 4, 2004, U.N. General Assembly Report, sess. 55, U.N Document (A/55/383, (08/01/2001) available at https://www.unodc.org/documents/middleeastandnorthafrica/organised crime/UNITED_NATIONS_CONVEN TION_AGAINST_ TRANSNATIONAL_ ORGANIZED_CRIME_AND_THE_ PROTOCOLS_ THERETO. pdf last seen on 19/09/2015.

7 Article 4, Council of Europe Convention on Action against Trafficking in Human Beings, 2005.

system. Organized crime mirrors the proliferation of intimidation and distrust among the common citizens towards the government and the law enforcement agencies.

Keeping this in mind, this paper attempts to relook the concept of organized crime by way of comparative study and putting forward suggestions for its prevention.

STUDYING ORGANIZED CRIME: NEED OF THE HOUR

Organized crime is not limited to a specific country but has become a transnational problem. It is evident from crimes like, trafficking of human, trafficking of drugs, money laundering and illegal immigration rackets. Today with growth of science and technology organized criminal groups are able to operate in a more sophisticated manner thereby aggravating the grim situation thereby bringing out the need to restudy the concept of organized crime.

As early as 1950s in USA the Kefauver Committee concluded that there was a nation-wide network of criminal syndicates in the USA, fundamentally based on 'muscle' and 'murder' indiscriminately used in running their criminal enterprises.[8] The United States Task Force Report[9] appropriately describes the scourge in the following words: 'Organized crime is a society that seeks to operate outside the control of the American people and their government'.

It involves thousands of criminals working within structures as complex as those of any large corporation, subject to laws more tightly enforced than those of legitimate governments. Its actions are not impulsive but rather the result of intricate conspiracies carried on over many years and aimed at gaining control over whole fields of activity in order to amass huge profits'.

Under Omnibus Crime Control and Safe Streets Act of 1968 of US, it has been defined as 'including unlawful activity of members of highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labour racketeering and other unlawful

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8 Ministry of Home Affairs, Government of India, *Justice Malimath Committee report on 'Criminal Justice Reform'*, (01/03/2003) available at www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf last seen on 18/09/2015.

9 Task Force Report-the Presidents' Commission on Law Enforcement Administration of Justice, 1967 (page 1); Madan Lal Sharma, 'Organized Crime in India: Problems and perspectives'United Nations Asia and Far East Institute for the prevention of Crime and the Treatment' 109 International Seminar, 1999 available at http://unafei.or.jp/english/pdf/RS_No54/No54_10VE_Sharma.pdf last seen on 15/06/2015.

activities of such associations'. The above definition reflects facts about the amount and diverse nature of organized crime and a conscious attempt to shun the restrictive definition which might limit application of the law.

Then the Task Force in 1976, under the National Advisory Committee on Criminal Justice Standard and Goals did not define the crime but it attempted to describe the nature of organized Criminal activity. It categorized[10] this crime into seven sub categories and observed that organized crime is a conspiratorial crime, having profit as its primary goal.[11] Then in 1970's the Organized Crime Control Act strengthened the existing laws in several respects. The Preamble of the act captures the nature and enormity of the threat posed to the society. It provided protection to an organized crime witness and it was mandatory for witness to give testimonies, further the act also criminalised use of money which was generated by activity pertaining to racketeering and prescribes jail for longer period. Organized crime is highly sophisticated and diver and widespread that annually drains billions of dollars from country's economy. In doing so they adopt unlawful activity, force and corruption, it derives a major portion of its power through money obtained from such illegal endeavours as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation and a serious danger of infiltrating the democratic setup of any nation.

To comprehend and tackle criminal activities pertaining to organized crime some countries have well enacted criminal association under its legislation. The United States' center piece of Federal Law proscribing organized criminal liability is Racketeer Influenced and Corrupt Organisation Statute 1970 (RICO): it involves murder, arson, robbery, bribery as racketeering. The witness security

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10 Herbert E Alexander and Gerald E Caiden, '*The Politics and economics of organised Crime*' 26 (1st ed., 1985)

'The task force listed the following seven characteristics of organized crime: Organized crime is a conspiratorial crime, organized crime has its profit as its primary goal, organized crime is not limited to illegal enterprise or unlawful services but includes sophisticated activities as well, organized crime is predatory using intimidation violence corruption and appeals to greed, organized crime is not synonymous with the mafia but knows no ethnic bounds, organized crime excludes political terrorists, being politically conservative not radical'.

11 Madan Lal Sharma, '*Organized Crime in India: Problems and Perspectives' United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment*' 109 International Seminar, (1999) available at http://unafei.or.jp/english/pdf/RS_No54/No54_10VE_Sharma.pdf last seen on 15/06/2015.

reform act empowers the Attorney General to provide security by way of changing their identity and relocate them. Under the RICO US Government has convicted various mafia leaders in the 1970's.[12] The witness security act adds on to strengthen the mode of preventing organized crimes. Due to prevalent problems of gangsters in Japan, the nation enacted Prevention of Irregularities Act which regulates the prevention of violence act by the gangsters and the scope and definition of Organised crimes confines itself to Yakuza, the Organised syndicate in Japan. However the amount of punishment prescribed is inadequately of one year.[13] Canada does not define organised crime, but use the term 'enterprise crime' in Canadian Criminal Code (CC) 1989.[14] German Criminal Procedure Code defines organised crime as 'a planned commission of offences for profit individually or as a whole.' When two or more than two persons collaborate and sustains for an indefinite period of time with tasks of using commercial or business-like structures, facilitated by violence or other means suitable for intimidation, or by using political influence, public administration, judicial authorities and media and economy, than the collaboration turns to be organized for a purpose that is criminal.[15] Italy has also defines organized crime under its Penal Code. A good instance is definition of Criminal association under Article 416 as 'when three or more persons associate for the purpose of committing more than one crime, whoever promotes or constitutes or organizes association' and prescribes a punishment of imprisonment from 3 to 7 years.[16] Interpol defines organized crime as an 'enterprise or groups of person engaged in illegal act with the primary purpose of benefit irrespective of national boundaries.'[17]

Analyzing all the above definitions, it can be inferred that organized crimes lacks a perfect definition and cannot be universally accepted. It can also be inferred that the criminal network has a major impact on law enforcers due to its wide range operations, with the obliteration of ethnicity or hierarchy as was in ancient mafia the network today operates in collaboration and sometimes in incoherence. It consist of criminal groups, the protectors and the specialist support which commit completely to one another. It operates beyond the individual's life time in a hierarchical structure and its membership

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12 6.18.1962C-1, Racketeer Influenced and Corrupt Organisation Act, 1970.

13 Prevention of Unlawful Activities by Criminal Gang Member, 1995.

14 Section 462.3, Canadian Criminal Code, 1989.

15 German BKA (Federal Bureau of Investigation) available at http://www.bka.de/EN/Home/homepage__node.html?__nnn=true last seen on 12/07/2015

16 Article 416, Italian Penal Code, 1930.

17 Definition available at http://www.interpol.int/Crime-areas/Organized-crime/Organized-crime last seen on 18/09/2015.

is mostly based on common traits based on criminal environment, ethnicity or similar interest. Forms of organized crime are different in each nation and hence if organized crime is to be defined, it has to be on the basis of country's experience dealing with the problem. A periodical evaluation of law enforcer's investigation must be conducted and once the lacunae in investigation are identified, the officers should be trained and measures to prohibit such omissions must be formulated and applied.

POSITION IN INDIA

Organized crime has always been in existence in India in some or other form. It has however come to a strong form due to the various socio-economic and political influences. We lack a comprehensive law to regulate and control organized crime; however there are certain provisions under IPC (Criminal Conspiracy, Dacoity); Law on gangsters; Prevention of Corruptions Act, and NDPS Act which provides base for dealing with such crimes. Another relevant law is the provisions of preventive detention which empowers the law enforcing machinery to detain prospective criminals to prevent and curb an activity of organized crime. The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 provides for detention of such persons. The Central Government or the State Government or designated officers of these Government, can pass an order for detaining a person with a view to preventing him from engaging in illicit traffic in narcotic drugs. The detention can be made for one year but in certain circumstances it is extendable to two years. Thus in India laws are scattered and we lack a comprehensive statute. The wide spread offense has been recognised and enacted in various Indian Statutes and laws and has applied the principles of legality.[18]

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18 Definition of Gang: 'A band of two or more persons who commit or attempt to commit or cause to be committed, either individually or collectively, in furtherance of a common object or objects and on a continuing basis, for material gains or otherwise, by taking recourse to use or show of violence or threat of violence, either direct or implied, or by fraudulent or dishonest means corrupting the public servants, any of the acts listed in Schedule I to this Act.'; Major Criminal offences under schedule I: Murder, bodily harm, smuggling, traffic in drugs, kidnapping for ransom, espionage, causing bomb blasts, aircraft hijacking, hostage taking, mass killing, contract killing, gang rapes, extortion etc.

Evidentiary aspects: The act provides for admissibility of scientific expert evidence; computer print-outs of telephone calls, confession of the accused person made to a police officer; identification by video graph; evidence obtained through Interpol and protection of witnesses. It also provides for the setting up of a national body to co-ordinate effort against organized crime and the setting up of Organized Crime Cells at the State and District levels; Criminalisation of Interfering with proceedings: laundering the proceeds of crime. The trial under the proposed Act is to be conducted by a Designated Court.

Apart from the national legislation we have state laws such as Maharashtra Control of Organized Crime Act, 1999, Gujarat Control of Organized Crime Control Act, 2003, Karnataka Control of Organized Crime Act, 2000 to name a few which has been very strongly involved and proved to be effective in curbing organized crime to an extent. The enactment of laws at state level is essential and it follows from the very concept of organized crime which breeds in large scale and numerous units and divisions.

The most recent attempt which most consequently would be successful is the Gujarat Control of Terrorism and Organized Crime (GCTOC) Bill, which was passed by the Gujarat Legislative Assembly on March 31, 2015. This can now be seen as a reality. The Bill has been presented for the fourth time after various amendments-the earlier versions have been rejected by the president of India in 2004, 2008 and 2009 respectively. The passing of bill is not free from the clutches of political debate on powers and constitutional violations; it carries an objective to admissibility of evidence through telephonic interception and confessions made before police as evidence. Clearly this bill mirrors the provision of the Patriotic Act of US passes after the 26/11 attack.[19] The bill has been broadly criticised from point of four provisions: promotion of police tyranny, abuse of law. As per the Criminal procedure code an investigation is to be completed within 90 days but under the bill the investigation can be completed within 180 days. In this period the accused may or may not be in judicial custody which would promote torture. Confession under 164 made to police is not admissible as evidence but the bill makes a provision to make such confessions admissible in cases on terrorism and organized crime if made before senior police officers — of the rank of Superintendent of Police and above — the Indian Evidence Act makes confession made before police inadmissible except in cases where confession leads to discovery of a fact that is material to the offence under investigation. The critics of this bill view that such a provision would be misused and it might lead to gross inhuman treatment and violation of human rights as well and the second aspect being immunity to government.

A GLANCE AT THE CRIMINAL ACTIVITY PATTERN

A network can be created and directed by a core of organizers who wants to use it for specific purposes (directed network) or it can emerge spontaneously as a mechanism to add efficiency to the

19 R K Raghavan & D Sivanandhan, '*An anti-terror law that can be fine-tuned*' The Hindu, (04/04/2015).

functioning of a market (transactional network).[20] Network are series of connections, they can be groups, organisations, computers etc. as they are connected in important ways. Such networks operate for financial gains through illicit activities.

Criminal networks may vary in shape, size, intent or membership; it may be small or big, national or transnational, political or social, local or global, with high influence or self-motive, for a purpose or sometimes purposeless. A specific network can either specifically chase one objective, for instance committing a particular crime, or it can broadly chase multiple objectives.[21] It can either be at individual level or encompass a group of members. Either way there is a commission of crime. Criminal networks are well organized and use advance technological tools to achieve their purpose. Criminal networks are made up of various key players like informants, transactors, abettors, accountants, businessmen and even politicians. However, criminal activities do take place at individual level where there is no involvement of criminal networks, crimes relating to cyberspace, banks, etc.

In an analysis of global trends conducted by the United States National Intelligence, 2000, the Centre for United Nations Intelligence Community (A Federal Government Agency) the U.S. National Intelligence Council included a short section on criminal organizations and networks. It noted that criminal organizations and networks based in North America, Western Europe, China, Colombia, Israel, Japan, Mexico, Nigeria, and Russia are likely to expand the scale and scope of their activities. They will form loose alliances with one another, with smaller criminal entrepreneurs, and with insurgent movements for specific operations. They will corrupt leaders of unstable, economically fragile, or failing states, insinuate themselves into troubled banks and businesses, and cooperate with insurgent political movements to control substantial geographic areas.[22] Criminals take advantages from companies or organisation when opportunities exist and abandon them when they come under the scanner of the law enforcement agencies.

In criminal activities like alcohol and tobacco smuggling, arms, drugs and human trafficking, corruption, counterfeiting, extortion, illegal immigration, labour racketeering, sex trading and violence (assassinators and assaulter) one thing is common and that is

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20 John Arquilla and David F. Ronfeldt, '*Networks in Netwars: the future of terror, crime, and militancy*', 62 (1st Ed., 2001).

21 Ibid at 65.

22 J. Richelson, 'The U.S. Intelligence Community', 83, (6th ed.,2011).

networking of criminal organisations. There is a systematic time tested method/tactic adopted by the criminal organisations in order to achieve the desired consequence. Criminal networks operate in a clandestine manner and unlike other criminal activities like murder or rape the tracks left are harder to trace. An eye should be kept on the activities of petty offenders, as they often lead to bigger criminal enterprise. Hence, it is essential to place police unit surveillance in vulnerable areas and area or locality where crime rate is high, should be marked and kept under observation.

A study of the problems that strengthen organized criminal networks is essential in order to reform the criminal justice system. Corruption, infiltration of the licit economy and the political system, posing of threat to equal enforcement of law, all these problems need to be deliberated upon. The laws seems adequate, India does not need to enact new laws but to implement the existing laws on a proper scale and for doing the same the author here tries to provide modes of implementing laws.

IMPLEMENTATION OF LAWS AND POLICY

Whenever a new law is enacted it has not been free from the clutches of debates which reflect upholding of spirit of democracy. As per the general principles and fundamentals of criminal procedural laws an act must be codified as an act following the notion of culpability and finally following the spirit of fair trial. The provision seems to violate the fundamentals but the argument here is 'laws can carve exceptions'. A proposition would be to provide evidence for recording confession and to impose the onus entirely on law enforcement to ensure a voluntary and free confession.

The burden to prevent such crime from occurring lies on the police and the community as a whole. To prevent organized crime it is essential to promote various policies such as the problem oriented policy, intelligence led policing, community policing, and other national and local policies. Public-police relation has always been rocky, the law enforcing agency has failed to instill trust in the community. First this relation should be made stronger by encouraging the involvement of the community in assisting and aiding the police with reliable information.

It would be so much better if criminal activities could be prevented, but to most it only seems a parable. Here *Intelligence led policing system* can be treated as a way of averting crime, to an extent, as it helps in effective functioning of police administration where data and intelligence are shared to avert commission of crime. Criminal justice system as we understand consists of police, prosecutors and

judges and officers of law. We speak of reforms of criminal justice system, but a serious question here is how can criminal justice system be reformed? To get the answer to this question we have to get the insight of how the subjects in these systems function and up to what level they can be marked. It therefore becomes important to study the functioning of state and the national police system.

Various National Policies on ways to detect and curb organized crime have been deliberated and enacted; however, what is lacking is a clearer understanding of the various patterns of criminal activities in social and economic context and a deeper understanding of how these patterns repeat themselves. Criminal gangs often target the failing political movement, insurgent groups, and poor families and allure them by promising them a better future, the primary object being greater control over substantial geographical area, to build a base for their illegal activities.

Criminal justice reforms does not lie only in the hands of law enforcers or law makers, but also with the assistance of various other groups, such as civil society, organisations and groups that are involved in creating awareness programmes, youth services, and various other personal agencies that have taken up the step to eradicate occurrence of crimes to an extent.

Intelligence Led Policing

Intelligence led policing is a business model and managerial philosophy where data analysis and crime intelligence are pivotal to an objective, decision-making framework that facilitates crime and problem reduction, disruption and prevention through both strategic management and effective enforcement strategies that target prolific and serious offenders.[23]

Intelligence can be best understood in the view given by the European Police Office (Europol), EU organisation which deals with criminal intelligence; they stated 'intelligence is based on raw information which can be about a crime, event, perpetrator, suspected person, etc. Intelligence is the enhancement of this basic information which provides additional knowledge about the activities of criminals. Intelligence provides information that is normally unknown by the investigating authorities and is intended to be used to enhance the efforts of the law enforcement investigators, it is information designed for action'.[24]

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23 J. H. Ratcliffe, '*Intelligence Led Policing*', 34 (1st Ed.,2008).

24 EU, Europol, *'Intelligence Policing*' available at https://www.europol.europa.eu/content/page/protecting-europe-21 last seen on 25/06/2015.

Why there is the need to *patronize and promote Intelligence led policy?* This policy would assist in reducing and preventing commission of a crime by initiating operations based on the information gathered rather than waiting for crime to occur and then initiating investigation. It is also known as the proactive method of functioning.

Originating in the United Kingdom, the intelligence led policing paradigm has its foundations in the recognition that police were spending too much time responding to crime and too little time targeting offenders.[25] The Police should target the prolific and prospective criminals, who are the main players, are and should look out for serious and emerging threats. Greater internationalization of illicit commodities, creation of electronic financial transaction and internet all led to an increase in transnational crime. Police departments could no longer stick to their jurisdiction and this compelled them to seek new ways of policing in order to equip themselves with ways to pre-detect and stop the occurrence of crime. After United Kingdom, terrorist activities of 9/11 in America triggered the need for adopting the system of intelligence led policing, which also alerted countries like Canada and Australia to disrupt and prevent such heinous crimes. There were series of questions raised about the future terror commission and the safety of citizens. ILP elevates from individual criminals of an organisations to high profile mask wearers. The police agency does not only maintain the criminal records but also targets serious offenders and their activities.

Federal intelligence agencies have departments specifically to examine criminal networks from South East Asian Countries and the Russian Mafia. Various federal and national agencies have directives to interdict transnational organized criminal organisations and to link domestic and international intelligence on these groups.[26] Internationally, organizations with mandates that stretch beyond traditional national borders are becoming common, including; the myriad agencies under the Department of Homeland Security (US), the UK Serious and Organized Crime Agency (SOCA), Criminal Intelligence Service Canada (CISC), and the Australian Crime Commission (ACC) and Australian Federal Police (AFP).[27]

The effective impact of Intelligence led policing lies in sharing of intelligence so that agencies can make the best utilization of the sources. Intelligence Data will aid in collections, comparisons and

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25 J. H. Ratcliffe, *'Intelligence Led Policing'*, 39 (1st Ed.,2008).

26 G. Wardlaw, & J. Bughton, *"Intelligence led Policing: The AFP approach',* 133 in *'Fighting crime together: the challenges of policing and security Networks* 149 (J.Flemming and J. Woods 1st ed., 2006).

27 Wortley, R. Mazerello, L, and Rombouts, *'Environment Criminology and Crime Analysis',* 62, (1st ed., 2008).

analysis of information collected by other agencies.[28] Such information would help in linking data, detecting the criminal patterns, effective actions, by which grave consequences of criminal activity can be averted. Often during investigations police departments becomes helpless because of inefficient justice system, lack of evidence, and clandestine nature of criminal activities. In such a case ILP would be helpful in providing with data and information through which criminal organisations and their future activities can be traced out and be prevented. Intelligence led policing will give a boost to the law enforcing agencies in fighting crime and in breaking down the criminal networks and arresting the key operators/offenders.

Intelligence led policing to be successful requires active collaboration between various law enforcing agencies and calls for sharing of data/information and intelligence reports. Intelligence led policing cannot be defined or explained without having an insight into the national Intelligence model of United Kingdom.

2000 The British Intelligence Model

National intelligence agency was introduced in 1992 and it aims to combat criminal activities, prevent/reduce such activities and to provide effectiveness and excellence in criminal intelligence. The National Intelligence model of Britain identifies the core business of policing as managing crime, managing criminals, managing localized disorders, managing enforcement and community issues, and reducing opportunities for crime. The desired outcomes of policing are community safety, crime reduction, arresting/disruption of criminals, management of hot-spots and control over potentially dangerous offender. The police methods and resources useful to achieve these outcomes include intelligence, reactive investigation, proactive operations and patrol resources. The British government's first National Policing Plan, covering 2003-2006, required that all 43 police forces in England and Wales adopt the National Intelligence Model and comply with its procedures by April 2004. '*The Model therefore represents what is in Britain an unusually determined attempt from 'the centre' to standardize policing practice and, indeed, to do so around a particular policing paradigm—intelligence led policing*'.[29]

The intelligence model distributes the task of operation into certain units to work at various levels. Starting at the root level policing consists of reactivating investigations and studying serious/

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28 J. H. Ratcliff, (in press) '*Intelligence led Policing*', 54 (1st ed., 2008).

29 Mike Maguire and Tim John: *Intelligence led Policing, Managerialism and Community Engagements: Competing priorities and the role of national intelligence model in the UK. Policing and Society*, 16 International Journal of Research and Policy, March, 17, (2006).

habitual offenders, who are often linked with bigger/larger organisations. The information gathered by the police personnel from various sources are analysed and the offender/s is/are put under surveillance. Cross border police co-operation aids in curbing criminal activities. Supply of illicit commodities, drugs and trafficking of human beings are crimes where authentic information is required and in such a situation sharing of intelligence and eliciting information from petty offenders is often fruitful. At the international level proactive measures are taken by intelligence analyst, primarily targeting existing criminal organisations and taking up measures by arresting and confiscating illicit commodities. The police intelligence remains updated on the whereabouts and activities of criminal organisations. Intelligence led policing is a tactical assessment model and is the most effective in order to implement the provisions of intelligence led policing. There is a need for a unit/department that keeps an eye not only on criminals but also on the users and peddlers of illicit substances.

Organized crime is more or less like a chain of network, where there are leaders, conspirators, financiers and executors. Each actor though unconnected with each other works in collaboration to achieve the ultimate objective. Therefore, once the chain is broken the crime can be prevented or at the least be curbed to an extent. For example in the case of drug peddling, the leader who possess the drug will call the business personnel to finance the deal, then the tainted officials will let the illicit commodity slip through, and then the local drug mafia will put it on the streets through local individual peddlers. Hence in order to crack down the criminal organisation it is essential to get started at the root level and thereby rooting out the problem. National intelligence policing focuses on managing with limited resources available at its disposal.

Community Policing

How do we describe organized crime in India? During the early 90's Dawood Ibrahim and other mafia gangs ruled the world of organized crime. But today if we look at the criminal pattern, criminal activities like drug trafficking and human trafficking has linked up at international level and often vulnerable community are targeted, either by force or coercion, by betrayal and by brainwashing methods. In such cases it often becomes difficult to crack down on the organisations due to limited and unreliable information regarding the leaders or conspirators and executors of a criminal organisation.

Now here community policing plays a crucial role as it deals with society and its people and their relationship with law enforcers. The main objectives of the police are to ensure peace, order and civility

and such objectives can be achieved through trustworthy police-public relation. As a result community policing should be promoted and patronized. There should be a separate intelligence department dealing with analysis and evaluation of intelligence information, and there must be units of officers for patrolling duties, both would stay in contact via wireless.

There are many definitions of community policing, but the most pragmatic and clear definition is that of Friedmann's, he defines Community policing as '*a policy and a strategy aimed at achieving more effective and efficient crime control, reduced fear of crime, improved quality of life, improved police services and police legitimacy, through a pro-active reliance on community resources that seeks to change crime causing conditions. It assumes a need for greater accountability of police, greater public share in decision-making and greater concerns for civil rights and liberties.*'[30]

Problem oriented policing and community policing are two different terms but they are two sides of the same coin. In both the main objective is to build police-public relation. Police officers serve the public and provide services and protection to the public for the disorder in the society. In order to understand the problems that are associated with policing, and to accomplish the objective of policing priorities, community consultation program should be employed which would enable the police authorities to address crime and disorder problems. There should be a public survey to collect feedback over police performance. A forum should be setup where the police can review their goals and priorities. Not only the police departments but even the community should setup forums where they can discuss the matters and problems they face, setting up an agenda for their own safety and stay in touch with the police by providing them with information of suspicious activities, and should try and understand the problems associated with policing.

The police should try and build confidence among the masses; a police-public forum where interactions regarding law and order situation and safety can be discussed should be setup. There is a need to instill accountability on the part of the community as a whole. A community cannot be made accountable for the occurrence of a crime but they can be educated and informed about the downfall of the society as a result of criminal activities. Why wait for post-crime action when one can act beforehand and understand the value of

30 Warren Friedmann, *'The Community Role in Community Policing*,' 12 in '*The Challenges of Community Policing-Testing the Promise',* (D.P. Rosenbaum 1st ed., 1994).

policing and be of assistance for one's own safety, why stay dependent on others when one can create one's own safety box. There should be a set of policing tactics, which could include- a 24x7 active helpline/ emergency number, maintenance of records for policing priorities, area policing, integrated teams comprising of foot patrolling units, motor patrolling and investigative functions, establishing mini/beat-stations and deploying volunteers, and setting up community advisory committees consisting of experts. Once the problem is identified the tactics should be tested and then evaluated, whether opting for such tactics were effective or not, this would lead to more extensive understanding of the problems relating to crime and the tactics that need to be employed to curb the same. Community policing is the modern method of policing, but it has been successfully tried out in North America, Europe, New Zealand and Australia.

Police Reform

Inefficient training, weak mental ability, political obstruction and interference, non-accountability are the main problems with effective police administration. Most of the countries do not have the required number of police personnel, the crime rate has topped the rating charts but there has been no increase in recruitment. In India one police officer serves approximately 700 to 750 citizens,[31] which means the burden of police officers have been increased and this burden he alone has to bear. The issues relating to recruitment of police personnel has been neglected for long and now it's high time that the Government steps up and takes the initiative. This is one of the main reasons for the failure of effective police administration.

Police duties are of various nature, only 20% of officers are involved in investigation, rest are engaged either in law and order maintenance or VIP duties.[32] There is a requirement of separate branch of law enforcers and the personnel should be involved in investigation. The more effective the investigation the smoother the criminal justice system will be. Political interference is another stumbling block in the independent functioning of the police. Investigating mechanism should be made different from the other duties like, maintaining law and order, public protection, VIP duties. Investigating department should be free from interference from political institutions. Political interference can be seen in matters of transfer, interference during investigation, which obstruct the police from effectively concluding a case. Often a case is closed because an

31 Ministry of Home Affairs, Government of India, '*The Indian Police System: A Reform Proposal*' available at www.loksatta.org last seen on 12/09/2015.

32 Ibid.

honest officer investigating that case is transferred. This branch could focus on effective substantive provisions and criminal procedure dealing with transnational organized crime, criminalising members of organized groups, sentencing policy, establishment of special courts to try organized crime, admitting of secondary evidence, providing for effective international cooperation, and adopt a tactic of allowing suspicious or illicit commodities to enter into the country, so that the key players can be brought to justice. Every state could adopt controlled delivery tactic (defined in 1988, United Nations Conference for the Adoption of the Convention against Illicit Trafficking in Narcotics Drugs and Psychotropic Substance), wherein the suspicious illicit commodities are allowed to enter into or through one or more countries under the supervisions of the competent authorities.[33] On question of legality of such investigation, an effective accountability mechanism, which would be dealing with the police accountability, would be an appropriate answer.

Creating Witness and Informant Protection Program

Witness protection is a key weapon in fighting organized crime. Witnesses play a very crucial role during the trial of a case, a judgment depend upon the statement of the witness, based on evidence. Most of the witness turns hostile as they face continuous threats from the criminal groups. Witness identity protection, witness assistance, assessing the threat and need for protection, rights of the protected witness,[34] who are the protected witness are major things to be kept in mind while drafting laws related to witness. Witness protection program aids in proper investigation as it provides for security of the witnesses and people close to them. Such programmes provide witnesses with new identities and relocate them at undisclosed places. Protecting a witness physically during trial is a task that calls for deployment of well-trained units. Witness protection program should be offered to only those witnesses who are in immediate or foreseeable danger from the criminal organisation against which such a witness is testifying against. There has been consensus that the real identity of the witnesses being offered protection under the program should not be available to every personnel in the investigating team since if

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33 Report of 108th International Seminar; Legal Framework against Transitional Organized Crime by Criminal Justice System in different countries, Global Conference on Organised Crime of United Nations Asia and Far East Institute (UNAFEI), (01/09/1999) available at http://www.unafei.or.jp/english/pdf/RS_No54/No54_00All.pdf last seen on 12/05/2015.

34 Y. Dandurand, *A review of selected witness protection programmes,* Research and National coordination organized crime division Law Enforcement and policy Branch Public Safety Canada. Report Number 01, (2010).

there are any tainted personnel in the investigating team there is likelihood that such personnel may divulge/leak key information to the criminal organisation being tried.

Informants play a crucial role as well, for without key information the police would be clueless and handicapped. Proactive policies are purely based on information gathered. Often informers are targeted by criminal groups, in such situations people refrain from being an informer for the love of life. An informant can be any one; he can be a common person, a petty offender or an activist. The credibility of the information should be analyzed and evaluated. Information received from informants should be verified before relying upon it.

CONCLUDING TOWARDS A BEGINNING

The paper has reached two conclusions first, a general assumption circumscribed around organized crime is 'greed and power' but on a careful analysis a number of reasons crop up, among the most common ones are poverty. For example a drug sellermight not be a high profile criminal but a person aggrieved by poverty or unemployment and second in an effective administration of criminal justice system, the upholding rights of an accused is oftenpictured in the frame, but in organized crime it's very perplexing to maintain similar provisions. In a democracy like India legal rights of an accused are well protected, however, if a system follows a strict right based approach the very same right turns into opportunities. Rights should be maintained but not at the risk of future crime.

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NJAC CONTROVERSY: CURTAILING OR EXPANDING JUSTICE DELIVERY MECHANISM

*Utkarsh Pandey**

ABSTRACT

The paper in the light of controversy arising out of appointment of Judges to the Higher Judiciary attempts to examine various facets of it which have majorly arisen post NJAC enactment primarily on the ground that it was passed along with the Constitutional Amendment Bill in the Parliament and hence the legislative Act is invalid, since an ordinary law can only pass after the Constitutional amendment was already done. The article shall also dwell upon one novel argument arising out of the controversy of self-imposed system of collegium, which Apex Court itself had formed and which strikes at the very heart of the Separation of Power, as formation of any such body runs contrary to the basic structure of the Constitution, and hence in the light of this criticism would analyze whether the NJAC is a rightful alternative, alongside criticism of latter as well. These issues shall be dealt upon extensively reading with the provisions of all related laws and judgments of this Court and concluding with the comparative analysis of some of the major Appointment systems in world both from civil and common law system.

Keywords: NJAC, Judicial Activism, Separation of Power, Basic Structure, Collegium.

INTRODUCTION

The objectives of political wing differentiation appear differently with the background conceptualized upon one's standpoint. Domestic law certainly attempts to realize the political value, interests, and preferences of various domestic actors, existing as specie to different heads of wings emerging out of Constitutional authority, acting as genus. Simultaneously, it also appears as a standard of criticism and means of controlling those in power and that which are incidental to it. The dualistic relation between Instrumentalism and Formalism[1] connotes two diverging and contrasting sensibilities of what it means

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1 The terms must not be confused with those as used by the Jurisprudence and must be only construed for the purpose of the literal meaning arising out of it. Instrumentalism here connotes the idea of some matter which has been accepted

to be a State, and two cultures of professional practice, the stereotypes of 'the upholder' to a powerful State actor conferred upon with multiple policy alternatives and then 'the Judge' scrutinizing and perusing the legality of particular domestic behaviour. Beyond targeting to the oscillation between the two ideas as system of a legal thought process, however the question 'what is the extent of their domain?' also affirmatively invokes popular aspirations about peace, justice and balance of power, and thus act as edifice for the platform for a national political dialogue.

The 'rule of law' is another taken-for-granted element of the (Indian) Constitution, often invoked-as is democracy-to convey essential adequacy of Indian constitutional arrangements. But 'the rule of law', like 'democracy', is not a concept with one accepted meaning. 'The rule of law' is not a legal rule,[2] whether in context of Indian Constitution or any other, but a political or moral principle. As such, it means different things to different people according to their particular moral or political positions. The 'rule of law' hence comes as major obstacle on the determining principles of separation of power, which derives its authority from Constitution, and through a liberal reading of the Directive Principles of state Policy.

But apart from this caricature framework, yet another application of theory based analysis of the factors governing the State's organs' relationship suggests that much wider analysis must also be given as such the conflict between various organs of State is something of an age old phenomenon and has been a focal issue ever since the notion of modern state system has been conceptualized, where one organ has always tried to encroach upon the domain and powers of that of the other with an attempt to limit its influence such that that othercould not restrain it from its own exercise of unlimited powers.

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through the general legislative framework which thence constitutes the Formalism when it is conceptualized. Hence, it must be noted that the cumulative relations between the two contributes in the aggrandizement of the latter by the former.

2 *See* Lawrence B. Solum, *Equity and the Rule of Law,* in The Rule of Law 120 (Ian Shapiro ed. 1994), and Geoffrey de Q. Walker, The Rule of Law: Foundation of Constitutional Democracy 23-42 (1988). The proposition is maintainable on the principle that *Rule of Law* is a concept which serves as foundation for the laws to be designed and implemented. At perhaps the most basic level, the *rule of law* has thus been used to mean a system in which governance is based upon neutral and universal rules the basic formulation emphasizes three intertwined concepts: (1) that legal detriments should only be imposed by law, not on the basis of the personal will or arbitrary decisions of government officials or private actor (neutrality); (2) that government action should be subject to regulation by rules, and that government officials should not be above the law (universality); and (3) that people should be protected from private violence and coercion (governance).

Central to this conflict is friction between Executive and Judiciary where former through its effective presence in Legislature has at many occasions attempted to limit the powers of the latter. The conflict relating to the National Judicial Appointment Commission (NJAC) is the manifestation of this frustration which highlights major differences between various organs and compels legal scholars to extensively deliberate upon both the legal and jurisprudential implications arising out of this perceived curtailment of Judiciary's power through a piece of legislation of the Parliament. Not only that the issue under deliberation requires immediate attention due to its direct challenge to the basic principles of the Constitution, but that it also has expanded ways beyond to adversely affect the appointment and transfers, both in and to the High Courts and the Supreme Court. The article in the light of this recent debate would attempt to trace the ongoing development for the purpose of which it shall dwell into the root cause of such friction mainly from the Judiciary's perspective followed with an analysis from the jurisprudential dimension of such critique and finally critically analyzing the issues and possible merits and demerits of the newly implemented system. What also becomes important is to peruse the existing legal framework and test it vis-a-vis the proposed changes and arguments advanced on such factors. The latter portion shall be dealt with, in form of issues and would succinctly attempt to bring forth the answers in this regard. Also, a comparative analysis of some of the leading judicial systems shall be put forth wherein a limited attempt will be only made to visit the factual criterion for the appointment and transfers in the higher judiciary. The Article here does not make an attempt to draw a contrast between a former and current system, rather it dwells into the nuances of the two systems, whilst perusing the modus operandi of the two and at the same time tracing the possible co-relation and disputes airing out of it. So far as the moral implications arising out of the two systems are concerned; it would not be the purpose of this article to deal upon.

EXECUTIVE'S INTERVENTIONIST APPROACH

If non availability of any antecedent order establishes a firm priority between how State's intent is caricatured seconded by any controversy about them either could be treated open or a presumption in this direction will necessarily have to be presumed that the procedural aspect in which the disagreement is revealed, or so to say translated, will somehow be able to dispose of it to the generalized satisfaction of all.[3] The latter aspect encompasses in it the idea of the 'harmony of

3 Generalized aspect has compulsorily been included, through State practices, in the legal frame to ensure common application of law but on the contrary it has every potential to abrogate from the fundamentals of going to the extent of

interests', the presence of any underlying aspect of convergence between manifested but conflicting State preferences. It would hence undoubtedly be wrong to think of the paradox of objectives as a technical problem that could be disposed of by reflecting more closely on the meaning of words such as 'justice', 'equity' and 'good conscience' or by making an attempt to carry out enhanced sophisticated socio-economic analyses inspecting the way the domestic unit is or indeed through drafting such definitions of underlying words in legal instruments. The core foundational principle of modern state system is stemmed upon the political theory of Social Contract. As propounded by various scholars of enlightenment era Europe, they believed that States are an outcome of an understanding reached between common people and their governments, through which former surrender some of their freedom and submit to the authority of the ruler, who in turn protects them from a common enemy. With the basis upon this theory, yet another theory or jurisprudential school, *Positive School*, can be perceived to have developed which makes *command of the sovereign* as the binding rules or obligations upon the society on which he exercises his authority.

These traditional notional understanding of the State system and jurisprudence governing them has helped in designing a unique apparatus which could better address the needs for effective State machinery. Social Contract theory contributed in existence of State where Constitution served as the basis of that contract between the rulers and its people; and Positive command found its enunciation through legislations which were effectuated by rulers to govern and regulate the behaviour of their subjects. The concerns regarding the excessive and unlimited exercise of authority by the State necessitated for putting in place such neutral system[4] which could be immune

derecognizing individual sovereign existence as it then stands to threaten the very objective for which certain enactment was formalized. Individualist approach should, therefore, always be overlooked for the interest of general masses and this has been the law of the land, accepting inherent recognition amongst the States.

4 In effect the evolutionary trend in the British Parliamentary history highlights how King's influence has been limited to the minimal. Nevertheless, during the Stuart era King Charles I attempted to contain the House of Commons when he entered the Parliament with his army, culminating in the Civil War. This was a unique episode of its own kind where we find that as an aftermath of this interference by King, Parliament too raised its own army and civil war erupted between Parliamentarians and the Royalists leading to defeat of the latter and subsequent trial and execution of the King. This was a turning point in Parliament's history in context of its sovereign existence as the Executive was then onwards made to realize the importance and sovereignty of Parliament, a principle which till date holds importance in democratic nations.

from it and ensure that rights, liberties and powers are properly enjoyed and one does not hamper the process of other.

Diceyan perspective of 'rule of law' though is widely accepted as a basis for putting such a system in place, but it must be recalled that his theories must be viewed with sceptical eyes. It must be realised that Dicey was the product of an undemocratic society, where fewer than half the adult population were entitled to vote in parliamentary elections when Dicey completed his famous *Study of the law of the Constitution* in the 1880s. Dicey himself also vehemently opposed the nineteenth century trend towards increased government intervention in social and economic affairs. His ideas about the relationship between government and citizens were not shaped by political values which most modern observers accept as entirely orthodox.

A contradiction between the rule of law and parliamentary sovereignty appears when we consider the concept of the 'independence of the judiciary'. After the Constitution wasenacted and in years immediately thereafter, Indian judges got appointed to Higher Judiciary at the will of the President. This had an overwhelming effect as the Judge's fate of promotion could be arbitrarily decided, who could be succeeded by someone junior simply because those Judges could not please the government. This fate befell upon four senior judges of the Supreme Court, as the consequence of 1973 judgment, who all were superseded by Justice Beg in which President for the first time had deviated from the customary practice of appointment.[5]

The continuance of this situation after the 1973 judgment would have undermined parliamentary sovereignty, since the President could have used his 'appointing' power to 'persuade' judges to interpret laws in a manner inconsistent with Parliament's intentions.[6] Though the authority to decide upon dismissal vested with Parliament, which could by the motion passed in the Lok Sabha and Rajya Sabha remove such judge, the matters relating to appointment fell within the domain of Executive.

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5 In England before the 1688 revolution and in years immediately thereafter, English judges held office 'at the king's pleasure'. This meant quite simply that not only did the king appoint the judges, but also that the judges who subsequently displeased the king or his government could be dismissed. This fate befell Chief Justice Coke in the early seventeenth century; the cumulative effect of judgments such as *Dr Bonham's Case* led Coke into such disfavour with the crown that he was removed from the office.

6 Problems similar to these did arise also in British setup where after in time around and immediately thereafter the Glorious Revolution of 1688, the King could 'dismiss' judge and that the Judge held office at 'the King's pleasure'. The solution to this problem adopted in 1701, provides a further example of a

But how should a Judiciary be immune from the unfair means or prejudices have always been subject to ambiguities and conflicts. Also the involvements of other branches in its internal activities have raised considerable doubts as to the level of effectiveness with which it performs its functions. At times it has also been observed that when the Executive have enjoyed absolute control within its own sphere at such times it had even transgressed into the domain of legislature and monopolised its functioning, and astonishingly, the Judiciary had at such critical moments remained just a mute spectator, sometimes even affirming such initiatives. This was certainly the case during the reign of Indira Gandhi.

No government has interfered more into the matters of Judiciary to the extent as had been done during Indira Gandhi's regime. It was, undoubtedly, one of the most critical point where the Judiciary seemed helpless at every moment. Exercising its executive power and majority support in parliament, Mrs. Gandhi did everything she could do to bring all organs of the constitution under her absolute control.

One such major event was the case of *ADM Jabalpur v. S Shukla*. In this case of 1976, popularly known as *Habeas Corpus Case*, the question was raised in several High Courts that whether a person can be stripped of his rights to seek writ of *Habeas Corpus* during National Emergency. The Courts held that person's right to move Courts for seeking writs can't be suspended while the proclamation of emergency is effective. As a result an appeal from this judgment lay before the Supreme Court. The Apex court negated HCs' decision by 4:1 majority, J. Khanna dissenting, and delivered judgement stating that '*no person has any locus to move any writ petition under Article 226 before a High Court for habeas corpus or any other writ.*'[7] Despite all the odds, J. Khanna in his dissenting view stated that;

> *The Constitution and the laws of India do not permit life and liberty to be at the mercy of the absolute power of the Executive . . . . What is at stake is the rule of law. The question is whether*

'balanced' constitution. The Act of Settlement 1700 provided that while the Crown had the power to appoint judges, judges would hold office 'during good behaviour'. This means a judge could only be removed by a joint address of the House of Lords and House of Commons, after the judge has committed a crime or engaged in some gross form of moral misbehaviour. (Loveland's *Constitutional Law, Administrative Law and Human Rights A Critical Introduction*, 5th ed. p. 58).

7 J. M H Beg even went to the extent of stating that, 'We understand that the care and concern bestowed by the state authorities upon the welfare of detenues who are well housed, well fed and well treated, is almost maternal'. ¶396 of the Judgment.

> *the law speaking through the authority of the court shall be absolutely silenced and rendered mute... detention without trial is an anathema to all those who love personal liberty.*[8]

The decision was thus a major blow to the ideals of Justice and Liberty enshrined in the Preamble. It showed that how Judiciary refrained from ensuring the restorationof the basic rights of common men against the arbitrary government and allowed them to detain anyone illegally, furthermore, as a consequence of his dissenting voice J. Khanna had to pay its huge price. He was next in line to be the Chief Justice of India but he was superseded by H M Beg as a consequence of which he resigned.

In yet another instance, the 1973 case of *Keshavanand Bharti v. State of Kerala,* also known as *Fundamental Rights case*, is well known mostly for its judgement upholding the rights of an individual and curbing the powers of the Government, but least for its consequences. The judgement was delivered with thin margin of 7:6 ratios, as a consequence of this within few hours of the delivery of this judgement Mr. A N Ray was appointed as the Chief Justice of India superseding three senior colleagues who gave dissenting views, Justices Shelat, Hegde and Grover. Consequently, these three senior Judges resigned from their posts within eight-hours of the swear-in of new CJI. Appointment of A N Ray as CJI by the executive had very damaging effect on the image of governance of the country and the Government came under fierce criticism. The Government sought to take refuge in by citing the argument that it had merely adhered to the recommendations of the *Law Commission Report* of 1958 prepared under the chairmanship of *M C Setalvad.*

Prior to 1973, the tradition of appointment of Chief Justices was done on the basis of seniority. The Commission's report of 1956 had actually criticized this convention citing the reason that it undermined the capabilities of other Judges. Here, this argument given by Government while answering the criticism at first instance might seem to be justified but Commission's recommendations were never implemented before 1973 and the general convention of appointing the senior-most judge as the Chief Justice was continually practiced. It was clear from the appointment of A N Ray, who had given judgement in the favour of Government, that Government was setting scores with the Judiciary.

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8 Excerpts from the dissenting opinion of J. H R Khanna in the decided case of *Additional District Magistrate, Jabalpur v. Shivakant Shukla.*

The most disturbing trend in the independence of judiciary came to surface when Judiciary itself submitted its authority to Executive by allowing it to appoint the judges to the higher judiciary. In Judges Transfer Case I of 1982 (*S. P. Gupta v. Union of India*) the apex court held that the word '*consultation*', while appointing Judges to higher judiciary under Article 124, did not mean *concurrence* and the Executive was not bound by the advice given by Judges, it borrowed the definition given in the decided case of *Sankalchand Seth's Case* of 1977. It was submitted that majority decision of Supreme Court in this case was bound to have impact on the independence of Judiciary as this would have given enormous power to Executive to appoint such people as the judges who are their favourites, thus, making judiciary an exploitative tool at the hands of Executive.

The fact that Supreme Court had by itself submitted its authority to Executive is a demonstration which manifests that how judiciary had been trying to be idealistic and did everything so particularistic in nature that it in a way undermined or overlooked the necessarily required broader interpretation of the law. Undoubtedly, the framers of the Indian Constitution had never thought that the Judiciary can even go to such a particularistic approach that would even undermine the basics of the several other concepts which are importantly required for the efficient and justified functioning of the system.

In the subsequent judgements delivered in two cases namely Judges Transfer Case II of 1993 (*S.C. Advocate on Record Association v. Union of India*) and Judges Transfer Case III of 1999 (*Presidential Reference*), the apex court overruled the judgement of *S P Gupta case* and held that no appointment shall be done without the recommendation and approval of the Chief Justice of India. For the appointment of Judge(s) to higher Judiciary it also established collegiums of four senior most judges of the Supreme Court on whose recommendation the CJI shall submit his report to the Executive. In matters of transfer of High Court Judges, the Court said, in addition to the collegiums of four Judges, the CJI should also consult the Chief Justices of High Courts (one from which the Judge is to be transferred and other receiving him).

This decision helped a great deal in restoring the ideals of independent judiciary as it protected the Judiciary from becoming a weapon of exploitation at the hands of government because had the decision of 1982 not been overruled, we would always have had only those adjudicators who could *only chant the hymns of Government*.

But the extent to which the collegium system served the purpose for which it was formed has always been questioned. Due to the

absence of any external factor into it and decisions relating to appointment and transfers done by select Judges to the exclusion of others raises a manifest concern of being prejudiced as it is not transparent. Secondly, the very formulation of collegium system by the Judiciary is also questionable as it is not the task of judiciary to create any system, but to only interpret law. Here by creating collegium system the judiciary had transgressed its powers and had encroached upon legislative domain, since creation of any such institution is solely a prerogative of the Legislature. It must be noted here that though Courts have been in past also involved in drafting and formulating certain guidelines, when lacunae in law have existed, but never has it gone to the extent of creating an authority or body. Insofar, laying guidelines are concerned, even those are temporary in nature, which in due course of time get translated into legislation and are enacted through Parliament.

TRACING THE DEVELOPMENT

In First Judges case, a bench of seven Judges of the Supreme Court in its decision held by majority that the recommendations of the Chief Justice of India for Judges to be appointed in the Supreme Court of India and in the High Courts were constitutionally not binding on the Government of India. The Court also clearly held in this case on the question of *locus standi* that lawyers practising in Courts could always petition in the larger interests of the independence of the Judiciary and held that lawyers 'had indisputably *locus standi* to maintain their writ petitions since they raised issues of Constitutional importance affecting the independence of the Judiciary'. Since the decision in a way made it not compulsory for the Executive to accept the CJI's recommendation, this gave the primacy to the former in latter's appointment. In year 1990, for the first time a Constitution Amendment Bill proposing to amend Article 124(2) and Article 217(1) providing for appointment of Judges to the Higher Judiciary on the recommendation of a National Judicial Commission was made in Bill No. 93 of 1990 – the Constitution (Sixty-Seven Amendment) Bill No. 93 of 1990 which provided for the Constitution of National Judicial Commission for making recommendations for appointment of Judges in Supreme Court and High Court. This Constitution amendment Bill however, lapsed by the dissolution of the Lok Sabha in 1991. Meanwhile, vide judgement dated 06.09.1993 the Supreme Court in *Supreme Court Advocates-on-Record v. Union of India* – later known as Second Judges Case – a bench of nine Judges – reported in (1993 (4) SCC 441) held by majority (7:2) that a collegiate opinion of a collectivity of Judges was to be preferred to the opinion of the Chief Justice of India with the caveat that if the government of the time did not accept

'recommendation' of the collegiate (then consisting of three of the senior-most Judges) it would be presumed that government – in the matter of appointing or not appointing Judges of the Higher Judiciary – had not acted bona fide. Thereafter doubts were expressed about the interpretation of the law laid down by the Supreme Court of India in the Second Judges Case (1993) – specially relating to appointment and transfer of Judges – and a series of questions were framed and referred to the Supreme Court of India for being answered in Special Reference No. 1 of 1998 (u/A 143(1) of the Constitution) by a bench of nine Judges (reported in 1998 (7) SCC 739). In the Third Judges Case (1998 (7) SCC 739) it was held that the Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and or to transfer a Chief Justice or Puisne Judge of a High Court in consultation with the four senior-most Puisne Judges of the Supreme Court (and not only with the two senior most Judges as previously held). But in so far as an appointment to the High Court was concerned it was held that the recommendation must be made in consultation with the two senior-most Puisne Judges of the Supreme Court.

With this the then NDA Government led by Vajpayee passed a resolution on 2nd February, 2000 constituting the National Commission to Review the Working of the Constitution,[9] to make suitable recommendations. It had as its Chairperson Mr. Justice M. N. Venkatachaliah, former Chief Justice if India. The Commission in the light of the task ordained upon it submitted its report to the government in which vide para 7.3.7, the report came to the following conclusion:

> *However, it would be worthwhile to have a participatory mode with the participation of both the executive and the judiciary in making such recommendations. The Commission proposes the composition of the Collegium which gives due importance to and provides for the effective participation of both executive and the judicial wings if the state as an integrated scheme for the machinery for appointment of judges, this commission, accordingly, recommends the establishment of National Judicial Commission under the Constitution.*

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9 The Commission submitted its report in the form of two volumes, volume one dealt with the basic principles and recommendations for amending the Constitution whereas Volume two is sub-divided into three books, each comprising of consultation papers on various heads incidental to law and those affecting the structure of the Constitution. Volume 1 bears the recommendations regarding topic under deliberation, vide chapter 7. The copy of Report is available with the Law Ministry and can be retrieved from their official portal.

The National Judicial Commission for the appointment of Judges of the Supreme Court shall comprise of:

1. The Chief Justice of India: Chairman
2. Two senior most Judges of the Supreme Court: Member
3. The Union Law Minister for the Law and Justice: Member
4. One eminent person nominated by the President after consulting the Chief Justice of India: Member[10]

The recommendation for the establishment of the National Judicial Commission and its composition are to be treated as integral in view of the need to preserve the independence of the Judiciary.

Working upon the recommendations, the Vajpayee Government approved the Draft so prepared by the Law Ministry on 6th May 2003 as – the Constitution (Ninety Eighth Amendment) Bill No. 41 of 2003 and introduced in Parliament on 9th May, 2003 – the Bill was however lapsed only because of the dissolution of the 13th Lok Sabha on May 2004. The only subsequent occasion for introducing a Constitutional Amendment with regard to provision for appointment of Judges in the Higher Judiciary was when the Congress led-Government (UPA-II) got the Bill passed in the Rajya Sabha the Constitution (One Hundred and Twentieth Amendment) Bill LXC of 2013 in which there was provision made for the Parliament by law to provide for the composition of a Commission to be known as the Judicial Appointment Commission. The said Bill however lapsed on account of dissolution of Lok Sabha. Bill No. 97 of 2014 (later altered to Bill No: 97C of 2014) – titled the Constitution (One Hundred and Twenty-First Amendment) Bill, 2014 was introduced in the Lok Sabha by the Ministry of Law and Justice on 11.8.2014. Bill No. 97/97C of 2014 sought (almost exclusively) to make changes in Article 124(2) and Articles 217(1) of the Constitution relating to provisions for appointment of Judges of the Supreme Court and of the High Courts, and also sought to make some other changes in Chapter IV of Part V of the Constitution (Union Judiciary) as well as Chapter V of Part VI of the Constitution (High Courts in the States). Prior to the said Bill No.97C of 2014, another Bill i.e. the National Judicial Appointments Commission Bill No.96 of 2014 was introduced in the Lok Sabha. The said Bill No. 97C of 2014 – titled The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014 and the National Judicial Appointments Commission Bill No. 96 of 2014 was passed by the Rajya Sabha with requisite majority. The Bill No: 97C of 2014 – titled The Constitution (One Hundred and Twenty First Amendment) Bill, 2014 was passed by the Lok Sabha

10 The Act provides for two such persons, thus making the whole composition even number as against odd which was stipulated in original Act.

with requisite majority along with the National Judicial Appointments Commission Bill No. 96 of 2014. Pertinently, on the very same day in the evening, the said Bill No. 97C of 2014 and the National Judicial Appointments Commission Bill No. 96 of 2014 was introduced in the Rajya Sabha.

The 121st Constitution Amendment Bill No. 97C of 2014 had since then been ratified by 16 State Legislatures[11] and therefore, received the assent of the President of India on 31.12.2014, subsequent to which, it came to be numbered as Constitution 99th Amendment Act 2014. Since upon receiving the Presidential Assent and by operation of Article 368, the Constitution stand amended as on 31.12.2014. On the very same day, the National Judicial Appointments Commission Bill No. 96 of 2014 received the assent of the President. Meanwhile a petition titled *Supreme Court Advocates on Record v. Union of India* was filed in the Apex Courtseeking for the grant of stay on the Act but arguments were being put forth by the Attorney General (AG), appearing on the behalf of Union of India, that the Act has not been notified yet and as such it could not be challenged by any court of the land since it has not taken a shape of Law. The matter was considered at length and after hearing both the parties it was felt that it should be referred to the Constitution Bench (CB) as the matter involves substantial question of Constitutional law. Hence vide order dated 7.4.2014 (unreportable) the matter was referred to the Chief Justice to take required steps, in furtherance of which the five Judges Constitution Bench was subsequently formed. The Coram was hence constituted; the matter was listed for hearing before it on 15.4.2015. Meanwhile, before such an order was made, vide order dated 24.03.2015, the Apex Court restrained all the High Courts in the Country from admitting any petition regarding the dispute currently under deliberation in the Apex Court. Vide Notification, dated 13.4.2015, in the Gazette issued by the Ministry of Law and Justice, Government of India the NJAC Act and Constitutional Amendment was notified and was brought into force. The matter was then placed on the prescribed date before the CB where the AG and counsel for SCAORA put forth the bench two pertinent issues (i) According to AG, since the law has been notified (vide publication in Gazette dated 13.4.2015) hence the petition must be considered redundant on the ground of it challenging the law which was not till then enacted and hence afresh petition needed to be filed, and (ii) According to AG since the Court has been seized to look upon

11 As per the submission (dated 16th of June) made by the Attorney General in the Court the number of States' legislature ratifying the amendment had gone to twenty. Difference lies in the fact that sixteen states had ratified the Act passed by the Parliament but then not yet notified, whereas four more ratified it post notification.

the constitutionality of the enactment and in a way it relooks the previous decision of 1993, hence a larger bench of nine or eleven Judges needed to be constituted for this purpose. Though the Court refused to allow the first argument raised by AG; on matters pertaining to the third issue the Court observed that there is no need to constitute the larger bench since the parties have challenged the NJAC and not previous decision of 1993 which actually has now become redundant due to the cessation of Collegium system.

MAJOR LEGAL ISSUES ARISING OUT OF NJAC CONTROVERSY

For the purpose of consideration, it becomes evidently important to inspect the NJAC issue and its predecessor Collegium system, in the light of various legal and jurisprudential issues from the legal perspective. As such four major issues arise out the recent conflict:

1. Whether the Legislature has an inherent power to amend the Constitution to the extent of which there had been no remote foresee-ability when it was being drafted.
2. Whether the NJAC Act is *ultra vires*to the Constitution.
3. Whether the NJAC Act takes away the primacy of Judiciary in appointment and transfers of Judges.

The above mentioned issues are some major legal questions which have arisen consequent to the conflict, and hence it becomes immensely important to channelize these issues in a proper sequential manner and to understand the Judiciary's position to reach certain definite conclusions. In so far as issue one is concerned, though no direct answers could be obtained for it, but a critical look into the doctrine of the *basic structure*, actually provides a deeper insight to understand the inherent power of Legislature. A careful reading to the Constitution and the background of its drafting shows that the constitution makers favoured the English setup of Executive with the head of state to be a democratically elected President (as against Britain, where head of State is hereditary Monarch) who shall act in accordance with the principle as laid down in the Constitution. Doctrine of Basic Structure is a concept which was foreign to other progressive constitutions in the world and was not even foreseen by the makers of Indian Constitution. But, Judiciary has through its Judicial Activism attempted to develop this doctrine to limit the power of Legislature to not to amend, either through addition or omission, the Constitution to the extent beyond which it does not affect that so-called basic structure. Two novel arguments against this Doctrine is thus bound to arise (i) that if Judiciary is to decide what should be the basic structure, then it certainly is the transgression of one's power into the domain of other because the plain jurisprudential logic

provides that Courts can only observe and act upon the law enacted by the legislature and cannot influence the law making power of it; (ii) the Legislature represents the will of the people, and hence Judiciary cannot sit upon it and dictate them whether or not to amend certain provisions. Also the basic structure cannot be viewed from a water tight compartment because of a dynamic nature of society which requires a flexible law to adjust to the needs of contemporary times, and therefore the Constitution will have to be amended, even to the extent of affecting basic structures. In this case, though Article 124(2) uses a plain and simple language which provides that a President shall do such appointment after consultation with required Judges, such a language is full of ambiguities and open to divergent interpretations. The Article, during its drafting, might not have been foreseen as something of causing a major controversy, but its interpretation has led to several complications. The literal reading of the provision emphasizes upon the influence of Executive and thus Legislature presumably has certain inherent power to amend the Constitution, to fill the vacuum, even to the extent of unforeseeability. It must be noted that various judicial pronouncements have considered the independence of Judiciary to be a basic structure, but simultaneously if the Constitution makers have explicitly provided for the consultation to be made by the President, who happens to be a head of Executive and is required to act in accordance with aid and advice of the council of ministers, then such a provision needs to be given a literal interpretation and therefore it must be presumed in affirmative that Legislature does possess inherent power to amend the Constitution influencing the working of State machinery, but not to the extent of violating fundamental rights of an individual. Secondly, the conflict between primacy of Legislature or Judiciary relating to former's power to amend the Basic Structure can be understood in the light of Constitution (Twenty-fourth) Amendment Act, 1971. As originally enacted the heading of the Article 368 read as 'Procedure for the Amendment of the Constitution' which was subsequently substituted by the wordings, 'Power of Parliament to amend the Constitution and procedure therefor'. This manifestation of the Power of Parliament to amend unambiguously shows that Legislature has an inherent power to amend the Constitutional provisions.

Dwelling upon issue two arising out of the probability of NJAC Act being ultra vires to the Constitution is major contention in the light of period the Act was passed and notified in the official Gazette. The petitioners too, through their petition, had contended that NJAC is ultra vires to the Constitution. This is because of two major reasons (i) that the said Act was passed the same day, even before, the Constitution 121st Amendment Bill was passed by the Parliament and

(ii) since the Legislative Act and Constitutional Amendment Act both affect not only Union Judiciary but also Part VI Chapter V, hence the need to invoke Article 368(2)(b) is necessarily felt, which was thence complied upon. According to reports coming from various submissions made in Court and analysis of records form the Parliament it becomes clear that the 121st Constitution Amendment Bill and NJAC Bill i.e. a Legislative Bill were introduced in the Lok Sabha on 13th August, 2014. As a matter of fact NJAC Bill of 2014 was introduced even prior to the introduction of the Constitution 121st Amendment Bill. This in law was a fatal infirmity. The passage of said Legislative Bill was an exercise in futility and also in total nullity since Article 124(2) as originally enacted (in 1950 Constitution) remained intact. Hence the passage of NJAC Bill was ultra vires and was not warranted by the provisions of Article 124(2) as originally enacted. This also means that the Parliament must have first amended and ratified and then notified the Constitution Amendment Bill after which it could have safely introduced the NJAC Act for the purpose. Insofar, second sub-issue is concerned, the Act was being ratifiedby sixteen states at the time it received Presidential assent. Parliament has been conferred upon with two types of power to make law, i.e., its Constituent Power and Legislative Power. It was under the Constituent power of the Parliament that the amendment was effectuated and copy of the Bill was circulated among the States for ratification and which was subsequently ratified by 16/29 states.

The origins, structure, and powers of the present judicial system is a subject best explored in detail in text books dealing with the legal systems. However some references to the broad points must be made here about the nature of both the court system and the 'judicial law making processes'. All courts in India are a *creature* of Statutes. Prior to advent of British in India, the and more precisely till the issue of 1661 Royal Charter,[12] the judicial system here mostly functioned on the principles of local customs, and courts were mostly having an overlapping jurisdictions, with no separate institution.

However, while Parliament has periodically altered the structure and jurisdiction of the courts, and while the 'common law' is undoubtedly inferior to statute in circumstances where a statutory and common law rule seemingly demand different solutions to a particular problem, Parliament has never enacted legislations which has sought systematically to control either the method or process of the judiciary's law making process.[13] Thus, in absence of statutory

12 The Royal Charter of 1661 conferred upon the Governor and Council all the Judicial powers within the settlement of Madras. (M.P. Jain, *Outlines of Indian Legal and Constitutional History*, 6th ed. P. 14).

controls, the matter of common law remains a matter for the court to control.

Such judicial power is not inconsistent with the notion of parliamentary sovereignty, because it is assumed that Parliament always intends that government will exercise its statutory powers in accordance with the precepts that the common law currently requires. It might be argued that Common law principles are the implied terms of the government process, and that the Parliament is generally considered to have 'contracted in' to these limits in executive autonomy. If Parliament does not want a particular government action to be subject to judicial control, it must say so in the statute which grants the power.[14] Because Parliament is sovereign, it would seem that in theory Parliament can if it wishes 'contract out' of the Common law principles which allow the court to regulate government activities, but which might be assumed to be politically or morally incorrect.

Issue three is of immense importance as the core of all conflict is whether the Amendment takes away the primacy of Judiciary in appointment to higher Judiciary. The Independence of the Judiciary is an integral part of the Basic Structure of the Constitution of India and Independence of the Judiciary, and inter alia, includes the necessity to eliminate political influence even at the stage of appointment of a Judge, the executive element in the appointment process being minimal. The Constitution (99th Amendment) Act of 2014 as passed by the two houses of Parliament, by providing for a National Judicial Appointments Commission consisting of the Chief Justice of India; and two other senior Judges of the Supreme Court next to the Chief Justice of India; the Union Minister in charge of Law and Justice; and two eminent persons to be nominated by a committee (consisting of the Prime Minister, Leader of Opposition or leader of single largest party in Lok Sabha and the Chief Justice of India), takes away the primacy of the collective opinion of the Chief

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13 In Britain, the 1688 (Glorious) Revolution in England did establish that statute could alter or abolish any common law principle whenever Parliament wished. (Loveland's *Constitutional Law, Administrative Law and Human Rights A Critical Introduction*, 5th ed. p. 65). Similarly, in India whenever the Court fills the gap by making guidelines, the Executive in some later point has to give it a formal shape by the way of preparing draft and bringing it in Parliament.

14 For explanation, the debate regarding the IX Schedule to the Indian Constitution and the opinion given in different cases have shown that the Parliament in its sovereign right though has a power to amend the Constitution but same could not be extended to the level of stripping the judiciary of its power to judicially review the legislations by putting it in IX Schedule and making provision of such (to review) restriction.

Justice of India and the two senior most Judges of the Supreme Court of India next to the Chief Justice of India i.e. even if all three senior most judges of the Supreme Court of India collectively recommend an appointee, the appointment is enabled to be a suspended by majority of three non-Judge members.

Clause 3 of the Constitution 99th Amendment Act of 2014 introduces Article 124C[15] in the Constitution of India as an integral part of the mode and manner of appointment of Judges-This confers unbridled power to Parliament to regulate by ordinary law, purported to be already regulated by the National Judicial Appointments Commission Bill passed by both Houses of Parliament in August 2014 and assented by the President on 31.12.2014 inter alia, the manner of selection of persons for appointment to the Higher Judiciary-without any safeguards whatsoever and in particular without requiring Parliament to ensure at all times the Independence of the Judiciary.

In addition, Article 124C leaves open enormous scope for the Parliament, by ordinary legislation, to give primacy to the Executive or Veto powers to the Executive or other unchecked powers to the Executive for the appointment of Judges to the higher Judiciary. Thus for instance, the second proviso to Sub-Section 2 of Section 5 and Sub-Section 6 of Section 6 of the National Judicial Appointments Commission Act 2014, which has been passed by both Houses of Parliament as an ordinary Bill (and not as a Constitution Amendment Bill), provides that 'the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation.' Not only does this very provision, open possibilities for erosion of Independence of the Judiciary but such an ordinary law can be also amended to substitute for the words 'two members' for the words 'one member'-thus completely negating any effective role of the three senior most members of the Higher Judiciary in appointment of Judges to the Supreme Court and the High Courts, and thus wholly transferring the power of appointment of Judge of the Higher Judiciary to the Executive.

COMPARATIVE ANALYSIS WITH MATTERS RELATING TO APPOINTMENT IN OTHER COUNTRIES

On perusal[16] to the working of Judiciary in different countries, of both

15 Introduced vide the Constitutional Amendment, 124C reads as 'Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it.'

Civil and Common law nature, it was observed that system in such countries incline heavily towards the 'inclusive' approach wherein appointments are made with the active involvement of Executive and Legislature alongside Judiciary. Appointment apart, the nature of task and functioning of other wings of the State also indicate that it is more democratic and inclusive oriented, with the clear intent avoid opaqueness.

1. **France : Article (65):** Title VIII of Constitution of France. The High Council of Judiciary shall consist of two sections, one with jurisdiction over judges, and the other over public prosecutors.

   The section with jurisdiction over judges shall comprise, in addition to the President of the Republic and the Minister of Justice, five Judges and one Public Prosecutor, one *Conseillerd'Etat* appointed by the *Conseild'Etat,* and three prominent citizen who are not members either of Parliament or of the Judiciary, appointed respectively by the President of the Republic, the President of the National Assembly and the President of the Senate.'

2. **United Kingdom: Article 47:** Part 5 (Bill of Rights 1689 with successive inclusion)

   a) The judiciary is independent of the executive; its judgments are not subject to ministerial direction or control. The PM recommends the highest judicial appointment to the Crown.

   b) The Lord Chancellor is the head of the judiciary, except in Scotland. His responsibilities include Court Procedure and the administration of Courts.'

3. **USA:** Article III Sub Article I of Constitution of USA. The judicial power of the US shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme Court and inferior Courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which not be diminished during their continuance in office.'

16 References have been made directly from the Constitution or the Statutes of different systems and have been given a plain reading of appointments made in Judiciary of such systems, which deliberately attempts to cover both common and civil law system.

S.No.	Country	Appointment of Judges	Judicial Intervention
1.	UK	1. By JAC. The Judicial Appointment Commission (JAC) is an independent commission that selects candidates for judicial office in courts and tribunals in England and Wales, and for some tribunals whose jurisdiction extends to Scotland or Northern Ireland. They select candidates for judicial office on merit through fair and open competition from the widest range of eligible candidates. 2. There are 15 members in the JAC including the Chairman. All of them, except the three judicial members are selected through open competition. Apart from the members from judiciary and legal profession, there are also judicial officers who are not legally qualified and also eminent persons from the public.	Equal participation by all stakeholders
2.	USA	1. Justices of the Supreme Court, judges of the Circuit Courts of Appeals and the Districts Courts [i.e. included under 'all other officers of the U.S.' referred to in the Constitution] all are appointed by the President of the United States with the advice and consent o the Senate. 2. Supreme Court justices, court of appeals, and district court judges are nominated by the President and confirmed by the US Senate, as stated in the Constitution. 3. The names of potential nominees are often recommended by senators and sometimes by members of the House who are of the President's political party. The Senate Judiciary Committee typically conducts confirmation hearings for each nominee.	Equal participation by all stakeholders
3.	Canada	1. Judicial appointments to the superior courts in each province or territory are made by the Governor General on the advice of the federal cabinet.	Equal participation and not exclusive participation

		2. Appointments to other superior courts which have jurisdiction for all Canada-the Federal Court, the Federal Court of Appeal, the Tax Court of Canada, and to the Supreme Court of Canada which is the final court of appeal from all Canadian courts-are also made by the Governor General on the recommendation of the federal cabinet. Appointments to the provincial court in each province are made by the Lt. Governor of the province on the recommendation of the provincial government	

As such it evidently becomes clear, on the observation of above Constitutional provisions of some countries that unlike the current NJAC Act, the Executive and Legislature have higher say in the appointments there. But at the same it should also be realised that a difference in the core of functioning with these system at one side and India system on the other evidently exist in a way that latter has always been pro-active and has event went to the extent of cheeking the unwarranted approaches of Executive and Legislature with heavy handedness.

CONCLUSION

One must observe however that the certain judgments pronounced by the Court only secured the independence of Judiciary against Executive, not against Parliament. Parliamentary Sovereignty meant both that an individual judge could be dismissed by a majority in the Lower and the Upper House and that the rules for such criterion could be changed and redesigned at any time by new legislation. This theoretical possibility has yet to emerge in reality: NJAC Act being one such instrument as it relates with the appointment, but again orienting it towards Executive function.

It should be stressed that the theoretical rationale for judicial control of government behaviour derives from the constitution's 'ultimate political fact' of parliamentary sovereignty. This requires that the government may only perform those tasks that Parliament (or Common law) permits. The court's constitutional role is therefore to police the boundaries of legislative intent, and ensure that government cannot overstep those boundaries without incurring legal liability.

NJAC is an outcome of years of deliberations and recommendations for a separate body to appoint and transfer judges, proposed by all circles of State's authorities and scholars who have spoken about

the need to replace the existing self-appointed collegium system, where Judges could make appointments and transfers to the Supreme Court and High Courts. This method of carrying administrative works of the Judiciary has been criticized on it being in derogation to the constitutional structure. In recent times the basis of criticism of the exiting collegium system has been primarily premised upon three arguments. First that the collegium system is not transparent and therefore the appointments done through it might be unfair. Second, by creating collegium system, the Judiciary has gone beyond its mandate by interpreting article 124 of the Constitution and formulating a unique institution of its own kind, which arguably was not foreseen by the Constitution makers. And thirdly, for the appointments in Judiciary government too has equal say as that of with Judiciary and therefore it must also be given a place in such decision making process.

Though the Act is conceived to ensure that executive too has its say in the appointments to the Judiciary, but a perusal to the legislation highlights that instead of maintaining the balance of power by allowing both the Executive and Judiciary to have equal footing, the Act silently bestows upon the Executive a major say. The composition of the NJAC goes as follows: The Chief Justice of India, two senior most Judges of Supreme Court, Union Minister of Law and Justice and two eminent persons (to be appointed by CJI , PM and LO) from which one should be from SC/ST/OBC background or woman. Further, while making the appointments to the High Courts, the Act u/s 6(6) provides that the NJAC shall not make any recommendation if any two members of it do not agree to such recommendation. Section 7 of the Act provides that if president feels that there is need to reconsider the recommendations, he can ask the commission to reconsider it. Now, section 6(6) has to be read with section 7 of the Act. Ananalysis to the objective of these sections highlights one core issue that it gives primacy to the Executive in such appointments. This is because, if there is a difference of opinion then such a recommendation would not be made at all and even if Executive is uncomfortable with such recommendation but quietly agrees to such recommendation then the President has the power to ask Commission to reconsider it. The role of president is undoubtedly always of primacy in any decision making process, but he has to act on the aid and advice of Council of Ministers, which somewhere allows Government to monopolize the Act.

The paper has presented the main issues of collegium system found in expanded reading of various Constitutional provisions. It has attempted to illustrate the application and limitations, both from

negative and positive dimensions, to highlight the discrepancies in law and to suggest the validity and violability of the reformatory measure which are designed accordingly. Although rightly considered as one of the most important issue of all times, the question that who should be the ultimate decision maker in appointments and transfers are bound to meet with severe clashes and criticisms as any attempt to disturb the course of procedure would only shift the balance in the favour of one and to the detriment of the other.

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CRITICALLY ANALYSING THE WHISTLEBLOWERS PROTECTION (AMENDMENT) BILL 2015: IS THE CHANGE A STEP TOWARDS REGRESSION?

Rupesh Aggarwal *

ABSTRACT

A very important facet for preserving the right to information is to protect the ones who are using that information in a coherent manner, hence ushering in administrative, legislative and bureaucratic accountability. Recent steps taken by the government with regards to amending certain provisions of the Whistleblowers Protection Act, 2011, seems to be affecting various facets of freedom of information ranging from the issue of public interest disclosures to safety of whistleblowers. This Amendment Bill seems to be discreetly diluting the effectiveness of the Act in a major way and curtails the freedom of people to make public interest disclosures for the larger benefit of the society. The Act itself is grappled with many issues, which has irked various activists and experts who have termed it asa 'mere paper tiger.'[1] *The Bill further erodes the effectiveness of the Act, by making it redundant and archaic. It not only marks a dent on the whistleblower protection regime but also reduces the potency of public interest disclosures by being inconsistent with many of the provisions of the Right to Information Act, 2005, which share a pivotal connection with whistleblowers protection. This paper is geared towards such critical evaluation and analysis of the Amendment Bill, by trying to make real sense of the provisions it seeks to modify, and subsequently attempts to grapple with the quintessential question that whether this Bill is trying to usher in a change towards regression?*

The first part of the paper gives a basic outline towards the Whistleblowers Protection Act, 2011 and the subsequent amendment, which the government wants to bring in. The second part tries to link and establish a connate relationship between right to information and whistleblowers protection. The third part discusses the various shortcomings of the amending Bill and how they attenuate the parent Act. The

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1 See, Suchismita Goswami, *Another election gimmick,* The Statesman (06/03/2014), available at http://www.thestatesman.com/news/42818-another-election-gimmick.html, last seen on 13/09/2015.

fourth part concludes the issue at hand by chalking out the future possible ways that can be adopted to rejuvenate the conceptual framework of whistleblowers protection under the said Act.

Keyword: Whistleblowers Protection Act, 2011, Right to Information Act, 2005, Universal Declaration of Human Rights, Central Information Commissioner and the State Information Commissioner.

INTRODUCTION

Whistle blowing is defined as an act of disclosure of information by people within or outside a government organization or private entity, which are not accessible to public but are of utmost importance to societal interests.[2] This statement throws a light on the importance of a whistleblowers protection policy in promotion of freedom of information. Keeping in mind the importance of the above said statement, it is a matter of ignominy that, even after 67 years of independence, our country doesn't have a well-formulated legal mechanism to protect whistleblowers, who keep their lives at stake to uphold the principles of right to know. Many people, who have ensured that information gathered is used towards bringing in transparency and accountability at the ground level, have paid a heavy price in return by losing their lives. A backlog of such incidents created an adequate amount of pressure on the government to bring a special law geared towards the protection of these people. The Whistleblowers Protection Act, 2011 (hereinafter referred to as the Act) was passed in Parliament on February 21, 2014. This Act seeks to protect whistleblowers, i.e. persons making a public interest disclosure related to an act of corruption, misuse of power, or criminal offence by a public servant.[3] The Act replaces the 2004 government resolution[4], which

2 Premlata and Anshika Aggarwal, *"Blowing the facts," whistle blowing policy in India,* Research directions, 1, Volume 1, Issue 7, Jan 2014, available at http://researchdirection.org/UploadArticle/90.pdf, last seen on 3/07/2015.

3 The Whistleblower Protection Bill, 2011, PRS Legislative Research, available at http://www.prsindia.org/billtrack/the-public-interest-disclosure-and protection-of-persons-making-the-disclosures-bill-2010-1252/, last seen on 06/07/2015.

4 Resolution No. 89 (Public Interest Disclosure and Protection of Informers (PIDPI) Resolution), Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training Government of India, (21/4/2004).

gave the Central Vigilance Commission (CVC) the power to act on complaints from whistleblowers and sets up a mechanism to receive complaints of corruption or wilful misuse of power by a public servant.[5] While the Lok Sabha passed the Bill on 27th December 2011, due to some 'legislative hurdles', the President was able to give assent to the Bill only in the year, 2014. Despite such a prolonged delay and the Act being notified in the official gazette on 12th May 2014, it has not come into force yet, as the government has not appointed different dates for different provisions of this Act till now[6] as stipulated under section 1(3) of the Act.[7]

While analysts and human rights activists were busy finding loopholes in the Act itself, the present government on 6th May, 2015 decided to introduce amendments to it in the form of Whistleblowers Protection (Amendment) Bill, 2015 (hereinafter referred to as the Bill). This Bill on the face seems to be providing legitimate protection to certain arenas from the concept of public interest disclosures, but a careful analysis will reveal startling shortcomings in the Bill, which have the capacity to nullify some of the positive effects of the Act, compromise the security of the whistleblowers and create a yawning gap between the fundamental right to know and whistleblowers protection scheme. Acts like Prevention of Corruption Act, 1988 and Right to Information Act, 2005 (hereinafter referred to as the RTI Act) needs to be complemented by a well-coordinated and meaningful whistleblowers protection strategy. Hence, to fully understand the effect of the new amendments to the Act, it becomes very important to analyze the linkages between right to information with the concept of whistleblower protection.

LINKING RIGHT TO INFORMATION WITH WHISTLEBLOWER'S PROTECTION

Article 19 of the Universal Declaration of Human Rights ensconces right to know well within the conceptual paradigm of fundamental human rights. It enjoins that *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without*

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5 Legislative Brief, PRS Legislative Research, available at http://www.prsindia.org/uploads/media/ Public%20Disclosure/Legislative%20Brief%20-%20Public%20Interest%20Disclosure%20Bil.pdf, last seen 7/07/2015.

6 *Gazette notification of India's Whistleblower Act*, Venkatesh Nayak, available at http://www.humanrightsinitiative.org/programs/ai/rti/india/national/email_alerts/2014/WhistleblowersProtectionAct2011.html, last seen 06/07/2015.

7 S. 1(3), The Whistleblowers Protection Act, 2011.

interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".[8] In its very first session in 1946, the UN General Assembly adopted Resolution 59(1), which stated, *"Freedom of information is a fundamental human right and, the touch-stone of all the freedoms to which the United Nations is consecrated".*[9] Coming to the Indian scenario the right to know and right to information has been adjudged by the Supreme Court in its various judgmentsas a fundamental right flowing from Article 19(1)(a) of the Constitution.[10] It was in the case of *Raj Narain v. State of U.P.*, that the court for the first time held that the public has the right to know every public transaction and all its bearing.[11] In the case of *S.P. Gupta v. President of India and Ors.,* the Apex Court held that *"no democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of government. It is only if people know how government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy."*[12] The preamble of the RTI Act says that, "*Democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold governments and their instrumentalities accountable to the governed.*"[13] The Supreme Court in its various judgments has vindicated this objective of the RTI Act as chalked out in its preamble.[14] Whistleblowers protection should be seen as the other end of this tunnel. Both of them promote same sets of values such as public participation in bringing in accountability and containing corruption,[15] making them akin to two wheels of the

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8 UN General Assembly, *Universal Declaration of Human Rights*, 217 A (III), Art. 19, (10/12/1948), available at http://www.un.org/Overview/rights.html, last seen on 11/07/2015.

9 U.N. General Assembly, Res. 59(1), Sess. 1, U.N. Document A/PV.65, 95 (14/12/1946) available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59(I)&referer=http://www.un.org/depts/dhl/resguide/r1_resolutions_table_eng.htm&Lang=E, last seen on 01/07/2015.

10 Art. 19(1)(a), the Constitution of India. It says that, "All citizens have the right to freedom of speech and expression."

11 *Raj Narain v. State of U.P.*, 1975 (3) SCR 360.

12 *S.P. Gupta v. President of India and Ors.*, AIR 1982 SC 149.

13 Preamble, Right to Information Act, 2005.

14 *Thalappalam Service Coop. Bank ltd. v. State of Kerela* (2013) 16 SCC 82; Namit Sharma v. Union of India (2013) 1 SCC 745; *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizvi,* (2012) 13 SCC 61.

15 See Department of Personnel & Training, October, 2009 Ministry of Personnel, Public Grievances and Pensions, *Guide on Right to Information*

same chariot. This chariot is that of democracy, which would be rendered meaningless without a strong law making people fearlessly participate in unearthing corruption through the information at their disposal.[16] After the inception of RTI Act, whistleblowing activities have increased manifold. This has made protection of whistleblowers all the more necessary. The artifice of accountability that the RTI Act and various judgments speak about won't be forthcoming if the whistleblowers using the information derived from public entries to make the government more accountable are not protected. Hence it becomes an urgent need to evaluate how the new Bill tries to compromise this position with regards to whistleblowers protection and an informed citizenry.

DILUTING EFFECTIVENESS OF THE ACT: AN EVALUATION

As stated above, because an environment of transparency and free information requires a strong whistleblower protection Act, an analysis of the amendments being introduced to the Act seems to be pivotal. If the competent authority starts to keep information in close closets without examining their truthfulness then it can be certainly taken as a deathblow to the whole of transparency and accountability regime. Hence, a critical analysis of the Bill has a lot of relevance to the concept of freedom of information. The Bill tries to dilute the Act by: a) restricting the scope of public interest disclosures, b) jeopardizing whistleblower's security and protection and c) not positioning the Act in sync with the provisions of the RTI Act, hence creating confusion and making these two pieces of legislations which in general parlance share a very close-knit relation, contradictory to each other in certain parts.

Restricting the Scope of Public Interest Disclosures

The restrictions in the Bill are in addition to the ones provided in the RTI Act. This dissuades whistleblowers to effectively unearth corruption in higher echelons of administrative and bureaucratic framework and subsequently puts more constraints on people's driven accountability in the Indian 'freedom to information regime'. It does this *firstly* by

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Act, 2005, available at http://mofpi.nic.in/H_Dwld.aspx?KYEwmOL+HGoC3PktBWCmTRa5aMHH7uT6BV0hU4XftgsBo6t5yowVJA==, last seen on 3/07/2015.

16 See U.N. General Assembly, *United Nations Convention Against Corruption* (UNCAC), Res. 58/4, A/58/422, Art. 13(2), (31/10/2003) available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf, last seen on 11/07/2015. It talks about reporting of information regarding corruption anonymously.

creating too many exceptions, under which public interest disclosure cannot be made; and *secondly* by making RTI Act as the only legitimate way to make public interest disclosures.

Creation of Too Many Exemptions

The Bill seems to be going against the principle that disclosure of information is an ordinary rule while secrecy is an exception.[17] While it is fully established that fundamental rights stipulated in our Constitution are not absolute[18] including the right to freedom of speech and expression,[19] unnecessary exceptions can prove to be detrimental for the very essence of the right itself. According to the Bill, Section 4(1) of the Acthas been drastically amended to severely confine the limits of public interest disclosures. It restricts the list of subjects on which these disclosures can be filed in front of a competent authority. Firstly under section 4(1)(a), the Bill bars any public disclosures if it contains information likely to prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the state, relations with foreign state, or lead to incitement of an offence.[20] So while the Bill under section 2 makes an improvement by taking away the protection to the armed forces as provided under the Act,[21] on the other hand it indirectly keeps these establishments out of the purview of the said Act. The Bill also amends section 5 of the Act by adding clause 1A to it which explicates that the Competent Authority must refer the disclosure to the appropriate authority appointed by a central or state government to ascertain whether it is exempt from disclosure.[22] The decision of the authority is binding on the Competent Authority. With regards to section 4(1)(a) the contours of what constitute national importance is neither well defined under the Act nor the Bill. This leaves lots of discretion in the hands of the appropriate authority, which in most of the cases has some vested interest in not disclosing information, affecting its own interests. By not establishing a centralized and independent authority to decide whether a public interest disclosures fall under any of the exceptions explicated in section 4(1), the Bill misses out on an extremely critical theme under the issue of freedom of information.

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17 Supra n. 12.

18 *Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988.

19 *People's Union for Civil Liberties v. Union of India*, AIR 2004 SC 1442.

20 The Whistleblowers Protection (Amendment) Bill, 2015 (passed by Lok Sabha, 13/05/2015).

21 Ibid. The word 'armed forces' is omitted from section 2 of the Bill.

22 Ibid.

For i.e. large-scale corruption scams similar to *Bofors Scandal* cannot be unearthed under the pretext of national security if the current parameters established under the Bill were to be applied. This can certainly stifle a person's capacity to make complaint against the government. Creation of such blanket ban on public interest disclosures will render making the society know about corruption in higher echelons of public administration virtually impossible.

Although no one is denying the importance of the security and sovereignty of our country and it is most vociferously asserted that these two elements hold paramount significance for any nation-state,[23] but promotion of accountability and transparency shouldn't be only field specific. This position was also agreed upon by the bench of the Central Information Commission (CIC) in the case of *Sandeep Unnithan v. Integrated HQ, Ministry of Defense (Navy)*, involving an RTI application concerning disclosure of information concerning policies of armed forces. In this case, one of the members of the bench strongly asserted for providing public with information regarding army's exploits and operations. He said that "*a rational disclosure policy refurbishes the image of the armed forces and only helps enhance confidence in their capability in the eyes of the people of the country whose security, it is the forces duty to ensure*".[24] The bench in this case ordered the navy to disclose information in accordance to section 4(1) of the RTI Act. Taking this into consideration, the current position in the Bill hence smacks of arbitrariness and imperiousness.

The Bill further places under section 4(1)(b) an added restriction upon information involving cabinet papers and along with it records of deliberations of the Council of Ministers, secretaries and other officers.[25] The only exception with regards to it is if the information is received as an outcome of an RTI application. In the case of *R K Jain v. Department of Revenue,* CIC said in its decision that;

> *Transparency has not become such a good idea because of the presence of the RTI Act, but it is good because transparency promotes good governance. Of the records, documents and files held by public authorities, a very large part can be made available for inspection, or be disclosed on request to the citizens, without any detriment to the interest of the public authority. This has not been done, or has still not been*

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23 *R.K. Jain v. Union of India*, AIR 1993 SC 1769.

24 *Sandeep Unnithan v. Integrated HQ, Ministry of Defense (Navy)*, CIC/WB/A/2007/01192, (Central Information Commission, 31/02/2007).

25 Supra n. 20.

> *systematically addressed, largely because of an intuitive acceptance of secrecy as the general norm of the functioning of public authorities. This mental barrier needs to be crossed, not so much through talks and proclamation of adherence to openness in governance, but through tangible action small things, which cumulatively promote an atmosphere of openness.*[26]

The same principle of promotion of transparency seems to be lacking under this Bill. Like these 2 exceptions there are 8 more exemptions mentioned in the Bill. While no fundamental right is bereft of some reasonable restrictions, and so is the case with the right to information, what becomes necessary is to prevent the state administration to use these restrictions, as a garb to illicitly attenuate the structural concept of society's greater good,[27] which the Bill has failed to achieve. The problem with so many exemptions is that the authority can under the garb of any of these restrictions refuse to give permission for making a public interest disclosure, even though in pith and substance that information isn't detrimental to anyone. This can subvert the very basis for which the Act is being brought.

MAKING RTI ACT AS THE ONLY LEGITIMATE WAY TO MAKE PUBLIC INTEREST DISCLOSURES

As hinted above, the Bill under few of the 10 exemptions further adds a stipulation of disclosing only thatinformation, which has been obtained from an RTI application. This sketches out a very myopic range under which public interest disclosures can be made. For i.e., according to section 4(1)(d) of the Bill, information relating to commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless such information has been disclosed to the complainant under the provisions of the RTI Act also cannot be disclosed.[28] Further section 4(1)(e) places the same restriction on information, which is available to a person in his fiduciary capacity or relationship.[29] Though the efforts of our legislator to connect the whistleblowing policy to the RTI Act is laudable, but in doing this, they have lost sight of a pivotal point. It has to be understood that although RTI Act is considered as the cornerstone for the freedom of information and the right to know,

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26 *R K Jain v. Department of Revenue*, 2013(295) ELT540 (CIC), (Central Information Commission, 08/08/2013).

27 See *Dinesh Trivedi v. Union of India*, (1997) 4 SCC 306. The apex court held that the concept of 'public interest' is paramount in such situations.

28 Supra n. 20.

29 Ibid.

still it is not the only way through which freedom of information is promoted and surely isn't the sole path to unveil corruption and wrongdoings in both public and private entities. Public interest disclosures through other means by whistleblowers, unearthing corruption at higher levels of administration and bureaucracy of the country equally provides information of what actually is happening in these fields to the public at large, hence increasing transparency and accountability in these higher strands of governance. In corruption at upper rungs of political and industrial milieu, whistleblowers can't always get information filed through an RTI application, without compromising their security. People working in an organization or investigative journalists sometimes get lots of information through clandestine means and this becomes a powerful weapon in their hands to expose the injustice that is being meted out by that specific organization, without letting them be recognized. By putting restrictions on such information, the Bill curtails the freedom with which whistleblowers can proceed to make information public. This can be considered as a serious dent on the whole concept of whistleblowers security and protection.

JEOPARDIZING WHISTLEBLOWERS SECURITY AND PROTECTION

Corruption, which has become like a plague,[30] running in the Indian economic, social and political environment, often goes unchallenged when people are frightened to raise their voices about it. From exposing high profile scandals to financial scam, whistleblowers play a critical role in saving both resources and lives.[31] With regards to an Act, which tries to provide protection to these audacious people, it becomes necessary to evaluate the intention of legislators while formulating this Act. The preamble of a piece of legislation is a very important precursor towards the intention of the legislators and the reason for the existence of an Act.[32] The opening line of the Act says that:

> *'It is an Act to establish a mechanism to receive complaints relating to disclosure on any allegation of corruption or wilful misuse of power or wilful misuse of discretion against any public servant and to inquire or cause an inquiry into such disclosure and to provide adequate safeguards against victimization of the person making such complaint and for matters connected therewith and incidental thereto".*[33]

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30 *State of M.P. v. Ram Singh* (2000) 5 SCC 88.

31 Supra n. 2.

32 See *Tribhuban Parkash Nayyar v. Union of India* (1969) 3 SCC 99; *Girdhari Lal & Sons v. Balbir Nath Mathur* (1986) 2 SCC 237.

33 Supra 7, Preamble

The Act first of all nowhere mentions what victimization means. It also doesn't provide any punishment for victimization of any whistleblower. In the current scenario, where in high-level political scams, people involved in corruption already know who the whistleblower is the absence of an independent authority governing protection of whistleblower is detrimental for the whole whistleblower regime.[34]

The Bill, in addition to not addressing these problems, further creates a dubious situation for people and public servants who have a piece of information but cannot disclose them due to restrictions mentioned in section 4(1) of the Bill. The Bill in its essence means that even though a person has vital information regarding a serious issue concerning the public, he or she will be ineligible for protection, if the information falls within the 10 restrictions mentioned in section 4(1). This makes these whistleblowers highly vulnerable since they cannot publicly disclose that information through the Competent Authority. Many of the whistleblowers are primarily internal whistleblowers, who have vital information concerning their organization and department[35] and if the Bill is brought into effect, it will make it difficult for them to maintain their anonymity.[36] This certainly diminishes the effectiveness of the Act to protect any whistleblower who has taken utmost pain in finding a material fact pointing towards an abuse of power or loss to public exchequer. This is worrisome as in a country dotted with incidence involving murder of whistleblowers, prime example being that of Satyendra Dubey who was murdered in 2003 for exposing corruption in the Golden Quadrilateral highways projects. Officials in our country already shy away from providing protection to these whistleblowers and with more restrictions and exceptions coming in, their safety will be seriously jeopardized. The current Vyapam scam in the state of Madhya Pradesh presents the true reality with regards to how protected these whistleblowers are under the current system. The Bill has elements to downgrade this scenario further.

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34 See Vidya Venkat, *Vyapam Scam: Whistle-blowers virtually on their own,* The Hindu (New Delhi, 11/07/2015)

35 *Indirect Tax Practitioners Association v. R.K. Jain*, AIR 2011 SC 2234.

36 See *Whistleblower Bill in India - A case of the right hand not knowing what the left hand has done*, Venkatesh Nayak, available at http://www.humanrightsinitiative.org/programs/ai/rti/india/national/2009/email_alerts/whistleblower_bill_in_india_aug_27_2010.pdf, last seen on 26/06/2015.

CONTRADICTION BETWEEN THE RTI ACT AND THE BILL

The relation between right to information and whistleblowers protection has been clearly pruned out; it becomes very important to evaluate how this Bill discreetly nullifies some of the positive effects of the RTI Act. Due to this innate relation that these two statues share, the fact that the new amendment brings in contradictions becomes more conspicuous and apparent. *Firstly* the Bill leaves little discretion in the hands of the concerned authority in deciding whether exceptions mentioned in section 4(1) of the Bill is applicable in a particular case. *Secondly*, the Bill doesn't provide for a grievance redressal mechanism as provided under the RTI Act. As both these statues are two sides of the same coin, the Bill by not articulating a system in the Act, in effect emasculates the mechanism under the RTI itself. *Thirdly*, The Bill lacks on a very consequential point concerning inclusion of the 'doctrine of severability' under the public information disclosure machinery. *Fourthly*, the Bill doesn't specify any waiver of exemptions in certain circumstances and fails to mention the time period under which the enquiry with regards to whether an exemption applies or not should end.

DISCRETION v. BLANKET BAN

Section 24 of the RTI Act throws some light on this contradiction. Although it starts with a non obstante clause saying that nothing in this statute will be applicable to any intelligence and security organizations,[37] later in the same section it has a proviso inserted which makes RTI Act applicable even in these organizations if the matter in hand is regarding corruption or human rights violation within these state agencies.[38] Section 4(1) of the Bill provides a blanket cover and bans all public interest disclosures regarding the issues concerning the security and sovereignty of the nation. It nowhere carves out a separate provision for corruption or human rights violation in these cases.

Further Section 8(2) of the RTI Act requires that even where an exemption applies to an application for information, a public body may release the information if the public interest in disclosure outweighs the interest protected by the exemption.[39] Hence according to RTI, even if the information concerns the sovereignty and security of the country, still the discretion to provide the required information to the

37 Supra 13, S. 24.

38 Ibid.

39 Supra 13, S. 8(2).

40 Ibid, S. 8 (1).

concerned person lies with the Public Information Officer (PIO's) and departmental appellate authorities.[40] The term 'public interest' has not been defined anywhere in the RTI Act and the final decision lies with the PIOs and departmental authorities to see whether any exemption applies and if so, whether it is overridden by more important public interest consideration, such as the need to promote public accountability, the imperative to protect human rights, or the fact that disclosure will expose an environmental or health and safety hazards.[41] Sadly, such a progressive and well thought out provision is missing from the Bill. The Bill doesn't spells out any level of discretion in the hand of the competent authorities. They are not provided with the requisite authority to balance out public interest or importance of the protected document on a weighing scale. The Bill just proposes a straight out blanket ban on disclosing such information. Logically seeing, these two sounds incongruous as on one side, the authorities are given the final decision to see whether informationis fit to be given, but on the other side, the person cannot for instance use that particular information to make a public interest disclosure. This is a direct attack on maintaining the accountability of the system through the information provided under the RTI Act. Furthermore, the above stated stand goes against the well settled legal position as established in the case of *S.P. Gupta v. President and Ors.,* wherein it was held that:

> "a *public authority can refuse disclosure of an information only if it is going to harm public interest*"[42] and in the case of *ICAI v. Shaunak H. Satya & Ors* wherein, it was adjudged that, "*public authorities must not read exemptions in the RTI Act in a restrictive manner and subsequently a fine balance should be attained between transparency of information and safeguarding of other public interest.*"[43]

This legal tenet makes it conspicuous that in addition to having a destructive effecton the Act, it in reality also puts constraints on effectiveness of right to information. Formulating this analytically, the situation that arises here seems to be incongruous. For i.e. while a public authority after applying its discretion had given an information under section 8(2) of the RTI Act, that information is rendered useless by the amendment as it imposes complete exemptions such as those mentioned in section 4(1) (a) of the Bill.

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41 Mandakni Devasher, *Your guide to using the Right to Information Act, 2005,* 26 (Commonwealth Human Rights Initiative, 2006).

42 Supra n. 12.

43 *ICAI v. Shaunak H. Satya & Ors.* (2011) 8 SCC 781.

ABSENCE OF A SYSTEM OF APPEAL

Section 18(2) of the RTI Act present an elaborate appeal and complaint mechanism, by vesting Central Information Commissioner and the State Information Commissioner with the power to initiate an inquiry upon receiving an appeal or complaint, if they find it reasonable to do so.[44] Section 18(1)(b) of the RTI Act clearly enunciates that an appeal can lie to the above said authority if the PIOs or designated lower authorities refuse to provide with the information so asked for.[45] It is surprising to see that the Bill misses on this and doesn't provide any mechanism of this sort by which aggrieved whistleblowers can appeal to any higher authority. Interestingly Section 20 of the Act talks about appeals to High Courts over the decision of the Competent Authority,[46] but these appeals lie only in the cases involving disputes regarding imposition of penalties for not following the orders of the Competent Authority.[47] The Act doesn't provide for any structure or framework in which a person can upon competent authority's refusal to enquire upon informationunder section 5 of the Act[48] appeal to a higher authority. The Bill also remains oblivious of this and doesn't provide for any grievance related mechanism. Though the Bill places many exemptions under the aspect of public interest disclosures, it doesn't provide whistleblowers with adequate firepower to challenge the appropriate central and state authority's decision, which is binding on the 'Competent Authority'.[49] This can lead to a lot of concentration in the hands of these respective authorities and subsequently leaves the whole mechanism bereft of checks and balances, which is so necessary in an Act of this nature. This outsourcing of critical functions of the Competent Authority to other institutions, not only raises questions over its character, duties and powers, but also leaves the whistleblowers, in the absence of an appellate body, at the mercy of these central and state authorities.

DOCTRINE OF SEVERABILITY: A MISSING COMPONENT

Section 10 of the RTI Act says that:

> *"Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in*

44 Supra 13, S. 18(2).

45 Ibid, S. 18(1) (b).

46 Supra 7, S. 20.

47 Ibid.

48 Ibid, S. 5.

49 Supra 20, S. 4(1).

this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information."[50]

This talks about 'doctrine of severability', wherein if information cannot be provided due to certain exemptions as provided under the RTI Act, the concerned authority still has a duty to disclose that part of the information which doesn't falls under the exemption.[51] In the case of *Veena Sikri v. DoPT, PMO, MEA and Cabinet Secretariat* which involved, an RTI application being filed to know the procedure being followed to appoint senior diplomats, the CIC for i.e. allowed parts of information to be released on the basis of this doctrine even though the concerned authority had decided that the information that was being sought, in totality involved questions of privacy of a third party.[52] The Bill in putting a complete restriction on public interest disclosures of the nature specified under section 4(1) fails to view particular information in parts. So while one part of information may be falling under the exemptions as provided, the other part can be of a nature warranting attention and further investigation from the Competent Authority's side. The Bill is unforthcoming in providing an adequate balance with regards to exemptions and disclosures.

TIME LIMIT TO FINISH ENQUIRY AND WAIVER OF EXEMPTIONS NOT SPECIFIED

Unlike the provisions of the RTI Act, which clearly mention various time limits for PIO's and other relevant authorities under which it is mandatory for them to provide information to the person asking for it,[53] the Bill stipulates no time frame as such for the relevant authorities to examine whether a particular public interest disclosure falls under the exemptions specified under section 4(1) of the Bill. This can leave a person waiting for a long time, only to know that he can't make that specific disclosure. Further section 8(3) of the RTI Act says that irrespective of exemptions mentioned above, any information relating to any occurrence, event or matter, which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section.[54] This is in harmony

50 Supra 13, S. 10(1).

51 See *Mr. Gopal Kumar v. Army Headquarters*, F.No.CIC/AT/A/2006/00069 (Central Information Commission, 13/07/2006).

52 *Veena Sikri v. DoPT, PMO, MEA and Cabinet Secretariat*, Appeal No. CIC/WB/A/2007/00287 (Central Information Commission, 7/05/2007).

53 Supra 13, Ss. 7(1), 11(3) and 19(6).

54 Ibid, S. 8(3).

with the legal principle as enunciated in the case of *ICAI v. Shaunak H. Satya & Ors.*, wherein it was categorically held that "*depending upon the nature of the exemption what is exempted from disclosure at one point of time may cease to be exempted at a later point of time*".[55] Strangely such a waiver of exemptions is not provided under the Bill. Absence of such waiver is equivalent to never disclosing information falling under any of the exemptions mentioned under section 4(1) of the Bill. This certainly sounds vague and unreasonable as it stifles the range of disclosures in addition to the already stated exemptions.

CONCLUSION

It is surprising to see that such an important Act, which is already facing criticisms from various quarters, is further being diluted by an amendment, which has the tendency in reality to make the Act spineless and toothless. The need of the hour is to come up with solutions and changes, which actually fill the potholes in the Act. Corruption is a big malaise in our country and it gets amplified, as we start moving to the higher rungs of administrative and bureaucratic setup of our country. The need hence arises not of protecting these upper arenas from public scrutiny but to incorporate them in a way so that a delicate balance is sustained between the concept of freedom of information and the integrity of these spheres of national importance. Encapsulating these branches of governance away from public glare can lead to a system where transparency and accountability are reduced to mere topics of research and analysis, with little relevance to the common man. The Bill in substance should be given a second look, and instead of providing for blanket bans, the government and the parliament should focus upon providing a level playing field along with maintaining that thin line between overreach and interference on one hand and public benefit on the other. For this it is extremely necessary to harmonize the Bill with the RTI Act. In addition to this, formulating a structured appellate mechanism within the Act can ensure fewer burdens on the courts, which are already grappled with a humongous backlog of cases and appeals. Amendments should be channelized to incorporate some advices from some erudite scholars and analysts, which can make the Act more whistleblower and people friendly. Whistleblower should be given adequate protection,as they are the liaisons in the whole scheme of accountability. The Bill instead of shying away from protecting them in the present form by creating too many exemptions should present alternative and coherent ways to move towards a corruption free society and further uphold the pedestal of a transparent society, the foundation of which was laid down by the RTI Act.

55 Supra n. 44.

DO THE COURTS INTERPRET OR MODIFY THE CONTRACTS? *ONGC v. RAI COASTAL* : A CASE STUDY

Stuti Toshi *

ABSTRACT

Section 37 of the Indian Contract Act, 1872 imposes an obligation on the parties to perform the Contract, unless the performance is dispensed with under the provisions of the Act. The enforceability of such a performance is ensured by the Courts of law. The power vested with the courts in ensuring compliance with the Indian Contract Act, 1872 empowers them to assess the viability of the terms of contract. In ensuring performance, the Courts also interpret the contracts in lines of justice to ensure that the interest of the both the parties' is secured. However, the thin line between interpretation and modification of contracts is vulnerable to be transgressed, especially with respect to existing stipulations in cases of breach under Section 74 of the Act. One of such relevant questions is being raised in ONGC v. Rai Coastal where, a pre-existing stipulation in the stated nature of liquidated damages is questioned to be penalty. The question arises whether Courts can modify the terms of Contract, which stated such a stipulation to be liquidated damages and qualify them as penalty; alongside modifying the payable amount by one of the parties in case of such a breach, when the pre-existing stipulation was a reflection of the consent of both the parties drafted upon keeping in consideration mutual interest and the valuation with respect to the possible breach.

Keywords: Liquidated Damages, Penalty, Section 74 of Indian Contract Act 1872, Stipulation.

INTRODUCTION

The Indian Contract Act, 1872 under Section 37 lays down that the parties to a contract must either perform or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or under any other law. The performance of the contracts so promised is ensured by enforcement of the contracts by the Courts of law. However, problem arises when the thin line between interpretation and modification of contracts is transgressed by the Courts in ensuring enforcement. One of such

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relevant considerations is being raised in *ONGC v. Rai Coastal.*[1] In this case, a contract was awarded to Rai Coastal pursuant to winning the bid in the floated tender for Sea bed engineering services by ONGC (Oil and Natural Gas Corporation Ltd.). Section 9 of the contract between the parties explicitly laid down that 'time shall be the essence of the scheduled completion'. The rationale for this, as stated by ONGC was that the data in this report was to be provided as the basis for the subsequent tender that was to be floated upon by ONGC.

The process envisaged within the contract, involved three stages of work-Mobilisation, Investigation and Reporting. The contract in its schedule E laid down the time limitations as follows-

Table 1.1

a) Mobilisation of vessel(s) boat(s) equipment of and personal for Geotechnical investigation and Oceanographic data collection.	30 days from the date of intimation.
b) Geothermal Investigation and Oceanographic data collection on scheduled route.	30 days after above mobilization.
c) Reporting 1. On board preliminary report	2 days after completion of survey.
2. Draft Report	20 days after submission of preliminary report.
3. Final Report	10 days after ONGC's comments.

The Section 9 of the Contract between ONGC and Rai Coastal is as follows-

> *9.1 The contractor agrees that time shall be the essence for the scheduled completion date as per time schedule given in Schedule E for the works and reports submitted.*
>
> *9.2 If the Contractor fails to complete the entire work including mob and demob comprising the total lump-sum project before the scheduled completion date fixed for the work or at any time repudiates the contract before completion of the work, or at any time the vessel*

1 *ONGC v. Rai Coastal*, Arbitration Petition No. 339 of 2003 and Arbitration Petition No. 350 of 2003.

equipments are confiscated under Clause 4 of this contract during the execution of Commission's operations, the Commission may without prejudice to any other right or remedy available to the Commission-

a) Receive from the Contractor as ascertained and agreed, Liquidated damages and not by way of penalty, a sum of equivalent to half percent of the total contract value for each week's delay or prorate value thereof, buy and the scheduled completion date subject to a maximum of 10% of the total contract value even though the commission may accept delay in completion after the expiry of the schedule completion date and/or.

SCOPE OF STUDY AND QUESTIONS ASSESSED

The disputed question of fact, before the Courts was the determination of number of days of delay. The number of days of delay would further determine the amount payable as damages. On one hand, ONGC purported to using the date of submission of final report (in the third stage of Reporting) for the purposes of calculation of period of delay, Rai Coastal relied on the date of submission of preliminary report. Rai Coastal relied on the fact the ONGC used the determinations of the preliminary report, and even after the final report was issued amendments were not made in the tender that was subsequently floated by ONGC. This case puts forth questions on the exercise of powers granted to Courts.

- Firstly, whether Courts are empowered to question the method of computation of damages, when stipulation exists within the terms of a contract?
- Secondly, whether there is a need of proof of actual loss in establishing a claim for damages?
- Thirdly, whether Courts modify the contract when they award damages in contravention of the existing stipulation within the contract?
- Fourthly, whether modification of nature of stipulation (either as liquidated damages or penalty) by the Courts amounts to transgression of power given to Courts?
- Fifthly, how relevant is the factum of losses being commensurate to damages, in enforcing liquidated damages clause?

The next question that arises is with respect to determination of quantum of damages to be awarded. Section 74 of the Indian Contracts Act, 1872 further lays down compensation for breach of contract where the penalty is stipulated for. Here, the disputed fact is the use of term 'penalty' in the heading, though further provision contemplates the existence of stipulations, which may not be in the nature of penalty. The section restricts the scope of 'reasonable compensation' to be awarded by the Courts to a maximum of prescribed stipulation between the parties. So, lastly, the question whether the provision of Section 74 holds valid in those cases where the losses sustained might be greater than the stipulation contemplated shall be assessed.

HISTORICITY OF THE PRINCIPLE

The English Courts devised the provision of having a stipulation within the terms of contract. The aim was to avoid the provisions of proving losses every time, hence the provision for Liquidated damages came into picture.[2] By this, parties could agree in advance that a breach of contract would trigger the payment of a fixed sum of money as damages. The line was drawn between liquidated damages and penalty by assessing the nature of the stipulation, if the sum was disproportionate to the foreseeable loss, then it was in the nature of penalty. The rule meant that if the sum stipulated was found to be penalty, the claimant had to prove loss in the usual way however, if the actual losses exceeded the sum named as penalty, he could recover the higher sum. Conversely, if the sum was found to be reasonable estimate, and hence liquidated damages the claimant was confined to that sum, even if actual losses exceeded it.[3]

The Indian legislature, as per the Constitution bench, in *Fateh Chand*[4] cut across the web of presumptions in English law and enacted a simple rule in Section 74[5] that a claimant, in the event of breach of contract, is entitled to 'reasonable compensation' not exceeding the sum named as 'penalty' or as the sum payable in the case of breach. The word 'penalty' which did not originally exist in the section, was added by way of amendment in 1899, and Sankaran Nair J.[6] explained

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2 William S. Harwood, *Liquidated Damages: A comparison of the Common Law and the Uniform Commercial Code,* Volume 45 Issue 7, Fordham Law Review, 1349 (1977).

3 Dunlop Pneumatic Tyre Case [1915] AC 847.

4 *Fateh Chand v. Balkishan Das* 1963 AIR 1405.

5 Section 74, Indian Contracts Act, 1872.

6 *Natesa Aiyar and Ors v. Appavu Padayachi* (1910) 20 MLJ 230.

that the object was to make abundantly clear that the provision applied to any stipulation intended to compel the performance of a contract, and not just to the payment of sum of money in the event of breach.

PROOF OF ACTUAL LOSSES

The first question that comes into consideration, to justify the amount of levied damages is whether or not losses are to be proven. As the causation to arrive at damages accrues through losses, on the face of it, it seems relevant to establish that losses have been caused. However, a second face of cases shows that in most significant scenarios, it is difficult to determine the losses (including questions of remoteness of damages) and hence, the parties could mutually agree on a stipulation while entering into a contract. Section 74 takes into consideration such cases, it lays down-

> *When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach, is entitled, whether or not actual damage or loss is proven to have been caused thereby, to receive from the party who has broken the contract, reasonable compensation, not exceeding the amount so named or, as the case maybe, the penalty stipulated for.*

Section 73 has an explicit causation requirement, but Section 74 does not call for one. This is so because the scope of Section 73 is wider, and inclusive of every instance of breach of contracts. It entitles a party that has suffered from the breach of contract to compensation. The relevant consideration is assessing the remoteness of the damage, i.e. the loss should have occurred in the 'usual course of things', and the proximity test should be passed- i.e. the causal link between the action and loss caused must exist resulting in need for payment of compensation.

However, the scope of Section 74 is comparatively restricted to those instances where for a breach, a stipulation exists. Here, the entitlement to compensation is not questioned. However, the amount to be payable is subjected to the nature of stipulation. To a large extent the right to assess whether such a stipulation is penalty or not is vested with the Courts and this is where the point of conflict comes into picture. This paper is aimed at understanding that when such a stipulation exists, which the parties agreed upon before the contract was signed keeping into consideration the interest of both the parties, then can the Courts question such a valuation and award compensation which would be prejudicial to the interest of one of the parties.

A combined reading of Section 73 and 74 suggests that the determination of losses is very crucial, especially in drawing the line between what is an actual damage and what is a remote damage. This distinction shall determine the extent to which the compensation shall be payable by the breaching party. Hence, for Section 73 and Section 74 the causal link must be established, between the caused damage and the action of the breaching party, where it should undoubtedly imply that the actions of the breaching party caused the damage. Once this link is established, under Section 73 the amount of losses should be determined, and within the scope of these losses, the remote damages must be excluded.

In *Supershield Ltd. v. Siemens Building Technologies FE Ltd.* (2010), it was held that in contractual disputes, there must be a causal link between the breach of contract and the resulting damage. In *Hadley v. Baxendale*[7] two tests were laid down to determine if there is a causal link-The first relates to direct losses that flow from the breach. The second relates to losses which may be in the reasonable contemplation of the parties at the time the contract is made. If a loss cannot be foreseen then the general rule is-it cannot be claimed.

The position in India demarcates the general and the special losses as well, where general losses are those accounted for in the usual course of the things and special losses are those which are specific to a case. However, damages with respect to both can be claimed, depending upon the facts of the case (and the extent to which it can be established that the losses are within the scope of 'usual course of things').

However, in cases of Section 74, i.e. those cases where a stipulation exists, the crucial point of determination is whether or not losses are to be proven.

In *Chunilal V. Mehta and Sons Ltd v. Century Spinning & Mfg Co Ltd*[8] Mudholkar J. suggested that where the right to recover liquidated damages under Section 74 is found to exist, no question of ascertaining damage really arises. Contrary to this, in *Sukhdev Kaur v. Hoshiar Singh*[9] it was seen that even when there is a liquidated damages clause, the party claiming damages may have to show his loss, this being necessary to ascertain the element of reasonableness.

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7 *Hadley v. Baxendale* (1854) 9 Ex 34.

8 *Chunilal v. Mehta and Sons Ltd v. Century Spinning and Mfg. Co. Ltd.* 1962 Supp (3) SCR 549; AIR 1962 SC 1314; *Hind Construction Contractors Ltd v. State of Maharashtra* (1979) 2 SCC 70; AIR 1979 SC 720.

9 *Sukhdev Kaur v. Hoshiar Singh* (2004) 2 ICC 55 (P&H).

In *ONGC v. Saw Pipes*[10] the Court, examining the necessity of proof of loss, stated- 'Section 73 and 74 of the Contract Act contemplate that in a contract, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach. If parties knew, when they made the contract that a particular loss is likely to result from such a breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at a conclusion that no loss is likely to occur because of such a breach. Section 74 is to be read along with Section 73 and therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual losses or damage suffered by him before he can claim a decree'.

This implies that in the present case, unless the Court believes that no loss is likely to occur, in a particular stage of the process, ONGC is not under an obligation to prove losses. The crucial thing to note is that this is a negative test, where the base presumption is that losses are occurring. If the other party is contending that losses are not being suffered, then the same has to be established.

Rai Coastal was claiming that no losses were suffered by ONGC in the time between the submission of preliminary report and the submission of final report. They backed this claim by stating that there weren't significant amendments made after the preliminary report was submitted, and hence relying on the findings of the preliminary report alone ONGC could have floated the subsequent tender, thereby stating that the difference in time between the submission of two reports need not be accounted for in computation of losses.

Here, in the third stage, the reliance on the preliminary draft report could not be hundred per cent, hence the final report being produced was crucial for the floatation of subsequent tenders. More importantly, the question that needs to be addressed is whether solely on the basis of preliminary report, subsequent tender was floated. The answer is No, as the final report was crucial to the determinations on which the subsequent step was based.

Hence, it can be said that until the final report was produced, ONGC was accounting losses. This is so because, a possibility existed, that the preliminary report is faulty, and hence ONGC also had to be prepared for alternative solutions, and the same needed a confirmation regarding its accuracy in its final report. So, ONGC was bearing the

10 *ONGC v. Saw Pipes* 2003 (5) SCC 705.

risk until the final report was submitted by Rai Coastal, thus necessitating the importance of final report. As the final report was crucial within the contract between ONGC and Rai Coastal, hence the period of delay must include within its ambit, the time until the final report is produced.

The provision of Section 74 blurs the difference between the stipulation being classified as liquidated damages or penalty. In *Ashwathnarayaniah v. Sanjeeviah*[11] it was stated that as Indian law does not make a distinction between penalty and damages, the language of liquidated damages clause need not specifically state that liquidated damages are not in the nature of penalty.

The British law takes it a step ahead to assumption of responsibility. In 2008, the House of Lords threw doubt upon whether these criteria are still the guiding principles. The case under question was *Transfield Shipping Inc. v. Mercarter Shipping Inc.*[12] which suggested that the Courts should look at whether the defendant had assumed responsibility for the loss suffered. The Courts would have to look at the full commercial background, often referred to as the factual matrix, to determine if this was so.

When looked at the present case, with respect to assumption of responsibility, it can be said that as the terms of the contracts made clear stipulations of the possibility of delay, and hence prescribed the amount to be paid as damages, and Rai Coastal in its full competency signed the contract, hence it can be said that Rai Coastal assumed responsibility at the time of signing of contract. Since, Rai coastal had assumed the responsibility, so now, the obligation to respect the consequences falls on Rai Coastal, which cannot be denied while the execution of the contract takes place.

The underlying principle guiding enforcement of contracts is mutual agreement and competency. The principle of freedom of contract rests on the premise that it is in public interest to accord to individuals broad powers to order their affairs through legally enforceable contracts that the Courts will enforce, without passing on their substance.[13]

So to a certain extent, the very existence of a stipulation dispenses away with the proof of loss, as the stipulation is a point of agreement between the parties, on occurrence of a previously foreseen

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11 *Ashwathnarayaniah v. Sanjeeviah* AIR 1965 AP 33.

12 *Transfield Shipping Inc. v. Mercarter Shipping Inc.* [2008] UKHL 48.

13 Tai Yeong Chung *On the Social Optimality of Liquidated Damages Clauses: An Economic Analysis Journal of Law, Economics and Organization,* 280 Vol 8 No. 2 1992.

and contemplated event. On the occurrence of such an event, the enforcement of the contract is necessitated, and fresh assessment of loss is not required. It is so because the very rationale behind agreement on that stipulation was to ensure enforcement without proof of loss, hence preventing delay in payments; also, the fact that in certain cases, ascertaining losses is exceptionally difficult (in such cases, presumptions are made in ascertaining losses, and there's a very high possibility that such a determination might not be approximate) requires the need for having a stipulation.

Hence, if the mandate of proof of loss is reinstated, it would defy the very rationale behind having a stipulation in the agreement, and would defy the basis of mutual agreement on which the very contract relies.

CALCULATION OF THE LOSSES

In *Murlidhar Chiranjilal v. Harish Chandra Dwarkadas*[14] the Supreme Court of India has set out two principles on which damages are calculated in case of breach of contract of sale of goods. The first is that the injured party has to be placed in as good a situation as if the contract has been performed. This is qualified by a second principle- the injured party is debarred from claiming any part arising out of his neglect. The onus is on him to mitigate losses consequent to the breach of contract. The Supreme Court has also said that the principle of mitigation does not give any right to a party in breach of contract, but it is a circumstance that must be borne in mind in assessing damages.[15]

Interest Act of 1978

The Interest Act of 1839 was repealed and the Interest Act of 1978 was enacted. The Interest Act permits the Court to allow interest in certain circumstances, first, if a certain sum is payable by virtue of some written instrument at a certain time, from that time, or secondly, if payable otherwise, from the time of a written demand with notice of the claim of interest. The time from which such an interest can be levied, is from the date of execution of the instrument.

Since levying interest is permissible subject to such conditions, a stipulation that exists within the terms of an agreed contract contemplating damages can account for interest as well. The Supreme Court in *State of Haryana v. M/s S L Arora and Company*[16] had opined that 'interest' in general terms, is the return or compensation for the

14 *Murlidhar Chiranjilal v. Harish Chandra Dwarakadas* (1962) 1 SCR 653.

15 *M. Lachia Setty & Sons Ltd. v. Coffee Board Bangalore* AIR 1981 SC 162.

16 *State of Haryana v. M/s S.L. Arora and Co.* AIR 2010 SC 1511.

use or retention by one person of a sum of money belonging to, or owed to another.

Here, given the fact that actual losses could not be contemplated, hence to a certain extent, interests were also claimed, which as per the interest act are permissible, within the scope of liquidated damages.

In the present matter of *ONGC v. Rai Coastal* the provision exists on *Liquidated Damages*. The stipulation that exists under Section 9 (of the Contract between ONGC and Rai Coastal) lays down two methods of calculation-

1. Half (50 per cent) of the total contract value for each week's delay or prorate part thereof;
2. Subject to a maximum of 10 percent of the total contract value, even though the Commission may accept delay in completion after the scheduled completion date.

Examining these two provisions implies that the first basis of calculation is in the stage wise delay by Rai Coastal. So the mandates of Schedule E come into picture. Let us examine the conduct.

1. The first stepwas to be completed within 30 days of petitioner's intimation (intimated on 21 Feb 1992, so should've been completed by 22 March 1992) but the same was done after a delay of 223 days 15 hours and 30 minutes (on 1 Nov 1992).
2. The second step was to be done within 30 days after the mobilization of marine spread. (the marine spread was mobilised on 1 Nov 1992 therefore, the survey was required to be carried out by 1 Dec 1992). Here, no delay was involved.
3. The third step involved reporting. The on board preliminary report was to be submitted within 2 days of after completion of survey (which was done by 8 Nov 1992 hence the report was to be submitted by 10 Nov 1992) but was submitted with a delay of 6 days (on 15 Nov 1992).

Further, the draft report was to be submitted within 30 days of submitting the on board preliminary report (hence, by 16 Dec 1992; which was submitted on 27 Nov 1992) which was submitted within the time allotted.

The final report (w.r.t. oceanographic data collection) was to be submitted within 10 days of receiving petitioner's comments (14 Dec 1992, hence was to be done by 24 Dec 1992) but was submitted with a delay of 160 days (submitted on 2 June 1993).

The mutually agreed upon contract relied on calculation of losses by calculating the number of days delayed in processing, and then calculating the overall losses caused [by taking the product of average one day costs (inclusive of reasonable profits) with the number of days delayed]. The method of calculation cannot be questioned by the Court as it is not a disputed fact. The disputed fact is whether the Courts should comply with the provision of stipulation in awarding damages, or can the Court come up with an estimate other than the stipulation.

In *Satyabrata Ghose v. Mugneeran Bangur and Co.*[17] it was stated that the Courts, cannot claim to exercise a dispensing power, or to modify or alter contracts. Also, the Courts stated that in ascertaining the meaning of the contract, and its application to the actual occurrences, the Court has to decide, not what the parties actually intended but what as reasonable men they should have intended.[18]

However, what is included within delay and what is not, can be checked upon by the Courts by assessing the legitimacy of the reasons for delay given by Rai Coastal. For the first two stages, the defences produced by Rai Coastal, were denied by the Courts as being legitimate enough. Hence for the purposes of calculation, this period has to be included.

The Courts looked at the third stage and held that the delay subsequent to the submission of the preliminary report is not material for assessment of liquidated damages. Here, the Court stated that even if there is delay, the loss is not established being caused to ONGC. The Court displayed ambiguity in the statements here, on one hand it stated that the delay is not material for assessment of liquidated damages on the other hand; it agreed that to a certain extent some losses were accounted by ONGC pursuant to this delay.

Here, an important thing to be assessed is the relevance of those reports. The reports were the basis for the subsequent tender to be issued. On one hand, it was seen that there was a delay in the production of the reports (both preliminary and final report, 6 days and 160 days respectively). On the other hand, the subsequent tender was floated by ONGC by relying on the preliminary report, and even after the final report was issued, there weren't significant amendments in the issued tender. One reading of this analysis would suggest that the subsequent delay (final report) wasn't crucial enough for the flotation of tender, but what has to be analysed is, the overall reliance was on the final report subject to which the tender was being floated, and the

17 *Satyabrata Ghose v. Mugneeran Bangur and Co.* 1954 AIR 44; 1954 SCR 310.

18 *Mott and Dickson Ltd. v. James B. Fraser & Co. Ltd.* 1871 LR 6 Exchange 269.

delay in its production (irrespective of quantified losses being differed) was unfair to ONGC. It means that though the tender was floated based on the preliminary report, however, until the final report was issued, ONGC was bearing the risk of the report being faulty. So the overall reliance lied on the final report, subsequent to which ONGC was to take actions, hence it was very crucial that the final report be produced on time.

It is without a doubt that the commercial value of time is very significant, in certain cases it cannot be calculated, like in this case. Here, though the report was furnished however, the uncertainty existed implying that losses could be accounted for by ONGC. The onus here is not on ONGC to justify losses, but on Rai Coastal to justify reasonable causes for delay. Since no justifications are put forth, hence Rai Coastal here incurs liability towards the caused delay and has to pay according to the stipulation made in the contract.

Thus, it can be said here, that the overall delay must take into account the delay caused in production of the final report.

Coming down to the quantum of losses assessed, the Court compared two analyses. On one hand, as Rai Coastal contested that the quantified losses (at 50 percent of CV per week's loss, subject to a maximum of 10 percent of CV) was harsh and hence was a stipulation by way of penalty. ONGC on the other hand contested that the stipulation is a genuine pre-estimate of losses and hence should be enforced.

The Court here stated that ONGC had to justify that the stipulation is a genuine pre-estimate, and since ONGC did not go ahead and do it, it believed that the stipulation is in the nature of penalty.

This is the point that needs reassessment. Let us examine some of the very relevant considerations in this context-

Firstly, the very basis of a contract is mutual agreement and free consent. So, the parties in their full competency enter into a contract, knowing that they have the flexibility to examine the contents of the agreement being signed between them. At the time of the contract being drafted, Rai Coastal owned the right to refute the contents of this agreement. The obligation is on the parties who are to enter into the contract to assess whether or not they can undertake the consequences that shall occur after the contract is signed. So here, the onus was on Rai Coastal to refute the liquidated damages clause in the agreement, at the time it was being drafted, before signing it, to ensure that the interest of Rai Coastal is taken under consideration. The post agreement refute, shows bad faith by the actions of Rai Coastal.

Secondly, when a contract is signed, the parties assess the reasonability within the scope of losses that might occur, and then a stipulation is put forth, which is subject to be reassessed by both the parties. It could be put forth by either of the two parties.

This implies that the stipulations laid forward are estimated from both ends, keeping in consideration the interest of both parties. Hence, such a stipulation, as was subject to mutual agreement and consent, comes out as a genuine pre-estimate. So, the factum of establishing that such a stipulation is a genuine pre-estimate does not come into picture. This is so because the contract is based on the assumption that the stipulation is a genuine pre-estimate.

As the stipulation being genuine is a presumption that occurs from the very existence of a clause on liquidated damages, then a contrary claim to this has the onus to prove that the stipulation is not a genuine pre-estimate.

So the party who contends that the estimate is not a genuine pre estimate has to establish it. Thus when the Courts did the opposite and placed the onus of establishing that the pre-estimate is genuine on one of the parties, it went against the very basis of contract. Here, the relevant consideration is that the Courts require a re-assessment of their considerations in assessing the nature of issues being dealt with, since the Courts went against the base presumption, the interest of parties suffered.

NATURE OF STIPULATION

The third most important consideration is whether the stipulation that exists can be assessed upon by the Courts in questions of its nature. This means, whether the Courts can challenge the fact that the stipulation named as liquidated damages (and explicitly stated that it is not in the nature of penalty) can be assessed by the Courts to be in the nature of penalty.

First and foremost consideration is with respect to jurisdiction of Courts. Whether Court's jurisdiction is restricted to interpreting the terms of the contract or can they go to the extent of modifying the terms of the contract.

In *Numaligarh Refinery Ltd v. Daelim Industrial Co. Ltd.*[19] it was held that the Court should not interfere even if a different interpretation is possible.

In *NCC Joint Venture Case*[20] it was held that when parties have agreed to a certain formula, and if at a later stage, an unexpected

19 *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.* 2007 (8) SCC 466.

outcome crops up, a party cannot unilaterally resort to a different interpretation to its advantage, in violation of the contract and to the detriment of the other party. The Tribunal further stated that if the parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it, that they have, by the course of dealing, put their own interpretation of the contract and cannot be allowed to go back on it.[21]

The Apex Court in *Abdulla Ahmed v. Animendra Kissen Mitter*[22] held that the evidence of conduct of the parties in this situation as to how they understood the words to mean can be considered in determining the true effect of the contract made between the parties. Evidence of acts done under it is a guide to the intention of the parties in such a case.

So, even in the present case, when the parties had mutually agreed on the terms of this contract, they are explicitly bound under it. So, the stipulation should prevail and the Courts do not have the jurisdiction to transgress from interpretation to modification. In the present matter, hence Courts cannot modify the terms of the contract, whereby the contract explicitly lays down that the stipulation is liquidated damages, not to be treated as penalty; and call it penalty; as this is not permissible within the realms of what the above mentioned case laws have established.

Rai Coastal must be put under an obligation to pay as per the damages assessed and no new stipulation can be introduced by the Courts.

The power of Courts in examining the nature of stipulation and ensuring the protection of interest of both the parties gives the Court a power to assess whether the stipulation is by the way of penalty or not. The test for qualifying it as penalty is laid in the Explanation of Section 74 which says, "A stipulation for increased interest from the date of default may be a stipulation by way of penalty." Also, the test of nature on penalty says that its intention is to punish the party that breaches the contract.

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20 *NHAI v. Unitech NCC Joint Venture* 2011 (Supp 1) Arb LR 94 (Delhi) (DB).

21 *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.* (1981) 3 ALL ER 577.

This does not draw a proper line between liquidated damages and penalties. Here, one important thing to note is, not all stipulations which have an increased interest from the date of default are penalties. This is so because the explanation is qualified by a 'may', which implies that there can be stipulations higher than the actual losses accounted for (actual losses shall include reasonable profits within their ambit). The higher value is not necessarily for punishing the party making the breach (at the time when the stipulation was drafted, to cover the scope of losses, a higher value could have been arrived at).

So, the Courts here cannot arrive at a conclusion that the stipulation is in the nature of penalty. Even if the losses are assessed and it is found that the stipulation is higher than the actual losses, yet the stipulation cannot be named as penalty. This is so because, the time at which the stipulation was drafted within the contract, it was covering a scope of activities, and pursuant to that scope, the stipulation exists. When the actions of the party are falling within that scope, that party is to comply with the obligation that it agreed to when it signed the contract. This shall still prevail, when on determination of actual losses it is found that the stipulation is not exactly equal to valuation of losses, as the test of reasonability was already met at the time the contract was being drafted.

So, in the present matter, when the Courts do not examine the actual nature of losses, and just by relying on the ground that the losses not being justified as genuine pre-estimate must be a penalty, the Courts are committing an error, as this is prejudicial to interest of both the parties (as this is disregarding the very existence of the stipulation, and the interest of both the parties was assessed when the stipulation was drafted).

The next consideration is examining if it qualifies to be a penalty. The very nature of penalty is to punish the party that commits the breach, and hence, by this nature, penalty does not qualify the test of limitation. This implies that if a stipulation exists, and has been qualified as a penalty, then there is no quantitative bar on the amount of penalty that can be imposed.

Moreover, the measure of damages to be paid in case of breach of a penalty clause by Section 74 is reasonable compensation not exceeding the penalty stipulated for. So, if the stipulation is qualified as penalty, it places the non-breaching party in a better position, as such a stipulation is permissible, and is not qualified by limitations of reasonability (how do we assess what is reasonable compensation in

the nature of penalty? Or how much punishment is the right amount of punishment?).

Also the maximum value of penalty can be imposed, which is the very stipulation of the penalty (as reasonable compensation has a maximum limit on the very stipulation). Section 74 does not invalidate the existence of penalty clauses, so such stipulations can prevail.

However, the question is whether Courts can question the nature that has been explicitly laid down as 'in the nature of Liquidated damages, not to be treated as penalty' in the present case, and go to the extent of calling such a stipulation to be a penalty.

There are two sides to this- quantitative and jurisdictional. The quantitative assessment suggests that an economic analysis must establish a significant difference in the valuation of actual losses and the stipulation, the difference if reasonable (within reasonable range of foreseen losses)- is not a penalty, and if exorbitant (beyond the scope of foreseen losses)- is penalty. However, as established earlier, the proof of loss is the crucial juncture.

The jurisdictional aspect suggests that Courts have the power to regulate the conduct of the parties, to protect the interest of the injured party, and in the ends of justice can go to the extent of modifying the terms of the contract, and call this clause a stipulation by way of penalty. This vests the Court with a discretionary power, and to a certain extent seems unregulated (example in the present case, when the Courts declared the stipulation to be penalty, without justifying it). But unless an economic analysis is made, a concrete word cannot be arrived at.

Liquidated Damages and penalty clauses in advance specify the amount of damages for breach, so that an innocent party which suffered damage need not prove its loss in case of breach, and will recover the specified amount of compensation regardless of the amount of actual damages.[23]

So, this brings us to an important conclusion that valuation has to be made, for the actual losses. As this valuation will give a verdict on the validity of the stipulation, the extent to which it is justified as a liquidated damages clause and whether or not it falls out as a penalty shall be determined.

Farnsworth has rightly stated – in comparison to the bargaining power which the parties enjoy in negotiating their substantive

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22 *Abdulla Ahmed v. Animendra Kissen Mitter* AIR 1950 SC 15.

23 Hugh Baele, *Chitty on Contracts*, 958 (31st Edition, 2015).

contractual rights and duties, their power to bargain over remedial rights is surprisingly limited. They are not at liberty to name an extravagant sum having no relation to the breach, for the fear of it being construed as penalty contrasting this, in relation to law relating to consideration. A man may sell his car for a handful of marbles and the law cares not, as long as he is satisfied. Yet the law would give no peace to a man who claims ten thousand rupees for failure to deliver a handful of marbles, branding such a clause penal.[24]

While under the common law the Courts do not enforce penalty clauses which provide for excessive amount of damages, under civil law the Courts may reduce the agreed amount of damages if the amount is found to be excessive because it contravenes the principle of good faith, or even increase them, if the amount of liquidated damages is considered to be too low.[25]

POST DETERMINATION OF LOSSES

The position in India provides a critical juncture to those cases where post determination it is found that the stipulation is lower than the actual losses. Hence it is crucial to examine the difference in treatment of stipulation with respect to losses.

When the Stipulation Exceeds the Actual Losses

When the stipulation exceeds the actual losses caused, then there are two possible scenarios. First, the compensation to be paid is brought within the range of reasonable compensation, which in turn is decided on the basis of actual losses. As Section 74 lays down, the higher limit for the liquidated damages shall be the stipulation itself.[26] Under the English law, only penalties maybe reduced to reasonable compensation. The Act also provides illustrations of what may be considered as penalties-75% interest in case of default on a bond normally carrying 12 percent interest, doubling the amount to be delivered. Indian decisions tend to follow and incorporate the principles laid down in the English decisions.

Also, when the stipulation is higher than the actual losses, and the Courts (like in the present case) are calling it a stipulation by way of penalty, then such a stipulation can prevail. This is so because there is no bar on the imposition of penalties within the confines of a

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24 E. Allan Farnsworth, *Contracts* 841 (4th Edition, 2004).

25 Peter Benjamin, *Penalties, Liquidated damages and Penal clauses in Commercial Contracts: A Comparative Study of English and Continental Law*, Vol. 9 No. 4, The International and Comparative Law, Quarterly, 600-627 (1960).

26 Section 74, Indian Contracts Act 1872.

contract. However, Courts have a power to regulate such impositions,[27] implying thereby that it falls down to the discretion of the Courts.

The Supreme Court has held that if parties regard a sum as reasonable, the Court should not reduce it in its discretion. Where the clause is one for liquidated damages, there is no question of ascertaining damages and such a clause excludes the right to claim unascertained damages.[28]

Where the government would suffer loss, which it would be unable to prove, a pre-estimate worked out on a percentage basis, for late supply of road building materials, was upheld as liquidated damages and hence payable as compensation.[29]

Even when the Courts held that the liquidated damages agreed for was not a pre-estimate of actual damages, yet it being an agreed amount in cases of delay, the same was held to be the valid compensation payable.[30]

Given the fact that final discretion lies on the Courts, the important points it comes down to is when the stipulation exceeds the losses, how significant is the difference.

Even in those cases where losses cannot be assessed (but it can be reasonably estimated that the stipulation significantly exceeds the losses) the relevant consideration should be compliance with the express provisions of the clause. The relevant consideration should be that both the parties agreed to it, at the time of the contract being drafted, in their full competency and free consent hence, they are now under an obligation to ensure that what they agreed for is being complied; implying that the stipulation should prevail.

When the Stipulation is Less than the Actual Losses

This is the critical juncture for the Indian Jurisprudence on contractual obligations and relations. It is so because, when the stipulation is less than the actual losses suffered by the party, the law restricts the scope of reasonable compensation being awarded to an upper limit of existing stipulation. This implies that the definition of reasonable compensation shall not exceed the existing stipulation.

Given the powers of the Courts, it can be said that when such a case arises, where the actual losses are significantly higher than the

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27 *ONGC v. Saw Pipes* AIR 2003 SC 2629, *Maula Bux v. Union of India* AIR 1970 SC 1955; *Union of India v. Rampur Distillery,* AIR 1973 SC 1098.

28 ONGC v. Saw Pipes AIR 2003 SC 2629.

29 Anand Construction Works v. State of Bihar, AIR 1973 Cal 550.

30 Cellulose Acetate Silk Co. Ltd. v. Widnes Foundary (1925) Ltd. [1933] AC 20.

stipulation arises, the Courts will own the discretion to expand the ambit of 'reasonable compensation' to bring it in lines with justice. However, how far can the Courts go and contravene the provision of Section 74 shall be a relevant consideration. What is also relevant to consider is that as the parties at the time of drafting the contract take reasonable measures, so they can always contest that the stipulation was a genuine pre estimate. Essentially, this question will fall within the hands of the Courts to interpret, and shall be a case specific analysis.

Another point to note is, given the question of performance within the contract, and the contract is a product of mutual agreement and consent, when the contract proposes no ambiguity, the Courts might not go beyond the scope of drafted contract, and agree with the stipulation, as the onus to ensure that the interest of the parties is protected, was with the parties, at the time when the contract was being drafted. So, when they agreed to stipulations that eventually turn out to be injurious, they undertook the responsibility for their negligence, and hence now, they shall bear the burden for the same. This shall prevail unless exceptional circumstances prevail, and the Court decides to award special damages, where the overall losses are covered for.

So, even in such cases, the Court's discretion plays a very important rule.

When the Stipulation is Equal to (within the reasonable range of) the Actual Losses

These are the only cases where the stipulation shall prevail without a doubt. However, given the subjectivity of circumstances, it might be a rare case scenario. However, the onus to justify the application of this shall be on the party who seeks to enforce the breach, as it might come down to establishing the actual losses, and once they're ascertained, the party seeking enforcement of the stipulation will have to justify that the stipulation is within the range of the actual losses.

Before a final conclusion is drawn, a few recent judgments on the same subject matter should be assessed to understand what considerations are checked upon by the Courts.

In *Reliance v. BSNL,*[31] the Court held that-

> *If by wrong routing of the calls or by masking, the cost of providing services is reduced, the concerned operator gets an undue advantage not only in the Indian market over other competing operators but also in the international market. These*

31 *Reliance v. BSNL Execution* Application No. 45 of 2012, Petition No. 2012.

> *time lines is [sic] an indica showing that clause 6.4.6 is not penal, but a pre-estimate of reasonable compensation for the loss foreseen at the time of entering into agreement. Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and therefore, the Court should not be astute to categorize as penalties, the clauses described as liquidated damages.*

The reliance was drawn back to an English case-*Export Credits Guarantee Department*[32] where the House of Lords rejected an attempt to portray a sum stipulated in the contract as a penalty upon the sole ground that it was payable not in the event of breach of contract, but on the breach of a contractual obligation the defendant owed to *third parties*.

The Court in *Kailash Nath Associates v. DDA*[33] held that-

> *Section 74 is to be read along with Section 73 and therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. In some contracts, it would be impossible for the Courts to assess the compensation arising from the breach and if the compensation contemplated is not by way of penalty or unreasonable, the Court can award the same if it is a genuine pre estimate by the parties as a measure of reasonable compensation.*

This case also dealt with the question of when and to what extent can the stipulated liquidated damages for breach of a contract be held to be in the nature of penalty, in the absence of evidence of actual loss and to what extent the stipulation be taken to be the measure of compensation for the loss suffered even in the absence of specific evidence.

In *M/s Construction and Design Services v. DDA*[34] the Court assumed losses being accounted for, pursuant to delay in execution of work allotted under the contract. The Court went on to saythat-loss can be assumed without proof and that the burden was on the appellant

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32 *Export Credits Guarantee Department v. Universal Oil Products* [1983]1 WLR 399.

33 *Kailash Nath Associates v. Delhi Development Authority*, Civil Appeal No. 193 of 2015, SLP (Civil) No. 32039 of 2012.

34 *M/s Construction and Design Services v. Delhi Development Authority*, Civil Appeal No. 1440-1441of 2015, SLP (C) No. 35365-35366 of 2012.

who committed breach to show that no loss was caused by delay or that the amount stipulated as damages for breach of contract was in the nature of penalty. Even if time was technically not of essence, it could not be presumed that delay was of no consequence.

Also, when in the absence of specific evidence, the respondent could be held to have suffered loss on account of breach of contract, and is entitled to compensation to the extent of loss suffered it is for the appellant to show that stipulated damages are by way of penalty. If the entire amount stipulated is a genuine pre-estimate of the loss, the actual loss need not be proven.

To the extent of determining whether actual losses are needed to justify a claim for compensation, this case can be referred. However, when it comes down to the quantum of losses being decided, this case presents a bad picture-'Evidence of precise amount of loss may not be possible but in the absence of any evidence by the party committing breach that no loss was suffered by the party complaining of the breach, the Court has to proceed on *guess work* as to the quantum of compensation to be allowed in the given circumstances'.

CONCLUSION

The Courts are empowered to interpret contracts within their ordinary meaning (literal rule of interpretation)[35] unless an ambiguity exists within the terms of the Contract.[36] So when a clause specifying the liquidated damages to be imposed exists, how far can the Courts go is the relevant question. Can the Courts go to the extent of modifying the contracts?

As the Apex Court concluded in *M/s Construction v. DDA,*[37] the relevant point is, that occurrence of losses is a presumption in those cases where a stipulation exists. And hence the power of the Courts in such cases becomes restricted, not requiring actual proof of loss.

In the present case there are losses being suffered, and there is a stipulation. At the time the contract was being drafted, the exact amount of losses that would be caused could not be estimated. And hence within reasonable limits a figure was arrived at to account for those losses. Now this figure could account for a reasonable compensation including both-aspects of liquidated damages and aspects of penalty. But can the Courts go back in time and rename this

35 *Bharat Singh v. Management of New Delhi Tuberculosis Centre*, New Delhi AIR 1986 SC 842; *Oriental Insurance Ltd Co. v. Sardar Sadhu Singh* AIR 1994 Raj 44.

36 *PUCL v. Union of India* (2005) 5 SCC 363.

37 *M/s Construction v. Delhi Development Authority*, Civil Appeal No. 1440-1441 of 2015, SLP (C) No. 35365-35366 of 2012.

stipulation as not being liquidated damages and instead penalty? It is up to the discretion of the Courts but in the spirit of justice this would defy the interest of the parties at the time of contract being drafted. So no, Courts can only interpret the contracts and not modify them.

Sure they're vested with the powers to modify them, but this power only comes into play when the contract is mala-fide, or when one party is exercising dominance over the other (in forms of a consent that is not freely obtained) or where the object or consideration involved is unlawful, etc. However, the power of modification of contracts is not with the Courts when the contract is lawfully drafted keeping the interests of both the parties under consideration. If the Courts go ahead and still modify it, it shall amount to unfair use of the discretionary powers vested with them.

On the question whether the Courts are empowered to assess the method of computation of damages, the answer is to the extent the method is unlawful the Courts can go behind the veil of the contract and assess the method of computation of damages. However, when lawful object and consideration is involved along with free consent the Courts cannot question the method of computation of damages. So, in *ONGC v. Rai Coastal,* the method of computation of damages (that is by calculating the number of days in which the work was delayed, then assessing its financial value by taking the product of the number of days delayed with the contract value) cannot be challenged in the Court of law.

Coming down to the second question on the need for proof of actual loss, the answer is in negative. This is so because the very purpose of having a stipulation is to address such situations where the determination is difficult. To prevent any conflict of interest, such stipulations are first required to meet the test of mutual consent and given the facts of the case, involvement of free consent and mutual agreement is depicted hence, the stipulation is a valid one and is enforceable. As was held in *Reliance v. BSNL,*[38] the purpose of a stipulation is to avoid litigation and ensure commercial certainty hence the stipulation even in this case should prevail.

On the question whether the stipulation can be classified by the Courts as penalty or liquidated damages, the answer is the Courts have the power to assess the reasonability of the stipulation; however to the extent this amounts to modification of contract it will be a case to case analysis. Though explicitly, Courts cannot modify the contracts. If the parties have chosen the name the stipulation as Liquidated

38 *Reliance v. BSNL Execution* Application No. 45 of 2012 Petition No. 2012.

damages and not penalty, it does not create a disputed situation as the Indian law under Section 74 doesn't create a significant demarcation between the two. However on assessing the nature of stipulation, if the intention to penalize does not accrue then the Courts can't classify the stipulation as penalty. Hence in the present matter as the intention was to make up for the caused losses and ensure commercial certainty, the stipulation should be dealt within the limits of being liquidated damages, ensuring compliance with the expressed intention of the parties.

On the question whether the modification amounts to transgression, as established earlier since it goes against the mutually agreed terms between the parties it essentially defies the basis of the contract and hence amounts to transgression. However, unless there's a dispute with respect to the way consent was obtained, or if it involves unlawful object or consideration, then such a transgression by the Courts is necessitated. The relevant test of assessing the need has to be met before the modification takes place.

On the final question of whether losses being commensurate to stipulation needs to be established the answer is no, as this was already answered when it was established that there is no need of proof of actual loss. To add to it, this would also defeat the very purpose of having a stipulation. The relevant consideration is the intention of parties in including a stipulation within the terms of the contract.

Hence, the most relevant consideration in assessing the stipulation is not only the test of reasonability but the interest of parties at the time when the contract was being drafted. Since the interest was secured, so the stipulation is enforceable. Here the Courts are under a duty to enforce the stipulation after assessing that the test of reasonability is met. The test of reasonability was met when the parties signed the contract. However, the scope of 'reasonable compensation' under Section 74 is fairly restricted, as it delimits the maximum compensation that can be awarded by the Courts to the existing stipulation. This disregards the existence of those scenarios where the actual losses might exceed the stipulation in such cases the Courts will yet only award compensation equal to the stipulation.[39] However, what is also crucial to observe is, such an analysis would be case specific, and as such a possibility to award such damages under 'special damages' might arise.

The power of the Court is though restricted to interpretation however, when needed Courts can go to the extent of modifying the

39 Section 74, Indian Contracts Act 1872.

contracts. However, in *ONGC v. Rai Coastal*, when the terms of the contract are not ambiguous, the role of the Court is restricted to interpreting the terms of the contract and ensuring that the interest of the parties is secured. Moreover, if it was to be contended that the stipulation is not within the interest of one of the parties, then the obligation was initially on that party to ensure that its interest was not defeated. Also, now the obligation is on the party raising such a contention to establish that the basis of the contract (free consent, mutual interest, etc.) is flawed. However if despite the negligence the party has failed to ensure protection of its own interest, and the assessment of the stipulation takes place by the Court, then the Court must take into consideration two factors- firstly, the actual losses suffered, secondly the reasonable considerations that the parties must have foreseen at the time of drafting of the contract in drawing the stipulation. If only the actual losses are ascertained then the compensation accorded will be fair to only the party that has breached the contract; however when the factors that led to the stipulation at the time of drafting are also included, it ensures that even the interest of the party that suffers from the breach is taken under consideration. The most important consideration here was to ensure that the interest of both the parties is protected, the party breaching the contract, and the other party which is also suffering from the breach.

Hence, the need today is for the justice system to depict rational assessments keeping on consideration interest of all the parties affected, andto ensure that the precedents set forth are enshrined in lines of justice, in every realm of the society.

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ON REGULATION OF CELEBRITY ENDORSING THE BRANDS IN INDIA

Dr. Ritu Gupta *

ABSTRACT

Celebrity endorsement is a frequent marketing communications strategy for fostering brand image and its propagation. However, sometimes celebrities who engage in false or deceptive advertising are likely to mislead the consumers, which may cause physical injury, pecuniary loss, or a combination of the two. A recent example of this phenomenon is the notice by the Food and Drug Administration (FDA) to Madhuri Dixit for seeking a report on a claim she made in the advertisement regarding the nutrition value of the '2-minute Maggi noodles'. Despite the issues related to such celebrity endorsements, little is known about the legal regulations for the endorser's liability for misleading advertisements. Therefore, it is significantly relevant to have legal guidelines on this issue so that the possible risk of promoting unhealthy and harmful products can be reduced. In the wake of gaining from the current Maggi debacle, it is highly desirable for India to set legitimate principles for misleading celebrity endorsements, and adduce advanced tested practices in our legal system.

***Keywords*:** Celebrity Endorsement, Misleading and Deceptive Advertising, Fault Liability.

INTRODUCTION

Endorsing the brands by the celebrities for an effective marketing campaign is a ubiquitous feature of advanced advertising correspondence.[1] Several studies have examined the response ofconsumers to celebrity endorsements in advertising. Findings show that celebrities make the advertisement believable[2] and add huge

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1 G. McCracken, *Who is the Celebrity Endorser? Cultural Foundations of the Endorsement Process,* 16 Journal of Consumer Research, 310, 316 (1989). See also J. E. Michael, *Celebrity Endorsements: A Case for Alarm and Concern for the Future,* 15 New England Law Review 521 (1980).

2 M. A. Kamins, M.J. Brand, et.al., *Two-Sided versus One-Sided Celebrity Endorsements: The Impact on Advertising Effectiveness and Credibility*, 18 The Journal of Advertising, 4-10 (1989). See also C. L. Kertz, R. Ohanian, *Source Credibility, Legal Liability, and the Law of Endorsements*, 11 Journal of Public Policy & Marketing, 12-23 (1992).

credibility to it.[3] Anirban Das Blah, managing director of Kwan Entertainment & Marketing Solutions, states that "India is a celeb hungry market and will continue to be so. Possibly the only market where if one takes the three leading players of the top 20 categories, the chances are that there will be some celebrity endorsing the brand."[4] From superstar Amitabh Bachchan to famous cricketer Sachin Tendulkar, all have lent their name for the campaigning of different brands. According to the American Appraisals, a consulting firm,the total value of the top 15 celebrity brands is US$ 820.7 Million.[5] Among them Shah Rukh Khan[6] and Ranbir Kapoor[7] came out to be the celebrities in the country who have more than $100-million valuation in the celebrity brand valuation study in India.[8] It is indicated by FICCI report, many regional and new foreign brands are aggressively using celebrities for endorsing their brands.[9] A significant amount of a celebrity's annual income, close to 50%-75%, is generated through brand endorsements.[10] A recent survey demonstrates that, 85% of corporates, media houses, celebrity management companies, advertisement agencies and other key persons involved in brand advancement agreed that celebrity endorsement is a compelling element for the visibility of their brand.[11]

Above exploration demonstrates that the featuring of a celebrities will increment further on account of developing advertising

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3 H. H. Friedman, L. Friedman, *Endorser Effectiveness by Product Type*, 19 Journal of Advertising Research, 63-71 (1979). See also J. Agrawal & W. A. Kamakura, *The Economic Worth of Celebrity Endorsers: An Event Study Analysis*, 59 Journal of Marketing 56-62 (1995).

4 Amit Bapna, *Endorse with Care,* The Economic Times, (Delhi,17/06/2015).

5 *Waiting For The Encorea Concise Report On India's Most Valuable Celebrity Brands*, American Appraisals, (October 2014), available at http://american-appraisal.in/AA-Files/Library/IN-PDF/AmericanAppraisalIndia-Celebri.pdf, last seen on 11/06/2015. See also, RatnaBhushan, *Brand Value: Only Shah Rukh Khan, Ranbir Kapoor in $100 million club*, The Economics Times, (Delhi, 04/11/2014).

6 Shah Rukh Khan is the most valuable celebrity brand, estimated at USD 165 million.

7 Ranbir Kapoor is valued at a close second, estimated at USD 129 million.

8 The study is done by US consultancy firm American Appraisal.

9 Shooting for the stars, FICCI and KPMG Media and Entertainment Industry, (2015), available at https://www.kpmg.com/IN/en/IssuesAndInsights/ArticlesPublications/Documents/FICCI-KPMG_2015.pdf,last seen on 01/06/2015.

10 Supra n. 5.

11 Ibid.

industry.[12] In accordance with worldwide patterns, India is among main five nations in use of superstars for brand supports.[13] Hence, due to growing number of celebrity endorsements, a compelling inquiry is: what is the endorser's liability if the commercial is false or tricky? In this regard, the paper identifies recent trends of law in advertising endorsement in India. After tracing the Indian legislations and regulations, the paper will head towards the observations of overseas practices. Further, this paper will analyze some common law principles in order to ascertain the celebrity's liability. Accordingly, some recommendations will be presented to maintain the positive aspect of celebrity endorsements and reduce, its negative effects.

RELATED LEGISLATION AND REGULATIONS ON CELEBRITY ENDORSEMENT IN INDIA

In spite of having a considerable debate on this issue,[14] at present, India has no specific regulation, for barring the celebrities from endorsing misleading advertisements. Few laws, like the Consumer Protection Act and Food Safety and Standards Act (FSSA) address the issues related to false claims and advertisements. Out of which FSSA is the only law that gives the current debate an opportunity to interpret the role and liability of brand ambassadors judicially.

The Food Safety and Standards Act, (FSSA) 2006[15] was made to consolidate the laws relating to food and to establish the Food Safety

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12 According to the 2014 FICCI Report on the Indian Media and Entertainment sector, Indian advertising spending in 2014 increased by 14.2% over 2013 and totalled INR 414 Billion. However, Digital Advertising increased by over 44.5% in the same period, a clear sign that corporate and advertisers are shifting their focus from traditional mediums to newer mediums that provide instantaneous access to an identified target market. Digital advertising, which was Rs.4, 350 crore in 2014, is projected to touch Rs.6,250 crore. In 2014, television industry grew at 13.8% driven by increased advertising by political parties during the general elections and on account of enhanced marketing budgets of e-commerce companies. Advertising revenue projections for 2015 are Rs.17,460 crore up from Rs.15,490 crore in 2014.

13 *What are The Benefits of Celebrity-Based Campaigns,* Millward Brown, available at, http://www.millwardbrown.com/docs/default-source/insight-documents/knowledge-points/MillwardBrown_KnowledgePoint_Celebrity-basedCampaigns.pdf, last seen on 06/07/2015.

14 After the notification was served to the endorsers of Nestle Maggi, all the daily newspapers were overflowed covering the civil arguments about the risk of endorsers for deceiving commercials. The Maggi controversy has opened a Pandora's box on the legal liability of celebrities who endorse food products even as it uncovered ambiguities in the Food Safety and Standards Act (FSSA), 2006, making the current debate an opportunity to interpret judicially the role and liability of brand ambassadors.

15 Food Safety and Standards Act, 2006 (Act 34 of 2006).

and Standards Authority of India.[16] One of the primary statutory goals of the this Act is, to "ensure availability of safe and wholesome food for human consumption" and it makes the manufacturer, store keeper, distributor, seller and the importer liable for violations, including 'unfair trade practice'. Sections 24 and 53 of FSSA deal specifically with advertisements. Section 24 of the FSSA restricts advertising related to food. It says, "That no advertisement related to food shall be made which is misleading or deceiving or contravenes the provisions of FSSA."[17] However, here, it has not been explained, whether the term "made" is only confined to commissioning the advertisement or its actual making. In the latter case, a brand ambassador can be held liable for misleading advertisements.[18] Well, this question is open for debate and only future will tell to what extent it can be interpreted. Sub-section (2) of the same section says "no person shall engage himself in any unfair trade practice[19] for the purpose of promoting the sale…[20]" But this clause does not specify who the "person" mentioned in it is, thus, making the ambit of the provision flexible. In M/s. *Coca-Cola India Limited v. Dr Amarjit Singh another,*[21] the question arose for consideration as to which entity could commit an unfair trade practice. The National Consumer Redressal Board, noted that such an entity could either be a 'trader, manufacturer, or a service provider'. On the basis of this judgement, to include models/brand spokespersons in the definition of 'unfair trade practice' would be, again, expanding its meaning beyond permissible limits.

Another clause 1 of section 53 of the Food Safety and Standards Act, states, "any person who publishes, or is a party to the publication of an advertisement, which– (a) falsely describes any food; or (b) is likely to mislead as to the nature or substance or quality of any food or gives false guarantee, shall be liable to a penalty which may extend to ten lakh rupees." According to this clause, the conviction of the

16 The Food Safety and Standards Authority of India has been set up under the Food Safety and Standards Act, 2006 as a statutory body for setting down science based measures for articles of food.

17 For details see section 24, Food Safety and Standards Act, 2006.

18 Krishnadas Rajagopal, *Law unclear if celebrities endorsing food products can be prosecuted*, The Hindu, (Delhi,05/06/2015).

19 Unfair Trade Practice, under Section 2(1)(r)(1)(i) of Consumer Protection Act, 1986, covers 'the practice of making any statement, whether orally or in writing or by visible representation which falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model'.

20 See section 24 of Food Safety and Standards Act, 2006.

21 IV 2010 CPJ 7 (NC).

celebrity endorser revolves around the interpretation of the clause 'is a party to the publication'. There are two different views about the celebrity brand ambassador. Some thinkers say that they are party to the advertisement hence, can be held liable for falsely representing the brand.[22] Some argue that they are neither a publisher nor a party to the publication of the advertisement rather they are merely a model in the commercial, hence there is a no liability. Due to these marshy provisions of the above Act, it is very difficult to make the celebrities liable for misleading advertisements.

Other than Food Safety and Standards Act, Advertising Standards Council of India (ASCI) is additionally meeting expectations in safeguarding customers from false and misleading advertisements.[23]

Advertising Standards Council of India is a non statutory tribunal, having a self regulatory mechanism for ensuring ethical advertising practices. It entertains and dispose of complaints based on its Code of Advertising Practice.[24] Nevertheless, having characteristics similar to a policy it is not easy for the guidelines, to be implemented and enforced. In order to understand the effectiveness of self regulatory framework and its adequacy in advertising in India a comprehensive survey was conducted by FICCI.[25] After soliciting inputs from various professionals, it was found that 56% of the respondents thought that the existing self regulatory framework is inadequate as well as ineffective.[26]

From the above discussion, it is clear that, the law has provisions to counter the misleading claims, but the question has never been raised in any court of India. This is one of the reasons there is no case filed against any of the celebrities under the above mentioned clauses. It is also clear that if these laws are interpreted judicially, they can play a leading role in deciding the extent of liability of the celebrities in case of misleading advertisement.

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22 Nanditta Batra, *Celebrities & endorsements: Due diligence needed*, The Tribune,(17/06/2015) available at http://www.tribuneindia.com/news/comment/celebrities-endorsements-due-diligence-needed/94622.html, last seen on 18/06/2013.

23 S. S. Kaptan, *Advertising, New Concepts,* 69 (1st ed., 2002).

24 The Advertising Standards Council of India (ASCI) (1985) has adopted a Code for Self-Regulation in Advertising.

25 Advertising Standards in India: An Introduction, FICCI Report, available at http://www.ficci.com/Sedocument/20240/Survey_on_Advertising_Standards.pdf, last seen on 11/07/2015.

26 Ibid.

OBSERVATION OF OVERSEAS PRACTICES

Modern celebrity endorsement in advertisements has its origin in USA[27] and, it has crossed the limits of different nations around the world, including South Korea and Japan.[28] From years of regulating endorsements, they have developed a rich experience to prevent celebrities from endorsing misleading advertisement. This affords us some great models that merit attention.

USA Regulation

In USA, endorsements are subject to the regulation and oversight of the Federal Trade Commission (FTC).[29] Section 12 of the Federal Trade Commission Act, specifically prohibits false advertisements which are likely to induce the purchase of food, drugs, devices or cosmetics. Section 15 defines a false advertisement for the purpose of Section 12.[30] Besides this, the FTC has promulgated several guidelines to specifically address celebrity endorsements.[31] These guidelines have additionally provided general considerations of endorsements activities to explain the celebrity's intent. For example, "If the advertisement claims that the celebrity uses the product or service, the celebrity must in fact be a bona fide user, and the advertiser can only use the endorsement so long as it has a good faith belief that the celebrity continues to hold the views expressed in the advertisement." FTC guidelines further impose conditions on the celebrities to ensure that the claim made by them is independently verified by them before endorsement. In additional, specific examples are also provided to help with identification or evaluation of the endorsement. With these numerous examples, the judicial department, celebrities and normal

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27 J. A. Morello Praegar, *Selling the President, 1920: Albert D. Lasker, Advertising, and the Election of Warren G. Harding,* 54 (1st ed., 2001).

28 S. M. Choi, Wei-Na Lee et. al, *Lessons from the Rich and Famous: A Cross-Cultural Comparison of Celebrity Endorsement in Advertising*, 34 Journal of Advertising 85-98 (2005).

29 Federal Trade Commission Act, 15 U.S.C. § 45(a)(l) and 52.

30 In determining whether an advertisement is misleading, Section 15 requires that the Commission take into account 'representations made or suggested' as well as 'the extent to which the advertisement fails to reveal facts material in light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.'

31 See Federal Trade Commission, 16 CFR Part 255 Guides Concerning the Use of Endorsements and Testimonials in Advertising. This document includes only the text of the Revised Endorsement and Testimonial Guides. To learn more, read the Federal Register Notice available at www.ftc.gov/opa/2009/10/endortest.shtm, last seen on 20/07/2013.

citizens can have a better understanding and be more informed.[32] Over all these FTC regulatory programs and remedies give the FTC a lot of control over the advertising procedure. As a rule, the FTC is bestowed with the power to oversee, regulate, issue, and uphold government tenets, regulations, and laws governing unfair competition among businesses in the United States.[33] Numerous advertisements have been interpreted as questionable under the guidelines of these programs, and advertisements have been altered. For example, in *FTC v. Garvey,*[34] The Ninth Circuit court ruled that to make the celebrity liable either he should work (i) as a 'direct participant' in the making of false advertising claims, i. e. had actual knowledge of the material misrepresentations, or (ii) under the principles of 'endorser' liability, should be recklessly indifferent to the truth or falsity of a representation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth.[35] After the Garvey case, the Federal Trade Commission made alterations in 2009 to give the buyer the freedom to try and hold celebrities liable in the event of deceiving advertisements.

In 2012, Khloe and Kourtney Kardashian were made part of a $5 million class action law suit for making misleading and unsubstantiated statements for a weight loss product called QuickTrim® Extreme Burn. The plaintiffs based their argumenton the basis of inconsistent and unscientific claims.[36]

If we compare Advertising Standards Council of India with FTC, the FTC is more viable than ASCI. The reason is that ASCI is only a self-regulatory body; while FTC is much more grounded which has strong and well defined enforcement bodies. Additionally, the FTC has illuminated its position in situations where the risk of the big name

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32 For example if an association of professional athletes states in and advertisement that it has selected a particular brand of beverage as its 'official breakfast drink' this would be considered an expert endorsement and this advertisement would be deceptive unless the association has in fact performed direct comparisons with comparing brands.

33 The Commission's specific investigative powers are defined in Sections 6, 9, and 20 of the Federal Trade Commission Act.

34 *FTC v. Garvey*, 383 F.3d 891(2004, United States Court of Appeals, Ninth Circuit). In this case FTC had sued former baseball player Steve Garvey (as well as Enforma and Media Interactive) for false and misleading advertising in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

35 A. M. Moorman, *False Advertising and Celebrity Endorsements: Where's My Script?*, 15 Sport Marketing Quarterly, 111-113 (2006).

36 J. Goldstein, *How New FTC Guidelines On Endorsement and Testimonials Will Affect Traditional and New Media,* available at http://www.cardozoaelj.com/wp-content/uploads/2011/03/goldstein.pdf, last seen on 12/06/2015.

is concerned. The rules make the big names sufficiently responsible to investigate the products first and then make a testimonial. If not, then the celebrity endorser can be considered responsible under Sec. 13 (b) of the rules.

Therefore, FTC has effectively possessed the capacity to promote awareness among consumers and also provide an efficient platform to address the grievances of the consumers in the matter of misleading endorsements.

Other Overseas Observations

Japan has likewise developed as an example of its first kind. It has a vibrant advertising industry where over 70% of all advertisements feature famous people.[37] Around 90 percent of advertisements that Japanese consumers rate as likable, feature a celebrity.[38] In Japan, having been found guilty of supporting false promotion, the celebrity is compelled to apologize publicly. This ruin their reputation and thus impacts their employment opportunities.[39]

In Korea, because of their strong advertising self-regulation Institution,[40] the disputes about false celebrity endorsement happen rarely. This has done an effective job in previewing the endorsed advertisement. It has developed a series of rules in terms of advertising, imposing strict limitation on products in terms of ways to express, audience difference, and other related aspects.[41] For instance, for advertising drugs, the Institution has divided drugs into three categories 1) general medicine, 2) special-function medicine and 3) medicinal material. The weight-loss pill has been identified as special-

37 R.B. Money, T.A. Shimp et.al., *Celebrity Endorsement in Japan and the United States: Is Negative Information All the Harmful?*, 3 Journal of Advertising Research, 113-123 (2006).

38 Ibid.

39 Advertising activities are for the most part managed in Japan under the Act against Unjustifiable Premiums and Misleading Representations, the Act on Specified Commercial Transactions, the Medical Care Act, the Pharmaceutical Affairs Act, the Health Promotion Act and the Outdoor Advertisement Act. There is likewise a 'fair commission code' appropriate to advertising, and a number of advertising guidelines issued by government bodies responsible for specific industries.

40 Voluntary Standards and Regulatory Approaches in Advertising in APEC Economies, Asia Pacific Economic Cooperation Report, (April 2014), available at http://publications.apec.org/publication-detail.php?pub_id=1523, last seen on 11/07/2015.

41 C. Nam, H. Mok Park et.al., *Korea - Pharmaceutical Advertising 2015* available at http://www.iclg.co.uk/practice-areas/pharmaceutical-advertising/pharmaceutical-advertising-2015/korea, last seen on 11/08/2015.

function medicine, which is prohibited to be TV advertised, and the same is for medicinal material. As in general medicine, it is also not allowed to use any inducing testimonials. Any violation is severely punished.[42]

Above global practices show that they have stricter guidelines and strengthened self-regulation institution which can control the content of the advertisement. India can analyze and bring such changes to its ever-evolving law so that the consumer is clear about the status of celebrity liability.

JUSTIFICATION OF ENDORSER'S LIABILITY UNDER THE COMMON LAW CAUSE OF ACTION

In the absence[43] of any concrete law regarding celebrity endorsement, some legal experts and consumer right activist base the liability of celebrities on the principle of reliance[44] (a requirement of the common law) which includes misrepresentation, deceit, fraud, tort law etc.[45] They argue that "brand ambassadors have a duty to take care. They are paid in crores to use their persona or voice to make the public purchase a brand. Therefore, consumers should also enjoy a tortious claim against them for using their highly commercially exploitative rights to mislead the public."[46] In fact, most of the FTC guidelines are based on common law principles. The possibility of holding a celebrity liable for an endorsement which results in harm to a consumer can be analyzed in the context of some of the common law principles such as:

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42 Ibid.

43 Supreme Court in, *Rajkot Municipal Corporation v. Manjulaben Jayantilal Nakum*, 1997(9) SCC 552, stated that, 'The English principles of common law are approved and adopted by the courts in India on the principles of justice, equity and good conscience'.

44 Theory of reliance is based on enforcing expectations; that is, the law of reliance protects some parties of places burdens on others, because all the parties expect such protection or burden to follow. It is justifiable at common law if the representation relates to a matter about which a reasonable person would attach importance in determining a choice of action. See Restatement (SECOND) of Torts § 538(2)(a) (1977). See also C. R. Morris, *ESSAY: Some Notes on 'Reliance'* 75 Minnesota Law Review 815(1991).

45 Supra n. 1.

46 Statement given by Madhavi Gorakhia Divan, Senior Advocate, Supreme Court and media law expert, in The Hindu (Delhi, 05/06 2015).

Misrepresentation and Deceit

Some scholars make the endorsers held liable on the basis of law of representations[47]-or more precisely, misrepresentation.[48] In other words, whether the celebrity can be held accountable depends on the existence of their misrepresentations in the endorsement. According to them an action for fraudulent misrepresentation can be proved if the plaintiff established the facts; (1) false representation (2) knowledge (3) inducement (4) plaintiffs' reliance on the representation (5) and injury to the plaintiff.[49]

Let us take the case of Maggi noodles here, wherein what false representations may be attributed to celebrities can be discussed on the basis of following points:

The first question is that, has Madhuri Dixit made a false representation about the quality and safety of Maggi oats noodles? If the assertion has to be characterized only honest opinion–and the true state of mind-there has been no false representation regardless of how inaccurate the opinion may be.[50] But principally, misrepresentation extends to 'any conduct that amount to an assertion not in accordance with the truth'.[51] In fact, the FTC guidelines expressly state that use of an individual's name, signature, likeness, or other identifying personal characteristics even without accompanying verbal statements, may cause consumers to believe that the entire message reflects the 'opinions' of the individual and not just those of the advertiser.[52] Therefore, by lending her identity to the product, she has asserted that she approved the quality of two minute oats Maggi noodles.[53]

But false representation, per se, does not make her liable for an action in deceit. Knowledge that the representation was false is also

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47 A representation is defined as any conduct capable of being turned into a statement of fact. Black's Law Dictionary 1169 (5th Ed. 1983).

48 J. S. Kogan, *Celebrity endorsement: recognition of a duty,* 54 The John Marshall Law Review, 47 (1987).

49 J. J. Harrington, *Torts — Misrepresentation — Liability of Certifiers of Quality to Ultimate Consumers*, 36 Notre Dame Law Review. 176 (1961). See also E. Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*,17 Kansas Law Review, 564 (1969).

50 Note on Liability of Advertising Endorsers, 2 *Stanford Law Review* 500 (1950).

51 Supra n. 48.

52 Ibid, at 49.

53 Though she after the complaint had tweeted that she had no knowledge about the presence of MSG in the product. Also, some of the celebrity argue that the endorsement they make are just opinion, and therefore less culpable.

required for the liability. US court argued that the requirement of 'scienter' cannot be strictly applied as it is rare for a celebrity to intentionally deceive a consumer.[54] Even FTC has specifically rejected the ancient, requirement of scienter,[55] by which a misrepresentation under common law could not be declared illegal.[56] To justify this argument courts recognize the doctrine of conscious ignorance as a substitute for actual knowledge.[57] Moreover, she knew that her 'opinion' is likely to induce consumer action. The only defense available to her is, bonafide act, for that she has to prove that she was using Maggi for her personal use and ascertained the reliability of the noodles through independent tests.

Even if her claim amounts to a false statement, and she was consciously ignorant about the quality of the product, the liability for deceit still requires that the representation was made intending to influence the consumer's act. This is indisputable that the endorsement is always made with the purpose of inducing the consumer.[58] Therefore, she cannot defend herself by saying that the advertisement was not endorsed to induce the consumer. It is argued that representation may not be the sole cause of purchase but it is one of the multiple factors of impelling her action.[59] Finally, about the injury, it is proved that MSG[60] in Maggi noodles was beyond permissible limits hence was harmful for the health.[61]

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54 See, *Kramer v. Unitas*, No 83-1324 Slip op (Southern District of Florida, 1985)

55 Fraud. Knowledge of Falsity of Representation. Not Essential to Support an Action, 7 Virginia Law Review, 227-228 (Dec. 1920).

56 I. L. Preston, *A Comment on 'Defining Misleading Advertising' and 'Deception in Advertising,* 40 Journal of Marketing, 54-57 (Jul. 1976).

57 Supra 50, at 501. see also,W. F. Brown, *The Federal Trade Commission and False Advertising*, 12 Journal of Marketing, 38-46 (Jul. 1947).

58 Ibid.

59 This can be proved by showing extended use of the product after endorsement. For example, Cadbury used Amitabh Bachchan to promote the brand when it went through a bad phase in India. Soon the advertisement recreated people's love for the brand and increased Cadbury's sale. (see V. Joshi, and S. Ahluwalia, *The Impact of Celebrity Endorsements on Consumer Brand Preferences*, (2008), available at: http://www.indianmba.com/Faculty_ Column/FC706/ fc706.html, last seen on 21/08/2015.

60 Monosodium Glutamate (MSG) is a flavor enhancer, if used in excess may be harmful for the health. According to Food Safety and Standards Rules, 2011, MSG, a 'flavour enhancer', should not be added to food for infants below 12 months. See http://indianexpress.com/article/explained/explained-noodles-in-the-soup/#sthash.q9GxhI3j.dpuf, last seen on 21/06/2015.

61 Gujarat, J&K, Tamil Nadu join Maggi band wagon, The Hindu, available at, *http://www.thehindu.com/news/national/maggi-noodles-row-gujarat-jk-ban-sales-of-maggi-noodles/article7282521.ece,* last seen on 04/06/2015.

In short, there is no barrier within the cause of action of misrepresentation that prevents the plaintiff to file a case against the endorser.[62] Though the justification for recovery may depend from case to case. Under Indian Penal Code, 1860, false and misleading advertisements are squarely covered under the definition of cheating, which is punishable with an imprisonment for a term upto seven years and fine under Section 420 of the IPC. The endorsers can be charged separately under this Section for practicing deception by false representations and consequent inducement.

Liability Under Negligence

In negligent representation, knowledge is not required to expose the representer to liability.[63] Failure to act with reasonable care in finding out the truth of the representation suffices. In the case of advertisements, the duty, arguably, does not arise out of a contractual relationship, but in response to a public need to have the burdens of modern commercial transactions equitably distributed.[64]

In Maggi case, the question is that whether Madhuri Dixit had a duty to take reasonable care regarding an investigation into the truth of any representation she made? Argument is that Madhuri Dixit has occupied an honored position in the public's propensity for emulation. She, voluntarily, for her personal benefit undertook to represent to the public and approved of a product which is harmful for the health of the public. Therefore, it would not be unreasonable to require her to ascertain the truth of the representation she made about the product.[65] Because of the delicacy of endorser-consumer relationship this additional duty to care can be presumed. Sir Fredrick Pollock writes:

> *A man who volunteers positive assertions to his neighbor, intending them to be acted upon for some purpose of his own advantage, is certainly bound in morality to use the ordinary care of a reasonable man to see that his assertion is warranted by the fact. It has never been decided that he is so bound in law, but it would be quite in accordance with the lines of development which the common law has followed in regard to actions and undertakings affecting the safety of others in person or property.*[66]

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62 Supra 50, at 505.

63 Supra 48, at 66.

64 Supra n. 49.

65 Supra n. 50.

66 Frederick Pollock in *Derry v. Peek*, 5 T.L.R. 625 (1889, House of Lords).

Even in India the concept of professional negligence has been recognized and the test for the same has been laid down by the Supreme Court in *Jacob Mathew v. State of Punjab,*[67] wherein it was held that "A professional may be held liable for negligence on one of the two findings: Either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess."

Applying this two-step test to celebrity endorsements, it can be concluded that a celebrity too can be held liable for professional negligence if, firstly, she did not possess the skill/competence to give an opinion on the product in question. This can be ascertained by his actual use of the product or at least an inquiry about the basis or trial on which claim is founded; or secondly if she acted carelessly.

Strict Liability

What if the endorser makes a reasonable inquiry into the truth of his representation, but a consumer who relies upon it is harmed nonetheless? The question is, whether the endorser can be legally accountable under the rule of strict liability or not?[68] The reason given is that the defendant takes part in injury by endorsing the product for his personal profit or other benefits. This later creates consumer demand for and reliance upon the product which calls for the imposition of strict liability.[69]

There is a problem in the application of this rule the reason is that the endorser only supplies information to the public regarding available products. He exercises no direct control over the production or distribution of the goods. Hence the doctrine of strict liability is difficult to apply in such situation.[70] However, actions for negligent misrepresentation and deceit provide consumers adequate protection against a celebrity-endorser's misrepresentations.

Damages and Other Tortfeasors

Though a celebrity endorsement can proximately cause physical injury, pecuniary loss, or a combination of the two. The celebrity endorser, however, is not the only party liable to the injured consumer, nor presumably the most culpable.[71] The responsibility clearly lies with the advertiser-manufacturer or advertiser-seller, and may also extend to the advertising agency. Therefore, there are scholars who argue

67 *Jacob Mathew v. State of Punjab & Anr* (2005) 6 SCC 1.

68 Supra 50 at 510.

69 Kasel v. Remington Arms, 101 Cal. Rptr. 314 (California Court of Appeal, 1972).

70 In general, the doctrine of strict liability does not apply to the rendition of services as opposed to the sale of goods. See *Magrine v. Krasnica*, 94 N.J. Super. 228 (Hudson Country Court, New Jersey,1967).

71 Supra 48, at 76.

that the celebrity endorser should bear joint responsibility[72] along with other parties for endorsing a false or misleading product. To justify this Kogan remarked "When a celebrity's endorsement causes harm to a consumer, a division can be made of the causes of the consumer's harm. The celebrity caused the injury by making a misrepresentation, but the manufacturer or seller is also responsible because it introduced a defective product or ineffective service into the stream of commerce."[73] And the justification for this joint liability lies in the indemnity clause they have with the advertiser either by the contract or as a matter of law.[74] Indeed, this opinion has already gained some response by the government.[75] Maggi case is the first step of expanding celebrities' obligation.

CONCLUSION

This is true that advertising today, conducted through any medium, is well stocked with endorsements by public figures. However, the major question is that, in the absence of specific law who should bear the loss? This is a real issue which needs to be addressed. There are few provisions of law in India that can easily import liability for misleading and dubious claims. For that it is important to consider the technique of law, already present to reason the liability of celebrity endorsements within the existing legal framework. Though, it would be difficult for the court to broaden the scope of the actions. As the trend is developing, and it is expected that in the coming future law may incorporate these rules. Other than this some of the overseas experiences of coping with false celebrity endorsements can be incorporated in our legal system. For that there is a need for specific and detailed regulation, and a clear assignment of obligation standards, in order to make every advertising participant liable. This is what we should learn from America. Just as the FTC in America has done, numerous detailed rules and specific examples have been established. This will greatly facilitate in tackling misleading statements in false endorsement. The law should impose upon the celebrity a duty to make a more pointed inquiry. Strengthening of supervision, enforcement and increasing penalties are also greatly needed. A good regulatory environment is of vital importance to prevent false or deceptive advertising.

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72 Ibid, at 47,75.

73 Ibid.

74 M. Verma Ambwani, *Maggi Soup opens a debate on celebrity endorsements*, The Hindu (Delhi 03/06/2015).

75 Mr. Paswan made a statement that 'action can be initiated by the government against the manufacturer (Nestle-India), advertising agency, and promoters/ endorsers (Madhuri Dixit) if an unfair trade practice complaint is lodged with the National Consumer Court. Compliant can also be filed with Cable Television Network (Regulation) Amendment Act for putting out a misleading advertisement'.

LEGAL E-RESOURCE AND COPYRIGHT ISSUES

*Kankana Baishya**

ABSTRACT

Legal fraternity needs to be abreast with the current legal information system that contains Licensed and Open Access (OA) e-books, e-journals and database of other digital resources. The study endeavors to compile Open and Commercial E-Resources for research community and to depict the picture of E-resource management in Indian Legal Universities. The URLs of Indian National Law Universities are collected from the website of Bar Council of India. The online survey was carried out through the websites of the concerned Universities to find out the E-resources in the field of Law. The article contains long list of Open Access Resources and the online study reveals thirteen E-books and ten E-databases are used widely in the national Law universities. Commercial resources are well organized in comparison to the Open Access resources due to the involvement of high cost which is not possible to bear by an individual and thus, University Libraries are playing a great role in this context by offering institutional access to those expensive and trust worthy licensed resources. Copyright is the matter of primary concern in case of licensed electronic sources. No copyrighted work may be reproduced, redistributed and circulated without prior permission of the copyright holder. Therefore, the users have to be primarily more concern about the usage policies and copyright issues of the resources imposed by the publishers as such to avoid any infringement causes.

Keyword: *Institutional Repository, Intellectual Property right, License, Policy, SHERPA.*

INTRODUCTION

To enhance the legal scholarship and conduct comprehensive research, it is indispensible for a legal educational institute to have a rich collection of E-resources along with printed resources. To cop up with the IT revolution, the Indian Law Universities are bound to adopt the E-Culture, comprising Licensed and Open Access (OA) e-

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books, e-journals and database of other digital resources. Licensed e-resources are subscribed through a legal agreement and the access to those resources is governed by agreement between the University and the respective publishers while the Open Access resources are accessible freely to the knowledge society. Open Access databases are the boon over commercial databases and play a vital role in bridging the gap between rich and poor legal education systems.

Research Problem

Retrieval of information today is just a matter of single click as most of the users completely rely on Google search. But the information available in the internet may not be authentic all the time and rather may lead to the wrong information. Therefore, it is the need of the hour to make the scholars aware about the availability and usage of the Open Access as well as licensed e-resources subscribed in the National law universities to pursue a qualitative research.

Purpose of the Study

The study intends to reveal the scenario of E-Resource management of National law Universities in India as well as to trace the existing legal Open Access and commercial e-resourcesand find out the protocols to be employed while using those resources.

Methodology

The URLs of Indian National Law Universities are collated from the website of Bar Council of India (http://www.barcouncilofindia.org/about/legal-education/national-law-universities-2/). The online survey was carried out through the websites of the concerned Universities to find out the E-resources in the field of Law. Internet surfing is also done to get more information on OA legal resources.

LEGAL E-RESOURCES IN INDIAN LAW UNIVERSITIES

Legal E-resources

Legal fraternity needs to be abreast with the current legal information system all the time. With the increase of legal e-resources prompt updation of knowledge becomes possible for the Legal professionals. Legal E-resources can be classified into the following types based on the accessibility

Open Access E-Resources

Open Access Legal E-resources provide opportunity to the legal society to access the contents World Wide Web i.e. free of cost and serve as a wonderful alternative for traditional information system.

The contents of the Open Access databases are usually furnished in India through various Government web portals in the form of decisions and reports free of cost. Some of the popular legal Open Access databases are as follows.

Name	Web Address	Type
Ministry of External affairs	http://www.mea.gov.in/bilateral-documents.htm?53%2FBilateral%2F Multilateral_Documents	E Treaties
JUDIS	http://www.judis.nic.in/	E Database
INCODIS	http://indiacode.nic.in/	E Database
LII	http://www.worldlii.org/catalog/56807.html	E Treaties
Portal Of Govt of India	India.gov.in	E Database
PRS Legislative Research	http://www.prsindia.org/	E Database
Law Commission of India Reports	http://lawcommissionofindia.nic.in/	E-Reports
National Women Commission Reports	http://ncw.nic.in/	E-Reports
National Human Rights Commission Reports	http://nhrc.nic.in/	E-Reports
India Labour Archives	http://www.indialabourarchives.org/aboutarchives.htm	E-Reports
Open Access Journal Search Engine	http://www.oajse.com/subjects/law.html	E-Journal collection
Directory of Open Access Journal	https://doaj.org/	E-Journal collection
Shodhganga	http://shodhganga.inflibnet.ac.in/	E-Thesis
India Kanoon	http://indiankanoon.org/	E-Database
Vakilno1	http://www.vakilno1.com/	E-Database
Legalpundits		E-Database
Advocatkhoj	http://www.advocatekhoj.com	E-Database
Human Rights Law Network	http://109.74.198.40:8087/jspui/	E-Repository

Licensed/Commercial E-Resources

Commercial E-resources are licensed for non-profit educational institutes. The contents are only accessible when contractual

agreement is signed between the commercial vendor and the subscriber for a stipulated period. The detail of mostly used resources are given below,

E-database

All the National Law University websites are thoroughly studied to find out a comprehensive list of commercial database. The table below depicts that thirteen databases has been widely used by the Universities.

Name	Url	NLSIU	NUJS	NLUB	NLUJ	NALSAR	GNLU	HNLU	NUALS	RMLNLS	RGNLU	CNLU	NLUD	NLUA
AIR Webworld	www.airwebworld.com	N	N	N	N	N	N	N	N	N	Y	N	N	N
Corporate Law Adviser	http://www.claonline.in/	N	N	N	N	N	Y	N	N	N	Y	Y	Y	N
Delnet	delnet.nic.in	N	N	N	N	N	N	N	N	N	N	N	N	Y
Ejurix	http://www.ejurix.com	N	Y	N	N	N	N	Y	N	N	N	N	N	N
Heinonline	http://heinonline.org/	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Jstor	http://www.jstor.org/	Y	N	Y	Y	Y	N	N	N	Y	N	Y	Y	Y
Kluwer Arbitration	http://www.kluwerarbitration.com/	Y	Y	N	Y	N	Y	N	N	Y	N	N	Y	N
Lexis India	http://www.lexisnexis.com/in/legal/auth/bridge.do?rand=0.4519966219047892	N	N	N	N	N	N	N	N	N	Y	N	Y	Y
Lexisnexis Academia	www.lexisnexis.com	Y	Y	Y	Y	Y	N	N	N	Y	Y	N	Y	Y
Manupatra	http://www.manupatra.com/	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y
Scconline	https://www.scconline.co.in	Y	Y	N	N	N	N	Y	N	Y	Y	N	Y	Y
Taxmann taxation database	http://www.taxmann.com/	Y	N	N	N	N	Y	N	N	N	N	N	Y	N
UN Depository	http://www.ods.un.org/simple.asp	N	N	N	N	Y	N	N	N	N	N	N	N	N
West Law	http://westlawindia.com/	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y'	Y	Y	Y
World Trade Law	http://www.worldtradelaw.net/	Y	N	N	N	N	N	N	N	N	N	N	Y	N

Y=Yes N-No

It can be traced out from the Table that AIR world and UN Depository are subscribed respectively by NALSAR, Hyderabad and NLSIU, Bangalore, Corporate Legal Adviser is used by four Universities, E-Jurix, Lexis India and World Trade Law by two universities, Heinonline and West Law are subscribed by all the Universities, Jstor by eight Universities, Kluwer Arbitration by six Universities, Lexisnexis Academia by nine Universities, Manupatra by twelve Universities, Scconline by seven Universities and Taxmann taxation database is used by three Universities. The statistical analysis is represented in Table-2.

Name	**No. of Universities**
AIR Webworld	1
Corporate Law Adviser	4
Delnet	1
Ejurix	2
Heinonline	13
Jstor	8
Kluwer Arbitration	6
Lexis India	2
LexisnexisAcademia	9
Manupatra	12
Scconline	7
Taxmann taxation database	3
UN Depository	1
West Law	13
World Trade Law	2

Statistics show, HeinOnline, Manupatra and West Law are the widely used databases among all the Universities. A brief information on the databases are given below.

a) **KluwerArbitration.com:** Itis the online resource for international arbitration research. It contains commentary from expert authors and an extensive collection of primary source materials including Conventions, Jurisdiction based information, Legislation, New York Convention Decisions, Rules and Chinese Court Decision Summaries on Arbitration. It also provides Books, Journals and News related to international arbitration.

b) **LexisNexisAcademia:** Provides access to five billions of searchable documents and records from more than 45,000 legal, news and business sources. It covers the area like legal, risk management, corporate, government, law enforcement, accounting, etc.

c) **Lexis India:** Lexis India is an extension database of LexisNexis for facilitating Indian Legal Information. Lexis India Provides Case Laws of Supreme Court of India and High Courts of respective states, Central Governmental Legislation, more than 60 Indian Legal commentaries on various law disciplines, Forms and precedents, Indian Journals including Journal of Indian Law Institute and Legal Dictionaries. Halsbury's Laws of India is also accessible through Lexis India.

d) **Manupatra:** It is the fastest growing company with content coverage of legal, taxation, corporate and business policy, commentaries, treatises, digests, editorial enhancements. Company's range of information products encompasses traditional and new media formats-Online Databases; CD-ROMs; E-mail Service; E-zine; Books and Journals.

e) **SCCOnline:** Contains the Supreme Court Cases & latest unedited judgments (latest judgments) (1969 - till date), overall all the labour law notes, law reports & latest unedited judgments till date (latest judgments) of 21 High Courts in India, tribunals and Commissions, Indian secondary materials like Constituent assembly debates, legal articles, reports of commissions and committees, bilateral treaties of the India and other nations, foreign & international materials.

f) **JSTOR :** JSTOR currently includes more than 2,000 academic journals, provides reliable 24/7 access to people in 160+ countries, upwards of 50 million pages of content that JSTOR has digitized. For the general public, JSTOR provides free access to nearly 500,000 articles no longer under copyright and offers free reading access to more than 1,300 journal titles. JSTOR launched its Books at JSTOR program in November 2012, adding 15,000 current and backlist books to its site.

g) **Westlaw India:** Contains over 300,000 High Court judgments covered as well as over 50,000 Tribunal decisions. Westlaw India contains complete amendment history and full text of Bare Acts since 1836 and Rules and Regulations. Presently, Westlaw India also covers State Legislation of 11 states. The Westlaw India full-text articles service contains thousands of articles in full text from journal titles published by the

Indian Journal of Intellectual Property Law, National Law School of India Review and The NUJS Law Review, amongst others. Westlaw India contains the UK Materials and EU Materials i.e. their cases, legislation, journals and current awareness. It also contains the US and commonwealth contents.

h) HeinOnline: HeinOnline is Hein's premier online research product with more than 90 million pages of legal history available in an online, fully-searchable, image-based format, more than 1,800 law and law-related periodicals, also contains the Congressional Record Bound volumes in their entirety, complete coverage of the U.S. Reports, famous world trials, legal classics, the United Nations and League of Nations Treaty Series, all United States Treaties, the Federal Register from inception in 1936, the CFR from inception in 1938, and much more.

i) Taxmann Online: It is a subject based database and provides case laws on direct taxes, indirect taxes and company laws. It extends it coverage to acts, rules, forms, regulations, and circulars about tax law and company laws. NLU, Delhi subscribes three user access of Taxmann. IT is a password based access service.

j) CLAonline: It is India's Online exclusive e-library on Corporate/SEBI and Business Laws since 1950 from the house of "Corporate Law Adviser". CLA contains resources on Corporate Laws (Company law, Securities Law, SEBI law, Foreign exchange law, SICA,MRTP, Competition law, Securitisation, LLP, etc) and Business Laws (Arbitration, Banking, Consumer Protection, Recovery of Debts due to Banks and Financial Institutions, Trade Marks, Designs, Copyright, Environment, IDRA, Income Tax, Information Technology, Money Laundering, Insurance, etc).

k) Worldtradelaw.net: It has two aspects. First, there is free portion of the site, which is available to anyone who surfs the web. The paid/subscribed aspect of the site consists of several elements, including well organized and easy-to-access primary source documents related to international trade law; a full text search engine for GATT/WTO decisions, a large collection of links to other sources of information on the web and a discussion form.

l) DELNET: DELNET information resources are bibliographic and full text in nature. In order to facilitate scholars DELNET covers union catalogues of books, ebooks, journals, ejournals and lots of online databases.

E-Books

Study of the University websites reveals that only ten E-Book packages are popular among the Law Universities in India. But as the e-books involve high cost and most of the holdings are reference in nature, only few Universities are subscribing to these E-book collections.

Sl. No.	Name	Web address	NLSIU	NUJS	NLUB	NLUJ	NALSAR	GNLU	HNLU	NUALS	RMLNLS	RGNLU	CNLU	NLUD	NLUA
1.	BlueBook Online	https://www.legal bluebook.com	Y	N	N	N	N	N	N	N	N	N	N	N	N
2.	Cambridge Books Online	http://ebooks. cambridge.org/	Y	Y	N	N	N	N	N	N	N	N	N	Y	Y
3.	Elgar Online	http://www. elgaronline.com/	N	N	N	N	N	N	N	N	N	N	N	N	Y
4.	Heinonline E book	http://heinonline.org/	N	N	N	Y	N	N	N	N	N	N	N	Y	N
5.	Kluwer Arbitration	http://www.kluw erarbitration.com/ CommonUI/ books.aspx	N	N	N	Y	N	N	N	N	N	N	N	N	N
6.	Oxford University Press Scholarship E Book	http://www.oxford scholarship.com/	N	N	N	N	Y	N	N	N	N	N	N	Y	N
7.	Springer Link	http://www.springer link.com	Y	N	N	N	N	N	N	N	N	N	N	N	N
8.	Taylor and Francis E Books	http://www.tand febooks.com/	N	N	N	N	N	N	N	N	N	N	N	Y	N

Y=Yes

N=No

From the above table, it is found that BlueBook Online and Springer Link are exclusively purchased by NLSIU, Bangalore, Kluwer Arbitration, Taylor and Francis and Elgar Online own by NLU, Jodhpur, NLU, Assam and NLU, Delhi respectively. Accordingly Cambridge Book Online is purchased by four Universities, HeinOnline E-book is by two Universities and Oxford University Press Scholarship E-book by is

purchased by two Universities. The detail can be better understood with the following Table. The table reveals that Cambridge Books Online is the highest used E-book collection.

Name	No. of Universities
BlueBook Online	1
Cambridge Books Online	4
Elgar Online	1
Heinonline E book	2
Kluwer Arbitration	1
Oxford University Press Scholarship E Book	2
Springer Link	1
Taylor and Francis E Books	1

A brief information on the e-books are furnished below,

a. **Bluebook online:** The Bluebook Online allows users to access the full content from anywhere of The Bluebook with dynamic searching and annotation features for individuals and groups.

b. **Cambridge Book Online:** Cambridge University Press has made more than 20,000 books on various fields out of which 2000 documents available in the field of Law.

c. **Elgar online E-book Collection:** Elgar Online E-book collection-2013 encompasses 102 e-books of legal value. The package focuses on wide range of legal areas including intellectual property, antitrust, environmental, energy law, international and comparative law etc.

d. **HeinOnline**: has a treasure of more than 5000 Legal Classic E-Books on variety of law subjects.

e. **Oxford E-Books**: *Oxford Scholarship Online* offers full-text access to scholarly works from key disciplines including 1203 documents on Law.

f. **Springer Link**: Provides access to millions of research information including 180,946 Law books.

g. **Taylor & Francis E-Books:** One of the world's leading publishers of scholarly journals, books, E-books, reference works, and databases incorporating *2736 nos of resources in the field of Law.*

h. ***KluwerArbitration.com:*** Is the world's leading online resource for international arbitration research. It contains a wealth of commentary from expert authors and an extensive collection of primary source materials.

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d) Downloaded data cannot be stored in any archival and searchable database. Some service providers allow subscribers to Post the URL to the publisher's version of the article on a website.

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Following table clearly depicts what is permitted and what is not permitted for the database users.

Permitted	Not permitted
• Viewing, downloading, copying, printing and saving a copy of search results • Using e-resources for educational, research, teaching, and personal study • Mailing an article to another authorized user or subscriber • Posting the URL to the publisher's version of the article on a website . .	• Systematic and bulk downloading • Systematic downloading or printing of entire journal issues or volumes, or large portions of other e-resources. • Using e-resources for commercial purpose (i.e. reselling, redistributing or republishing licensed content) • Remove or modify any licensed materials • Making online content available to unauthorized users • Posting contents of a licensed article to a open site • Circulating full text content online and offline

Copyright and Information Technology Act, 2000

Following provisions of the Information Technology Act, 2000 are relevant to understand the relation between copyright protection and Electronic Databases,

a) If any person (including a foreign national) violates copyright by means of computer, computer system or computer network located in India, he would be liable under the provisions of the act.

b) If any person without permission of the creator or any other person who is in charge of a computer, computer system or computer network accesses to such computer, or downloads, copies or extracts any data, computer database or information from such computer system or computer network including information or data held or stored in any removable storage medium. He shall be liable to damages by way of compensation not exceeding one crore rupees to the person so affected.

c) While adjudging the quantum of compensation, the adjudicating officer shall have to consider the following factors:
   i) The amount of gain or unfair advantage, wherever quantifiable, made as the result of the default;

ii) The amount of loss caused to any person as a result of the default;

iii) The repetitive nature of the default.

d) A network service provider (ISP) will not be liable under this act, rules or regulations made there under for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.

CONCLUSION

Advent of Information Technology has created real challenges for copyright issues as misuse of the databases becomes very easy through internet and other media in this digital era. The databases are protected in India under the Copyright Act, 1957 and Information Technology Act, 2000 as well but these issues are yet to gain momentum in comparison to the other countries. A commercial database is the compilation of various e-resources systematically arranged and fixed. Copyright Act covers only the original work of the author. But the legal databases collate also judgments from various courts which are not requisite condition for claiming copyright. For example in case of the SCC online database, the compilation of judgments cannot be something over which copyright can be claimed as the judgments are already in public domain and exempted from copyright protection. Hence, any person can reproduce and publish them unless such publication has been made restricted. But in case of journal articles the copyright protection is strongly needed as the articles are the original creativity of the authors. Creating and compilation of an Electronic database involves huge investments therefore to recover investments the database providers required to protect their effort. Open Access as well as Commercial, both types of E-resources is the indispensible part of modern Legal Information system. To carry on standard research activities, the scholars have to be well accustomed with this new trend of information system. Commercial resources are well organized in comparison to the Open Access resources due to the involvement of high cost which is not possible to bear by an individual and thus, University Libraries are playing a great role in this context by offering institutional access to those expensive and trust worthy licensed resources. Although the licensed documents are more reliable than the Open Access documents, at the same time the users have to be primarily more concern about the usage policies and copyright issues imposed by the publishers as such to avoid any infringement causes. To cultivate a balanced legal environment, copyright law should be more harmonized and comprehensive in India basically for electronic databases.

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THE LANGUAGE OF REFORM: FEMINIST ENGAGEMENTS WITH CASES OF SEXUAL OFFENSES

Navya Jannu & Elizabeth Dominic†*

ABSTRACT

In this article, we explore the semantics of language employed in legal judgments and its impact on the 'juridicalisation'[1] of reform. The scope of this exploration is limited to cases involving sexual violence. We posit that there are three types of legal judgments: (1) bad (erroneous misinterpretation) (2) progressive with regressive stereotypes and (3) reformative judgments with an extremely poor underbelly, reflecting how not to do reform in juridical style.Through a critical analysis of these judgments, we reflect on the painful inadequacies of the substance of such judgments and the societal implications of the language used therein. In doing so, we highlight the inadequate and knee-jerk nature of the 'reform' done. It is suggested that, juridical reform wholly erase the history of the feminist struggle, reinforce stereotypes, are inadequately thought about and are entirely paternalistic. The language employed in these judgments forces us to rethink the idea of judicial activism in India and reconsider its approach entirely.We argue that the insistence on doing reform raises a larger question about the nature of reform and the language used to do it: Can we actually reform the law unless we look into the psyche of the judge and people? We emphasize that there is no scholarly work on judicial writing or judgment writing and this is an attempt to fill that lacuna through this paper.

***Keywords*:** Juridicalisation, Judgments, Judicial Activism, Feminist, Sexual Offenses.

INTRODUCTION

This article originated with our desire to explore the extent to which gender has been incorporated into the semantics of 'reformative' legal

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1 Åke Frändberg, *From Rechtsstaat to Universal Law-State: An Essay in Philosophical Jurisprudence,* 16 (1st ed., 2014). (We employ the term 'Juridicalisation' to refer to the institutionalization of reform by the judiciary through judgments. '*A thing is 'juridicalised' when its organization is manned by professional functionaries, especially when they are academically educated and trained in law faculties, law schools and the like. It forces back non-juristic influences.*') See, W.W. Pue & D. Sugarman, *Lawyers and Vampires: Cultural Histories of Legal Professions,* 123-125 (2003).

judgments, concepts and judicial psyche. We are intrigued by the dynamics of interpretation of legal concepts and their articulation in judgments, which have, more often than not, satisfied and strengthened our respect for the rule of law. However, every now and then we stumble upon interpretations and articulations in judgments that tend to dilute, confuse and even erode the intrinsic value of such concepts. This forces us to rethink and question the possibility of these legal principles and the ability of those who apply it in countering their own social and human prejudices, pressures and biases when responding to cases.[2]

This paper is an assemblage of our modest deliberations on few recent judgments, relating to sexual offense, by the Supreme Court and select lower courts from 2010 to 2015, which bring to fore several problematic responses. We take a closer look at the often-misogynistic language[3] used in these judgments through a feminist lens to see, whether these judgments are actually 'reformative'.

THE PROBLEM OF REFORM

Reform is the process by which an improvement or change is done to something which is considered as wrong or unsatisfactory.[4] India is an active worksite for social and gender reform. Social reforms manifest in legislative and judicial action as awareness of the regressive and coercive nature of the social systems and institutions that result in the subjugation of women. The nature of these social systems demands a feminist engagement with their constructions of gender, culture and tradition.[5] Probing through the legal regulation of woman in the society, the nature of offenses against them, the rigid constructions of their 'role' and identity and the manner in which their cases are articulated depict the lives of women as 'subversive'

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2 A. Dhanda and A. Parashar, *Engendering Law: Essays in Honor of Lotika Sarkar,* 339 (1999).

3 By language we refer to the words, vocabulary and ideological underpinnings that are used to communicate legal judgments and decisions. Language and its semantics have strong and pervasive implications; they are powerful tools in communicating and initiating change. Judicial decisions can affect interests far beyond those formally represented in the courtroom in a number of ways. Legal rulings often tend to produce diffuse effects mainly because of the changing nature of cases coming to Court, the gravity of the offenses to be decided and the changing dynamics of the society. Very often, Judges are aware of the broader implications of their decisions and their impact on different interests groups, this pushes them to *reform.*

4 M.A. Lusted, *The Fight for Women's Suffrage,* 102 (1st ed.,2011).

5 R. Kapur and B. Cossman, *Subversive Sites: Feminist Engagements with Law in India* (1st ed.,1996).

and 'submissive' sites, demanding *reform.*[6] This discovery led 'reformers' to challenge and deconstruct hierarchies and traditional institutions that affect the person and agency of women.

We recognize that, the problem of reform exists at the level of both the judiciary and the legislature, but what is truly concerning is the impulsive, inadequate and knee-jerk nature of these reforms. It is suggested that juridical reform wholly erase the history of the feminist struggle, reinforce stereotypes, are inadequately thought about and are entirely paternalistic. The language employed in these judgments force us to rethink the idea of judicial activism in India and reconsider its approach entirely.

The insistence on gender sensitivity in judgments raises the postcolonial question of the paternalistic way in which we look at gender issues in the society. Issues of gender reform in India, unfortunately limit themselves to Good Samaritan discussions and quick actions that stem from immediate societal movements[7]. Such quick action is unhealthy because of a lack of theorization and contextualization of the role and agency of women and erasure of the historicity and context of feminist struggles on the ground. There is a pressing need to rethink the willful reluctance of the judiciary to detach themselves from antiquated notions of modesty, morality and the deeply gendered 'roles' of man and women in their judgments.

ROLE OF JUDICIARY IN BRINGING ABOUT REFORM

Judges in common law countries such as India are vested with a lot of power, they play an important role in advancing the understanding of law, fighting oppression against women and *doing* reform. It is interesting however, to note that law does not always operate in the same way and is often inundated with contradictions;[8] the law may often reinforce relations of subordination while at the same timeprovide an important source of resistance and change.[9]

In view of this, it is crucial that the Common Law Judge plays an active role in the application of the law when trying to *do reform*: actively identifying existing gaps and overcoming them.

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6 Supra n. 5.

7 For example, the Delhi Gang Rape Case of 2012 pushed for a revision of 'Rape law'. The revision of 'Rape Law' unfortunately only limited itself to expanding the definition of sexual intercourse and did not look into issues of marital rape, revision of the definition of modesty, digital penetration etc.

8 C. Smart, *Feminism and Law: Some Problems of Analysis and Strategy*, 14 International Journal of Sociology of Law 109 (1986). Carol Smart calls this the 'uneven development of law'.

9 Ibid.

How Do Judges Do Reform?

Judges can do reform through their written judgments. They must, thus be cautious and fully aware of the language used in their judgments, eliminate personal ideological underpinnings and recognize the limits of their power. The social and political significance of the judiciary[10] is highlighted in the contextof the Indian society, where:

> *We want courts to sustain personal liberties, to end tensions…We ask Courts to shield us from public wrong and private temptation, to penalize us… to adjust our private differences…*[11]

As the public hand reaches deeper into the judiciary in search for justice and reform, judges today must not only settle disputes but also solve problems that other institutions are unable and unwilling to deal with effectively.[12] They do, more often than not carry the weight and responsibility of doing reform: deciding when and how to do it.

Sexual Violence Judgments

In this section, we select a few recent judgments of the Supreme Court and High Courts,[13] (primarily cases of rape), often with an excellent goal but with terrible reasoning and an equally problematic language. We argue that three distinct perspectives[14] are discernible in the recent trend of sexual offense judgments:

a) Bad judgments (erroneous misinterpretation or misapplication of law);

b) Progressive with regressive stereotypes; and

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10 The social and political significance of the judiciary has become a common trait of contemporary democracies, this process is otherwise known as the 'Judicialization of Politics'.

11 S.M. Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 Southern California Law Review 901, 901 (1970-71).

12 Ibid, at 11.

13 We focus on judgments from these courts as they, in our opinion, have strong precedential value and thus have pervasive implications on the society and judicial cognition of issues. We emphasize the importance of the language and choice of vocabulary used in judgments rendered by courts of such stature.

14 While the categories identified as above are useful in characterizing and conceptualizing the current judicial approach in sexual offense cases, we are at the same time aware of the dangers of such a process of categorization. They appear rigid and inflexible. Efforts to fit cases into these categories may often leave out the parts that don't. Yet, without these categories it would be difficult to proceed with our theorization of the set of cases examined or communicate our perspectives thereupon. We accept that there may be 'good judgments' in this realm, however disengage with the category in itself.

c) Reformative judgments with an extremely poor underbelly.

In the discussion that follows, we will describe each of these perspectives and critically analyze the cases selected to demonstrate how they fit within the category.

ANALYSIS

Bad Judgments

In *Achey Lal* v. *State Govt. of NCT of Delhi,*[15] the accused was acquitted despite the medical report clearly stating that, the '*penetration was so severe that the victim choked to death*'. The court held that,'*it was not substantial enough to term the injuries as consistent with rape*'. The judgment is a clear step back to the pre-Mathura period. The court here emphasized that a woman should suffer a certain degree of injury to prove that she was raped.

This is a misapplication of the law pertaining to rape, which does not concern itself with 'degree of penetration' but only with the fact that penetration had occurred against the will of the victim. This approach also wholly contradicts post-Mathura amendments. What is shocking is that the Court found force in a contention that '*even if the sexual intercourse was forceful it was not forcible*' as the accused was menopausal. This necessarily implies that just because the woman is menopausal, she could not be raped and is completely outrageous. Age is not a factor to confirm rape. The Court here, instead of reprimanding this contention, relies on it in rendering its decision. This is illustrative of the painfully poor application of the law and the misguided thinking of the judiciary in rendering such 'bad judgments'.

Another site demonstrating a visible misapplication of the law is an order delivered by the Fast Track Court of Delhi, set up exclusively to handle cases of sexual violence against women as an apposite example of cases where the language employed. In a recent case,[16]

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15 *Achey Lal v. State Govt. of NCT of Delhi*, 2014 (4) JCC 2796 (The accused was alleged to have raped the deceased aged 60-65 years. Upon post-mortem the deceased was found to have suffered from injuries in the antennal part of vagina and in and around it. The cause of death was found to be asphyxia due to aspiration of gastric contents which occurred as a result of forceful sexual intercourse which was sufficient in the ordinary course of nature to cause death. The court however acquitted the accused as it found that the injuries were not sufficient enough to prove rape. The court blind folded itself to the factor that the penetration was so severe that it resulted in death. At least this could have been considered as a sufficient ground for the court to convict the accused for having caused death by negligence instead of letting him go scot-free).

16 *Suo Moto Cognizance v. Suo Motu Cognizance*, W.P.(C) 8066/2013 (Delhi High Court, 19/12/2013). (In the case, upon the insistence of the prosecutrix to

Justice Bhatt acquitted a man accused of committing rape. He opined that every act of sexual intercourse between two adults on the basis of assurance or promise of marriage does not amount to rape merely because the man revoked his promise later.

In this order, he makes certain controversial remarks on the character of the woman: referring to her as 'immoral' as she engaged in pre-marital sex. In his opinion, a girl engaging in premarital sex not only acts immorally but also acts in '*violation of the tenets of every religion as no religion in the world allows pre-marital sex*'; '*it was the sole responsibility of the girl to have weighed the pros and cons of her action before she submitted her body to the accused and that the accused cannot be held responsible for the same since it is improper for a girl to engage into such a relationship merely because of the promise of marriage.*'

In another judgment Justice Bhatt, writes "*girls voluntarily elope with their lovers to explore the greener pastures of bodily pleasure, and on return to their homes, they conveniently fabricate the story of kidnap and rape in order to escape scolds and harsh treatment from the parents.*"

The court here portrays the woman as the perpetrator of the crime. One easily notes how Justice Bhatt here is more concerned with drawing a moral code for women as opposed to punishing the offender. In this moral code, he exalts the chastity of woman and propagates the idea of pre-marital sex as a taboo and '*infamous product of western culture*' in spite of the rapid social change, which we claim that our country is undergoing. It tags those women who on their own will have sexual relationship as women of immoral character.[17] Such articulations we argue, evidence the misogynistic tenants of the judiciary that are unable to detach themselves from archaic representations of women and morality. These dated ideologies often and as illustrated here cloud the application and understanding of legal concepts in judgments.

Progressive But with Regressive Stereotypes

In a recent Supreme Court decision,[18] a division bench upheld the view that the testimony of a prosecutrix was equivalent to that of an

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fulfill the promise of marriage made by the accused, the accused took her to Jammu on the pretext of marrying her. He applied vermillion on her forehead and made her believe that they both are married and thereafter they had sexual relation).

17 Ibid. (In the case the High Court took *suo moto* cognizance and reprimanded this court for giving sermons to women. It expressed strong disapproval of the misogynistic fashion in which this court was rendering its judgments, which wholly contradicted the purpose for which it was set up).

18 *Munna v. State of MP*, (2014) 10 SCC 254 (The case of the prosecution was that while she was sleeping in her house the appellant and the co-accused entered

injured witness and therefore could be acted upon without corroboration. This we opine was a progressive and positive step in rape law reform. We are however upset with the regressive reasoning adopted by the Court in reaching this decision. This Court cites with approval the case of *Hirjibhai* v. *State of Gujarat.*[19] In *Hirjibhai's* case, the Court held,'*…no Indian woman or girl would make a false allegation of sexual assault and if an exception for the same comes up it will be from an urban elite community.*' The court here rests on a faulty and classist premise, which understands female sexuality in the terms of stereotypes of women from the middle class and upper caste Hindu sexual norms. It demonstrates a mistrust of women from the working class and acting on non-Hindu sexual norms. The court grounds its decision on the rationale that '*…a woman…would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred*'.

The Court here reinforces the archaic stereotype of the 'ideal woman' and the idea that a '*rape victim would be ostracized and will be looked down by the society and that it would take a lot of courage for her to brave the world*'. The Court remarks that,'*if an unmarried girl is subjected to rape it would be difficult for her to get an alliance from a respectable family and on the other hand if she is married her family would want to avoid talking about such an incident due to the fear of social stigma on the family name and family honor and she might lose the love of her husband and her matrimonial home might be shattered*'.

While the judgment may on the face of it appear progressive, we cannot be impervious to the problematic reasoning adopted. The Court here accepts, furthers and supports a misogynistic view of woman as the sole repository of familial honor. Instead of instilling confidence in rape victims to approach the court to meet them justice, it dissuades them in view of these antiquated ideologies. Clearly, the court is taking one step forward and two steps back.

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her house late in the night and raped her and fled. The prosecutrix stated that she was threatened with a knife to not raise an alarm and that she explained the whole incident to her husband who lodged an FIR at the police station on the next day. The issue addressed here was whether the testimony of the prosecutrix can be accepted without corroboration. The court answered it in the affirmative but in this case the circumstances as a whole casted doubt upon the case of the prosecution and therefore the accused was given the benefit of doubt).

19 *Bharwada Bhogin Bhai Hirjibhai v. State of Gujarat*, (1983) 3 SCC 217.

In another recent Supreme Court case,[20] this court held that delay in lodging the FIR should not be considered as a ground for questioning the veracity of the prosecutrix'sstatements; a plausible and progressive step towards rape law reform. Here again we see the Court resting on a problematic rationale: it cites with approval the case of *State of Rajasthan v. N.K.-The accused*[21] where the court did not rely upon 'the delay in lodging the FIR' as a ground for doubting the case of the prosecution but accepted the delay owing to the convening of a Panchayat to settle the matter within the village.The victim's family felt it better to resolve the issue in the Panchayat as opposed to lodging a case, which in their opinion '*would bring insult, shame and disrepute upon the family*.' The court while accepting this reason stated that:

> '*It was natural of them to have resorted to such an alternative as the factor that the girl was a victim of rape would have serious implications upon her marriage and the in-laws might refuse to accept her into their family as their family name would also be then at stake*.'

We argue that, these judgments despite their efforts to be progressive are held back due to their linkage to patriarchal and pre-modern notions of chastity and morality. The convictions of the rapists are being secured at the cost of re-enforcing the very assumptions that subordinate and oppress woman.[22]

REFORMATIVE JUDGMENTS WITH A POOR UNDERBELLY

In a recent decision, the Court considered whether a man acquitted of rape should be viewed as a rape case survivor.[23] While such a deliberation may be seen as a reformative step towards changing the way we 'view' rape victims today. We are upset by the lack of

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20 *Mukesh v. State of Chattisgarh*, (2014) 10 SCC 327 (The prosecutrix claimed that she had been raped by the accused when she came out of her house in the night to answer the call of nature. She stated that she had protested and tried to escape from the clutches of the accused and during the attempt she was injured as the accused caught hold of her and threw her on the ground. She also could not raise any cry for help as the accused had stuffed scarf in her mouth. After the offence was committed the accused fled and the prosecutrix informed her family about the mishap. The issue addressed here was whether the delay in filing the FIR would be sufficient to doubt the legitimacy of the prosecution's case and thereby whether it would amount as a ground for the acquittal of the accused and the court answered it in the negative).

21 *State of Rajasthan v. N.K.-The Accused*, (2005) 5 SCC 30.

22 G. Gangoli, *Indian Feminisms: Law, Patriarchies and Violence in Indi*a (2007).

23 *State v. Mr. Israil Babu*, Sessions Case No. 74 of 2014 (Tis Hazari) at Para. 25. It is interesting to note the author and presiding judge of the instant judgment to be a woman. Detailed discussion offered in this article on page 16.

contextualization and theorization that belies this deliberation. The Court writes:

> *In recent times a new expression is being used for a rape victim i.e. a rape survivor. The prosecutrix, a woman or a girl who is alive, who has leveled allegations of rape by a man is now called a rape survivor. In the present case, the accused has been acquitted of the charge of rape as the prosecutrix retracted and turned hostile. In the circumstances, such a person, an acquitted accused, who has been acquitted honorably, should he now be addressed as a rape case survivor? This leaves us with much to ponder about the present day situation of the veracity of the rape cases.*

To belittle the historicity of the term 'rape survivor' and render it to an insensitive mockery can hardly be seen as a welcome step. Rape victims in India are prey to a slew of collateral issues such as stigma and shame. As a result of several recent women's movements rape victims today are heralded as 'survivors'. The change in nomenclature resulted as part of an increasingly global movement to improve understanding of the post-sexual violence healing process and changing the society's negative perception of the female victim. 'Rape survivor' is seen as a more respectful term as opposed to the rather morally loaded term 'rape victim', thus giving it a more preferred status. Victim can imply a particular period in time, whereas surviving means you've moved past it. Seldom do we hear 'Holocaust victim', rather, it is said 'Holocaust Survivor' because they went beyond that event, they 'survived' it. The term acknowledges personal strength and fortitude. Many however, find difficulty with the use of the word 'survivor' in judgments because of the irrelevance of the term in the legal context, where the only appropriate word is 'victim'.

RETHINKING LANGUAGE USED IN SEXUAL OFFENCE JUDGMENTS

Judgments are different to other forms of legal writing; they differ not only in purpose but also in style and form. We agree that, just as there is no bright-line method of writing poems, novels or academic writing, there is no 'one-way' of writing judgments. Judges are and should be free to choose their own form, style and language to meet the subject and content of their judgments. What needs a revisit is the 'substance' or 'what' of the judgment and the choice of words (adjectives in particular) used to communicate them.[24] We emphasize the art of 'telling the story' in a judgment. This is perhaps most evident in the

24 This is the primary focus of the 'Feminist Judgment Project' spearheaded by Rosemary Hunter, among others.

Judge's rehearsal of the facts, the parties' disparate stories, background, reasons why the case came to court, information about the parties involved etc. in weaving the legal narrative of the case. Language is especially important in this regard.

Judgments can be well written and badly written. Well-written judgments we posit are 'concise, clear, interesting and accessible'[25] Bad ones are long and tend to ramble and obfuscate both the law and facts.[26] We suggest that in revising the style of writing in the realm of sexual offense cases, judges must incorporate a 'gender aware consciousness.' It is important for the judge in writing the judgment to 'set the scene' cautiously i.e. the first few lines of the judgment/ decision that crucially set the tone and approach of the decision to follow. Clarity and concision of language, style and structure are central to a judge's ability to *do reform* through the judgment.

While reviewing the case laws selected, we noted a rather misogynistic and callous approach in 'telling the story' by judges who frequently employ derogatory adjectives such as 'of loose morale', 'easy virtue' etc. in describing the female in question. Judges should be cautious of the language being used and be wary of indulging in 'irrelevant facts' and using arbitrary, dated and moralistic adjectives in doing so. The judge must make a strategic choice about *how* to tell a story, including his style and tone because of its pervasive implications particularly in cases of sexual offenses.[27]

It is not easy for victims of rape and sexual abuse to discuss the incident and so social and legal systems must strive to *make* it easy for them. It is here that impartial judicial writing is of paramount importance. They must be written about just as another cowardly and contemptible crime such as armed assault. When a house-owner is bludgeoned on the head and robbed, the narrative serves only to confirm the seriousness of the crime and the culpability of the burglar. Such a narrative must be established for rape as well; where shame for the

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25 *Judgment Writing*, available at http://www.aija.org.au/Mag02/Roslyn%20Atkinson.pdf last seen on 18/03/2015.

26 At the very least, judgments must identify the relevant facts, legal issues and make a clear decision on the application of the law to the facts without indulging in careless ventures into personal ideologies and perceptions.

27 V. Roy, *Taking the Stigma Out of Sex Crimes,* The Hindu (28/11/2013), available at http://www.thehindu.com/opinion/op-ed/taking-the-stigma-out-of-sex-crimes/article5398221.ece, last seen on 07/07/2015: when a prominent case of rape or sexual assault dominates the mindscape of a society, a slew of collateral issues also come to the fore: stigma to the rape victim, lack of privacy etc.

victim is removed from the equation and what's left are only the physical details themselves, for better or for worse.[28]

It matters for the kind of story that is ultimately being told, and for the way that story reaches the law and the law reaches that story. Gender matters...class matters. These things matter, not as a potential source of bias, but as necessary and inevitable part of the story which is unfolding.[29]

We have observed that, all judges drench their judgments in their own personal philosophies. As Richard Posner notes, the judges' choice of style, her language and structure, 'encodes' her message, her outlook.[30] Judges must keep in mind that their judgments have different audiences at all levels, each distinct from the other and engaging with it in their own personal ways. In Common Law Systems such as India, where Court cases are precedent, have a significance that stretches beyond their authoritative resolution of a specific dispute, it is important to note that, the judge is communicating not only the parties in dispute but also to the broader legal community-other lawyers, judges, law students, legal academics and the society at large. For this reason, judgments trying to *do reform* in the area of sexual violence, especially against women are particularly important. Only then, will attitudes towards the victim become far less judgmental and only then there can be reform.

ENGAGING WITH GENDER SENSITIVITY

Insistence on gender sensitivity in judgments raises the postcolonial question of the paternalistic way in which we look at gender issues in the society. Issues of gender reform in India, unfortunately limit themselves to Good Samaritan discussions and quick actions that stem from immediate societal movements.[31] Such quick action is unhealthy, because of a lack of theorization and contextualization of the role and agency of women and erasure of the historicity and context of feminist struggles on the ground. There is a pressing need to rethink the willful reluctance of the judiciary to detach themselves from antiquated notions of modesty, morality and the deeply gendered

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28 Ibid.

29 S. Berns, *To Speak as a Judge: Difference, Voice and Power*, 18 Hypatia 235 (2003).

30 R.A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 University of Chicago Law Review 1420,1422 (1995).

31 For example, the Delhi Gang Rape Case of 2012 pushed for a revision of 'Rape Law'. The revision unfortunately only limited itself to expanding the definition of sexual intercourse and did not look into issues of marital rape, revision of the definition of modesty, digital penetration etc.

'roles' of man and women in their judgments. The question hence raises that how judges dealing with cases in this field, long dominated by their preoccupation with the role of women and the Indian 'society' respond to the challenge of de-recognizing gender and morality as constitutive elements of culture and society?

Today, there is a growing demand for 'gender aware' judges.[32] To understand what this means we must revisit of two crucial concepts that guide such theorizations: 'gender awareness' and 'gender sensitivity'. We articulate the two concepts as different with distinct social implications, especially in context of sexual offense judgments. We rest the two terms on a hierarchy that places gender awareness above gender sensitivity. We understand 'gender awareness' as a theorization of man and woman as equals, having assimilated and reconciled in that understanding the biological differences between the two. 'Gender-sensitivity' on the other hand, we feel theorizes the woman as 'weak' and in need of 'sensitivity' or 'protection'. It has an uneasy paternalistic and misogynistic glow to it, which we feel differentiates it from 'gender awareness'.

Gender sensitivity imposes a duty or an obligation to be *sensitive* towards the woman. This is inherently problematic and wholly contradicts the efforts of the feminist struggle. Robert Cover in his seminal piece[33] on 'jurispathic governance', lambasted such a judicial approach. Agreeing with Cover, we press the need for more 'gender awarness' as opposed to 'gender sensitivity'. We recommend the need for more 'gender aware scholarship'[34] and the need to tailor judicial psyche to be guided by this discourse. Having said that, we now examine and carve out the kind of women, who are sought to be, protected through these sexual offences judgments through a short case study.

Let us now examine the bouquet of adjectives used by the court

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32 M*ake Judges Gender Sensitive for Justice to Women*, Outlook, available at http://www.outlookindia.com/news/article/Make-Judges-GenderSensitive-for-Justice-to-Women/739180, last seen on 20/03/2015; *Equal Justice to Women: Role of Courts and Judges*, National Commission for Women, available at http://ncw.nic.in/pdfreports/Gender%20Sensitization%20of%20Judicial%20Personnal.pdf, last seen on 18/03/2015; *Women Empowerment and Gender Justice*, available at http://www.hcmadras.tn.nic.in/jacademy/Article/Women%20Empowerment%20and%20Gender%20Justice-Dipak%20Mishra.pdf last seen on 18/03/2015; Ulrike Schultz, *Gender and Judging* (1st ed., 2014).

33 R. Cover, *Who's Afraid of Jurispathic Courts?: Violence and Reason in Nomos and Narrative*, 17 Yale Journal of Law & The Humanities, 9 (2005).

34 For example, the Delhi Gang Rape Case of 2012 pushed for a revision of 'Rape Law'. The revision of 'Rape Law' unfortunately only limited itself to expanding the definition of sexual intercourse and did not look into issues of marital rape, revision of the definition of modesty, digital penetration etc.

to describe the 'character' of the victim and attempt to whittle out the 'kind of women', the court seeks to 'protect' through its reformative judgments. At the outset, we lament and disapprove of this approach altogether, which is not only problematic but also contradicts the 'greater good' in doing reform. The court here, is both protectionist and patriarchal; emphasizing a need for them and the law to 'protect' women, who are assumed to be 'naturally weaker' than men.[35] This approach accepts the traditional discourses that accept women as weak, biologically inferior, modest etc.[36] and aid the Court's construction of the 'good woman in need of protection'.

We were upset by the misogynistic vocabulary used by the Supreme Court and High Courts, in several recent judgments. The Courts here frequently and casually employ terms such as 'good character', 'strong virtue'[37], and 'scrupulously chaste'[38] etc. in describing the characteristics of the *good woman*. If she is seen to portray the so-called 'feminine' characteristics that are perceived as 'natural' and 'appropriate', the Court will protect her and lambast the accused who 'caught',[39] 'dragged',[40] 'took against her will'[41] and 'ravished'[42] her with sexual violence. It is seen as an affront to this good woman, her morality and chastity.

On the other hand, Judges appear to be more ambivalent in the case of the notorious *bad woman*. The Court's attitude in cases involving an 'unchaste'[43] woman of 'loose character'[44], 'easy virtue'[45],

35 V.S. Deshpande, *Women and the New Law: With Particular Reference to the New Law of Rape, Being the Criminal Law Amendment Act 1983, and the New Law of Dowry*, 22 (1st ed.,1984).

36 Supra 9, at 23.

37 *Mulla and Anr. v. State of UP*, AIR 2010 SC 942.

38 *Ajahar Ali v. State of West Bengal*, 2013 (4) SCC 2523; *Phool Chand v. State of MP*, 2014 Cri LJ 4789; *Shreemad Jagadguru Shankaracharya v. State of Karnataka*, 2015 Cri LJ 827.

39 *Lilia Ram Swaroop v. State of Rajasthan*, Criminal Appeal No. 595/2004 (Supreme Court, 06/10/2010); *State of UP v. Reshmani*, 2014 (87) ALLCC 29.

40 *Ledhai v. State of UP*, 2012 (2) ACR 2108.

41 *Deepak v. State of Haryana*, 2015 (3) SCALE 414; *Vinod Kumar v. State of Kerala*, 2014 (4) SCALE 537.

42 *Md. Ali v. State of UP*, 2015 (3) SCALE 274; *Vipin v. State of UP*, 2010 Cri LJ 3789; *Satpal Singh v. State of Haryana*, (2010) 8 SCC 714; *Smt. Mona Panwar v. The Hon'ble High Court of Judicature at Allahabad, through its Registrar*, (2011) 1 SCC (Cri) 118.

43 *Narender Kumar v. State (NCT of Delhi)*, AIR 2012 SC 2281.

44 *Tukaram v. State of Maharashtra*, AIR 1979 SC 185; *Rishi Pal v. State of UP*, 2011 (4) ADJ 530; *State of Maharashtra v. Madhukar Narayan Mardikar*, AIR 1991 SC 207; *Lalruatpuia v. State of Mizoram* 2013 Cri LJ 2693.

45 *Swamy v. State of Karnataka*, Criminal Appeal No. 424/2009 (Karanataka High Court, 14/02/2014).

'loose morale'[46], 'promiscuous'[47], 'not good character'[48] or 'bad character'[49] 'frequently engaging in sexual activity'[50] or 'engaging in pre-marital sex'[51] is in stark contrast to the former. It is interesting to note how despite the negative vocabulary used to describe these women; Courts do not associate sexual *freedom* with strength or independence and still see the women in need of protection.[52]

GENDER AND JUDGING

> *The woman judge's gender puts us on notice. What it puts us on notice of is not simply the difference of the woman judge, but the dependence of all the judges on their background, values and experiences. The woman judge upsets this misleading and unhelpful image of the superhero or default judge. Her presence disrupts the 'homogeneity' of the bench, exposing unarticulated gendered assumptions embodied in our understanding of the judge and judging where the difference is inescapably present yet denied.*[53]

In this section we briefly look at a few recent judgments rendered by benches with woman judges and attempt to examine whether their gender impacted their reasoning. In other words, did a *Ruma Pal* or a *Ranjana Desai* use a different (or better) reasoning while articulating a position on sexual violence? Such a reflection we feel, offers a fresh look at the role of a woman judge and the process of judging. We re-examine here the gendered assumptions that contain our perceptions of judgments rendered by women judges and their articulations. We attempt to examine sex as a variable determinative of whether a women judges differently from men and whether they articulate things 'differently'.[54]

But first, we must ask why a judge's gender puts us on notice? Why are we concerned about the differences, if any, in the way a man

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46 *Rishi Pal v. State of UP*, 2011 (4) ADJ 530.

47 Supra n. 43.

48 *Gopal v. State of Haryana*, C.A. No. 1233 SB/2002 (Punjab-Haryana High Court, 08/11/2011).

49 *Md. Iqbal v. State of Jharkhand*, AIR 2013 SC 3077.

50 Ibid.; *Kaushal Ram v. State of M.P.*, 2011 (4) CGLJ 349; *Netram Sahu v. State of Chhattisgarh*, 2012 (4) CGLJ 168; *State of Karnataka v. Narasimha*, Criminal Appeal No.974/2011 (Karnataka High Court, 12/12/2014).

51 *Bidhan Lodh v. State of Tripura*, Criminal Appeal.No. 50/2011 (Tripura High Court, 29/01/2015).

52 Supra 45; *State of U.P. v. Pappu alias Yunus*, (2005) 3 SCC 594; *Narender Kumar v. State (NCT of Delhi)*, AIR 2012 SC 2281.

53 Supra 25, at 114.

54 Ibid.

or woman judge judges? Are there any differences in the way in which a woman judge's gender interacts with the victim/ defendant? Perhaps, a look into these questions can dispel common myths and assumptions that pervade our perceptions about women judges. For this, we discuss the cases of *Baldev Singh* and *Shimbu* (for brievity, the facts of these cases have been elaborated upon as footnotes) both comprising of benches with a woman judge. A brief perusal of these judgments in response to pleas for the reduction of sentence awarded to the rapists, reveal a visible contrastin their articulations and ideological underpinnings:

Baldev Singh v State of Punjab[55] (Katju, J and Gyan Sudha, J) is an example of, in our opinion, a very poorly articulated judgment. This judgment was adequately lambasted[56] by a bench comprising then Chief Justice, Sathasivam and Ranjana Desai, JJ in *Shimbu & Anr v Haryana.*[57]

Let us now analyse the difference in approaches taken by the judges in the two cases and identify the ideology and theoretical underpinnings reproduced in their articulations. The former case, takes a back-seat approach to the issue of comprises whereas the latter takes a more patriarchal and protectionist view in assuming that the victim would have been coerced into making the compromise. What about cases where the woman genuinely asserts her choice in permitting a reduction of sentence? An initial response to this analysis is that there are no differences between the sentencing behaviour, even in rape cases. Nor does this illustrate a case where the gender of the judge interacted with the gender of the victim. In fact a study of a few recent cases reveals that women judges have treated men and women defendants similarly; others evidence otherwise.[58]

DISCUSSION

All things being equal, it would be a good idea, both for the image of the judiciary and for women in general to have more women judges.[59] This ofcourse comes with a caveat, in that this must not lead to appointing women as judges just because they are women. Diversity

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55 *Baldev Singh v. State of Punjab*, AIR 2011 SC 1231.

56 Ibid, at 711,19.

57 *Shimbu v. State of Haryana*, AIR 2014 SC 739; J Venkatesan, *Compromise in rape cases out of the question: SC,* The Hindu (28/08/2013), available at http://www.thehindu.com/news/national/compromise-in-rape-cases-out-of-the-question-sc/article5064363.ece, last seen on 20/03/2015.

58 *Beeru v. State NCT of Delhi*, 2014 (1) JCC 509.

59 E. Rackley, *Women, Judging and the Judiciary: From Difference to Diversity*, 7 (1st ed., 2013).

must not be pursued at the expense of merit.[60] It is important to have the best man for the job.[61] It is not that there is a unique or essentially different 'female voice' with which all female judges speak but the very nature of judging. Judging is not the mechanical application of clear rules to known facts. Judges have to make choices—when the law runs out, when it is unclear or when the law gives them a choice. Anyone, male or female employs their own experiences in articulating that choice.[62] Women who have led their 'women lives' have just as much to contribute as men.

Concluding, we feel that, it is crucial for judges today to develop a 'feminist consciousness'. A feminist consciousness is not an inevitable result of being female or living life as a woman. Rather, it is a political achievement on the part of both men and women. Bringing a gender lens to judging also results from experience and education but most importantly from reflection of individuals and organizations. We wish to emphasize here that, no work has been done on this in the Indian context.

ENGAGING WITH THE 'PSYCHE'

The insistence on doing reform raises a larger question about the nature of reform and the language used to do reform: Can we actually reform the law unless we look into the psyche of the judge and people? How does one engage with the psyche of the judge? What are the implications of judicial psyche on judgments? What are the limits of legal language in conversing with societal issues?

We believe that, engagements with the 'psyche' of judges and the society have much to teach us about the law's potential limitations in addressing these struggles. A closer engagement with the psyche of judges and the society, their lived experiences, ideologies and beliefs, we believe, may provide an important lens through which law may be studied and 'reform' may be brought about. It may help us explore the nature of reform needed and its ability to reform the language in which judgments are written. It may also help us discover new ways of engaging with the law and identify why judges behave the way they do, write the way they write and think the way they

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60 Ibid.

61 Many scholars have critiqued this as a 'false dichotomy' in that it leads us to view 'merit' as a narrow concept wherein judges could be graded according to some supposedly 'objective' criteria to gauge their judging ability. Given the variety and complexity of the criteria needed to be a judge, it would be surprising if this were so.

62 In other words 'inarticulate choices' as referred to by Holmes, J over 100 years ago.

think.[63] It may even raise more questions thananswers; it may force us into deliberating the problematic connection between 'societal psyche' and 'judicial psyche'. It may help us identify the fallacies that reinforce regressive social behavior and frustrate their eradication.

CONCLUSION

'Indian culture' is an interesting paradox. While popular representations of woman depict them to be strong and feisty, Indian laws and judgments appear quite conservative and misogynistic. As demonstrated through our review and reflection of a few recent judgments, we have highlighted the limitations of judges as 'social reformers' and their 'reformative articulations' of the law in sexual offense cases.

We have discussed the semantics and implications of the language employed in judgments and their pervasive implications on the society and those formally engaged in the courtroom i.e. the victims and the defendants. We have highlighted the need to revise the language used by Judges in their judgments and the need to develop a 'gender aware' 'feminist consciousness'.

In the context of law reform, we recognize and emphasize the need to unpack and challenge the assumptions on which judgments are based and to ensure that feminist's recommendations for reform do not inadvertently reinforce the deeply gendered assumptions that have contributed towards misogynistic judgments. In doing so, it is important to be attentive towards the potential limitations of judges and the law; and to the ways in which engaging with the law may even be detrimental if not wholly limiting to the larger project of social and gender reform. We stress that strategies for engaging with the law must be rooted in a firm understanding of judicial and societal psyche. We while appreciating the noble attempts of judges to *do reform* have attempted to highlight the half-baked results of their often-contradictory engagements in communicating with their own perceptions and the society. We emphasize that there is no scholarly work on judicial writing or judgment writing and have made a modest attempt to fill that lacuna (or at least in part) through this paper.

63 Vikram Raghvan's critique of the 2013 Naz judgment attempts to view the judgment from the Judge's point of view. This example we posit, could be a possible template on how to analyze psyche of the judge in a judgment. Additionally, as we suggest that Naz Delhi and Naz SC could be useful in expanding the judiciary's understanding of sexual offences to offences involving persons other than women (the SC in Naz famously stated that yes, people do get harassed because of 377 but that is unfortunate). We argue that this kind of reasoning devalues the sexual nature of offences when women are not involved- women are sought to be protected as opposed to other persons? If so, why? What does this say about the psyche of the judge and the society?

IN RE: MOHIT MANGLANI V. M/S FLIPKART INDIA PRIVATE LIMITED AND OTHERS

Rudraditya Khare & Sakshi Malhotra†*

INTRODUCTION

In its recent order passed on April 23, 2015, the Competition Commission of India looked into the allegations of unfair trade practices against some major companies operating in online retail sector, viz., Flipkart, SnapDeal, Jabong, Myntra and Amazon. The investigation was a result of information filed by the informant Mr. Mohit Manglani. The Informant alleged that the E-Commerce portals have indulged in anti-competitive practices by entering into 'Exclusive Distribution and Supply Agreements' which have an 'Appreciable Adverse Effect on Competition'. These agreements were alleged to exclude the manufacturer from selling his goods on the other E-Portals or the physical market thereby creating market barriers. The informant alleged that this causes the buyers to agree to the process and the terms of sale of the E-Commerce portal since there is no choice available to him. According to the information filed by the Informant, such agreements are in violation of Section 3(1) read with Section 3(4), Section 4(a)(i) read with Section 4(b)(i) and Section 19(3) of the Competition Act, 2002. The case was heard by a Coram comprising of five members and was chaired by Mr. Ashok Chawla. The other members of the Coram were Mr. S. L. Bunkar, Mr. Sudhir Mittal, Mr. Augustine Peter and Mr. U. C. Nahata. The Commission gave the order in favour of the E-Commerce Portals, but the problems of the E-Commerce portals are far from over as the Commission has also launched a fresh enquiry against them with respect to the 'Resale Price Maintenance' agreements. This case will have a huge impact on the future investigations by the Commission against the E-Commerce companies since the Commission has failed to address relevant concerns.

FACTS AND ALLEGATIONS RAISED

The investigation was initiated as an upshot of information filed by Mr. Mohit Manglani (the 'Informant') against major online retail players of the Indian e-commerce industry, namely, Flipkart, Jasper Infotech, Xerion Retail, Amazon and Vector E-commerce (collectively, the 'Opposite Parties'). The Informant raised allegations suggesting that the Opposite Parties indulged in anti-competitive practices by entering

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into exclusive supply and distribution agreements with manufacturers/sellers of goods and services.[1] The Informant alleged that such exclusive agreements for sale of certain products exclude and prohibit the sale of such a good on the other e-portals and physical channels. For instance, he cited writer Chetan Bhagat's latest novel, which was launched exclusively on Flipkart. This enabled the Opposite Parties to control the supply of the goods exclusively sold on their portals, which may lead to foreclosure of market for the traders operating in the physical market, thereby causing an appreciable adverse effect on competition (AAEC). Further, this enabled them to manipulate prices and impose other terms and conditions detrimental to the interest of the consumers. This information was clubbed with the information filed by the ADCTA (All Delhi Computer Traders Association), which alleged that the Opposite Parties were engaged in predatory pricing, by purchasing goods from distributors or dealers on 21-30 days' credit and subsequently selling these products at prices lower than their purchase prices.

ARGUMENTS ADVANCED

1. That the Relevant Product Market is Inclusive of its Substitutes.

- Relevant market in question cannot be construed as product specific for each exclusive dealing agreement. The relevant market for a product would also include its close substitutes.[2]
- Therefore, products which were able to exercise a price constraint on such products would also form part of the relevant product market. For instance, the relevant product market for a book could be delineated on the basis of language, genre, etc. but could not be confined to each book which was marketed through a particular portal.
- Given the wide range of available substitutes and the existing competition in the retail market as well as amongst the e-portals themselves no single manufacturer will be able to exercise enough market power to affect competition in the relevant market.

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1 Exclusive supply agreements are considered to be anti-competitive under Section 3(4)(b) of the Act, and exclusive distribution agreements are considered to be anti-competitive under Section 3(4)(c) of the Act, if they cause any appreciable adverse effect on competition.

2 Section 2(r), The Competition Act, 2002.

2. That the Opposite Parties Operate as a Market Place Model.

- This entails that the e-portal is not the owner of the goods sold, but simply a distribution channel. According to this model the e-portals only act as facilitators providing a place wherein the sellers and the prospective buyers meet and trade the commodities.
- Therefore, the online and offline (or physical) retail markets are merely subsets of the organized retail market in India, and it do not constitute separate relevant markets in themselves.

3. That the Opposite Parties do not have a Dominant Share in the Market.

- Opposite Parties further submitted that in India organized retail market accounts for 8% of the Indian retail market and E-Commerceis a subset of the organized retail market. Under the organized retail market as well E-Commerce only accounts for 1% of the market and consequently its market share is not enough to constitute a dominant position.[3]
- With regard to their exclusive arrangements with manufacturers and suppliers, the Opposite Parties alleged that such vertical agreements[4] were not presumed to have AAEC.

4. That there is No Condition for an Appreciable Adverse Effect on Competition.

- The Competition Act, 2002 requires these exclusive supply/ distribution agreement to be evaluated on the acid test of various factors laid down under Section 19(3) of the Act,[5] so as to determine whether they discourage, or in fact, improve competition. Therefore, the Opposite Parties contended that the exclusivity of their alleged exclusive distribution and supply agreements was limited to the exclusion of other online portals, and did not exclude or prohibit the manufacturer/supplier to sell their product on their own websites/stores or in the physical market through retailers.

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3 Supra 1, at Para 16.

4 Vertical agreements refer to arrangements between entities operating at different levels in the production and distribution chain, e.g., an agreement between a manufacturer and a distributor.

5 Section 19(3), The Competition Act, 2002.

- Furthermore, they argued that given the wide range of available substitutes and the existing competition in the retail market as well as amongst the e-portals themselves, no single manufacturer was able to exercise enough market power to affect competition in the relevant market.

ORDER OF THE COMPETITION COMMISSION OF INDIA

CCI agreed with the Opposite Parties in determining that the relevant market could not be product specific as it includes all substitutes of a product. Therefore, it could not be said that the Opposite Parties were 100% dominant in the market for those products, which were exclusively marketed by them. Further, that whether the online market is considered to be a separate relevant product market or a subset of the retail market, Opposite Parties are not individually dominant. Evaluating the impugned exclusive agreements on the touchstone of the factors laid down under Section 19(3) of the Act,[6] the CCI concluded that such agreements do not seem to create any entry barriers in the market. CCI reached such a conclusion considering that the manufacturers/suppliers are free to sell their products on their own websites as well as the physical market. Moreover, the availability of variety of substitute goods gives rise to sufficient competitive constraints, which deters any scope of monopoly or dominance. The entrance of new E-portals in the market rather indicates a growth in competition. The Commission further commended the E-portals and stated that they improve price transparency, allowing consumers to make a more informed decision. CCI concluded that the alleged exclusive arrangements do not cause any AAEC in the relevant market.

CRITIQUE

The critique of the judgement is twofold:

Firstly, CCI did not decide upon or discuss whether online and offline Market constitute the same relevant market or are they separate relevant markets in themselves. Therefore, it failed to provide certainty as to how should relevant market should be determined in the future investigations. This question is essential so as to ascertain whether the Opposite Parties have a dominant or substantial share in the market so as to cause an appreciable adverse effect on competition. Furthermore, it is uncertain whether the Opposite Parties

6 The factors that were considered by the CCI in this case, include creation of entry barriers in the market, elimination of existing competitors, foreclosure of competition, accrual of benefits to consumers, improvements in production or distribution chain and promotion of technical, scientific and economic development.

shall be considered as a separate relevant market or merely a channel of distribution.

Secondly, the CCI has concluded that the shares of the Opposite Parties are not enough to be dominant or result in a Monopoly to cause AAEC.[7] This conclusion of the Commission was based on the fact that the E-Commerce market is highly competitive and none of the Opposite Parties can operate independently without considering the competition, to cause an appreciable adverse effect on the market. But if we consider the collective share of these 5 portals, it accounts for around 92% of the market share thereby giving them a dominant position to cause an appreciable adverse effect on competition. Such 'Collective' dominance is not recognized under Section 4 of the Competition Act. Under the Competition (Amendment) Bill, 2012 this concept has been proposed to be introduced in India. The Bill proposes to amend Section 4 as under:

> *...after the words 'or group', the words 'jointly or singly' shall be inserted.*

Only if this Bill which has been passed by the Rajya Sabha and tabled in the Lok Sabha on 17th February 2014 is enforced as law, the activities of the E-Commerce companies can be brought under the scanner of CCI.

SOLUTION

The only way to keep a check on the anti-competitive activities of these E-Portals is the introduction of the concept of 'collective dominance'. This concept has been recognised by the European Union and The United States of America. The application of this concept may result in a few futilities, which have also been experienced in the areas where it is already recognised. The problems that may arise by the introduction of this conceptare:

- That, collective dominance might cover cases that relate to collusion and cartelization proscribed under Section 3 of the Act.
- That, since Section 4 of the Act, unlike Section 3, does not require the CCI to show an AAEC, this might result in a situation where enterprises acting in concert but not causing AAEC, might fall under the ambit of Section 4 (1).
- Practices that occur without any collusion or anti-competitive intent may come within the purview if undertaken by a large section.

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7 Supra 1, at Para 16.

- That, there will be a risk of scrutiny under both Section 3 (3) and Section 4. In the absence of clear evidence on concerted action, it may be difficult for the CCI to establish a case under Section 3(3).
- That, in such an event, the CCI may with the proposed amendment, bring a case under section 4 (1) of the Competition Act, which does not require it to show the existence of an agreement or concerted action. Introduction of the concept of joint dominance is likely to blur the distinction between Section 3(3) and Section 4 of the Competition Act.

Thus, to make the law a little more certain, a competitive impact, i.e. some sort of harm to competition should be made an essential parameter when assessing abuse of dominance. This should be accompanied by providing meanings and clarifications drawing a distinction between Section 3 and Section 4 and also suggesting the circumstances under which either is applicable.

AFTERMATH OF THE ORDER PASSED BY THE CCI

It seems that the woes of E-Commerce portals are far from over. The CCI observed that several ecommerce portals have made illegal discount and pricing arrangements with the manufacturers for reselling their products. As per these special arrangements, the manufacturers do not allow the ecommerce players to sell a product below a particular threshold. The CCI will initiate fresh investigation against ecommerce portals for violating resale price rules, under section 3(4)(e) of Competition Act, 2002. This section provides:

> *To sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.*

If the charges are proved, then these e-commerce portals can experience a slew of penalties; and even change in their business model. The Agreements are not void *per se* but the *rule of reason* is applied so as to evaluate its voidability. Resale Pricing void only when it violates Sec 19(3)[8] but in the present case the CCI has held that the Opposite Parties do not have a dominant position to cause an Appreciable Adverse Effect on Competition, following the same reasoning it will become an enormous task for the commission to prove their liability under Section 3(4)(e).

8 *ESYS IT v. Intel Corporation*, Case No. 48 of 2011 (Competition Commission of India, 16/1/2014); *Amit Auto Agencies v. King Kaveri Trading Co.*, Case No. 57 of 2013 (Competition Commission of India, 08/10/2013).

CONCLUSION

The order of the Commission is very accurate with respect to deciding that the relevant market will not comprise of a particular product but will be considered along with its substitutes. This conclusion is in consonance with the earlier decisions where it has been held that, *'For defining the relevant market it is pertinent to examine if there exists substitutability'*.[9] It has also been held that the '*goods or services*' must be interchangeable.[10] Such a position has been affirmed UNCTAD[11] as it has stated that 'Relevant Market' includes all nearby competitors, to which consumers could turn to if the price is raised by a not insignificant amount.[12]

In spite of the accuracy observed by the court in deciding the legal accuracy, it failed to determine whether online retail market and offline retail market form part of the same relevant market or not, also the Commission did not conclusively determine whether the online retail market is a market or merely a channel of distribution. It is very important to assess what the relevant market comprises of since the further finding of the Commission will depend upon it. This order has failed to conclude that online and offline market forms part of the same relevant market or not. This will create an uncertainty as to whether online and offline market shall be considered to be different or same relevant market or merely as channels of distribution. CCI has held that no Opposite Parties have market power or dominance to cause AAEC individually. Therefore, until and unless the proposed amendment to the Competition Act is enforced the E-Commerce companies cannot be charged with anti-competitive activities.

* * *

9 *Arshiya Rail Infrastructure Limited v. Ministry of Railways*, Case No. 64 of 2010, 02 of 2011 & 12 of 2011 (Competition Commission of India, 14/08/2012).

10 *Surinder Singh Barmi v. BCCI*, Case No. 61 of 2010 (Competition Commission of India, 08/02/2013).

11 United Nations Conference on Trade and Development.

12 *Elaboration of a Model Law or Laws on Restrictive Business Practices*, Trade and Development Board, United Nations Conference on Trade and Development, TD/B/RBP/81/Rev.5,(20/02/1998) available at http://unctad.org/en/docs/tbrbp81r5.pdf, last seen on 14/08/2015.

LEGAL METHODS

Prof. (Dr.) G.P. Tripathi & Dr. Ajay Kumar
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*Vidhi Singh**

Law as a career, and to be a lawyer of the day and of tomorrow, one must get associated with economics, sociology, Indian legal history, political science subjects, in addition to law subjects. It is only one can be called as a 'lawyer', who is socially relevant, technically sound and legally competent. Law is a discipline that shares contents with all other disciplines while analyzing the system of administration of justice and governance in a democratic political system by which the country is governed. Legal system of the world *per se* is very vast in its varied nature so much so the Indian legal system and hence, it is difficulty for any lawyer to learn all law subjects and get expertise in all of them. Therefore, legal education is task-specific, particularly to an area of specialization. Nowadays legal profession is a multi-task profession where every student of it needs to have an excellent reading, writing, research and communication skills for which reviewer found this book is a value addition in the personal and the institutional library.

The book is divided into twenty-two chapters viz., Chapter-1, Legal Methods; Chapter-2, Legal Type and Social Type; Chapter-3, Theories of Law and the Legal Methods; Chapter-4, Systems of Law and Constitutional Governance; Chapter-5, Socio-Legal Methods and Evolutionary Theories-Custom; Chapter-6, Judicial Methods-Precedent; Chapter-7, Legislative Methods-Legislation; Chapter-8, Interpretation of Statutes; Legal Method to Find Out *Sententia Gegis*; Chapter-9, Ownership of Property and of the Computer System; Chapter-10, Property and Possession; Chapter-11, Legal Person, Methods of Law Creating it; Chapter-12, Legal Rights-Concept, Analysis and the Right Holders; Chapter-13, Methods how Law is Executed-Organisations of Law; Chapter-14, Methods of Law Teaching; Chapter-15, Alternative Dispute Resolutions; Chapter-16, Arbitration; Chapter-17, Negotiation-Method of Conflict Resolution; Chapter-18, Conciliation; Chapter-19, Mediation-Whether a Facilitator; Chapter-20, Lok Adalat and Legal Aid; Chapter-21, Research Methodology in Law; and Chapter-22, Globalization, Human Rights and Method of Law. Besides afore-mentioned chapterization, the authors also have

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provided with the Appendices in the book viz., Bar Council of India; the Arbitration and Conciliation Act 1996; the Legal Services Authorities Act 2010; the GAIL (India) Limited Conciliation Rules 2010; the Foreign Awards (Regulation and Enforcement) Act 1961; the Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and the Foreign Judgments (Reciprocal Enforcement) Act 1961. The authors further have provided with an exhaustive list of references in bibliography in addition to the subject Index to support the readers' independent research.

First chapter of the book is devoted to legal methods wherein the authors have analysed critically the concepts of normative character of law and morality, rules, principles, standard of justice, legitimacy of law, western philosophy and transcendental philosophy. They have further tried their best to define 'law' while focusing on scriptural law, cosmic law, and process of understanding of *dharma* with its philosophical approaches and the application of law in the modern systems of administration of justice. The authors have also focused on defining kinds of law while categorizing *priori* (deductive reasoning) and *posteriori* (inductive reasoning) methods with their merits and demerits.

The second Chapter emphases on the nuances of legal types and social types wherein legal questions in suits of civil nature, criminal nature, revenue nature etc. and the jurisdiction of courts have been discussed in detail. The authors further have explained stay of suit, injunctions-temporary and permanent, interlocutory orders, doctrine of res judicata, escalation cost, and distinction between the 'issue estoppel' and '*res judicata*'. Briefly, the authors have made a mention of the judges' job description in the legal system such as normative functions of law, legal functions of law, and social functions of law-directly or indirectly. At the end of the chapter, the authors have covered the social control as a function of law where they have pointed out that law and public opinion, interest and demands in legal system are the two main pillars of legal culture out of which the legal reasoning emerged as legal tool.

The third Chapter in which the authors have covered theories of law and the legal methods wherein importance is given on Vedic law, Greek law, Theological attitude-revelation, intuition and inspiration as a source of law. While doing so, the authors have dedicated a lot of time and space on defining the theory of Augustine (Stoics), St. Thomas Acquinas (Eternal law), Machiavelli (Political power is the end in itself), Grotius, Hobbes (The impersonal state and the individualism), Locke, Stammler (Natural law with a changing contents), Duguit (Social solidarity), Radbruch (Democratic legal

relativism), Hauriou (Legal institutionalism), and Maihofer (Natural law and existentialism). Thereafter, the authors have defined positivism with a distinction between 'is' and 'ought' to be a law; connecting with sociological and realist approaches to law. At the end of the chapter, the emphasis is given on 'pure theory of law' of Hans Kelsen which reflects early 20th century skepticism about natural law and sociology, to both of which Kelsen claimed purity of method, i.e., a method free from contamination by values of any sort.

In fourth Chapter emphasis is placed on explaining about different Empires, Leagues, Confederations, Federations, NATO, the United Nations Organisations, National Political systems, Unitary Nation-States, Federal Systems, Subnational Political Systems, Tribal Communities, Villages, Cities, and Regions Systems wherein monarchies and republics have also been discussed. The authors have further focused on the separation of power in the USA and UK context while defining legislative, executive and judicial systems of Indian democratic government with varied functions of these three organs of quasi-federal government system.

The fifth, sixth and seventh Chapters are dedicated to socio-legal methods and evolutionary theories on custom, judicial precedents and legislation wherein the authors have given in-depth invocation of law making, executing and administering system in Indian legal system. These three chapters provide a clear understanding about the law making process and also highlights its difficulties that any government faces while judicial review mechanism being invoked by the apex court. The authors opined that, 'a balance between securing the implementation of measures that were adopted by representatives of the people and the flexibility in the interest of an efficient administration lies in the conscience and experience of individual. This shows the reflection, which goes from the specific to the general and the faculty of judgment that subsumes the particular under the general form of the fundamental element that is present in every human being'.

The eighth Chapter focused on different dimensions of interpretation of statutes, wherein basic aims of interpretation are defined exhaustively. Basic rules of interpretation such as golden rule, literal rule, and mischief rule of statutory interpretation are defined with examples and the focus is also given on *Mimamsa* rules of interpretation to understand the Vedic text in the context, along with some identified Axioms and Maxims of general experience. At the end of the chapter, emphasis is also placed on *Vidhi* and *Nisedh* as text principles whether they are obligatory or non-obligatory.

The ninth and tenth Chapters are dedicated to the concept of ownership and possession over the property wherein the authors have defined these concepts with their historical and present perspectives. The focus is also made on the nature, kinds and societal approach to ownership and possession with comparative analysis of USA and USSR countries based on different society and theories.

The eleventh Chapter focused on the concept of person as an entity, natural person and legal person, theories of juristic personality-fiction theory, concession theory, purpose theory, symbolist theory or bracket theory, realist theory with seven attributes of legal person. The metaphor of personality is useful in conceptually facilitating and describing many of the corporation's traditional and modern corporate attributes such as, perpetual succession, ability to own property, ability to be sued, sue in its own name, ability to create a floating charge, limited liability, and compliance with the formalities of the Companies Act.

The twelfth Chapter explained in detail legal rights and provides their analysis with various theories such as, choice theory, benefit theory, several functions theory of Wenar, claim rights theory Sreenivasan's view on rights. Further, the authors have explained exclusivity of rights-primary and remedial rights, conditional rights, property rights and subjective rights supported by Hohfeld's analysis of legal right appropriately. However, MacCormick, Kant and Raz theories have also been provided in the chapter to make it easier for the readers to understand.

The thirteenth Chapter has explained about how, law is executed in civil, criminal, service, revenue and other legal matters in the country. Wherein, the authors have explained that what are the roles of different agencies in terms of executing law at different levels, though role of bar and the bench have also been mentioned in the chapter.

The fourteenth Chapter emphases on the methods of law teaching, examination, qualifications, levels of study, post-graduate and research degree in law. In this chapter, the authors have given a holistic approach to law teaching as a better career option where any one can achieve his goals of life and contribute to legal profession as such. The focus is also given on how the best legal curriculum can be designed for different degree programme with effective outcome of it. The reviewer is of the opinion that this chapter will enhance teaching and course design skills of young teachers, who are willing to take teaching as their career.

The fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth Chapters have been dedicated to the alternative disputes resolution mechanism wherein the authors have defined arbitration, negotiation, mediation and conciliation as an alternative disposal of disputes outside the court. While focusing on arbitration, the authors have provided statutory provisions from the Act of 1996 along with the forms of arbitration, private arbitration, judicial arbitration, arbitration and mediation process in general and family disputes and mediation in particular. Further, they have focused on negotiation theory-foundations and approaches, i.e. structural approach, strategic approach, behavioral approach, concession exchange approach and integrative approach. A considerable focus is also given to principles of conciliation with a role of a conciliator in conciliation *vis-à-vis* arbitration and mediation. The authors have supported their research with the relevant provisions of Code of Civil Procedure, UNCITRAL, ACAS and NADRAC with comparative analysis of United State of America, United Kingdom and India and opined that 'the introduction of conciliation as a means of alternative dispute resolution in the Act is definitely a positive step towards encouraging parties to opt for it. Taking into consideration the time efforts and money involved in pursuing cases before a court or an arbitrator in India, conciliation should act as the perfect means for resolving disputes, especially those of commercial nature'. Further the authors have explained on the importance of mediation as an alternative dispute resolution mechanism with steps to be taken in mediation where mediator acts as a facilitator and connected mediation with Lok Adalat in a very perfect manner.

The twentieth Chapter provides in detail the provisions of the Legal Services Authority Act, 1987 with their applicability and *suo motu* action to be taken. The chapter also provides the provisions on *Lok Adalat* and working procedure. The authors have given considerable focus on the importance of legal aid services to be provided to the variety of people within the legal limits.

The twenty-first Chapter is devoted to the research methodology in law wherein the authors have provided with meaning and objectives of research and different types of research such as descriptive or analytical; applied or fundamental; quantitative or qualitative; conceptual or empirical; and some other types of research. While highlighting the significance of research, the authors have explained in detail the formulating the research problem, extensive literature survey, development of working hypotheses, preparing the research design, determining sample design, methods of collection of the data,

methods of hypotheses testing, generalization and interpretation of data and preparation of the report. The reviewer is definitely sure that this chapter will enhance research skills of the budding lawyers in their research pursuits.

The last Chapter is dedicated to globalization, human rights and methods of law where the authors have explained in detail global sociology, theory of international social learning, reflexive globalization and politics of rights. They have further analysed new Indian jurisprudence in the light of case of *Indira Gandhi v. Jai Prakash Narayan*, idea of constitutionalism and classical liberal theory of human rights. At the end of the chapter, the authors have explained, how the process of modernization and Beck's politics for human rights have played a role in the Indian democracy.

On the whole, the book is very well articulated. The in-depth analysis of the concepts covered in the book will provide valuable insights to law students, researchers, academia, lawyers and judges. However, adequate care to correct the printing mistakes has not been taken. At different places, authors skip-over the points without giving the benefit of detailed analysis and the ratio of some cases for the benefit of the students and the researchers. Further it is humble submission of the reviewer that due to different discussed disciplines, there is slight ambiguity between different chapters. Here reviewer, while admiring the efforts of the authors in bringing out a scholastic work for the benefit of the students of law and researchers; trusts that they will fill the gaps and correct the printing errors in the next edition. This book undoubtedly will be a welcome addition for the students and researchers of law. Despite the shortcomings referred to and many other quibbles in respect of referencing, this book is good for vigorous intellectual exercise.

* * *

INTELLECTUAL PROPERTY, HUMAN RIGHTS AND COMPETITION: ACCESS TO ESSENTIAL INNOVATION AND TECHNOLOGY

Prof. Abbe E.L. Brown
Edward Elgar Publishing Ltd., Cheltenham, U.K. &
Northampton (Massachusettes, U.S.A)
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*Nichinka Upadhyaya**

Author Abbe E. L. Brown's interconnection with the subject has its start in her doctoral research evidently reflected in her book. The text goes on to mention about the essential technologies. The author has gained vast amount of her expertise and experiences in legal dimensions while being in London, Edinburg and Melbourne which acts as an additive to the credibility of her present work. Furthermore, the vast expertise in the field of law, through means of conferences and publications on Intellectual Property, Human Rights and Competition Law makes her a rightful and justified author to satisfy the requirements of the title of the book. The author had undertaken this task, as earlier mentioned in her thesis at Edinburg in 2003 from where she graduated in 2009.[1]

In recent past, the impact of Intellectual Property regime has come to hugely dominate the global politics. It affects the human rights of people around the globe. Especially from the Neo-liberal and Globalization perspective, effect is evident from a dualistic approach. At one point it necessitates the protection of one's own creativity, through exclusion of other, but states at the other end, such protection might disastrously contribute towards aggravating situations in the developing world, which runs short of material resources and fails to procure the required protected elements. Author also dwells upon the competition aspect of IP as it involves a straight question of access of technology and need to overcome competing priorities. Hence, this necessitates the identification of essential technologies and its management upon the IP Law. Brown suggests certain concrete methods that Courts can apply as a test in a form of legal analytical process more oriented towards international, national and regional spheres.

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1 See Foreword to the book.

One persisting problem arising out of the existing system, which author rightfully argues, is that even though IP rights are recognized as human rights by various international sources, they yet stand to fall in conflict with other basic human rights such as; Right to Education, Health Care, sharing of benefits for Scientific Development and Participation in Cultural Life. Hence, reading it with the Right to Exclude, the author attempts to introduce the concept of 'essential technology'. A manifestation of this frustration has been illustrated by an example of pharmaceutical drug. The access of which, can be restricted to the people who need it. This also illustrates the conflicts arising out of problems of IP power and struggles of the nations, activists and organizations. The book then also goes on to understand and analyze the existing international regime and standards laid down by it, particularly in the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).

The standards so designed and formalized in reality, limit its scope to the technology's nature and features, while excluding other incidental things. This debate is illustrated in a way that the infringement of one's IP right may be compensated by the remedy either through injunction or damages. However, Courts may refuse to grant such remedy if it falls within the category of standardized technology. Brown argues that it has undesirable consequences, as the ascertainment of nature of such matters lies with the courts which have wide discretion. Therefore it deprives the IP owner, business establishments, activists and States of any ascertained predictability. In views of Brown it is on the courts that how they draw a line of balance between IP, competition and human rights so far it relates with potentially essential technology.

In its third chapter, *Existing links and opportunities: human rights, competition and essential technologies*, author goes deep into the ulterior role, Competition has in IP, where she highlights dualistic implications arising out of existent 'abuse of dominant position' viz., geography and the availability of alternatives. A difference has been drawn between acceptable and abusive monopoly where former connotes micro and latter macro level of monopoly. An illustration for this needs necessary mention of "patent owners obtain 'a micro-monopoly … on the given specific technological solution they have developed, not a macro-monopoly on the industrial sector to which that solution belongs."[2] Author also explains that how could a technology be a step towards achievement of certain pre-decided objectives which have been laid down by human rights law as essential pre-requisites.

2 Chapter 3.II.II, supra note 48.

In its fourth chapter, *An existing solution? The judicial and regulatory interface between the three fields* covers range of jurisdictions and makes an attempt to explore the relationship between (i) IP with human rights and (ii) IP with competition. The former part has again been split into two groups; firstly where there has been a contrast in the decisions and suggestions of IP law and human rights and secondly where unanimity has been observed. Secondly, the decision relating to refusal to license IP and covering aspects relating to essential facilities doctrine and also deliberated upon Euro-Defence decision and regulatory enquiries. The author, in this chapter, primarily focuses on US, UK and EU decisions.

In its fifth chapter, *Using human rights*, the author suggest a unique test, called as the Human Rights Emphasis, as a way to balance fundamental rights when two rights happen to fall in conflict with each other. The Human Rights Emphasis involves two-step test. First step concerns with identification of certain *relevant right* and step two involves evaluation and combining of such rights. The evaluation process works upon point system where initial value of one is ascribed to each Right and which is then adjusted up and down one to meet the criteria for the right to be balanced. This leads to an output of three differential results: if in favour of IP owner then it is 'plus one'; if it is against IP owner then it is 'minus one'; or neutral. For this purpose further scenarios have also been provided to explain this summation with explanation of Human Rights Emphasis.

The sixth chapter of the book, *Market definition and abuse: new arguments for access,* shifts its focus upon Human Rights Emphasis as a desirable means for attainment of certain objectives and consequently how such rights of IP owner is protected. The chapter explains how theoretical identification of essential technologies has been developed in its preceding chapters and that the standards Brown has formed for regard of obligations imposed by EU to incorporate Human Rights Emphasis. This also could be then extrapolated to the principles of market definition with IP at the centre stage. Though Brown here also specifically makes it clear that should IP right be defined in tandem with market; and Human Rights Emphasis against the IP owner, then *it will abuse to refuse to license or to enforce the IP.*

The seventh Chapter, *Wider perspectives* contemplates and deliberates upon the possibilities of expanding perspectives on IP, human rights and competition. Brown here realistically argues that such change in national and international plane could be gradually achieved. Brown also recommends some amendments to the TRIPS for allowing greater access to the essential technologies through

definitive languages and expanding the definition and concept of *dominant position*.

The last chapter makes an attempt to extensively bring all related issues under it. Brown provides an overview of the problems and possible solution, while she also states that such solutions might not be effective to the extent as expected. She heavily emphasizes upon implementation of the Human Rights Emphasis which according to her, is intrinsically intertwined and would provide greater, wider and more equitable access and parallel to which shall also lay respect for IP rights.

Summarising the book, it makes an extensive attempt to elaborately deal with the issue which touches at the very heart of policy making systems around the globe. The conflict between human rights and competition and IP has been theoretically attempted to be harmonized and for this purpose Brown focuses more in UK and EU region. This naturally highlights the command she holds on the regional issues.

But the book in the light of such confined regional focus has its own drawback, as it stands to lose favour with reader from different regions of the world, especially in the country like India. This could be undone if the local issues which India faces are understood by drawing an analogy with the illustration and applying the theories developed by Brown and testing it.[3]

Adding further, the book in my personal opinion strongly helps provide some philosophical grounds for the Indian courts to domestically apply its test for betterment and harmonization of various conflicting subject matters.

* * *

3 One example of such analogy could be the IP issues arising out of generic drugs and the human rights implications arising out of it. Simultaneously Anti-trust Law and Compulsory License provides a stronger ground for successfully arguing in favour of applying such theories.

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