



# INTERNATIONAL JOURNAL OF LAW & MANAGEMENT STUDIES

Volume II Issue I  
**FEBRUARY 2017**

**ISSN-2455-2771**

*International Journal of Law & Management Studies is a bi-monthly law journal published by Harbinger Technologies, bearing the ISSN number 2455-2771 and is indexed in Scholarly Open Access, ROAD Directory of Open Access Scholarly Resources, International Innovative Journal Impact Factor (IIJIF), Scientific Indexing Services (SIS), I2OR Indexing Services, Directory of Research Journals Indexing (DRJI) and other research databases of value. Impact Factor 2.145*



**HARBINGER**  
bringing the web closer to you

**PUBLISHED BY HARBINGER**

## EDITORIAL BOARD

### *Core-Team*

Sameer Avasarala, Publishing Editor

Shashank Kanoongo, Managing Editor

Samiya Zehra, Managing Editor

Sneha Priya Yanappa, Honorary Member

Devina Srivastava, Executive Editor, ICLR

Shruti Sharma, Executive Editor

### *Editorial Board*

1. Sushma Reddy, Associate Editor
2. Sumedha Sen, Associate Editor
3. Sumana Chamorthy, Associate Editor
4. Varshini Rajesh, Associate Editor
5. Prachi Srivastava, Associate Editor
6. Shreyan Acharya, Member Editor
7. Aswinikumar Bairagi, Member Editor
8. Urmila Debbarma, Member Editor
9. Mohit Kumar Gupta, Member Editor

## ADVISORY BOARD

1. Ms. Sneha Priya Yanappa, Honorary Member, Editorial Board
2. Adv. Dr. Kishor Dere, Research Scholar
3. Adv. Anantha Krishna, High Court of Hyderabad
4. Dr. Lokanath Suar, G.M. Law College, Puri
5. Adv. Shravanth Arya Tandra, Karnataka High Court
6. Dr. Monika Jain, Amity Law School, Delhi
7. Dr. Sudeepta Pradhan, ICFAI Business School, Hyderabad
8. Prof. Deevanshu Shrivastava, Jagran Lakecity University, Bhopal
9. Prof. Yash Tiwari, Barkatullah University, Bhopal
10. Prof. Rahul Mishra, Alliance School of Law, Bengaluru

**CONTENTS**

Editorial Note	5
<b>1. DISPUTE RESOLUTION IN INTERNATIONAL LAW WITH REFERENCE TO INTERNATIONAL COURT OF JUSTICE</b>	
Dr. Manjula S.R.	6
<b>2. STRESS OF DISTRESSED ASSETS: WILL THE JOURNEY CONTINUE OR END?</b>	
Deepak Tulsani, Sachin Kumar	16
<b>3. AN ECONOMIC DINOSAUR – WILL THE WORLD SURVIVE?</b>	
Sachin Kumar, Deepak Tulsani	30
<b>4. GROWTH OF PIL &amp; JUDICIAL ACTIVISM IN INDIA</b>	
Ganesh N. Pandey	39
<b>5. BAN ON ONLINE ADS: A SHIELD TO AVERT FEMALE FOETICIDE (CASE COMMENT)</b>	
Kahkashan Jabin, Shreet Raj Jaiswal	46
<b>6. ABORTION LAW: AN URGENT NEED FOR UPGRADATION</b>	
Mannat Singh	54
<b>7. CORPORATE CULTURE &amp; ETHICS IN MODERN ORGANISATIONS</b>	
Prof. P.S.S. Laxmi Kavya	64
<b>8. PRACTICAL CHALLENGES CIRCUMSCRIBING CSR IN INDIA</b>	
Raavi Mehta	74

9. **ENFORCEMENT OF COMPETITION LAW IN INDIA: A COMPARATIVE ANALYSIS WITH UK & EU**

Riyanka Roy Choudhury 80

10. **JUDICIAL ACTIVISM IN APPOINTMENTS**

V.G. Sreeram 104

11. **FORUM SHIPPING & DISPUTE SETTLEMENT IN INTERNATIONAL INVESTMENT ARBITRATION:  
THE ROAD AHEAD**

Vandana Kumari 115

Thank you Note 135

\*\*\*

## *Editorial Note*

Volume II Issue I

*The Editorial Board of the International Journal of Law & Management Studies is pleased to bring forth Volume II of the journal! The journal has attempted to cover a wide ambit of areas including all such areas which form the nexus between law and management. The journal has strived to contribute to the academic research improving around critical legal issues through articles contributed by students, practicing scholars and academicians.*

*The scope and extent of International Journal of Law & Management Studies is not limited to commercial laws and includes within its ambit laws that directly or indirectly impact the socio-economic framework of the country which is a big determinant of investments in the country. Governance and related matters have also been a point of focus. Governance, being the prerogative of the Legislature and the Parliament is fundamental to the growth of a country. However, when civil rights and liberties are at stake owing to disregard and the apathetic attitude shown by Legislature in law-making, Executive in its implementation, Judiciary, being the last resort for the citizenry, acts as the engine of social welfare.*

*The journal seeks to focus, in the upcoming issues, on certain growing areas of law including Intellectual Property Rights, Competition Law, moving towards tribunalisation of all commercial areas of law. The journal seeks to study the way tribunals function and importantly, overlapping jurisdiction of tribunals in commercial law spheres in the upcoming issues*

**Sameer Avasarala**

*Publishing Editor*

We seek to place our gratitude on record to all contributors for their valuable research papers, articles through which the journal seeks to promote active academic research in the areas.

**DISPUTE RESOLUTION IN INTERNATIONAL LAW WITH REFERENCE TO  
INTERNATIONAL COURT OF JUSTICE**

**Dr. Manjula S. R<sup>1</sup>**

**ABSTRACT**

The dispute refers to the existence of disagreement where the material proposition of fact or law is affirmed by one party and denied by the other party. Until the 1990's Indian economy was heavily influenced by socialistic principles which tended to paint foreign direct investment as highly distortionary and largely negative in its effects on national economic development. In this direction, India, has entered into so many bi-lateral treaties with other countries. International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN). The idea for the creation of an international court to arbitrate international disputes first arose during the various conferences that produced the Hague Conventions in the late 19th and early 20th centuries. The body subsequently established, the Permanent Court of Arbitration, was the precursor of the Permanent Court of International Justice (PCIJ), which was established by the League of Nations. From 1921 to 1939 the PCIJ issued more than 30 decisions and delivered nearly as many advisory opinions, though none were related to the issues that threatened to engulf Europe in a second world war in 20 years. The ICJ was established in 1945 by the San Francisco Conference, which also created the UN. All members of the UN are parties to the statute of the ICJ, and nonmembers may also become parties.

The court's primary function is to pass judgment upon disputes between sovereign states. Only states may be parties in cases before the court, and no state can be sued before the World Court unless it consents to such an action. Under article 36 of the court's statute, any state may consent to the court's compulsory jurisdiction in advance by filing a declaration to that effect with the UN secretary-general, and by 2000 more than 60 countries had issued such a declaration. The declaration (the "optional clause") may be made unconditionally, or it may be made on condition of reciprocity on the part of other states or for a certain time. In proceedings before the court, written and oral arguments are presented, and the court may hear witnesses and appoint

---

<sup>1</sup> Assistant Professor, P.G. Department of Law, Karnataka University, Dharwad

commissions of experts to make investigations and reports when necessary. Cases before the ICJ are resolved in one of three ways: (1) they can be settled by the parties at any time during the proceedings; (2) a state can discontinue the proceedings and withdraw at any point; or (3) the court can deliver a verdict. The ICJ decides disputes in accordance with international law as reflected in international conventions, international custom, general principles of law recognized by civilized nations, judicial decisions, and writings of the most highly qualified experts on international law. The court's judgment is final and without appeal.

**Keywords:** Hague Conventions, International Court of Justice, Judicial decisions, jurisdiction, reciprocity,

## INTRODUCTION

The term international disputes not only cover disputes between states as such but also other cases that have come within the ambit of international regulation, being certain categories of disputes states in one hand and individuals, bodies corporate, and non-state entities on the other hand. There are two methods of dispute settlement i.e. Peaceful means of settlement and forcible method of settlement.

The purpose of United Nations is to maintenance of peace. It is fair to say that international law has always considered its fundamental purpose to be the maintenance of peace. Basically, the techniques of conflict management fall into two categories that are *diplomatic procedures* and *adjudication*. The former involves an attempt to resolve differences either by the contending parties themselves or with the aid of other entities by the use of the discussion and fact-finding methods. Adjudication procedures involve the determination by a disinterested third party of the legal and factual issues involved, either by arbitration or by the decision of judicial organs. The United Nations Charter requires all members' states shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.<sup>2</sup>

The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States notes that, 'States shall accordingly seek early and just settlement of their international disputes by Negotiation, Inquiry, Mediation, Conciliation, Arbitration, Judicial

---

<sup>2</sup> Article 2 (3) of the United Nations Charter-1947

Settlement, resort to regional agencies or arrangements or other peaceful means of their choice'.<sup>3</sup> The same methods of dispute settlement are stipulated in article 33(1) of the UN Charter, although in the context of disputes the continuance of which are likely to endanger international peace and security. The efforts also initiated by the regional instruments for peaceful settlement of disputes.<sup>4</sup>

## DIPLOMATIC METHODS OF DISPUTE SETTLEMENT

The diplomatic methods of dispute settlement involve negotiation, conciliation, mediation, arbitration and judicial settlement etc.

**Negotiation:** The negotiation is a bi-partite procedure which involves only two parties to resolve their disputes without the intervention of neutral third party. It consists basically of discussions between the interested parties with a view to reconciling divergent opinions, or at least understanding the different positions maintained. Negotiations are the most satisfactory means to resolve disputes since the parties are so directly engaged. It depends upon the degree of mutual goodwill, flexibility and sensitivity.

In certain circumstances, there may exist a duty to enter into negotiations arising out of particular bilateral or multilateral agreements. The Convention on the Law of the Sea, 1982 provides that, when a dispute arises between states parties concerning the interpretation or application of the Convention, 'the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means'.<sup>5</sup>

*In Cameroon v. Nigeria (Preliminary Objections)*<sup>6</sup> It was emphasized that, 'Neither in the Charter or otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the court, it is possible that tribunals may direct the parties to engage in negotiations in good faith and may indicate the factors to be taken into account in the course of negotiations between the parties. Therefore, the negotiations have to be conducted in good faith.

---

<sup>3</sup> General Assembly Resolution No 2625 (XXV).

<sup>4</sup> a) American Treaty on Pacific Settlement, 1948 b) The European Convention for the Peaceful Settlement of Disputes, 1957

<sup>5</sup> Article 283(1) of the Convention, it was discussed by the International Tribunal for the Law of the Sea in *Southeren Bluefin Tuna* cases, 28 ILM, 1999, p- 1624.

<sup>6</sup> ICJ Reports, 1998, pp-275,303.

*In German External Debts*<sup>7</sup> The Court was emphasized that although an agreement to negotiate did not necessarily imply an obligation to reach an agreement, it does imply that serious efforts towards that end will be made’.

*In the Lac Lanoux arbitration*<sup>8</sup>, it was held that consultations and negotiations between the two parties must be genuine, must comply with the rules of good faith and must not be mere formalities. The infringement of the rules of good faith was held to include the unjustified breaking off of conversations, unusual delays and systematic refusal to give consideration to proposals or adverse interests.<sup>9</sup>

*In North Sea Continental Shelf Case*<sup>10</sup> it has been considered that, where disputes are by their continuance likely to endanger the maintenance of international peace and security, article 33 of the UN Charter provides that the parties to such disputes shall first of all seek a solution by negotiation, inquiry or mediation and then resort, if the efforts have not borne fruit, to more complex forms of resolution.

### **Good Offices and Mediation**

Another type of diplomatic procedure of dispute resolution is Good Offices and Mediation. It involves the use of a third party, whether an individual or individuals a state or group of states or an international organization, to encourage the contending parties to come to a settlement. Unlike other techniques this process aims at persuading the parties to a dispute to reach satisfactory terms for its termination by themselves. Technically good offices are involved where a third party attempts to influence the opposing sides to enter into negotiations, whereas mediation implies the active participation in the negotiating process of the third party itself.

One of the examples of the good offices method is the role played by the US President in 1906 in concluding the Russian-Japanese War, or the function performed by the USSR in assisting in the peaceful settlement of the India- Pakistan dispute in 1965. Another negotiation began in Paris in the early 1970s. A mediator, such as the US Secretary of State in the Middle East in 1973-74 has an active and vital function to perform in seeking to cajole the disputing parties to reconcile the

---

<sup>7</sup> 47 ILR, pp-418,454.

<sup>8</sup> 24 ILR, PP-101,119.

<sup>9</sup> It was held in *Tacna- Arica Arbitration* case.

<sup>10</sup> 1969, ICJ Reports, pp-3,47.

different claims and improve the atmosphere pervading the discussions. The UN Secretary-General can sometimes play an important role by the exercise of his good offices.<sup>11</sup>

**The Hague Conventions of 1899 and 1907** laid down many of the rules governing these two processes. The signatories to the treaties had a right to offer good offices or mediation, even during hostilities, and that the exercise of the right was never to be regarded by either of the contending sides as an unfriendly act.<sup>12</sup> It was also explained that such procedures were not binding. The Conventions laid a duty upon the parties to a serious dispute or conflict to resort to good offices or mediation as far as circumstances allow, before having recourse to arms.

### **Inquiry**

The dispute resolution sometimes requires conducting inquiry. Inquiry as a specific procedure under consideration here is to be distinguished from the general process of inquiry or fact finding as part of other mechanisms for dispute settlement such as through the UN or other institutions. Provisions for such inquiries were first elaborated in The Hague Conference as possible alternative to the use of arbitration.<sup>13</sup>

Inquiry was most successfully used in the *Dogger Bank incident of 1904* where Russian naval ships fired on British fishing boats in the belief that they were hostile Japanese torpedo craft. The Commission of Inquiry consisted of four naval officers of the UK, Russian, French and American fleets, plus a fifth member chosen by the other four. It was required to examine all the circumstances, particularly with regard to responsibility and blame. It was found that there was no justification for the Russian attack. In the event, both sides accepted the report and the sum of 65,000 found were paid by Russia to the UK.

The United States of America was concluded 48 bilateral treaties between 1913 and 1940 with provisions in each one of them for the creation of a permanent inquiry commission were known as the *Bryan treaties*.

In *Letelier and Moffitt* case, the only decision to date under one of the Bryan treaties, a US-Chile Commission was established in order to determine the amount of compensation that would be paid

---

<sup>11</sup> MALCOLM N. SHAW QC, 'International Law', (2008) Sixth edition, Cambridge University Press ,P-1018.

<sup>12</sup> Article 3 of the Hague Convention No.1, 1899 and Convention No. I, 1907.

<sup>13</sup> Article 9 of the Hague Convention.

by Chile to the US in respect of an assassination alleged to have been carried out by it in Washington DC. Chile denied liability but agreed to make an *ex gratia* payment equal to the amount of compensation that would be payable upon a finding of liability, such amount to be determined by the Commission.<sup>14</sup>

### Conciliation

Conciliation is a process of dispute resolution by the intervention of the third party as chosen by the parties themselves. It involves the elements of both inquiry and mediation, and fact it emerged from the treaties providing for permanent inquiry commissions. The conciliation is to make proposals for possible settlement but not a binding decision. The rules dealing with conciliation were elaborated in the 1928 General Act on the Pacific Settlement of International Disputes. **The Geneva General Act** as amended provides that, ‘The task of the Conciliation Commission shall be to elucidate the questions in dispute to collect with that object all necessary information by means of enquiry or otherwise, and to endeavor to bring the parties to an agreement. It, may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.’<sup>15</sup> A number of multilateral treaties do, however, provide for conciliation as a means of resolving disputes.<sup>16</sup>

*In Iceland-Norway dispute*<sup>17</sup> the conciliation procedure was used over the continental shelf delimitation between *Iceland and Jan Mayen Island*. The agreement establishing the Conciliation Commission stressed that the question was the subject of continuing negotiations and that the Commission report would not be binding, both elements characteristic of the conciliation method. The Commission also took into account Iceland's strong economic interests in the area as well as other factors. The role of the concept of natural prolongation within continental shelf delimitation was examined as well as the legal status of islands and relevant state practice and court decisions.

---

<sup>14</sup> *Supra* note no 11.

<sup>15</sup> Article 15 (1) as amended in 1949.

<sup>16</sup> The 1948 American Treaty of Pacific Settlement, 1957 European Convention for the Peaceful Settlement of Disputes, The 1964 Protocol on the Commission of Mediation, Conciliation and Arbitration to the Charter of the Organization of African Unity, the 1969 Vienna Convention on the Law of the Treaties, the 1981 Treaty Establishing the Organization of Eastern Caribbean States, the 1975 Convention on the Representation of States in their Relations with International Organisations etc.

<sup>17</sup> 20 ILM,1081,p-797.

The solution proposed by the Commission was for a joint development Zone; an idea that would have been unlikely to come from a judicial body reaching a decision solely on the basis of the legal rights of the parties. The flexibility of the conciliation process seen in the context of continued negotiations between the parties was demonstrated.

## **INTERNATIONAL INSTITUTIONS AND DISPUTE SETTLEMENT**

The United Nations charter provides for the existence of regional arrangements or agencies with such matters relating to the maintenance of international peace and security.<sup>18</sup> It stipulates that members of the UN entering into such arrangements or agencies are to make every effort to settle local disputes peacefully through such regional arrangements or by such agencies before referring them to the security Council, and that the Security Council encourages the development of the peaceful settlement of local disputes through such regional arrangements.<sup>19</sup>

### **The African Union (Organization of African Unity)**

The Organization of African Unity was established in 1963. Article XIX of its Charter referred to the principle of the peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration and to assist in achieving this Commission of Mediation, Conciliation and Arbitration was established by the Protocol of 21 July 1964.

There are number of sub regional organizations in Africa in conflict resolution.<sup>20</sup> The mission of ECOWAS is to promote economic integration and its institutions include the Authority of Heads of State and Government; the Council of Ministers; the Community Parliament; the Economic and Social Council; the Community Court of Justice; a secretariat and a co-operation fund.

### **The Organization of American States<sup>21</sup>**

It provides that international disputes between member states must be submitted to the Organization for peaceful settlement, although this is not to be interpreted as an impairment of the rights and obligations of member states under articles 34 and 35 of the UN Charter. The American

---

<sup>18</sup> Article 52 (1) of Chapter VIII of the UN Charter

<sup>19</sup> Article 52(2) of the UN Charter

<sup>20</sup> The Economic Community of West African States (ECOWAS)-1975, a Protocol on Democracy and Good Governance adopted in 2001.

<sup>21</sup> Article 23 of the Charter of the OAS, signed at Bogota in 1948 and as amended by the Protocol of Cartagena de Indias, 1985.

Treaty of Pacific Settlement sets out the procedures in detail, ranging from good offices, mediation and conciliation to arbitration and judicial settlement by the International Court of Justice.

One of the examples concerned the frontier incidents that took place on the border between *Costa Rica and Nicaragua* in 1985. The Council set up a fact-finding Committee and, after hearing its report, adopted a resolution calling for talks to take place within the Contadora negotiating process.

**The Arab League**<sup>22</sup> it aims at increasing co-operation between the Arab States. It facilitates for peaceful settlement of disputes amongst its members. In practice, it consists primarily of informal conciliation attempts. One notable exception was the creation in 1961 of an Inter-Arab Force to keep the peace between Iraq and Kuwait.

**In Europe:** The European Convention for the peaceful Settlement of Disputes adopted by the Council of Europe in 1957 provides that legal disputes are to be sent to the International Court, although conciliation may be tried before this step is taken. Other disputes are to go to arbitration, unless the parties have agreed to accept conciliation.

## **BINDING METHODS OF DISPUTE SETTLEMENT**

**Arbitration:** Among all other dispute mechanisms Arbitration is considered as the binding process. The procedure of arbitration grew to some extent out of the processes of diplomatic settlement and represented an advance towards a developed international legal system. It emerged with the Jay treaty of 1794 between Britain and America which provided for the establishment of mixed commissions to solve legal disputes between the parties. The procedure was successfully used in the Alabama Claims arbitration of 1872 between the two countries, which resulted in the United Kingdom to pay compensation for the damage caused by a Confederate ship built in the UK.

Arbitration is a useful process where some technical expertise is required or where greater flexibility and speed than is available before International Court is desired.

## **CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES- 1899**

---

<sup>22</sup> The Arab League was established in 1945.

Part IV of the convention deals with international arbitration. Article 37 states that, international arbitration has for its object the settlement of disputes between states by judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the award.

**Permanent Court of Arbitration** was also established to facilitating an immediate recourse to arbitration for international differences, which is not possible to settle by diplomacy the contracting parties undertake to maintain the Permanent Court of Arbitration as established by the first peace conference.<sup>23</sup> There are other conventions which deal with the Arbitration as the best mechanism to resolve the international disputes.<sup>24</sup> *Island of Palmas Case*<sup>25</sup> as a result of Spanish – American War of 1898, Spain ceded the Philippines to the U.S by the Treaty of Paris of that year. In 1906, A U.S official visited the island of Palmas which believed to be part of the territory ceded to it and found surprise a Dutch flag there. In the first place the Arbitrator deems it necessary to make some general remarks on sovereignty in its relation to territory.<sup>26</sup>

## INTERNATIONAL COURT OF JUSTICE

The main functions of the international court of justice and tribunals are to resolve the disputes between the states. The potential for such disputes to raise important issues of international institutional law is reflected in many cases, like an application filed by the former *Yugoslav Republic of Macedonia against Greece*, in 1993.<sup>27</sup> alleging that in the case of an application to join NATO Greece has violated the obligations. The documents governing the functioning of the Court are silent concerning the method by which special agreements are to be notified to the court. Where proceedings are instituted by special agreement, Article 40(1) of the Statute provides that the case is brought before the court by notification of the special agreement.<sup>28</sup>

---

<sup>23</sup> Article 41 of the Convention.

<sup>24</sup> 1) Convention on the Execution of foreignn Arbitral Awards-1927, 2) Convention on the Recognition and enforcement of foreignn Arbitral Awards-1958, 3) Resolution of the United Nations Conference on International Commercial Arbitration-1958, 4) European Convention on International Commercial Arbitration-1961 5) United National Commission on International Commercial Arbitration-1985.

<sup>25</sup> 1938, A.J.I.L. 735.

<sup>26</sup> D.J.HARRIS, 'Cases and Materials on International Law', (1979), Sweet and Maxwell Limited, London, Sixth Edition, p-174.

<sup>27</sup> PHILIPPE SANDS Q.C., 'Bowett's Law of International Institutions', (2011), First South Asia Edition Thomson Reuters (Legal) Ltd, London, p-342..

<sup>28</sup> Shabtai Rosenne, 'The Law and Practice of the International Court' (1965) Volume 2, Printed in the Netherlands printing Division, Leyden, p-523.

It is generally admitted that, the determination of whether municipal laws are consistent with international law is an essential part of the function of any international court. In *Norwegian Fisheries Case*<sup>29</sup> Judge Anzilotti, goes so far as to say that the Court has sovereign power of adjudication on this point.<sup>30</sup>

---

<sup>29</sup> 1951 I.C.J, P-181

<sup>30</sup> C.Wilfred Jenks, ' *The Prospects of International Adjudication* ',(1964), London- Stevens & Sons Limited ,Dobbs Ferry, New York, Oceana Publications, p-557.

**STRESS OF DISTRESSED ASSETS- WILL THE JOURNEY CONTINUE OR END?**

**Deepak Tulsani, Sachin Kumar<sup>31</sup>**

**ABSTRACT**

The non-performing assets of the banks which have reached an alarming level, has gathered the attention of the policy makers and investors. The losses continually written off by banks has put the entire system in a state of peril. Although progress is necessary however, progress at the cost of future sustainability is hazardous in this dynamic environment. This paper examines the current trends in the NPA, shows how the problem in public sector bank is much worse than private sector banks, provides some remedial measures.

**Keywords:** NPA, PSB's, loans, SBI.

**INTRODUCTION**

The banking system in India originated in the last decade of 18<sup>th</sup> century. There was State Bank of India(SBI), State Bank of Patiala, State Bank of Mysore, State Bank of Hyderabad, etc., who were the main players at that time. However, the trend was to be biased towards the rich people which was huge obstacle in the goal of promoting social and economic imperatives, agriculture and so on. In 1991, Prime Minister Indra Gandhi initiated the nationalization of banks in order to remove these obstacles and break the monotony so that the four-decades of state-directed lending could come to an end and credit was available to agriculture, personal financing, housing, industry, etc. The primary function of banks is to lend loans and take deposits but now it involves a lot of facilities such as ATM'S, NEFT, RTGS, CHEQUE, etc. while nationalization did help in providing to the undermined sectors of the economy, it also led to an increase in the NON-PERFORMING ASSETS(NPA).

A NON PERFORMING ASSET is described as a loan that doesn't generate income for the banks. As long as a loan is reimbursed in the form of its interest and principal payments it does not cause

---

<sup>31</sup> Student, Symbiosis Centre for Management Studies, Pune, Symbiosis International University, Pune

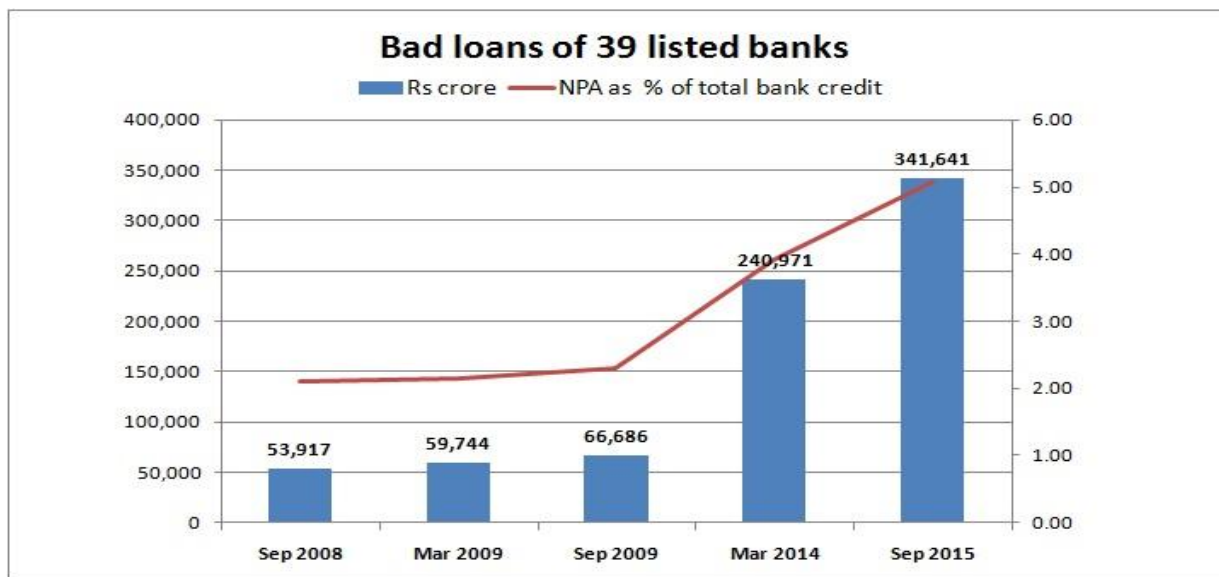
any worry to the bank, but the moment it ceases to generate income for more than 90 days, it is declared as a NON PERFORMING ASSET.

I can still remember when my professor told me about the Narasimhan committee-1 and NPA. The purpose of the Narasimham-I Committee was to study all aspects relating to the structure, organization, functions and procedures of the financial systems and to recommend improvements in their efficiency and productivity. The Narasimhan committee-1 proposed that the NON-PERFORMING ASSETS should be maintained at 3-4% in the economy which led to the development of ASSET RECONSTRUCTION FUNDS(ARF'S).

International experience shows that when the bad loan recognitions are postponed, banks lose their ability to fund an economic revival- as it happened with japan with 'zombies' after the 1989 crash.

“There are two approaches for zombie bank managers take as they struggle to bring their institutions back to life,” writes Yalman Onaran in ‘zombie banks’. “they’ll hoard cash and give a few new risky loans, and wait for the slow profit-building to pay for losses overtime. Or they will take much bigger risks with the hope that they can make windfall profits to plug the holes.”

The NPA is an industrial phenomenon which indicates industrial sickness. It causes degradation of the reputation of the banks, increases credit risk and also causes the banks to gives lesser interest on deposits along with a couple of other things. In India, the NPA situation had been evolving since 2008 and still continuing.



(Shukla, n.d.)

From Rs 53,917 crore, Indian banks gross non-performing assets (GNPAs) in September 2008 (just before the 2008 global financial crisis broke out following the collapse of Lehman Brothers), the bad loans have now grown to Rs 3,41,641 crore in September 2015. In other words, the total GNPAs of banks, as a percentage of the total loans, has grown from 2.11 per cent to 5.08 percent (without considering the potential bad loans).

And this why RBI Governor Raghu Ram Rajan has ordered the banks for an early recognition of NPA's. the question is whether it was a right move?

### **OBJECTIVE OF THE STUDY**

This study is undertaken with the view to analyze the effect of the NON-PERFORMING ASSETS on the banking sector, what will be the repercussions and what remedies can we provide in order to tackle the NPA. In order to assess the validity of the above statement and to fully understand the trends in NPA, the study has been taken up with the following objectives:

1. To check the current trends of NPA for future implications.
2. To suggest remedial measures that could be taken to tackle NPA's.
3. To study the status of NPA of selected banks.
4. To understand the measures already implemented.

### **CONTRIBUTION TO THE STUDY**

The study will be beneficial to all the stakeholders such as customers, debtors, banks and shareholders etc., as it would help in understanding the current trends in the Non-Performing Assets, and suggest remedial measures in view of profit. It will also give can insight how long might the situation continue and would also serve as a base for other researchers with their study.

### **SCOPE OF THE STUDY**

This study considers most of the banks of the private and the public sector with the time period spanning from 2011 to 2016 present. It could suggest measures that could help to solve the problem of NPA.

### **TYPES OF NPA**

- 1) **Substandard Assets:** these are the assets which has remained an NPA for a period of less than or equal to 12 months.
- 2) **Doubtful Assets:** these are the assets which have remained an NPA for a period of more than 12 months.
- 3) **Loss Assets:** a loss asset is one where a loss has been identified by the bank or the internal or external auditors or the RBI inspection but the amount has not been written off wholly. In other words, such an asset is considered uncollectible and of such little value that its continuance as a bankable asset is not warranted although there may be some rescue or recovery value.

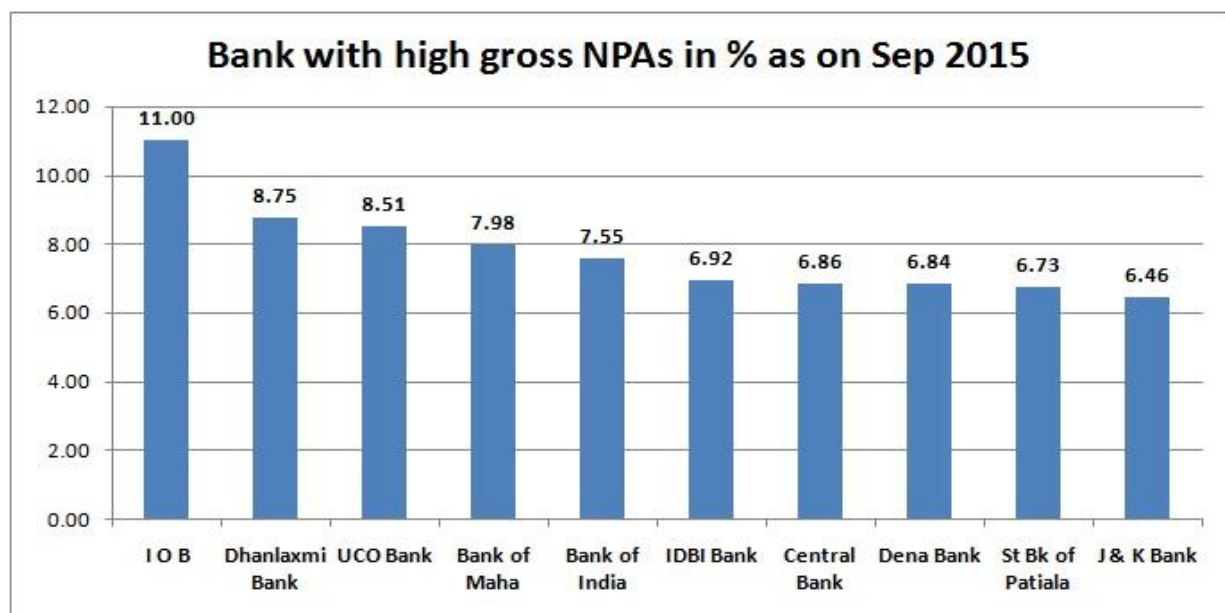
### IMPACT OF NPA

- 1) **Liquidity:** funds are getting blocked which lead to decreased profitability, which in turn leads to lack of cash which in turn leads to borrowing money for a short period of time which finally leads to additional cost of borrowing. Due to the lack of money routine payments and dues are not paid on time.
- 2) **Profitability:** the main source of income for a financial institution is from the income generated through standard assets. NPA refers to the investment in a bad project which does not generate income. Because the money gets blocked, not only the profitability of the financial institution decreases but it also leads to an opportunity cost which prevents the bank in a project that could have generated income. So NPA's not only affect current profits but also affect the future projects.
- 3) **Reputation of the bank:** another effect of NPA is that since the profitability decreases, the reputation of the bank i.e. all its stakeholders get adversely affected.
- 4) **Capital adequacy:** As per Basel norms, banks are required to maintain adequate capital on risk weighted assets on an ongoing basis. Every increase in NPA level adds to risk weighted assets which warrant the banks to shore up their capital base further. Capital has a price tag ranging from 12%-18% since it's a scarce resource.
- 5) **Credit loss:** Due to diminishing reputation of the bank, people will start withdrawing their money which will lead to liquidation of the bank eventually.

- 6) **Liability Management:** In the light of high NPAs, Banks tend to lower the interest rates on deposits on one hand and likely to levy higher interest rates on advances. This may become hurdle in smooth financial intermediation process and hampers banks' business as well as economic growth.
- 7) **Credit loss:** due to diminishing reputation of the bank, people will start withdrawing their money which will lead to liquidation of the bank eventually.

## CURRENT TRENDS

As we saw in the introduction how the bad loans i.e. the NPA the banks as total percentage of the credit evolved from 2008 from 2.2% to 5% in sept 2015.



(Kadam, n.d.)

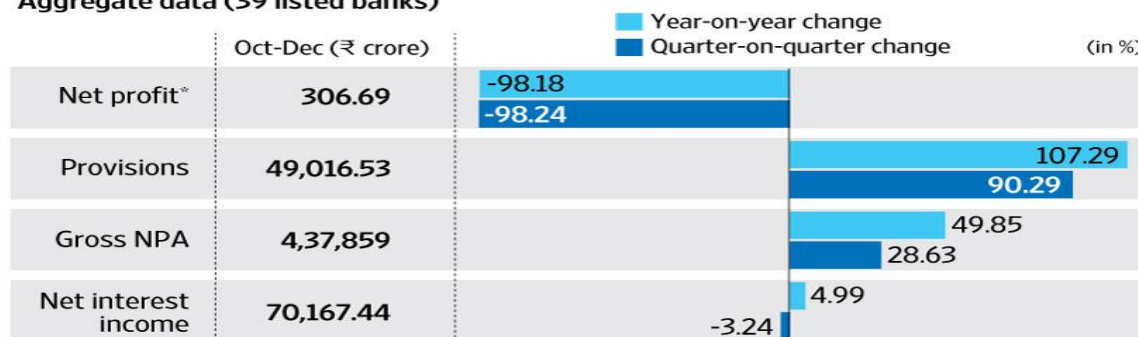
State-run banks are on the verge of a crisis due to their high NPAs, which constitute over 90 percent of the total bad loans of the industry. Nine out of 10 most stressed banks in the sector are government banks.

In the December quarter of the 40 listed banks, 10 banks had gross bad loans of more than 8%, while 22 banks have an excess of 5%. In a matter of 40 days, banks lost a market capitalization of 1.8 lakh crore.

## TAKING A HIT

Provisions made for bad loans, as directed by the central bank, have wiped out December quarter profits of listed banks.

### Aggregate data (39 listed banks)



\*Aggregate net loss for 24 PSU banks at ₹10,911.56 crore  
Aggregate net profit for 15 private banks at ₹11,218.25 crore

Source: Capitaline

State banks reluctance to lend is reflected in their credit numbers. Government banks' credit growth slowed to 6.7% December last, from 19.1% in the same month in 2013 while private sector banks' credit growth accelerated to 20.5% in the same period from 16%. (Rangan, n.d.)

(Iyer, n.d.)

The aggregate net profit of the 39 listed banks fell 98% to Rs.307 crore in the December quarter from Rs. 16,806 crore in the year earlier. The 24 public sector banks were the worst performers, having reported an aggregate loss of Rs. 10,911 crore in the December quarter compared to a profit of Rs. 6,970.8 crore in the year-ago quarter. Such was the surge in bad loans that provisions towards these wiped out the profits of 12 out of the 39 listed banks. Out of the 27 banks that reported a quarterly profit, six saw profits plummet more than 70% from a year-ago period.

The bank saw fresh slippages of Rs. 20,692 crore during the three months ended December and profit dipped by 62% from a year ago. The bad loans of private sector banks are just about 6.6 per cent of their total valuation as their gross NPAs are only about one-eighth at about Rs 46,000 crore, which is also well below their total market value.

However, in case of PSU banks, if loans that face the risk of being declared NPAs (Non-Performing Assets) going ahead are also taken into account, their overall stressed advances are estimated to be almost double at over Rs 8 lakh crore. An analysis of their latest quarter results shows that the cumulative gross NPAs of 24 listed public sector banks, including market leader SBI and its associates, stood at Rs 3,93,035 crore as on December 31, 2015 which is nearly 1.5-times of their total market value, which currently stands at Rs 2,62,955 crore.

This also marks a rise of over 50 per cent from their gross NPAs totaling Rs 2,61,918 crore a year ago. Except for State Bank of India (SBI), and a few smaller ones, all listed public sector banks have gross NPAs in excess of their market capitalization. In most cases, the quantum of bad loans is more than double the market value, while some lenders have gross NPAs as high as four or five-times of their respective market valuations. In comparison, most private sector banks have gross NPAs well below their market values, although the quantum of bad loans have risen for them as well in a big way.

<b>WRITE-OFFS AND RECOVERIES</b>		
<b>BANK</b>	<b>WRITE-OFFS IN LAST 10 YEARS</b>	<b>RECOVERY IN LAST 10 YEARS</b>
SBI	41,641	11,566
Bank of Baroda	9,929	3,177
Allahabad Bank	7,359	204
IDBI	7,174	1,471
Corporation Bank	3,732	691
Dena Bank	3,350	1,170
Bank of Maharashtra	3,031	1,099
State Bank of Patiala	2,197	475
State Bank of Bikaner & Jaipur	2,001	403
PNB	1,539	595

*Figures in Rs crore*

■ Bank of India provided data only for last six years when it wrote-off Rs 41,361 crore and amount recovered during this period was Rs 27,410 crore.

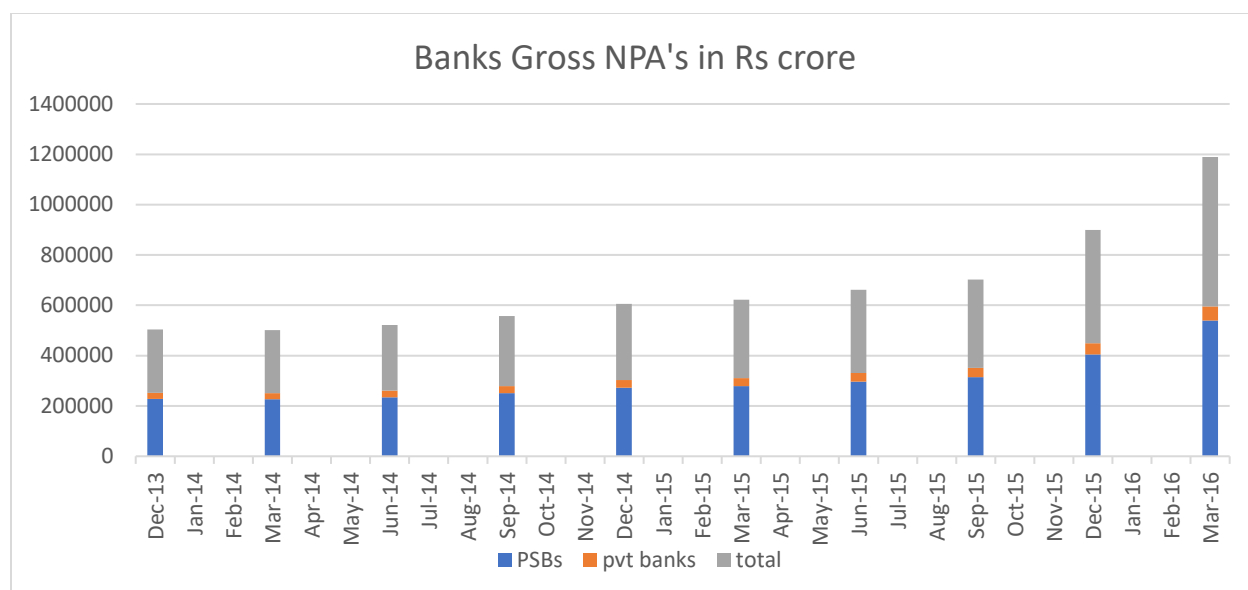
■ Indian Overseas Bank, Canara Bank and Indian Bank refused to part with data on write-offs and NPAs under the RTI, claiming either exemption under the law or that they don't maintain year-wise data

(PTI, n.d.)

In the march quarter, the State Bank of India (SBI), the largest government bank, has written off over Rs 41,640 crore as non-performing assets (NPAs) in the last 10 years but failed to recover even one-third of this amount in the same period from bad loan accounts. Since 2011, the SBI's write-off has jumped 15 times and in 2014-15, its NPAs were more than at least 14 other public sector banks (PSBs).

Following it is the Bank of India, a much smaller bank and fourth largest in terms of assets, wrote off more than Rs 41,361 crore in six years, indicating this amount could be much more than SBI's write-off for 10 years.

(Anand, n.d.)



(UNIKRISHANAN, n.d.)

The gross NPA in the banking system (both public and private) stood at Rs 5,94,929 crores which indicated an increase of approximately 33 percent. To understand how big the problem is we need to look at the march-end overall increase which stood at 8.2 percent, and this only the stock of NPA. There is an equally large stock of restructured loans on the books of the banks.

In the June quarter, the net non-performing assets (NPA's) of ICICI bank, the country's biggest private sector lender, more than doubled to 3.01 per cent in the June quarter or Rs 15,308, from 1.04% in the previous quarter. The bank's gross NPA ratio jumped to 5.28 percent. Even Axis bank's net NPA more than doubled to 1.08 percent bringing the gross NPA to 2.54 percent (Rs 9,553 crore).

HDFC bank was one of the few banks to report a profit even as its NPA rose to 0.32 percent (or Rs 1493 crore) from 0.27 percent in the previous quarter (or Rs 1027 crore). The gross NPA increased to 1.04 percent. From 0.95 percent. (Verma, n.d.)

In case of PSB's, the banks are trading well above their 12-month target prices based on Bloomberg consensus expectation. Some banks like Canara bank, Bank of India, Allahabad bank, Punjab National bank are trading at a 30-50% to the on-year price targets. This is due to the fact that PSB's have aggressively recognized the bad assets.

## On a Bumpy Ride

Bank	Close (₹)	Premium/ (Discount) to Target Price*	Price to Book^		ETIG Volatility Measure (3-yr)**
			Current	5-yr Avg	
SBI	225.6	-2.2	0.97	1.10	2.7
BoB	152.3	-1.9	0.83	0.90	3.6
PNB	123.7	56.4	0.58	0.71	3.5
Canara Bank	251.5	36.7	0.42	0.57	4.0
IDBI Bank	71.8	33.0	0.53	0.52	3.8
Union Bank	130.9	7.8	0.39	0.60	4.3
Bank of India	107.3	47.0	0.26	0.56	4.0
Allahabad Bank	74.4	53.4	0.28	0.50	3.9
OBC	112.3	26.3	0.24	0.47	4.5
Andhra Bank	58.3	-17.4	0.36	0.55	3.7
Syndicate Bank	75.4	4.7	0.37	0.47	4.1

\*based on 12M consensus target price ^ based on trailing book value  
 \*\* derived from daily trading range Source: Bloomberg, ETIG

(BEAUREAU, n.d.)

This has led to a very volatile market for the PSB's since the profits have been declining and there still a long way to go due to the provisioning.

### EXISTING MEASURES

The RBI has taken various initiatives to ensure that NPA's of the bank are handled in an orderly manner. Some of these measures are: -

- 1) **SARFAESI ACT 2002:** The SECURITISATION AND RECONSTRUCTION OF FINANACIAL ASSETS AND ENFORCEMENT OF SECCURITY INTEREST ACT,2002 empowers banks/financial institutions to recover the NPA'S without the intervention of the court. It provides the three alternative methods for recovery which are **securitization, asset reconstruction and enforcement without intervention of court.**

The provisions of this act are applicable to NPA loans with amounts outstanding above Rs 1 lakh. NPA loan accounts where the amount is less than 20% of the principal and interest are not eligible under this act.

The act empowers the banks:

- a) to issue a demand notice to the defaulting borrower and guarantor, calling upon them to discharge their dues in full within 60 days from the date of notice.

- b) to give notice to any person who has acquired any of the secured assets from the borrower to surrender them to the bank.
- c) to ask any debtor of the borrower to pay any sum due or becoming due to borrower.
- 2) **Lok Adalats:** Lok Adalats is for recovery of small loans. According to RBI guidelines issued in 2001, they cover up to Rs 5 lakh, both suit filed and non-suit filed are covered.
- 3) **Compromise Settlement:** it is a scheme which provides a simple mechanism for recovery of NPA. It is applied to advances below Rs 10 crores.
- 4) **Credit Information Bureau:** a credit information bureau helps banks by maintaining a data of an individual defaulter and provides this information to all banks so that they can avoid lending to him/her.
- 5) **Debt Recovery Tribunals:** The debt recovery tribunal act was passed by Indian parliament in 1993 with the objective of facilitating the banks and financial institutions for speedy recovery of dues in cases where the loan amount is Rs 10 lakhs and above.
- 6) **Special Mentions Account:** The RBI said that before a loan turns into an NPA, banks should identify stress in the account by creating a new sub-asset category, 'special mention accounts' (SMA). Within the SMA category, there should be three sub categories: SMA-NF (NON-FINANCIAL SIGNALS OF INCIPIENT STRESS), SMA-1 ((principal or interest payment is overdue between 31-60 days, SMA-2 (principal or interest payment overdue between 61-90 days). The RBI also said that reporting of an SMA-2 by one or more lending banks/NBFC's will trigger the formation Joint Lenders Forum(JLF) and formulation of a corrective action plan.
- 7) **Provisioning:** the RBI has ordered the banks to keep some of the profits as provision in order to neutralize the recognized NPA's.

## REMEDIAL MEASURES

The following are the remedial measures proposed in order to tackle NPA's:

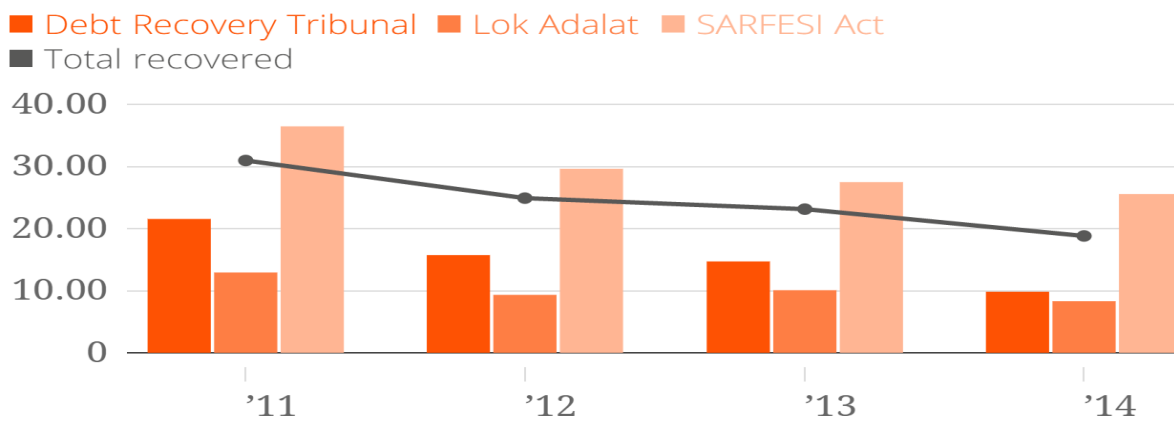
- 1) **Selling stakes in PSB's:** most of the PSB's have recorded loses which hard to recover. Many other have NPA's 2,3, some even 5 times their valuations. Many analysts fear that

the current level of capital of PSB's are simply not enough to cover the actual extent of bad loans in the system. Therefore, a prudent solution for the government would be to sell or lower their stakes in biggest loss making PSB's such as IDBI, IOB, Bank of India, Punjab National Bank. Politically it might be a difficult move so a more feasible solution would be to lower stakes to 51%.

- 2) **Cut off from Political pressure:** many banks had given loans to companies just due to their connections with political parties. The RBI should implement a mechanism which allows the banks to autonomously function without the influence of political parties.
- 3) **Credibility criteria:** the RBI should impose stricter guidelines for the evaluation of the companies and make sure certain eligibility blocks are set in place in order to ensure that no one can trespass this wall of defense. The project to be funded should be tested through every possible scenario even the ones to occur least likely, make sure that the collateral value is higher in case of a default, etc.
- 4) **Promotor assessment:** many banks lend to MNC's and corporates due to their well-established brand image. Banks need to have a thorough check of the promoters and the projects, verify the numbers and only then lend to the companies in order to prevent cases like "kingfisher airlines".
- 5) **Post-disbursement assessment:** Position of overdue accounts is reviewed on a weekly basis to arrest slippage of fresh account to NPA.
- 6) **Increase the number of ASSET RECONSTRUCTION COMPANIES (ARC's):** currently, there are only 13 ARC's existing in India of which not more than two-three are active and given the amount of non-productive loans in the economy, this number is miniscule. The RBI should promote ARC'S and try to utilize this in order to utilize the collateral backing the stressed assets.
- 7) **Increasing the efficiency of the DRT's:** the chart below shows a time series analysis of the DRT's and Lok Adalats. Together they were able to realize as much as 30% of the

amount of case but the ratio came down to a mere 18% due to decrease in efficiency of DRT'S that came down from 21.5% in 2011 to 9.83% in 2014.

#### Recovery of NPAs by public sector banks (% of cases filed)



Scroll.in  
(Jain, n.d.)

- 8) **Setting up a plan with willful defaulters:** before the RBI declares the loan as an NPA, a thorough check must be a mandate whether it can be recovered with just a little guidance to the defaulting party. If all checks out, the RBI must try to give such assistance.

#### CONCLUSION

The banking sector has always had NPA's but this because of the fact that every time an economy goes through bad times. We are bound to have NPA's however, the NPA situation has accelerated way out of hand to the extent where they could destroy the backbone the economy i.e. the banks. The NPA levels of Indian Banks are still higher than Foreign Banks. The RBI has put a lot of effective systems in place but there are still a lot of things missing. The bank management needs to speed up the recovery process. If the situation is not handled with due diligence, the results could be catastrophic.

Last August, the finance minister called the NPA levels in the PSB's as "unacceptable" and declared a capital infusion of 70,000 crores in the economy spread over four years. The RBI governor Dr. Raghuram Rajan said that a deep surgery is needed in order to revive the economy and has ordered the banks to recognize the NPA's to clean up the balance sheets by 2017.

The banks are going need dynamic provisioning and heavy capital infusion. The current trends indicate that the NPA situation in the PSB's is much worse than the private sector banks. PSB's have stressed advances approximately two times their valuations while the private sector banks have only one-eighth of it. In the industrial sectors, borrowers in infrastructure (especially power), iron & amp, steel and textile industries have been most affected due to stalled projects, delayed policy decisions, economic slowdowns, several macro-economic factors and virulent management.

While the government tries to force banks into disclosing and recovering their bad loans, the possibility of corruption and lax norms in lending seems to sum up the situation where funds are not only being "diverted" but "stolen" in public eye. Moreover, even the ARCs have not been able to do much. They haven't been able to bring that kind of capital and even wherever they have brought the capital, they are supposed to be asset reconstruction companies. I have not seen much reconstruction happening, may be some demolition might have happened in a few places.

Even though after the June quarter results, many banks have started becoming profitable again, there is still a long way to go. The recognizing stage is just the beginning, when the provisioning part comes in to play, the banks will be facing serious heat. Morgan Stanley estimates that the Indian banks will need 2.5 lakh crore by 2019 while the government's estimate is 1.8 lakh crore.

While the profitability of some banks may be impaired in the short run, however, once the system is cleaned, it will be able to support the economic growth in a sustainable and profitable way.

## REFERENCES

1. (n.d.). Retrieved from [http://economictimes.indiatimes.com/articleshow /51078318.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://economictimes.indiatimes.com/articleshow /51078318.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)
2. Anand, U. (n.d.). Retrieved from <http://indianexpress.com/article/business/banking-and-finance/banks-confirm-recoveries-crawl-as-write-offs-swell/>
3. BEAUREAU, E. (n.d.). Retrieved from <http://economictimes.indiatimes.com/markets /stocks/news/june-quarter-show-could-upset-psb-stocks-rally/articleshow/53347300.cms>
4. Iyer, V. N. (n.d.). Retrieved from <http://www.livemint.com/Industry/ZQhav7x8FESxfLT1tHp0aO/Listed-banks-NPAs-surge-by-Rs1-trillion-in-December-quarter.html>
5. Jain, M. (n.d.). Retrieved from <http://scroll.in/article/813493/rivals-past-and-present-global-powers-converge-on-the-gulf-of-aden>
6. Kadam, D. U. (n.d.). Retrieved from <http://www.firstpost.com/business/explained-in-5-charts-how-indian-banks-big-npa-problem-evolved-over-years-2620164.html>
7. PTI. (n.d.). Retrieved from [http://economictimes.indiatimes.com/ articleshow/51078318.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://economictimes.indiatimes.com/ articleshow/51078318.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)
8. Rangan, M. G. (n.d.). Retrieved from <http://economictimes.indiatimes.com/industry /banking/finance/banking/why-raghuram-rajans-npa-move-may-either-bring-indian-banking-to-life-or-push-it-into-a-coma/articleshow/51114936.cms>
9. Shukla, M. G. (n.d.). Retrieved from <http://www.firstpost.com/business/explained-in-5-charts-how-indian-banks-big-npa-problem-evolved-over-years-2620164.html>
10. UNIKRISHANAN, K. K. (n.d.). Retrieved from <http://www.firstpost.com/business/rs-600000-crore-npas-over-90-with-psbs-is-the-bad-loan-story-turning-scary-2822560.html>
11. Verma, S. (n.d.). Retrieved from <http://indianexpress.com/article/business/banking-and-finance/private-banks-record-fall-in-profits-rising-bad-loans-hdfc-icici-2950513/>

## **AN ECONOMIC DINOSAUR – WILL THE WORLD SURVIVE?**

**Sachin Kumar, Deepak Tulsani<sup>32</sup>**

### **ABSTRACT**

Brexit or Bremain an acronym of the words British and Exit or British and Remain respectively. A decision that was in the hand of British people to decide whether to remain as a part of European Union (EU) or taking an exit from it. On Thursday, 23rd June 2016 a referendum was held in which Britain people decide to move out of European Union. This referendum which was committed by the United Kingdom(UK) Prime Minister and leader of Conservative party David Cameron during the 2016 elections which was opposed by the opposition Labour party. United Kingdom leaving European Union will have a huge impact not only on Britain but also on Europe and rest of the world. The impact will mainly on Travel, jobs, Immigrations, trade and also economy. The study that has been done from various sources to find out the consequences and can the world survive.

**Keywords:** European Union, Brexit, Britain, British, United Kingdom, Bremain, Treaty of Rome, Maastricht Treaty, Pound, Euro.

### **INTRODUCTION**

The world economy shakes after the Britain took a referendum from the European Union. With the turnout of 73%, 51.9% of the Britain people voted to leave European Union and rest 48.1% in remaining with the EU. An incredible power was in the hand of Britain People that captures the attention of people around the world. The power to shake the world economy and forces Country Government and corporates to review their economic policy. A decision that led British Prime Minister to resign from the position and also the value of pounds depreciated to 30 year low. A Britain relationship with European Union has come to the end after 43 years.

### **REVIEW OF LITERATURE**

The European Economic Community (EEC) was created in the year 1957 after the Treaty of Rome which was signed by the members of the European Countries and led by France and West Germany. In 1960, United Kingdom was struggling to boost their economy as after world war the

---

<sup>32</sup> Student, Symbiosis Centre for Management Studies, Pune, Symbiosis International University, Pune

prices of goods was increasing sharply, foreign exchange rate became unstable and there was also increased in the deficit of balance of payment. Besides economic problem the UK was also facing social issues like unemployment. The UK growth rate in 1960 was half of the France or Germany.

Since, UK was facing a lot of problems, they applied for the membership to be part of the community in 1963. But this application was rejected by the French President Charles De Gaulle in 1967. However, when the new President Georges Pompidou took the charge, UK managed to become the part of EEC on 1 Jan 1973 which was also called as Common Market. During this period, Harold Wilson leader from the Labour Party was the Prime Minister of UK and he was not able to provide the solutions of economic and social problems which led to force down the value of their currency Great Britain Pound (GBP) from \$2.80 to \$2.40, a cut of around 14%. Previously the devaluation of the currency was first devaluated in the year 1949 from \$3.66 to \$2.80, a cut of around 30.5%. (Academia)

### **BIRTH OF REFERENDUM**

Once UK joined European Union, after that lot of questions were raised about the common market and loss of independence and economic matters. Since then political parties started using EEC as an election issue and started promising to the British people about referendum or exit from the EEC in order to win the elections

The first referendum was taken by the United Kingdom Government in 1975 i.e. within 2 years of membership, the majority of 67.2% was in favour of staying in the union community and rest 32.8% was in favour of leaving United Kingdom “BREXIT” it from the European Union.

Again, after eight years of first referendum i.e. in 1983 the labour party fought the election with the promise to out from the membership called European Economic Community, but it was trounced by the Margaret Thatcher's Conservative party.

### **MAASTRICHT TREATY**

There was treaty signed between the Europe Countries Members and UK government which was named as Maastricht Treaty (officially known as the treaty of Europe) as the meeting was held in Maastricht, Netherland in 1992. It was regarding changing the word from Economic in European Economic Community to European Union. It was done to clearing the path from a political union

from the Economic union. The Maastricht Treaty was created between the 12 countries which are Belgium, Denmark, Germany, Spain Greece, France, Ireland, Italy, Luxembourg, Netherlands, Portugal and the United Kingdom.

The Maastricht Treaty created the European Union and every country in the EU agreed to setup a common currency called Euro as a part of a drive towards the European Economic and Monetary Union except United Kingdom as they continue their Sterling (Great Britain Pound) and Denmark continued their currency which was introduced in 1875 called Danish Krone, though the Government of Denmark fixes the exchange rate with Euro at a specified rate of 1 euro equal to 7.46038 kroner. (eurostat) (Travel document system)

Maastricht Treaty involved three pillars of the European Union which include European Communities which is based on the principle of supranationalism means all the countries in the European Union should cooperate with each other to achieve the common objectives and goals. These members share the Union's Super-National Institutions which include the commission, the European Parliament and most importantly the court of justice common Foreign and the Security Policy. (The Guardian)

The other pillar of the treaty mainly emphasis on the coordination in the foreign policy, human rights, democracy and peace keeping commonly known as Common Problem and Security Policy. The third pillar of the treaty was about Police and Judicial Co-operation in Criminal Matters which was about bringing together cooperation in the fight against crime, Terrorism and Smuggling. It was commonly known as Justice and Home affairs. (financialtimes16)

## **REFERENDUM PARTY**

In 1994 the new party was formed called as Referendum party who fought in 1997 elections with a solution of providing a referendum from the membership in UK but unfortunately only able to get 2.6% of the votes. This European Elections was mainly held to choose the representative of the European Union. During the same period, another party came into the picture with the name of United Kingdom Independence Party (UKIP) and had the steady beginning. But in 2005 European elections UKIP was able to achieve third position followed by second position in 2010 elections and winner of the 2015 European Elections. The success of UKIP led to major parties which also include David Cameron's Conservative Party, helping in taking a definitive stance on

the European Union issue. In 2012 UK, Prime Minister David Cameron rejected the calls from Referendum, but suggested that there will a possibility of keeping a referendum. During the 2015 elections David Cameron, UK Prime Minister promised to hold an in or out referendum from the European Union before 2017. He also gave the freedom to his ministers and all MPs in campaigning either in favour of exit from the EU or leaving the EU.

## **SECOND REFERENDUM**

The second referendum was taken up by Scottish Government on 18 September 2014 which was about making Scotland a separate country and leaving United Kingdom. In this referendum 55.3% of the votes was against independence i.e. not leaving UK and 44.7% of the Scottish people voted in favour of leaving UK and make Scotland Independence. In this Referendum, the turnout was 84.6% which was highest for any election or referendum in UK.

So, on Thursday, 23rd June 2016 there is going to be third referendum in UK which is important date for the Britain and EU members as Britain is holding an in or out referendum regarding their membership in the European Union. (efta)

## **CONSEQUENCES ON UK AND EU**

### **Membership Fee**

Every EU members have to pay the membership fees which included the European Budget.

Since, Britain has decided to leave European Union then they are going to save a lot of funds which can be made available for their other priorities. The total contribution paid by the UK Government in 2015 was £17.8 but they got a rebate worth of £4.9billion and they also received £4.4billion for farm subsidies and other programmes.

### **Broad Economy**

Since, UK has taken an exit from EU, now they have to negotiate regarding trade agreement and if they not able to negotiate for free trade agreement terms then according to the researchers from National Institute of Economic and Social Research it will lead to a net loss to the UK economy and because of the lower direct investment United Kingdom GDP will permanently reduce by 2.25%. However, this estimates was done in 2004 and from then the world economy has changed considerably.

Another analysis done by economist from the Centre for Economic Performance (CEP), part of London School of Economic states that UK can suffer income losses from 6.3% to 9.5% of GDP which is similar to the losses that resulted from the global financial crisis in 2008-2009.

On the other hand, if UK Leaves EU but able to negotiate about the Free Trade Agreement then they will only incur a loss of about 2.2 % of the GDP.

### **Trade**

There is a Free Trade Agreement between the European Union members which means there are no charges or tariffs that are imposed in trading the goods between the European Union members. This agreement helps the EU members to avail goods at a cheaper rate by export and import it which paying any charges.

Among the total exports of UK, more than 50% of it goes to EU countries and they also get the benefit from the agreement that has been made between EU and other countries which includes agreement with African Countries and South American Countries. Currently according to the BBC news, the European Union is negotiating with the United States. If the agreement happens between them then UK will be very beneficial for their business. But, if UK leaves EU then establish their own agreements with US.

According to the Think-Tank Open Europe, UK economy will lose 2.2 per cent of their GDP by 2030. However, it also mentioned that if they are able to negotiate about the Free Trade Agreement with the European Union then their GDP could rise by 1.6 per cent.

### **Immigration**

Under the European Union law, Britain Government cannot block anyone from the other EU member state coming in their country while the people from UK also has the equivalent right that they are allowed to work and live anywhere else in the EU.

According to the data provided by office for National Statistics, there are 942,000 people which are from eastern European members living and working in UK which include countries like Romania and Bulgaria and 791,000 people from Western Europe. In total, out of 64.1million of people living in UK there are 2.93million works from outside EU. Majorly the foreign workers are from China and India.

### **Consumer Affairs**

It includes the effect on the people living in UK and is related to the prices of goods, safety and standards. The European Union legislation keep a track on the protection issues and regulates on quality standards.

So, as Britain took an exit from European Union the prices of goods and services will increase and become more expensive which will directly impact on the consumers and on an average the UK residents may have to spend around £450 more in a financial year. But the consumer protection laws that is existed will remain even if Britain leaves EU.

### **Jobs**

The unemployment rate in UK is 5.1 % which is lowest over the past decade and in EU its almost double i.e.10 %. There are the EU laws which protects the workers' rights and handle their grievances but this law includes the tax rates, benefits and minimum wage system which are under the Government decision.

### **Travel**

Europe is one of the most favoured tourist destination and this is because of the laws by EU legislation as there is only one visa called Schengen visa by which tourist can visit all the 26 countries included in the European Union members except UK without further any cross-border formalities. As United Kingdom leaves European Union the flights from other European Countries may get costlier and which will lead to less tourist visits from Europe Countries.

### **Energy and Environment**

There are several policies that are made by the European Union in order to tackle the Climate change, conserving environment, and legislates the issues related to the water quality and air pollution.

Therefore, now UK have to make a separate committee which will legislates the issues related to environment, water quality, air pollution and climate change in UK. Making a separate committee may create an unnecessary burden on UK government. As most of the energy resource include Gas that comes from other EU countries such as Norway will get costlier.

## **EFFECT ON THE WORLD ECONOMY AFTER UNITED KINGDOM LEAVING EUROPEAN UNION**

- The stronger USD against GBP has affect the US business that sell their products abroad because the stronger US Dollar make their products expensive and unattractive for the consumers outside USA.
- The value of GBP has fallen to 0.75 against 1 US Dollar, which is the lowest since 1985. The pound got depreciated for about 12% since the referendum results has been declared. (inteconomics) (bloomberg)
- In the world market \$ 2 trillion has been wiped out after UK leave EU which includes 7.92% change in NIKKEI 225, 4.07% in NASDAQ 100 and 12% change in FTSE MIB. (indianeconommics) (bloomberg)
- The credit rating agency such as moody, Fitch, S&P has downgraded the UK's credit rating. It means lending money to the UK Government has become less safe now. (Telegraph16)
- Fear of Disintegration of European Union – There is a global concern that UK maybe the first of more members to leave European union because the French right far leader Maine Le Pen has gave some clue by saying that Brexit has gave us wings regarding holding their referendum vote. Moreover, Netherland and Italy also showed some concerns about the referendum. (woodford)
- Scottish Prime Minister Nicola Sturgeon also says that the Scotland isn't looking to leave the European Union which means there can be the disintegration of United Kingdom also.
- The EU is one of the largest trading blocs in the world and the major partners are USA and China. So, if European Union breaks there will be a huge global uncertainty.
- Many big companies said they will review their investments in the United Kingdom as they are leaving European Union.
- Many of the company's headquarters are based in London and after Brexit they are looking to change their base which may results in unemployment in UK.

## **PROCEDURE FOR LEAVING THE EUROPEAN UNION**

On December 13, 2007, all the European Union members has signed the treaty of Lisbon. This agreement amends the two treaties which form the constitutional base of the European Union i.e. Maastricht treaty of 1993 which was also known as the treaty of European Union from 2007 and also the treaty of Rome from 1958 which is also known as Treaty of the Functioning of the European union from 2007 as well. The treaty was applicable from 1 December 2009. This treaty allows the union member states with the decision to right to leave EU.

As per the Article 50 of the Treaty, the member who is willing to exit from the EU and is not interested in continuing to be the member then head of the member should notify the European Union Council. After that the withdrawal agreement would be negotiated

between the union and the state outlining the member's future relationship with the Union. The country willing to leave the EU, need to gain support from at least 72 percent of the continuing members in the EU representing at least 65 percent of their population and also need the permission from the European Parliament. Once the member leaves the EU then the remaining members has to undertake negotiations on making the necessary changes in the EU budget, voting's allocations and policies.

## REFERENCES

1. 2016. <[http://www.euro-dollar-currency.com/maastricht\\_treaty.htm](http://www.euro-dollar-currency.com/maastricht_treaty.htm)>.
2. 21 June 2016. 11 July 2016. <<https://www.ineteconomics.org/ideas-papers/blog/brexit-impact-on-the-world-economy>>.
3. <<http://indianexpress.com/article/business/world-market/brexit-effects-world-stocks-tumble-as-britain-votes-for-eu-exit-2874906/>>.
4. Ed. Teresa Hunter. 20 June 2016. July 2016. <<http://www.telegraph.co.uk/money/special-reports/how-brexit-will-affect-your-money/>>.
5. 2016. JULY 2016. <<http://www.bloomberg.com/graphics/2016-brexit-watch/>>.
6. Academia. Ed. M Nicolas Firzli. 2 Aug 2016. <[http://www.academia.edu/26810948/Beyond\\_Brexit\\_Britain\\_Europe\\_and\\_the\\_Pension\\_Wealth\\_of\\_Nations](http://www.academia.edu/26810948/Beyond_Brexit_Britain_Europe_and_the_Pension_Wealth_of_Nations)>.
7. eufa. 1 Aug 2016. <<http://www.eufa.int/eea/policy-areas/capital>>.
8. eufa. 2 Aug 2016. <<http://www.eufa.int/eea/eea-agreement/eea-basic-features>>.
9. eurostat. 21 July 2016. <[http://appsso.eurostat.ec.europa.eu/nu/i/show.do?dataset=ert\\_bil\\_eur\\_a&lang=en](http://appsso.eurostat.ec.europa.eu/nu/i/show.do?dataset=ert_bil_eur_a&lang=en)>.
10. <http://www.traveldocs.com/world-atlas/Denmark-atlas61#Economy>. 2016.
11. theguardian. 26 July 2016. <<https://www.theguardian.com/news/datablog/2012/nov/16/uk-election-turnouts-historic#data>>.
12. theresa-may-tells-high-court-judge-brexit-wont-go-ahead-in-2016-in-first-legal-challenge.  
Ed. CHLOE CHAPLAIN. 19 July 2016. 29 July 2016.  
<<http://www.standard.co.uk/news/uk/theresa-may-tells-high-court-judge-brexit-wont-go-ahead-in-2016-in-first-legal-challenge-a3299336.html>>.
13. Travel document system. 25 July 2016. <<http://www.traveldocs.com/world-atlas/Denmark-atlas61#Economy>>.
14. woodford. article. 11 July 2016. <<https://woodfordfunds.com/economic-impact-brexit-report/>>.

## **GROWTH OF PIL AND JUDICIAL ACTIVISM IN INDIA**

**Ganesh N. Pandey<sup>33</sup>**

### **PUBLIC INTEREST LITIGATION**

If we look at history, the undeveloped concept of PIL can be traced in the system of **Actio Popularis** of Roman law, which permitted anyone in society to initiate an action for public delict in a court of law. Thus, this system of Actio Popularis of Roman law can be described as the historical basis for the present form of PIL.

The Court exercising their power of judicial review found to their dismay that the poor, depraved, illiterate, urban & rural unorganized labor sector, women, children, handicapped by ignorance, indigence & illiteracy & other downtrodden having either no access to justice or had been denied justice. A new branch of proceeding known as Public Interest Litigation was evolved with a view to render complete justice to the aforementioned classes of persons.

PIL means a legal action initiated in a court of law for enforcement of public interest or general interest, in which public or class of community have pecuniary interest or some interest, by which their legal right or liabilities are affected.

In the case of **Janta Dal v. H.S. Chowdhary AIR 1993 SC 892 S. Ratnave Pandia J.** said “lexically the expression ‘PIL’ means a legal action initiated in court of law for enforcement of public interest or general interest which public or class of community have pecuniary interest or some interest by which their legal right or liabilities are affected”.

During last three decades, judicial activism has opened up a new dimension for judicial process and has given a new hope to justice-starved millions. The concept of PIL which has been and is being fostered by judicial activism has become an increasingly important one- setting up valuable and respectable records especially in the area of the Constitution.

### **DEVELOPMENT OF PUBLIC INTEREST LITIGATION IN INDIA**

---

<sup>33</sup> Student, Law College Dehradun, Uttarakhand University

The seeds of the concept of PIL were initially sown in India by Krishna Iyer J. In 1976 (without assigning the terminology) in **Mumbai Kamgar Sabha v. Abdulbhai**.<sup>34</sup>

After the germination of the seeds of the concept of PIL in the soil of our judicial system, it was nourished, nurtured and developed by the apex court by a series of outstanding decisions in **Fertilizer Corporation Kamgar Union v. Union of India**<sup>35</sup> the terminology 'Public Interest Litigation' was used. In this case Krishna Iyer J. made the following elaborate observations:

- (1) If the tone of public life in the country were sufficiently honest and fair-minded, formal norms to control administration may not be needed.
- (2) In such a climate, civil remedies for administrative wrong doing depends upon the actions of individual citizens.
- (3) A pragmatic approach to social justice warrants a liberal interpretation of constitutional provisions (including Articles 32 and 226) so that the court may carry out effective policing of the corridors of power until other ombudsman arrangements are made.
- (4) The Court's function of course is limited to testing whether administrative action has been fair and free from the point of unreasonableness and has substantially complied with the procedural norms set for it by rules of public administration and that the action of the administration is not mala fide.
- (5) Locus standi must be liberalized to meet the challenge of the times. Ubi jus ibi remedium must be enlarged to embrace all interest of public minded citizen or organization with serious concern for conservation of public so as to promote justice in its true facts.
- (6) Justifying the broader concept of standing the stated law as I conceive it.
- (7) Restrictive rules of standing are an antithesis to a healthy system of administrative law.
- (8) In India freedoms suffer from atrophy and activism is essential for participative public justice.
- (9) We ought not to be deterred by the prospects of false and frivolous suits. The litigants are unlikely to expend their time and money unless they have some real interest stake.

---

<sup>34</sup> AIR 1976 SC 1455

<sup>35</sup> AIR 1981 SC 344

(10) If a citizen is merely a way-farer or officious intervener without any interest or concern beyond what belong to any one of the one of the 660 million people of the country, the door of the court will not be ajar for him.

(11) Justifiability of the issues and standing to agitate them are two different things.

### **VEXATIOUS AND FRIVOLOUS LITIGATIONS**

The growing use of public interest litigations has brought a new hope to the victims of administrative injustices and criminal negligence of the government through the process of participative justice. But there may develop some unhealthy trends of misuse of this process which the Supreme Court pointed out in **S.P. Gupta v Union of India**<sup>36</sup> in the following words "... but we must hasten to make it clear that the individual who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cases of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration the court should not allow itself to be activated at the instance of such person and must reject his application at the threshold ...we may also point out that as a matter of prudence and not as a rule of law, the court may confine this strategic exercise of jurisdiction to cases where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of persons is violated and as far as possible, not entertain cases of individual wrong or injury at the instance of third party..."

In a decision of the Supreme Court in **Union Carbide Corporation v. Union of India**<sup>37</sup> Rangnath Misra, C.J. said thus:

"I am prepared to concede that public activists should also be permitted to espouse the cause of the poor citizen, but there must be a limit set to such activity and nothing perhaps should be done which would affect the dignity of the court and bring down the serviceability of the institution to the people at large. Those who are acquainted with the jurisprudence and enjoy social privilege as men educated in law owe an obligation to the community of educating it properly and allowing the judicial process to continue unsoiled."

---

<sup>36</sup> AIR 1982 SC 149

<sup>37</sup> AIR 1992 SC 248 at p.262

K.N. Singh, J., expressed his opinion in **Shubhas Kumar v. State of Bihar**<sup>38</sup> in the following words:

Public interest litigation cannot be invoked by a person or body of persons to satisfy his or its personal grudge and enmity. If such petitions under Article 32 are entertained, it would amount to abuse of process of court. Personal interest cannot be enforced through the process of this court under **Article 32** of the Constitution in the garb of a public interest litigation. It is the duty of this court to discourage such petitions and to ensure that the course of justice is not obstructed or polluted by unscrupulous litigants by invoking the extraordinary jurisdiction of this court for personal matters under the garb of public interest litigation

The Delhi High Court in **Vinod Kumar Kanojia v. Union of India**<sup>39</sup> recently turned down the petitioner's claim to invoke public interest litigation as it suffered from mala fides. In this case the petitioner has preferred PIL on behalf of the Hindustan Kanojia Organization (a community of dhobis) scheduled caste in India after coming to know from the news that a film in the name of **"Dhobi Ghat"** is going to be released and the name of the film has affected their sensitivity and created a dent in the feeling of the community. The court held that **"dhobhi ghat"** is a description of a place where clothes are washed. It has place-oriented description and the naming of a movie of this nature cannot be offensive to the caste in question.

The court in **Sheela Barse v. Union of India**<sup>40</sup> made the following useful observation regarding the right of withdrawal of a public interest litigation:

"The proceedings in a public interest litigation are therefore intended to vindicate the public interest by the prevention of violation of the rights, constitutional or statutory of sizable segments of the society which owing to poverty, ignorance, social and economic disadvantages cannot themselves assert and quite often not even aware of those rights. The technique of public interest litigation serves to provide an effective remedy to enforce these group rights and interest.

In order that these public causes are brought before the courts, the procedural techniques judicially innovated specially for the public interest action recognizes the concomitant need to lower the locus standi thresholds so as to enable public minded citizens or social action groups to act as

---

<sup>38</sup> AIR 1991 SC 420

<sup>39</sup> AIR 2011, Del. 73.

<sup>40</sup> AIR 1988 SC 2211

conduits between these classes of persons of inherence and the forum for the assertion and enforcement of their rights.”

The entire development of public interest litigations in India till today can be attributed to the following four procedures: -

- (1) Liberalization of the rule of locus standi
- (2) Treating letters as writ petitions
- (3) Suo motu intervention by the judge (M.P Thakkar, J, converted a letter to the editor in a newspaper by a widow mentioning her plight because of the non-payment of the provident fund family pension.)
- (4) Adoption of non-adversarial procedure of justice and appointment of commission.

## JUDICIAL ACTIVISM

‘Judicial activism’ is a judicial philosophy which motivates judges to depart from traditional precedents in favor of progressive and new social policies.

**Definition:** - It may be defined as a dynamic process of judicial outlook in a changing society. Judicial activism mainly stems from the failure of the other two.

## ORIGIN OF JUDICIAL ACTIVISM

It is a concept that originated in the USA. It is a process in which the judiciary uses the concept of judicial review to tell upon the unconstitutionality of legislative and executive orders.

While some strands of judicial activism in India could be observed since the early 50s onwards through the debate that persisted between the precedence of Fundamental Rights of Part 3 and Directive Principles of State Policy of Part 4 of the Constitution of India which was pronounced through various judgments as –**Sajjan Singh v. State of Rajasthan**<sup>41</sup>, **Golaknath v. State of Punjab** <sup>42</sup>, the hue and color of judicial activism changed with the Supreme Court’s landmark judgment in **S.P. Gupta’s case**<sup>43</sup> wherein it was pronounced that any person who was deprived or

---

<sup>41</sup> AIR 1965 SC 845

<sup>42</sup> AIR 1967 SC 1643

<sup>43</sup> AIR 1982 SC 149

underprivileged and could not approach the court for the redressal of grievances. The court acknowledged that the legal process carried with itself certain disadvantages for the poor, deprived and underprivileged. Hence, **P.N. Bhagwati, J. and Krishna Iyer J, initiated a stream of judicial activism.**

### **CERTAIN INSTANCES OF JUDICIAL ACTIVISM**

**(1) Ban on smoking in public places-** In an important judgment the Supreme Court directed all the states and union territories to issue orders barring smoking in public places such as public offices, hospitals, public transport, railways, educational buildings, libraries, etc. This no doubt is a laudable step to boost public health.

**(2) Protection against inhuman treatment in jail-** In *Sunil Batra v. Delhi administration*<sup>44</sup>, it was held that in order to protect prisoners from inhuman and barbarous treatment, writ of habeas corpus can be issued.

In *D.S. Nakara v. Union of India*<sup>45</sup> it was laid down that a registered society, non-political, non-profit making and voluntary organization is entitled to file a writ petition under Article (32) to espouse the cause of old infirm prisoners who cannot approach the court individually.

**(3) Child welfare-** In *Lakshmi Kant Pandey n. Union of India*<sup>46</sup> Justice Bhagwati laid down principles and norms to be followed while deciding whether a child should be allowed to be adopted by the foreign parents.

In *M.C Mehta v. State of TN*<sup>47</sup> it was held that children cannot be employed in match factories as it is a hazardous employment within the meaning of Employment of Children Act, 1938.

**(4) Protection of ecology and environmental pollution-** In *Rural Litigation and Entitlement Kendra v. State of UP*<sup>48</sup> certain limestone quarries were ordered to be closed as there were serious deficiencies regarding safety and hazards in them.

---

<sup>44</sup> AIR 1978 SC 1675, 1979 SCR (1) 392

<sup>45</sup> AIR 1983 SC 130, 1983 SCR (2) 165

<sup>46</sup> (1984) 2 SCC 244

<sup>47</sup> AIR 1991 SC 417

<sup>48</sup> AIR 1987 SC

**(5) Proper storage and supply of blood by blood banks-** In **Common cause v. Union of India**<sup>49</sup>, the Supreme Court gave directions to establish a National Council of blood transfusion as a society registered under the Societies Registration Act.

**(6) Directions for C.B.I investigation-** Directions for C.B.I investigation should be issued only in some rare and exceptional cases. Therefore, in the instant case, the refusal by writ court to direct C.B.I enquiry was proper.

The list of instances of the judiciary assuming an activist role is endless.

In my opinion Public Interest Litigations and judicial activism both are playing a major and very important role in delivering justice to needy and deprived persons. The Government should make some rules so that unfair use cannot be taken in the name of public interest litigation only for highlighting one self's name and the court should also take strict action against such individuals.

---

<sup>49</sup> (1996) 1 SCC 753

**CASE COMMENT – SABU MATHEW GEORGE v. UNION OF INDIA & ORS.**

**Writ Petition (Civil) No.341 of 2008; ORDER DATED: 05/07/2016**

**BAN ON ONLINE ADS- A SHIELD TO AVERT FEMALE FOETICIDE**

**Kahkashan Jabin & Shreet Raj Jaiswal<sup>50</sup>**

**ABSTRACT**

The central idea of the case comment revolves around the uniqueness of the case law. The case is a milestone in the direction of concern for female feticide by banning online ads regarding pre-natal sex determination appearing on various search engines. The case highlights the stiff attitude of judiciary *in presenti* for preventing orthodox ideology of parents craving for male child and it also reminds the most substantial ideology that economic loss is now no more an excuse to ruthlessly violate the law. In the present case, the issue is related to the violation of PC & PNDT Act i.e. (Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 which prohibits an advertisement for pre-natal and pre-conception sex determination facilities. After reading the case law and before judging it, it must not be forgotten that putting a ban on various renowned search engines namely, Google, Yahoo and Microsoft for showing ads, which eventually provides an access to pre-natal sex determination and sex selection technique, would cause great loss to such profit oriented corporate world. Thus, the case marks the obiter that when there exist the elements that humiliate our laws that constantly tries to protect the prestigious values of our society, it directly leads to its forestall through the limb of judiciary; no matter how many various elements are going to act as hurdles in the path of eliminating those blemishes from our society. In the present case, the Supreme Court faces enormous issues, some economically debatable and some vexing one and others being frivolous only but still nothing less than a ban was the only way which our Hon'ble Court sought to put on those accused search engines to stop them from showing further ads providing access to websites which paves way for pre-natal sex determination. The Court vehemently criticized the stand taken by those search engines which claimed their helplessness in banning the content shown on their pages and ultimately done away

---

<sup>50</sup> Student, Faculty of Law, University of Lucknow, New Campus, Lucknow

with the ignorant attitude of Google, Yahoo and Microsoft by putting ban on alleged ads in clear words in its order. Therefore, the efforts of the authors throughout the whole case comment have been to focus over the significance of the case and the principles and ideology laid down by it.

**Keywords:** ban on online ads, female feticide, pre-natal sex determination, selective sex selection.

The present case once again establishes that human values shall always be kept in priority than any other materialistic things. The case deals with the order of the Supreme Court banning the pre-natal sex determination ads appearing on various renowned search engines. India is a country with so many variants in its each element yet the governance of this country manages so well to maintain the equality among those diversities. This case is also an example of the same, set by our Hon'ble Supreme Court in which it has shown its firm determination regarding the policies and laws dealing with prohibition of pre-natal sex determination. Expressing strong displeasure at displaying content related to sex determination by search engines Google, Microsoft and Yahoo, the Supreme Court called on the Centre to come up with a memorandum to stop the abuse.<sup>51</sup> "Can these search engines continue to violate the law? Is there nothing that can be done to completely stop them? Google, Microsoft, Yahoo can't continue doing illegal activity in the name of being an intermediary," a bench led by Justice Dipak Misra asked Solicitor General Ranjit Kumar.<sup>52</sup> The law relating to prohibition of pre-natal sex determination tries to maintain the equality between the babies who are not born even; so, when a child is born whether a boy or girl, he/she has equal right to take breathe in this free nation. Though the law regarding it was made very earlier still if the orthodox parents get an access to gates where they can have the services for pre-natal sex determination then judiciary has to intervene to balance the humanitarian laws and the profit-oriented corporate sector.

In this public interest litigation (PIL), the Supreme Court of India took a stern stand against the Central Government which said that it could not stop online advertisements for pre-natal sex determination which showed up on search results in India. The PIL was filed by one Sabu Mathew

---

<sup>51</sup> Bhadra Sinha, SC pulls up Google, Yahoo for hosting pre-natal sex determination sites, Hindustan Times ( July 05, 2016 15:26 IST), <http://www.hindustantimes.com/india-news/impossible-to-block-ads-that-promote-sex-determination-test-internet-firms-tell-sc/story-Sqcrs5W7PQI8WOHwbVKh7K.html>.

<sup>52</sup> SC raps Google, Microsoft over sex determination ads, The Indian Express Tech i.e. (July 6, 2016 3:23 am), <http://indianexpress.com/article/technology/tech-news-technology/sc-raps-google-microsoft-over-sex-determination-ads-2896135/>

George in 2008 and the litigant sought a ban on online contents on pre-natal sex determination which are in violation of the provisions of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. According to the prohibition of sex selection Act, any person who puts an advertisement for pre-natal and pre-conception sex determination facilities in the form of a notice, circular, label, wrapper or any document through media in electronic or print form can be imprisoned for up to three years and fined Rs 10,000.<sup>53</sup> Search giants Google, Yahoo and Microsoft have been arraigned as respondents in the suit along with the Central Government. The Group Coordinator, Cyber Laws Formulation and Enforcement Division, Government of India, Department of Information Technology, had filed a counter affidavit on 16th August, 2010. In the counter affidavit, the Central Government had said that pre-natal sex determination is an offence in India but is not so in other countries and the information in these websites is hosted offshore and is aimed at a wider audience. Therefore, blocking such websites may not be feasible and desirable. It also mentioned that some of the websites provide good content for medical education and therefore blocking of such websites may not be desirable. In its earlier order under this case a division bench headed by Justices U.U. Lalit and Dipak Mishra took objection to the response in the affidavit and said that it reflects a kind of helplessness by the government.<sup>54</sup> The bench also urged that an effort has to be made to see that nothing contrary to the laws of India are advertised or shown on.<sup>55</sup>

The, commonly called PC-PNDT Act, makes it illegal to determine the sex of the unborn child or even use sex-selection technologies. The law first came into force in 1996 as the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, in response to the falling sex ratio and fears that ultrasound technologies were being used to determine the sex of the fetus. The law was amended in 2003 to bring the technique of pre-conception sex selection within the ambit of the Act – essentially, banning practices where medical practitioners try to influence the sex of the child before conception by using techniques such as sperm sorting (where a sperm cell

---

<sup>53</sup> Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, PC & PNDT ACT §22(3), 1994

<sup>54</sup> Shashidhar KJ , SC tells Govt, search engines to stop ads on sex determination, Medianama (December 5, 2014), <http://www.medianama.com/2014/12/223-sc-tells-govt-search-engines-to-stop-ads-on-sex-determination/>

<sup>55</sup> *Id.* at 4.

is specifically chosen because of its sex chromosome).<sup>56</sup> The law as it stands not only prohibits determination and disclosure of the sex of the fetus but also bans advertisements related to pre-conception and pre-natal determination of sex.<sup>57</sup> Encouragement of prenatal tests by relatives of the pregnant woman, including her husband, as well as encouragement by clinics via advertisements is illegal.<sup>58</sup> Even when it is absolutely necessary that a woman undergo a pre-natal test, the sex of the baby is not to be revealed to her or her relatives in any manner.<sup>59</sup> It aims to prevent sex-selective abortion, which, according to the Indian Ministry of Health and Family Welfare, has its roots in India's long history of strong patriarchal influence in all spheres of life.<sup>60</sup> Prenatal sex determination has caused the Child sex ratio to go down at alarming rates, in India, which is also another factor that led to its banning.<sup>61</sup>

As the law relating to sex determination stands very clear that advertising such content is absolutely prohibited thus Supreme Court raps Central Government for sloppy implementation of PNDT Act. The division bench headed by J. Dipak Misra and J. R. Banumathi in their harsh observations accused these intermediaries of having no respect for Indian law which bans sex determination tests and kits facilitating it. The Supreme Court in this case slammed search engines Google, Yahoo and Microsoft for failing to keep out ads selling sex selection kits, and asked the Central Government and the intermediaries to immediately come up with technical solutions to prevent such ads from popping up during routine searches. "You have to do something about this (such ads on search engines). This has become a social evil," Justice Mishra observed. "You have to abide by the law. You can't say that you are not technically equipped. If you say you are, get out of the market," Justice Mishra said.<sup>62</sup> Justice Mishra then directed the government, which was

<sup>56</sup> Anuradha Mascarenhas, Sex determination: An old law, a new debate, The Indian Express (February 4, 2016 12:39 am),

<http://indianexpress.com/article/explained/sex-determination-an-old-law-a-new-debate/>

<sup>57</sup> Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, PC & PNDT ACT §22, 1994

<sup>58</sup> Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, PC & PNDT ACT §4(4) & (5), 1994

<sup>59</sup> Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, PC & PNDT ACT §5(2), 1994

<sup>60</sup>Pre-natal Sex Determination, Wikipedia The Free Encyclopedia, [https://en.wikipedia.org/wiki/Prenatal\\_sex\\_discernment](https://en.wikipedia.org/wiki/Prenatal_sex_discernment)

<sup>61</sup> *Id.* at 10

<sup>62</sup> Samanwaya Rautray, Supreme Court slams Google, Yahoo and Microsoft for sex selection kits ads, The Economic Times Politics and Nation (July 06, 2016, 01:59 A.M.), <http://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-slams-google-yahoo-and-microsoft-for-sex-selection-kit-ads/articleshow/53070073.cms>.

represented by Solicitor General Ranjit Kumar, to immediately convene a meeting of technological experts from both sides on ways and means to keep off such ads from search engines. Counsels for the intermediaries tried to resist the court order, insisting that it was not technologically feasible to block all key words involving such ads as it would inadvertently block out any content remotely connected to such words. Senior advocate CA Sundaram, appearing for Google, said that as soon as any such ad pops up, the intermediary blocks it, but it was impossible to completely prevent them from coming up.<sup>63</sup> Mr. Parikh, learned counsel for the petitioner, in his turn, had submitted that other countries have been able to control such advertisements, which violate the laws of their countries by way of entering into certain kind of agreement, developing technical tools and issuing appropriate directions. He also submitted that despite the legal prohibition, the respondents, namely, Google India, Yahoo India and Microsoft Corporation (I) Pvt. Ltd., are still getting things advertised in violation of the legal provisions contained in the Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, as amended from time to time.

Though the Hon'ble Supreme Court was firm on his stand and did not change its opinion to keep those online evils out of the reach of the people even after Google and Microsoft argued that they were not advertising anything which violated the PC-PNDT Act or any Indian law.<sup>64</sup> They also said it was not clear from the government's affidavit the nature of information sought as it has only stated that the search engines should be asked to provide or submit details of measures adopted by them to block or filter keywords and sponsored links violative of PC-PNDT Act and amendments. Filing an affidavit on the issue, the Centre also expressed its inability to check such advertisements which are in violation of the law which prohibits the sex determination of a fetus but said it can be done by the search engines—Google, Yahoo and Microsoft.<sup>65</sup> Search engine majors have said they are blocking advertisements publicizing sex-determination tests but cannot extend the ban to other forms of content, including search results, videos, blogs or images. In their representation to the Ministry of Electronics and Information Technology (MeitY); Google, Microsoft and Yahoo claimed that the law, under which pre-natal sex determination is banned, extends to advertisement viz., commercial communication but does not apply to search results. However, the multinational

---

<sup>63</sup> *Id.* at 12

<sup>64</sup> Supreme Court bans Google, Yahoo from showing sex determination ads, DNA Essel Group 90 Years (29 Jan 2015, 06:45am), <http://www.dnaindia.com/india/report-supreme-court-bans-google-yahoo-from-showing-sex-termination-ads-2056402>

<sup>65</sup> *Id.* at 14.

companies assured the Government to flash a message warning a user, looking for sites on sex-determination tests or laboratories with the facility, that it is illegal to get such a test done. MeitY had submitted details of its interaction with the companies before the Supreme Court. It was at the top court's behest that the ministry held a discussion with the industry stakeholders. In its assurance to the ministry, the companies said they will incorporate the "warning message" to be flashed at the top of "key word searches", which relate to pre-conception and pre-natal determination of sex or sex selection. The companies said they have already blocked the "key word search" terms leading to such sites. The list of "key words" that are to be blocked will be reviewed and expanded regularly with the help of the Government. They also agreed to block auto-complete suggestions. It said that the government's policy and Supreme Court's order on the issue has been already placed as part of the terms and condition page.<sup>66</sup> Moreover, it was submitted that the Department of Information Technology, Ministry of Communication and Information and the competent authority of Department of Health and Family Welfare are required to work harmoniously to see to it that the provisions of the 1994 Act are not violated, for that gravely affects the sex ratio in the country which has been seriously viewed by the legislature, as well as by this Court on the basis of legislation made by the Parliament.

Thus, the technicality of the case depicts how the respondents tried to persuade the court by giving various instances to protect the corporate sector but that was all in vain. The Supreme Court did not appear to have entered the frivolous debate at all. In the latest arguments in the case, the Solicitor General of India Mr. Ranjit Kumar offered the government's hand in filtering and blocking sex-selection advertisements. Mr. Kumar stated that, "if the URL and the I.P. addresses are given along with other information by the respondents", and also listing keywords, the Union of India can order website blocking under Section 69A of the Information Technology Act, 2000 (amended). The Union's stance, it would seem, is that either the search engines should block offending ads by themselves, or block on the basis of directions issued by the Government. Notably, in its order of 28 January 2015, the Supreme Court has directed that, as an interim measure, "Google, Yahoo and Micro Soft shall not advertise or sponsor any advertisement which would violate Section 22 of the PCPNDT Act, 1994. If any advertise is there on any search engine,

---

<sup>66</sup>Can't extend ban on sex determination ads to videos, blogs: Search engines to SC, Hindustan Times (August 09, 2016, 01:36 IST), <http://www.hindustantimes.com/india-news/can-t-extend-ban-on-sex-determination-ads-to-videos-blogs-search-engines-to-sc/story-DJ5Gyxtrt5afqEWEJU36M.html>

the same shall be withdrawn forthwith by the respondents”.<sup>67</sup> In spite of this order the search giants continued to deliver such ads, in response to which, on August 15, 2015, the petitioner again filed an affidavit for the same cause, the result of which gave a very fruitful order. Mr. Sanjay Parikh, learned counsel appearing for the petitioners submitted that vide order dated 28th January, 2015, the Court had directed to reflect the said order on the ‘policy page’ as also on the page containing ‘terms and conditions of service’, but the ‘policy page’ does not sub-serve the purpose and, therefore, it should be put on the ‘Home page’.

The entire leaning towards the firm stand to put a ban on such eminent and giant search engines is also influenced by a campaign started by our Prime Minister Narendra Modi viz., “Beti Bachao, Beti Padhao” campaign, started nearly a week before this judgment. The Supreme Court restrained search engines namely, Google India, Yahoo India and Microsoft Corporation (I) Pvt Ltd from advertising or sponsoring any advertisement on sex determination technologies in violation with the Indian laws and contributed enormously to the campaign, started mainly to focus on prohibiting the ever-increasing female feticide. Miserably, our society is ignoring the importance of girls and not realizing their worth even in present world and blindly following the herd which always craves for having a male child. The order was passed just to remove this flaw from our society.

Remarkably, the ban on sex selection has its roots not only in India but many countries around the world have banned sex selection. They have banned the abortion of a fetus based on gender and/or they have banned the practice of using IVF and then pre-implantation genetic diagnosis (PGD) to determine the sex of embryos. Often the only exception is for sex-linked genetic disorders. These countries have said loud and clear that choosing which children get to live and which ones are slated to die based simply on their gender are an evil which their society will not tolerate. According to the Center for Genetics and Society’s BioPolicyWiki page<sup>68</sup>, the following countries have banned sex selection, either for non-medical reasons or altogether: Australia, Austria, Belgium, Bulgaria, Canada, China, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Israel, Italy, Latvia, Lithuania, Netherlands, New

---

<sup>67</sup> Geeta Hariharan, Search Engine and Prenatal Sex Determination: Walking the Tight Rope of the Law, The Centre For Internet & Society (29 January, 2015), <http://cis-india.org/internet-governance/blog/search-engine-and-prenatal-sex-determination>.

<sup>68</sup> Rebecca Taylor, U.S. Must Join Other Nations Banning Sex-Selection Abortion, Life News.com (Apr 24, 2012 1:02PM), <http://www.lifenews.com/2012/04/24/u-s-must-join-other-nations-banning-sex-selection-abortion/>

Zealand, Norway, Portugal, Russia, San Marino, Singapore, South Korea, Spain, Switzerland, Turkey, United Kingdom, and Vietnam.

Further, the process for banning ads relating to sex selection is not that much out of the reach of accused search engines as **Yandex, the Russian search provider**, appears to have prevented ads relating to pre-natal sex determination for different reasons. In its Advertising Requirements<sup>69</sup>, Yandex mandates several restrictions on advertisements relating to medicines, medical products and medical services, which require licenses, registrations with Russian federal authorities, etc. to be produced to Yandex before an ad can be placed. Yandex has placed these restrictions in pursuance of Russian federal laws, but it appears that they have had the unintended consequence of keeping the site clear of advertisements that violate Section 22 of the PNDT Act, as well.

In the nutshell, it can be stated that there can be no dispute that the respondents, namely, Google India, Yahoo! India and Microsoft (I) Pvt. Ltd., in the name of intermediaries, cannot put anything that violates the laws of this country. Deducing from the content, it is far much clear that the initiative taken by the court in the present case by issuing such a significant order is giant step in this direction not only in terms of a single nation (India) but also globally. The case will act as precedent in similar forms of cases and issues relating to ban on online advertisements or sponsors that give rise to social evil of female feticide by providing means and measures to pre-natal sex determination. After going through the case there remains no doubt that the order issued by the Supreme Court is appropriate one and worth mentioning- ‘a need of the hour’, where the Child sex ratio is going down at alarming rates and has become a matter of concern *in presenti*.

---

<sup>69</sup> Regulations for placing advertisements on Yandex Advertising Requirements, Yandex Legal Documents, [https://yandex.ru/legal/adv\\_rules/?lang=en](https://yandex.ru/legal/adv_rules/?lang=en)

## **ABORTION LAW: AN URGENT NEED FOR UPGRADATION**

**Mannat Singh<sup>70</sup>**

### **ABSTRACT**

The Abortion Laws in India allow abortion only in very few circumstances which ultimately leaves women with no choice other than to perform the task themselves at home. Sexual crimes, the lack of decision making powers in women in India, multiple pregnancies, social taboos, social dynamics of our society as well as the crippling shortage of trained midwives and medical practitioners have all resulted in the creation of a complicated situation where a large number of abortions occur under the radar either by quacks or themselves. The result of unwanted pregnancies can be grave and adversely effects the lives of women and their families. The Abortion law in India is 38 years old and has become obsolete and needs urgent upgradation. A women's reproductive and sexual health, mental health, marital status, family dynamics, financial stability, personal needs, shape her reproductive choices. Reproductive rights are globally recognized as critical both to advancing women's human rights as well as in promoting development. The woman who is carrying the foetus has absolutely no agency over her body under the Indian abortion law. It is high time that we understand the needs of women with respect to the abortion laws and make amends accordingly.

### **INTRODUCTION**

“Abortion has been legal in India since 1971, when the Medical Termination of Pregnancy Act was passed. The law is quite liberal, as it aims to reduce illegal abortion and maternal mortality. An abortion can be performed in India until the 20th week of pregnancy. The opinion of a second doctor is required if the pregnancy is past its 12th week. The Medical Termination of Pregnancy Act was amended in 2002 and 2003 to allow doctors to provide mifepristone and misoprostol (also known as the “morning-after pill”) on prescription up until the seventh week of pregnancy.”<sup>71</sup>

---

<sup>70</sup> Student, University School of Law and Legal Studies, Guru Gobind Singh Indraprastha University, Delhi

<sup>71</sup> Angloinfo India. (2016). Termination & Abortion. [online] Available at: <https://www.angloinfo.com/india/how-to/page/india-healthcare-pregnancy-birth-termination-abortion> [Accessed 12 Aug. 2016]

“Every year 6.7 million abortions take place in India but the sad part is that 5.7 million are illegal. The place and technique used in most of the illegal cases are unsafe and unhygienic, "The result is obvious - India has a steep maternal mortality rate of 498 per 100,000 women, which is very high as compared to other countries, we are following 38-year-old law of abortion which prohibits abortion after 20 weeks, unless under exceptional circumstances such as a threat to the mother's life. Importantly, pregnancy that results from rape or failure of a contraceptive device between married couples is viewed as causing grave injury to the mental health of the woman. Many countries like Canada, Korea, China, Germany, France and several other European countries have comparatively liberal laws on abortion. Canada goes to the extent of not interfering with the issue at all and leaves it entirely to the woman and her physician. The woman is perceived as having complete liberty upon her person and the fetus is seen as a part of her body, acquiring the status of a person only after birth. Korea permits abortions till twenty-eight weeks but spousal consent is mandatory for married women. In India, legal abortion beyond 20 weeks can only be done in certain circumstances. If complications arise either in the mother or the child or some rare disease that the child suffers from, then the legal period needs to be increased to 24 weeks or above.”<sup>72</sup>

“When is termination of pregnancy allowed by a medical practitioner?”<sup>73</sup>

- (i) The continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health; or
- (ii) There is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.
- (iii) In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonable foreseeable environment.

## PERMISSION

No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her

---

<sup>72</sup> Singh Bhati, C. (2016). Legalize Abortion in India. Legal Service India. [online] Available at: <http://www.legalserviceindia.com/Supreme-court/Transfer-of-Petition-in-India.htm> [Accessed 12 Aug. 2016]

<sup>73</sup> The Medical Termination of Pregnancy Act, 1971. (2016)

guardian. (b) Save as otherwise provided in C1. (a), no pregnancy shall be terminated except with the consent of the pregnant woman.”

### **ABORTION AS A HUMAN RIGHT**

“Throughout history, induced abortions have been a source of considerable debate and controversy.<sup>74</sup> An individual's personal stance on the complex ethical, moral, and legal issues has a strong relationship with the given individual's value system. A person's position on abortion may be described as a combination of their personal beliefs on the morality of induced abortion and the ethical limit of the government's legitimate authority.

It is a woman's individual rights, right to her life, to her liberty, and to the pursuit of her happiness, that sanctions her right to have an abortion. A woman's reproductive and sexual health shape her reproductive choices. Reproductive rights are internationally recognized as critical both to advancing women's human rights and to promoting development. In recent years, governments from all over the world have acknowledged and pledged to advance reproductive rights to an unprecedented degree. Formal laws and policies are crucial indicators of government commitment to promoting reproductive rights. Each and every woman has an absolute right to have control over her body, most often known as bodily rights. A woman's right in this respect is doubtful because her right is dependent on certain conditions: proof of risk to her life or grave injury to her physical or mental health, substantial risk of physical or mental abnormalities to the child if born and a situation where abortion could only save her life, all to be arrived at by the medical practitioners. Can a woman request a medical practitioner to perform an abortion on the ground that she does not want a child at that time? Where the liberty of the woman is fully dependent on certain other factors, such a quest cannot be said to be just and reasonable. The M.T.P. Act also does not classify the pregnancy period so that the woman's interests and the state's interests could be given predominance in one's own spheres.

The decision as to abortion may be entirely left with woman provided she is sane and attained majority. Only in cases where an abortion may affect her life, her freedom may be curtailed. All other restrictions on the right to abortion are unwelcome. True, a woman's decision as to abortion

---

<sup>74</sup> Garg, M. (2016). Laws governing the Right to Abortion in India, woman's right to terminate pregnancy under certain circumstances. [online] Available at: [http://www.legalserviceindia.com/articles/adp\\_tion.htm](http://www.legalserviceindia.com/articles/adp_tion.htm) [Accessed 12 Aug. 2016].

may depend upon her physical and mental health or the potential threat to the health of the child. Apart from these reasons, there are also various important factors. She or the family may not be financially sound to welcome an addition. It may be a time when she wants to change her profession, which requires free time and hard work. Her relationship with the husband may virtually be on the verge of collapse and she may prefer not to have a child from him, for it may possibly affect a future marriage. All these factors are quite relevant and the Indian statute on abortion does not pay any respect to them.

The law thus is unreasonable and could well be found to be violative of the principles of equality provided under Article 14 of the Constitution. Is it desirable to pay compensation to woman for all her physical and mental inconveniences and liabilities, which arises in that context? Finally, it may be noted that the M.T.P. Act does not protect the unborn child. Any indirect protection it gains under the Act is only a by-product resulting from the protection of the woman. The rights provided as well as the restrictions imposed under the statute show that the very purpose of the state is to protect a living woman from dangers which may arise during an abortion process. It is the protection to the mother that protects the unborn.”

“The prohibition or severe restriction of abortion has not hindered its practice but instead it has forced high risk abortions that hit poor women harder. Large part of the legislations in Latin America have tried to solve the problem of abortion through prohibition, meaning grave economic, social, health and social justice consequences for the women living in these countries while there is no fall in the high abortion rate that exists in the region. Because of this, it is essential to review the laws that regulate induced abortion.”<sup>75</sup>

## **PREVIOUS CASES**

“This is not the first time that the Supreme Court has permitted a woman to abort a foetus older than 20 weeks. In 2015, the apex court overturned a decision by the Gujarat high court in a similar case. The Gujarat high court had denied permission to a 14-year-old rape survivor to abort her 25-week old foetus. Interestingly, while delivering its verdict, the high court acknowledged the adverse physical, emotional and psychological implications of the decision on the petitioner’s life, but ultimately chose to subscribe to the law. The girl then approached the Supreme Court, which

---

<sup>75</sup> Choike.org. (2016). Choike - List of countries and their present status on abortion legislation. [online] Available at: [http://www.choike.org/nuevo\\_eng/informes/5010.html](http://www.choike.org/nuevo_eng/informes/5010.html) [Accessed 12 Aug. 2016].

recommended that a medical panel examine the girl and decide whether the termination of pregnancy was in her best interests; if the panel was in favour of the abortion, then the girl could go ahead with the termination.<sup>76</sup>

In 2008, the Bombay high court denied a woman, whose foetus had been diagnosed with a congenital heart defect, permission to abort her 26-week foetus. The petitioners argued against the constitutionality of section 5 of the MTP Act – which permits abortion beyond 20 weeks only if it is necessary to save the life of the pregnant woman. The petitioners argued that since the 20-week law includes a provision to terminate a pregnancy if a foetus has severe abnormalities, the same provision should apply if the foetus is over 20-weeks old. However, the high court rejected this argument and held that it was not empowered to read down section 5 as it would virtually amount to usurping the power of the legislature.

Therefore, on a plain and strict reading of the MTP Act, the court held that abortion on the ground of severe abnormalities of the foetus was only permissible within 20 weeks. As there was no risk to the life of the pregnant woman, the court denied the petitioners the right to abort the foetus.

Similarly, in 2015, the Punjab and Haryana high court denied a 13-year-old rape survivor permission to terminate her 25-26-week-old foetus. More recently in *R v Haryana*, the Punjab and Haryana high court did not grant the petitioner, also a rape survivor, permission to terminate her pregnancy as the commissioned medical report did not agree to an abortion. However, by way of abundant caution, the court requested doctors from AIIMS, the premier medical institution in the country, to reassess the possibility of terminating the pregnancy. The doctors were instructed to take the decision in good faith and in the best interest of the petitioner. However, the petitioner delivered a healthy baby over the course of these lengthy proceedings. Interestingly, the court also directed the Centre to make necessary amendments to the MTP Act – to clearly stipulate that doctors will not be unnecessarily prosecuted if they act in good faith to save a rape survivor's life or to prevent grave injury to the women's physical and mental health."

---

<sup>76</sup> Bedi, P. (2016). It is Time to Overhaul India's Restrictive Abortion Law. *The Wire*. [online] Available at: <http://thewire.in/57111/how-indias-abortion-laws-fail-its-women/> [Accessed 12 Aug. 2016]

“The Supreme Court’s order passed in the case of “Ms X” v Union of India is a cop-out on an important issue — the constitutional right of a woman to have autonomy over her own body in the context of a pregnancy.<sup>77</sup>

While it has allowed the petitioner to terminate her pregnancy on the basis of medical advice that pointed out that her life would be in danger if the pregnancy was continued, the Court refused to engage with the larger questions that the petition raised – that the provisions of the Medical Termination of Pregnancy Act, 1971 (MTP Act).

It leaves us therefore in a situation where the question of whether an abortion is to be undertaken or not is left purely in the hands of a medical practitioner, with no say for the woman who is actually pregnant. The woman who is actually carrying the foetus has no agency over her body under Indian law. It is this problematic approach of the law in India that should have been examined by the Supreme Court, to see if this is not contrary to the constitutional right to life and liberty, not to mention the right to privacy of a woman.”

## **NEED FOR ABORTION**

“Women's needs and aspirations are at cross purposes with the MTP Act in many ways. The Act is far from accommodating women's abortion needs; rather, women have to disguise their needs to fit within the conditions of the Act. Hence, many of their abortions are rendered technically illegal. For example, if a woman says she needs an abortion because of failure of contraception, she can hardly resist if a doctor insists that she must now use a so-called foolproof contraceptive method. Nor can she argue that she is capable of handling her contraceptive needs effectively. Hence, she is more vulnerable to the already existing pressures to use a permanent or long-acting method. In the Indian context, where women have limited access to good quality primary health and reproductive health care and where the state has a strong bias in favour of population control, their bargaining power while accessing abortion-services is significantly lowered, in spite of their own need for abortion and safe contraceptives. There is also very little space for a woman to acknowledge her sexuality overtly when she needs an abortion, especially if she is single. Either

---

<sup>77</sup> Alok Prasanna Kumar, A. (2016). Abortion law: In 24-week pregnancy case, Supreme Court failed to address women's right to their bodies. F. India. [online] Available at: <http://www.firstpost.com/india/abortion-law-in-24-week-pregnancy-case-supreme-court-failed-to-address-womans-right-to-her-body-2916174.html> [Accessed 12 Aug. 2016].

she has to say that pregnancy is a 'husband's' or that the pregnancy resulted from coercion or rape. Being forced to tell lies-in addition to being seen as 'immoral' and 'heart-less' -makes women feel even worse than they already do about having an unwanted pregnancy. All this turmoil occurs at a time when a woman needs care, support and reassurance. Instead, the law, the biases of health professionals as well as socio-cultural norms act against her.<sup>78</sup>

In addition, a woman is distinctly disadvantaged when a doctor insists upon the husband's signature at the time of abortion. Husbands are sometimes away or absent for long periods of time. Requiring a husband's signature may ensure legal immunity for doctors, but it also reflects the patriarchal values of Indian society. Children belong to the husband; hence, a woman must get his permission to abort a pregnancy. The rights of the father overrule the rights of the woman to regulate her fertility. On the other hand, if a man denies paternity, neither a single or even a married woman can get an abortion unconditionally. Some of the women in our study said their husbands would not practice contraception themselves, nor allow their wives to do so. The women undergo repeated abortions as a consequence, while the husbands say the pregnancies must be illegitimate.

These problems point to important ethical considerations related to the decision to have an abortion, which are rarely taken into account, eg. that sex should be safe and non-coercive, that men should take responsibility if they contribute to starting a pregnancy, and that women and their offspring should have recognized legal rights.”

“In a significant decision, the Punjab and Haryana High Court ruled that the right to abort a pregnancy in a marriage rests with the wife and not husband.<sup>79</sup>

A woman is not a machine in which raw material is put and a finished product comes out. She should be mentally prepared to conceive, continue the same and give birth to a child. The unwanted pregnancy would naturally affect the mental health of the pregnant woman...” said the court.

Stressing that marital intimacy between a couple does not automatically translate to the woman's consent to child bearing, Justice Jitendra Chauhan said, “Mere consent to conjugal rights does not

---

<sup>78</sup> Gupte, M., Bandewar, S. and Pisal, H. (2016). ABORTION NEEDS OF WOMEN IN INDIA: A CASE STUDY OF RURAL MAHARASHTRA. [online] Available at: <http://www.cephat.org/publications/pc09.html> [Accessed 12 Aug. 2016]

<sup>79</sup> The Hindu, (2016). She, the decision maker. [online] Available at: <http://www.thehindu.com/sci-tech/health/policy-and-issues/she-the-decision-maker/article2892441.ece> [Accessed 12 Aug. 2016]

mean consent to give birth to a child for her husband.” Welcoming the judgement, Jagmati Sanwan, All India Democratic Women's Association national vice-president said, “If the family conditions are unsuitable, no woman would like to give birth to a child because after all, she is the one who takes care of the children for all practical purposes. We see around us that fathers often desert their families after a couple of deliveries. But children become a part and parcel of the mother's physical and emotional world. She invests much into their wellbeing and she alone suffers. Hence, the rights of whether to give birth or not, should be with her.”

### **CONSEQUENCES OF UNWANTED PREGNANCY**

“The denial of legal abortion services may have serious consequences for women's health and wellbeing. Additional evidence on the risk factors for presenting later in pregnancy, predictors of seeking unsafe illegal abortion, and the health consequences of illegal abortion and childbirth after an unwanted pregnancy is needed. Such data would assist the development of programmes and policies aimed at increasing access to and utilization of safe abortion services where abortion is legal, and harm reduction models for women who are unable to access legal abortion services.”<sup>80</sup>

“Bonding and love between parent and child is a crucial foundation for family integrity and wholesome child development. It is sometimes said that parenthood, particularly motherhood, is a 'natural' condition in which 'there is always room for one more.' But can all parents learn to love a child who was unwanted during pregnancy? Further, even if a woman does love a child born after an unwanted pregnancy, is love ever enough to ensure wholesome child development? Although it is true that unwanted pregnancy does not always translate into unwanted births, research on the development of children who were unwanted during pregnancy suggests that when women say they cannot adequately care for a child, it is important to listen to them. Both unintended and unwanted childbearing can have negative health, social, and psychological consequences. Health problems include greater chances for illness and death for both mother and child. In addition, such childbearing has been linked with a variety of social problems, including divorce, poverty, child abuse, and juvenile delinquency.”<sup>81</sup>

---

<sup>80</sup> Gerdtts, C., DePiñeres, T., Hajri, S., Harries, J., Hossain, A., Puri, M., Vohra, D. and Foster, D. (2014). Denial of abortion in legal settings: Table 1. *J Fam Plann Reprod Health Care*, 41(3), pp.161-163.

<sup>81</sup> Nancy Felipe Russo, N. and P. David, H. (2016). Psychological Issues - When Pregnancies are Unwanted. [online] Prochoiceforum.org.uk. Available at: [http://www.prochoiceforum.org.uk/psy\\_ocr2.php](http://www.prochoiceforum.org.uk/psy_ocr2.php) [Accessed 12 Aug. 2016].

In one study, unwanted children were found less likely to have had a secure family life. As adults, they were more likely to engage in criminal behavior, be on welfare, and receive psychiatric services. Another found that children who were unintended by their mothers had lower self-esteem than their intended peers 23 years later. The adverse health consequences of teenagers' inability to control their childbearing can be particularly severe. Teenage mothers are more likely to suffer toxemia, anemia, birth complications, and death. Babies of teenage mothers are more likely to have low birth weight and suffer birth injury and neurological defects. Such babies are twice as likely to die in the first year of life as babies born to mothers who delay childbearing until after age 20.”

“Does it matter whether a pregnancy is unintended at the time of conception—mistimed or unwanted altogether?”<sup>82</sup> There is a presumption that it does—that unintended pregnancy has a major impact on numerous social, economic, and cultural aspects of modern life. But it is important to define what these consequences might be. Therefore, in assessing the consequences of unintended pregnancy, it is useful to review the available data on the extent to which these demographic attributes themselves carry increased risks for children and their parents. Information on both socioeconomic and medical risks are reviewed below; because poverty is intertwined with the issues of both age and marital status, as subsequent text reveals, it is not discussed as a separate issue it is important to note the strong association of teenage childbearing with various problems. The link to diminished socioeconomic well-being, for example, for both children and their mothers has been recognized for several decades (Bacon, 1974). Adolescents who have children are substantially less likely to complete high school than those who delay childbearing. In recent years, the proportion of teenage mothers with high school degrees has increased, in large part because many are able to complete requirements for the general equivalency diploma. However, few teenage mothers attend college, and less than 1 percent have been found to complete college by age 2. Moreover, teenage mothers are more likely to be single parents or, if they are married, to experience marital dissolution (Hayes, 1987). Indeed, the proportion of teenagers who are single parents has increased substantially over the years. Births resulting from unintended pregnancies are often conceived out of wedlock and the infants are born to unmarried women. More than 40 percent of infants born after unintended conception begin life with unmarried parents. Births to

---

<sup>82</sup> The Best Intentions. (1995)

unmarried parents are twice as likely to be unintended as births to married parents (70.4 compared with 33.9 percent) (Kost et al., 1994). Moreover, couples who marry after conception—usually unintended—are more likely to divorce than couples who marry before conception (Bumpass and Sweet, 1989). Finally, unintended pregnancies within marriage are associated with a greater risk of divorce after the child's birth. For all these reasons, children born after unintended conceptions are very likely to live apart from one or both of their parents, usually their father, sometime during childhood.”

<sup>13</sup>“The social stigma associated with being an unwed parent is so much that it may lead some women to attempt or commit suicide. In our social setup, pregnancy outside marriage is considered a humiliation that will affect not only the mother but also her family. Such a woman is ostracized in most of our Indian Societies. The immediate family and extended family, which should provide social protection to mothers to be, leave them alone considering their social and financial burden. According to a research conducted by a Colombo-based lawyer, “The single women both at home and at the work place have to face many physical advances from men young and old, married and unmarried. In our interviews these women found it difficult to discuss these sexual advances.” To be single and specially an unwed mother is taken as that you are available or easy to gain access to. Furthermore, what is more critical is that the responsibility of a child born outside marriage rests solely on the mother. The lack of support from family, relatives, society, etc. makes her living quite hard and sometimes unbearable.”<sup>83</sup>

---

<sup>83</sup> Mathur, P. (2016). [online] Available at: <https://palakmathur.wordpress.com/2009/05/03/social-and-cultural-stigma-unwed-mothers/> [Accessed 12 Aug. 2016].

## **CORPORATE CULTURE AND ETHICS IN MODERN ORGANISATIONS**

**PSS Laxmi Kavva**<sup>84</sup>

### **ABSTRACT:**

Today's world is full of profit oriented attitude which is turning man into machine. In today's globalization, it is win or perish in the market, customers are unforgiving in the sense of quality and price. Even the third world countries are looking for sustainable, less expensive and high technological goods in their hands. The organizations are resorting to all the deeds to make it right at the end to the customer. Even though customer is king somewhere the organizations are losing their main theme of existence that is service to customer as the profits increase they are neglecting the customer which in turn is making him look for second options. This is leading to a friction in between the organizations which is making them loose their culture and ethics this paper tries to throw light on these present issues of corporate culture between employee-employer and employee-customer, the importance of ethics in the organization is once again reminded through this paper.

### **INTRODUCTION:**

Corporate Culture incorporates qualities and practices that "add to the extraordinary social and mental environment of an association. Ravasi and Schultz (2006) composed that corporate culture is an arrangement of shared suppositions that guide what happens in associations by characterizing proper conduct for different circumstances. It is likewise the example of such aggregate practices and suppositions that are taught to new hierarchical individuals as a method for seeing and, notwithstanding, thinking and feeling. In this way, authoritative society influences the way individuals and gatherings collaborate with each other, with customers, and with partners. What's more, authoritative society might influence the number of representatives relate to an association.

Schein (1992), Deal and Kennedy (2000), and Kotter (1992) propelled the thought that associations frequently have extremely varying cultures and in addition subcultures. Although an organization might have its "own special society", in bigger associations there are here and there existing

---

<sup>84</sup> Asst. Prof, M.B.A. Dept., G.V.R &S College of Engineering and Technology, Budampadu, Guntur

together or clashing subcultures since every subculture is connected to an alternate administration group.

### **DEFINITION:**

According to Needle (2004), organizational culture represents the collective values, beliefs and principles of organizational members and is a product of such factors as history, product, market, technology, and strategy, type of employees, management style, and national culture; culture includes the organization's vision, values, norms, systems, symbols, language, assumptions, beliefs, and habits.

### **EMERGENCE OF CORPORATE CULTURE:**

The idea of corporate culture rose as a deliberately developed reality in the 1960s close by related improvements like the social obligation development—itsself the result of environmentalism, consumerism, and open antagonistic vibe to multinationals. Attention to corporate society was without a doubt likewise a result of development, not minimum extension abroad—where organizations ended up contending in other national societies. The U.S. rivalry with Japan, with its exceptional corporate society, was yet another impact. So was the ascent to unmistakable quality of administration masters the dignitary of whom was Peter Drucker. As corporate got to be mindful of themselves as performing artists on the social scene, corporate society turned out to be yet another part of the business to watch and to assess—close by the "hard" measures of benefits, incomes, benefits, and shareholder return.

Corporate culture by definition influences a company's operations. It is likewise, by definition, something that spills out of administration descending and outward. In numerous companies, the "way of life" was set at an opportune time by the alluring movement and administration of an organizer. Yet, as significant inclinations turn out to be profoundly standardized, corporate culture additionally turns into an institutional propensity that newcomers secure. In real work on "reevaluating" the company starting from the top, consequently, is hard to accomplish, requires significant investment, and happens just under solid authority.

Spectators and experts of the marvel have a tendency to subdivide culture into its different expressions related either to significant voting demographics (representatives and specialists, clients, sellers, government, the group) or to strategies or styles of operation (careful,

preservationist, hazard taking, forceful, imaginative). A corporate society might likewise, by violating certain limits, get to be self-destructive—as the instance of Enron Corporation, the vitality merchant, delineates. In the Enron society, a forceful, inventive, high-chance style prompted misrepresentation and extreme breakdown. Examination is useful in seeing how a corporate culture communicates in particular ranges. In any case, the idea is social and society, as the expression itself suggests. It doesn't fit revamping by an adjustment of standard building pieces.

### **COMPONENTS OF CORPORATE CULTURE:**

- Vision
- Values
- Practices
- People
- Narrative
- Place

### **EXAMPLES:**

Real Life examples of Corporate companies who have very strong culture can make you easily understand the concept and importance of corporate culture.

#### **Zappos:**

Zappos procures as indicated by cultural fit most importantly. It has built up what the organization society is, and fitting into that culture is the most essential thing administrators search for while employing. This advances the way of life and upbeat representatives, which eventually prompts cheerful clients.

#### **Warby Parker:**

Warby Parker has made organization culture conscious by making a devoted group tasked with concocting occasions and projects to advance group. Awesome organization society doesn't happen all alone.

### **Southwest Airlines:**

Southwest isn't new to the diversion. It's been in operation for a long time. Yet some way or another, amid all that time, the organization has figured out how to impart its objectives and vision to representatives in a way that makes them a part of a brought together group. Southwest likewise gives representatives "authorization" to go that additional mile to make clients upbeat, engaging them to do what they have to do to meet that vision.

### **Twitter:**

Employees of Twitter can't quit raving about the organization's way of life. Housetop gatherings, agreeable colleagues and a group situated environment in which every individual is spurred by the organization's objectives have enlivened that acclaim.

employees of Twitter can likewise expect free dinners at the San Francisco base camp, alongside yoga classes and boundless get-away for a few. These and numerous different advantages are not unbelievable in the startup world. Be that as it may, what separates Twitter?

Employees can't quit discussing how they adore functioning with other savvy individuals. Specialists rave about being a piece of an organization that is accomplishing something that matters on the planet, and there is a feeling that nobody leaves until the work completes.

### **Google**

Google has been synonymous with culture for a considerable length of time, and sets the tone for a large portion of the advantages and advantages new businesses are currently known for. Free dinners, worker outings and gatherings, budgetary rewards, open presentations by abnormal state officials, exercise centers, a puppy cordial environment etc. Googlers are known not driven, gifted and among the most elite.

As Google, has developed and the association has extended and spread out, keeping a uniform society has demonstrated troublesome in the middle of home office and satellite workplaces, and in addition among the distinctive divisions inside of the organization. The bigger an organization turns into, the more that culture needs to reevaluate itself to oblige more representatives and the requirement for administration.

While Google still gets stellar audits for pay, advantages and headway, there are likewise a few workers who note developing agonies that you'd anticipate from such an enormous organization, incorporating the anxiety connected with a focused situation. Procuring and expecting the best from representatives can without much of a stretch turn into a stressor if your way of life doesn't take into account great work-life parity.

### **ETHICS IN CORPORATE WORLD:**

Ethics considerations ethical judgments concerning what's wrong and what's right. All the choices created during a company square measure created by a number of people or teams however they're influenced by the prevailing culture of the corporate. Business ethics aren't a compulsion however it's a selection that provides a major rank to the corporate. Call the choice to follow business ethics could be an ethical decision. Business ethics bears the complete weight of any call created within the company world. What square measure advantages of business ethics in company world? Business ethics will bring many benefits to a corporation. for instance,

- 1) It attracts the purchasers to the merchandise equipped by the firm and so it will increase the sales and profits.
- 2) It conjointly attaches the staff with the corporate, it makes them stick with the corporate and thereby reduces labor turnover and will increase productivity.
- 3) It attracts increased variety of staff to the corporate, which successively reduces the price of achievement of latest staff. It allows the corporate to simply rent additional proficient staff while not searching them done.
- 4) It attracts investors to the business and helps to take care of the share worth of the corporate high. It protects the corporate from takeover.

These square measures some edges of business ethics and company social responsibility. Unethical behavior of a corporation will reverse the method of growth. mental object concerning company social responsibility will injury the name of a firm and may create it less appealing to the investors and also the stakeholders. These could result in serious fall in profit. Businesses square measure expected to create the maximum amount profit because it will. A business itself contributes within the growth and development of society.

However, business leaders cannot quit their real objective and begin doing social service; it'll adversely have an effect on the expansion method. By applying ethics in their business, business leaders will fulfill each their responsibilities equally. a corporation will perform its ethical duties together with creating cash and merchandise smart for the society by applying business ethics. associate moral business not solely follows ethic itself however it conjointly makes others do a similar. The staff, suppliers, investors and also the customers square measure additional doubtless to follow the ethics after they feel the moral encompassing. moral behavior replicates itself. If someone adopts it, it'll be followed by alternative peoples yet and when you time the full surroundings will become moral. Lack of ethics in business not solely causes loss of name for that firm however it will cause serious loss to the broader world too. If a corporation is careless concerning merchandising its waste merchandise, it's going to hinder the event method of the country, loss of renewable resources and affects the lives of its inhabitants.

Moral business isn't solely concerning being careful concerning the surroundings and ensuring that you simply not cause any injury to the outer world. It conjointly means the corporate ought to dedicate a number of its time in rising things around it like politics, amusement, social work, and infrastructure of the country then on. Business ethics not solely helps your business however it takes the responsibility of the full encompassing. Business ethics square measure necessary for a business. It's the mirror of the composition of any company. It reflects the thinking and awareness of a corporation of its ethical duties towards the society. It helps in maintain the name of the corporate and gets additional investors, customers and staff to the corporate.

#### **DIFFERENT EXAMPLES OF ETHICAL ISSUES IN CORPORATE WORLD:**

There has for some time been sizeable discussion in philosophy concerning the moral standing of firms and company bodies. Those at the pinnacle of firms have, unsurprisingly, lobbied to possess firms declared to own several of the additional vital rights of individual persons while not additionally having the no of heavy responsibilities of individual persons. therefore, firms have typically seen themselves as having duties to their shareholders, and few if any duties to the broader community on the far side those expressly needed by law.

The issue of company responsibility sometimes involves public notice once a company acts in a very approach that the general public takes to be ethically harum-scarum. samples of such behaviours square measure legion, however they sometimes involve firms acting so on maximize

their own profits at the expense of the atmosphere, or those in developing countries, or native communities, or people, or smaller firms etc. etc. the problem of company responsibility became salient on a rather completely different and strange dimension recently once Visa, MasterCard and PayPal all blocked donations to WikiLeaks.

Much has been afore said within the public media regarding this course of events. Some commentators have thought it outrageous that firms like Visa ought to take it upon themselves to form what square measure primarily moral choices on a part of those that use Visa services. The thought, I take it, is that whereas Visa the corporation will have no matter read it likes regarding the WikiLeaks website, thus too every folk within the community features a right to associate opinion regarding the ethics, or not, of the WikiLeaks website. those that suppose that WikiLeaks could be a danger to government and society, which it's flagrantly unethical ought to refrain from donating any cash to the positioning. those that suppose it provides a vital supply of data regarding government activities so government may be responsible to the folks that elect it which this is often important in a very democracy, should, if they select, have the proper to present cash to the positioning.

Commentators found out that by obstruction payments to WikiLeaks, Visa, MasterCard and PayPal effectively created the selection for everybody. Moreover, as several found out, this is often for sure insincere only if these same firms don't generally police the process of payments to alternative organizations that square measure ethically ambiguous. for example, you and that I will present cash through Visa or MasterCard, to expressly militant sect racist organizations. we are able to pay cash for creation victimization Visa and MasterCard. we are able to present cash to exit international, a lobby cluster and data supplier regarding putting to death. Visa, MasterCard and PayPal haven't any policies regarding these organizations - thus why choose on WikiLeaks?

Visa, PayPal and MasterCard have all claimed that the rationale they're obstruction payments to WikiLeaks isn't owing to something to try and do with ethics in any respect, however is a difficulty regarding lawfulness. Their statements say that their rules proscribe customers from facilitating any action that's misappropriated. Thus, their claim is that that they're not taking associate moral stand at all; they're just following the law. however, this is often a tough argument to swallow.

The status of the WikiLeaks website is unclear, and until now no charges are evidenced. it's tough to check however donating cash to the positioning may be thought-about facilitating criminal

activity before it being proved that the positioning has engaged in any criminal activity. thus, it's tough to not browse Visa's call as not being actuated by alternative issues, a number of that square measure presumptively moral issues (though some aren't any doubt political).

Whatever one thinks of the motivations of Visa and their kind, serious and attention-grabbing queries are raised by their actions. specifically, quite apart from the particulars of the WikiLeaks case their square measure questions on however such firms got to approach moral queries arising from (in this case) the process of payments to organizations. initially blush one would possibly defend the read that Visa and MasterCard got to method any and every one payments unless those payments square measure to organizations that square measure, at the time of payment, misappropriated (such as explicit terrorist organizations). Then people square measure left to form their own choices near to whom to present their cash. this is often by no means that a crazy read. actually, one ought to have respectable worries regarding the prospect of organizations like Visa and PayPal implementing policies regarding that transactions they'll method and that not, supported a policy derived from their own moral issues. That such organizations ought to dictate the way during which we have a tendency to pay our cash could be a scary proposition and one that has, in terribly tiny half, been created additional real to United States within the wake of the WikiLeaks scenario. This worry could be a terribly real one, and would possibly lead one to contend that moral issues ought ne'er to play a job in organizations like PayPal deciding whether or not to method transactions or not.

But as continually, nothing is totally clear-cut. it's not clear that we wish organizations like Visa to method payments completely despite the moral issues at play. throughout the second war Swiss banks rather notoriously handled each the German government and with people World Health Organization had product and monies that were virtuously, if not lawfully, stolen. nation banks effectively took the read that they were just the processors of economic transactions, which it absolutely was not up to them to form choices regarding process or not process transactions supported any moral views they may or won't have regarding the circumstances during which the monies were gained. that's primarily the perspective that we've got simply thought-about applying within the case of Visa and MasterCard - one that leaves choices regarding what's moral and what's legal up to governments and people at intervals a society and permits no role for such choices at intervals firms. however, that looks engaging even as long because the society in question has laws

that support moral behavior. If nation government were to alter its laws and begin seizing the property of everybody with red hair and freckles and if it were to then method the transacting of that property through organizations like Visa, we'd not, I expect, be thus sanguine on suppose that Visa got to merely method those transactions no queries asked. If that's right, though, then we have a tendency to should suppose that firms like Visa have some moral responsibilities in terms of the process of economic transactions that transcend just following the letter of the law at intervals any explicit country.

The WikiLeaks case raises larger problems regarding the extent to that firms like Visa and MasterCard got to impose some type of constraints, borne from moral issues, on the people World Health Organization use their services. There aren't clear cut answers to the current question: it's not enough to easily say either that ethics ought to be utterly missed of the equation, nor that they ought to exert no matter pressures they happen to need. the reality should lie somewhere in between. however, within the heat of the argument regarding WikiLeaks, this additional nuanced discussion has mostly been lost. which could be a pity.

## **CONCLUSION:**

All these discussions about various organizations and their corporate culture and flow of ethics in modern organizations is about change. A change which should be welcomed in the organization always with an inspiration and persuasion.

But change and corporate culture does not mean giving salaries providing food to the employees etc.; they are all to be done naturally but, what really is not changing in this world is the nature and mindset of people who are always focusing on monetary issues than climbing up the ladder of needs.

Being ethical is the most difficult one these days with all the unpretty things around us.

Employee is becoming the enemy of the employee, they are fighting for money and power in the department. So, what kind of corporate culture who have studied so well will behave so emotionally in the situation.

So, a real change in corporate culture is when employee is trusting in Team based work in the organization.

Following ethics sometimes leads to difficult situations in life and work the individuals need to be strong and self-sufficient. They have to wait their turn to play their role. Corporate culture is all about the perspectives and attitudes of the employees. If that is no good, then there will be trespassing of ethics and then we end up biting our nails.

Employees need to be motivated directly or indirectly then a change can be seen which leads to the efficient performance of the employees.

## **REFERENCES**

- 1) *"Business Ethics (Stanford Encyclopedia of Philosophy)". Plato.stanford.edu. 2008-04-16. Retrieved 2013-06-04.*
- 2) Smith, A (1776/ 1952) *An Inquiry Into the Nature and Causes of the Wealth of Nations*. Chicago, IL: University of Chicago Press, p. 55
- 3) Jones, Parker & et al. 2005, p. 17
- 4) *Slavery and the Making of America—Episode 1*. Video.google.com. Retrieved on 2010-09-02.
- 5) Kingsolver, A. (2008). *Capitalism*. Encyclopedia of Race and Racism. J. H. Moore. Detroit, Macmillan reference ISBN 0-02-866021-8 pp. 268–271.
- 6) Needle, David (2004). *Business in Context: An Introduction to Business and Its Environment*. ISBN 978-1861529923.
- 7) "Three Bell Curves: Business Culture Decoded"
- 8) Sirota Survey Intelligence
- 9) Lean Enterprise Institute
- 10) NetPromoterScore
- 11) Ravasi, D.; Schultz, M. (2006). "Responding to organizational identity threats: Exploring the role of organizational culture". *Academy of Management Journal* **49** (3): 433–458. doi:10.5465/amj.2006.21794663.
- 12) Schrod, P (2002). "The relationship between organizational identification and organizational culture: Employee perceptions of culture and identification in a retail sales organization". *Communication Studies* **53**: 189–202. doi:10.1080/10510970209388584.

**PRACTICAL CHALLENGES CIRCUMSCRIBING CORPORATE SOCIAL  
RESPONSIBILITY IN INDIA**

**Raavi Mehta<sup>85</sup>**

**ABSTRACT**

The concept of CSR is an expedient to survival and success of a business along with fulfilling its community goals. It continuously evolves as a process keeping in loop everything in and surrounding a corporate. Each company needs to play their own role in some ways as it is integral for their growth. Assessing and identifying the real needs of the community around a particular company can help in formation of CSR plans and policies. It becomes necessary to review the existing policies in order to develop more meaningful visions for the companies and broaden their contributions to reach to local communities. The concept of CSR is presently rooted on the worldwide business agenda and it has discovered strong footing in the Indian corporate field and the demand of the hour is to take social businesses to a higher level.

This paper is organized as follows. It begins with enumerating about modulated arrangement initiated by SEBI which were fueled by an ambitious endeavor which resulted in the enactment of Section 135 of the Companies Act 2013. These became the reason for growth on the CSR front. It further elucidates the relation between CSR and Corporate governance and how they are seen complementary to each other. The next part of the paper provides for the practical challenges in the provisions for CSR in the 2013 Act. The paper concludes highlighting that the concept of CSR is an expedient to survival and success of a business along with fulfilling its community goals. But, to be able to move from hypothesis to a concrete activity, numerous deterrents need to be overcome. The recommendations are in the last part.

**INTRODUCTION**

The Government of India made a primary endeavor to set the Corporate Social Responsibility (hereinafter 'CSR') issue in motion by issuing CSR Voluntary Guidelines in 2009.<sup>86</sup> The guidelines

---

<sup>85</sup> Student, Amity Law School, Amity University Rajasthan

<sup>86</sup> Corporate Social Responsibility Voluntary Guidelines, Ministry Of Corporate Affairs Government Of India, 2009

highlighted the social advantages emanating from CSR but were mostly recommendatory in nature with a minimal practical focus. The fundamental components of CSR approach which includes observance of stakeholder's interest, ethical working, awareness for worker's rights and welfare, regard for human rights and promoting activities to advance social and comprehensive improvement were envisaged in these guidelines. Further, laying down the foundation of development of CSR, MCA issued National Voluntary Guidelines for Social, Environmental and Economic Responsibilities of Business (NVG), 2011 refining the 2009 guidelines.

The move from a voluntary CSR system to a modulated arrangement initiated when the Securities Exchange Board of India (SEBI) mandated the top listed 100 Companies as under the Listing Agreement<sup>87</sup> to compulsorily exhibit their CSR activities in the Annual Business Responsibility Reports. The cardinal principle of this clause is that all businesses should conduct and govern themselves with ethics, transparency and accountability and must promote the wellbeing of stakeholders and employees. Further, the growth on CSR front fueled by an ambitious endeavor which resulted in the enactment of Section 135 of the Companies Act 2013 (hereinafter '*the Act*').

### **CSR OBLIGATIONS UNDER THE ACT**

Section 135 of the Act brought CSR activities of Indian Companies under the domain of Company Law and made CSR spending and reporting obligatory for the first run through in India. The Act broadly determines the scope of CSR activities in Schedule VII and embraces a comply-or-explain approach for compliance under Section 135, laying no clear punishment for non-compliance. Later, the Companies (CSR Policy) Rules, 2014 came into force which promotes transparency and disclosure in the company affairs. The Rules emphasize on setting up a CSR committee comprising of three board members out of which one must be an independent director and recommends the companies to report spending at least 2% of their average net profit from the preceding three years for undertaking CSR activities. This committee is solely responsible for preparation and implementation of a detailed plan on CSR activities including the type of activities, expenses and monitoring mechanism for the activities.

### **RELATIONSHIP BETWEEN CSR AND CORPORATE GOVERNANCE**

---

<sup>87</sup> Clause 55

There exist two different theories pertaining to the integration of CSR and corporate governance, which are “*pro-regulation*” and “*pro-business*”. The former views corporate governance as a regulatory mechanism which places obligations on the directors of a company to conduct business in a manner which aims not only in maximizing the share value but also in considering social responsibilities. However, the latter stand in disagreement with this thought and advocates that additional liability must not be imposed on the directors of a company as it would impede in satisfying the interests of the shareholders. The “*pro-business*” model states that casting such burden on the directors of any company would negatively affect the conduct of business thereby, having socio-political impacts. They further state that the Legislature must take into consideration these elements and frame regulations in a manner that mandates the directors of a company to act in a socially acceptable manner, while pursuing the goal of long-term benefit for the company.

CSR functions in a manner which is not highly regulated. Whereas, Corporate Governance works in a strictly regulated framework as it is a formal system laid down for effective management and transparency to the shareholders. However, when perceived in a wider sense it includes under its ambit the impact of the actions of a company on the society, its employees, customers and various other stake-holders. If these two senses are harmoniously construed together, corporate governance no longer remains a mere system of profit maximization. Therefore, Corporate Governance and CSR are seen complementary to each other.

Conclusively it is important to highlight that in a comprehensive system of corporate governance, CSR has secured a significant position. CG provides a framework under which the objectives of CSR and ethical business can be enriched. Though, this convergence has taken place in the recent times, it would shape and strengthen the Corporate Governance sphere in times to come. With the advent of this concept, ethical business conduct and social responsibility will become a major consideration in the day-to-day business activities. Further, the principles of transparency, responsibility, accountability and fairness will come under the ambit, theory and practice of CSR. With the evolution of the concept of corporate governance, the concepts of accountability and social responsibilities have also gained a significant position. It has evolved to include fiduciary obligations towards share-holders, multiple stake-holder engagement and an economic scrutiny to incentivize the management to engage in furthering the objectives of CSR. Such a system of

corporate governance which is infused with the theory of CSR contributes towards enhancing the role of share-holder in actively participating in all the socially responsible initiatives of a company.

### **PRACTICAL CHALLENGES IN THE 2013 ACT**

The CSR strategy comes with its own challenges which make it hard for implementation. It has faced practicality issues ever since its inception which shall continue until requisite steps are taken to effectively and efficiently implement it. To make it successful, innumerable hurdles have to be crossed not only in the stages of planning but also in the stages of implementation and execution of the projects. In planning and policy formulation we have excelled but in execution we still lack behind. Also, the provisions under CA, 2013 indicate various loopholes. There are many other factors curtailing its proper implementation and some of such factors are discussed below.

The biggest hurdle is using the capabilities and competence of a corporate to address environmental concerns to the utmost.<sup>88</sup> Technical and managerial incapacity to execute the CSR initiatives has hindered its emergence as a concept.

Secondly, apart from implementation issue, managing these activities is equally difficult. Only efficiency in its management can ensure benefits of CSR to all. Problems in handling and managing activities results in problem of assessing companies' performance. Lack of transparency and accountability among managers aggravates the issue.

Thirdly, budget constraints act as a bottleneck in its implementation adding to the problem of unawareness and non-involvement of community. There is a lack of inclination towards CSR activities leading to its steady growth in India. To promote understanding among community members it is necessary to communicate with them and broaden their narrow perception of it. Sensitizing the issue and informing people through different channels can enable them to participate and contribute to the activities of the company undertaking it. Serious efforts for growing community awareness can build the trust among people to further support this concept.

Fourthly, the provisions guiding CSR activities are vague in nature. They do not give definite directions on how the activities are to be taken and who shall monitor them. This gives way to

---

<sup>88</sup> Corporate Social Responsibility (CSR) in India: A Review, Mr. Neelmani Jaysawal and Mrs. Sudeshna SahaĀ, Jaysawal and Saha. Space and Culture, India 2015, 3:2, page 81

unprofessionalism in taking up the activities. Specifying on how spending on CSR can be made, instead of leaving it on companies to decide, can make the provisions more practical. Further, they do not state about the treatment of tax for engaging into CSR activities. It leaves an ambiguity as to whether tax benefit can be availed on spending money for fulfilling the obligation under the provisions of Section 135 of the Act. Therefore, aligning these provisions with the tax laws can bring more clarity in implementing the provisions.

Lastly, most companies don't fall in the bracket as specified in the Act and therefore, get away with the responsibility towards contributing to the environment. Only companies making good profit are governed by the provisions of the Act and the remaining firms are out of its purview. The handfuls of companies which fall within the purview of Section 135 of the Act are unable to win people's trust on the account of concealment of the activities undertaken by them. So, robust statutory guidelines which expedite the growth of CSR and ameliorates the aforementioned challenges must be formulated by the Legislature.

## **CONCLUSION AND RECOMMENDATIONS**

The concept of CSR is an expedient to survival and success of a business along with fulfilling its community goals. It continuously evolves as a process keeping in loop everything in and surrounding a corporate. A specific set of activities which lay down time bound targets in handling social and environmental issues must be laid down by the Law makers themselves. This can also improve the social performance of a company. But this in itself would not suffice in promoting CSR. Each company needs to play their own role in some or the other way as it is integral for growth of this sector. Assessing and identifying the real needs of the community around a particular company can help in formation of CSR plans and policies. It becomes necessary to review the existing policies in order to develop more meaningful visions for the companies and broaden their contributions to reach to local communities.<sup>89</sup>

Also, both government and corporate should pool in their resources to address the budgetary problems. Budgetary support can accelerate the process and ensure that these initiatives reach out

---

<sup>89</sup> A Study of Corporate Social Responsibility in Indian Organization: An-Introspection, Rajeev Prabhakar and Ms. Sonam Mishra, 21st International Business Research Conference, 10 - 11 June, 2013, Ryerson University, Toronto, Canada, [http://www.wbiworldconpro.com/uploads/canada-conference-2013/management/1370168444\\_430-Sonam.pdf](http://www.wbiworldconpro.com/uploads/canada-conference-2013/management/1370168444_430-Sonam.pdf)

to the beneficiaries in rural areas as well. Keeping all the people within the boundary of CSR will allow the access of benefits of CSR to maximum. Expanding the scope of activities to all the local areas will motivate other companies to adopt this mechanism and undertake CSR activities at their level. Institutionalizing CSR to become part of the integral business strategy framework can improvise their brand image and identity also. Further, aligning them with tax provisions and laying down clear penalty provisions can provide both incentive and deterrence to adopt this growth oriented concept respectively. Uniformity in practicing CSR activities among all the eligible companies and making it central for a business strategy can prove to be very helpful in the long run.

The concept of CSR is presently rooted on the worldwide business agenda. But, to be able to move from hypothesis to a concrete activity, numerous deterrents need to be overcome. Key indicators of progress in the CSR sector are to be identified to assess the company's performance. Clarity and communication can make a business appear more reliable and accelerate the yardstick for different associations as well. The provisions for CSR in the Indian law can prospectively guide the field of corporate to a new era which is free from the challenges confronted by this sector. CSR has discovered strong footing in the Indian corporate field and the demand of the hour is to take social businesses to a higher level.

**ENFORCEMENT OF COMPETITION LAW IN INDIA: A COMPARATIVE ANALYSIS**  
**WITH U.K & EU**

**Riyanka Roy Choudhury<sup>90</sup>**

**ABSTRACT**

The Competition Commission of India<sup>91</sup> (the Commission) is the authority vested with the powers to enforce the provisions of the Competition Act, 2002 <sup>92</sup>(as amended by the 2007 Act). The central government has the power to establish the Commission through a notification. Section 8<sup>93</sup> defines the composition of the Commission, the number of members, and their qualifications. The Central Government has reserved to itself the right to appoint the Chairperson and a member during the first year of the establishment of the Commission. Section 9<sup>94</sup> provides that the selection of the chairperson and the members shall be made in the manner prescribed. The paper follows a descriptive and analytical methodology of research. Primary as well as secondary sources have been referred in the paper. The scope of the paper is limited to some common-law countries in specific. The Competition Laws of India, USA and UK with respect to the 'Enforcement mechanism' have been covered. To understand the Enforcement mechanism of Competition Laws in India, ascertain the changes brought about by the Amendment Act of 2007 and to make a comparative analysis of these laws with the laws of other countries like USA and UK.

**Keywords:** Competition Law, Commission, U.K., U.S.A. India

**INTRODUCTION**

The Central Government may appoint a Director-General for the purpose of assisting the Commission in conducting an inquiry into the contravention of any of the provisions of this Act, for the conduct of cases before the Commission, and for performing such other functions as are, or may be, provided by or under

---

<sup>90</sup> Riyanka Roy Choudhury, Trainee Judicial Clerkship, M.P. High Court Bar

<sup>91</sup> Section 7, The Competition Act, 2002

<sup>92</sup> The Competition Act of India, 2002, Amended by the (Amendment) Act of 2007

<sup>93</sup> Section 8, The Competition Act, 2002

<sup>94</sup> Section 9, The Competition Act, 2002

this Act.<sup>95</sup> The central government may also appoint the required number of additional, joint, deputy or assistant directors-general as may be necessary. It may also appoint other advisers, consultants or officers.<sup>96</sup>

The provisions for the duties, powers and functions of the Commission are stipulated under Chapter IV of the Act. Section 18<sup>97</sup> seems to have asserted somewhat widely the duties of the Commission. These duties are:

- to eliminate all such practices that have an adverse effect on competition,
- promote and sustain competition,
- protect the interests of consumers, and
- ensure freedom of trade carried on by other participants, in markets in India.

Many of its duties may only be performed while dealing with specific cases of violations of the Act brought to its notice for inquiry and decision. The Commission is not in a position to directly eliminate anti-competitive practices, or to promote or sustain competition in India. The same would be the position relating to the protection of consumers.

### **ANTI-COMPETITIVE AGREEMENTS AND ABUSE OF DOMINANCE**

Section 19<sup>98</sup> of the Act, sets out the procedure for inquiry by the Commission into alleged contraventions of section 3(1),<sup>99</sup> anti-competitive agreements, and section 4(1),<sup>100</sup> abuse of a dominant position. The Commission may initiate action by commencement of an inquiry on receipt of a complaint of a violation of these sections from any person, consumer or their association or a trade association.<sup>101</sup>

The Commission may also act on a reference made to it in this regard by the central government, state government, or a statutory authority. Section 21<sup>102</sup> provides for a reference

---

<sup>95</sup> T.Ramappa, **COMPETITION LAWS IN INDIA- POLICY, ISSUES AND DEVELOPMENTS**, (3<sup>rd</sup> ed, 2014), 275

<sup>96</sup> ‘*The Roles of The Competition Commission and the Department of Trade and Industry in Promoting Competition*’ Competition Commission Press Release, June 2003.

<sup>97</sup> Section 18, The Competition Act, 2002

<sup>98</sup> Section 19, The Competition Act, 2002

<sup>99</sup> Section 3(1), The Competition Act, 2002

<sup>100</sup> Section 4(1), The Competition Act, 2002

<sup>101</sup> Indian Foundation of Transport Research & Training v Sh. Bal Malkait Singh, President and Ors, *Case No. 61 of 2012*

<sup>102</sup> Section 21, The Competition Act, 2002

by a statutory authority. In the course of any proceeding before a statutory authority, which has been established for the purposes of regulating the production or supply of goods or provision of any services or markets, if a party to that proceeding raises an issue that any decision that the statutory authority may take would be contrary to the provisions of the Competition Act, then that statutory authority may refer that issue to the Commission. The Commission shall give its opinion to that statutory authority within 60 days of the receipt of the reference.

### **THE PROCEDURE**

On receipt of a complaint or a reference, the Commission should first satisfy itself that there is a prima facie case.<sup>103</sup> If the Commission is of the opinion that there is no prima facie case, it will dismiss the complaint and may also order costs. Where it considers that there is a prima facie case, the Commission will direct the Director-General to cause an investigation to be made into the matter. The director-general has to submit a report on his findings to the Commission within the specified period. Copies of the report should be forwarded to the parties and to the central or state government, or the statutory authority as necessary. The complainant should be given an opportunity to rebut the findings of the director-general, if they are to the effect that there is no contravention of any of the provisions of the Act. If after hearing the complainant, the Commission considers that further inquiry is called for it should direct the complainant to proceed with the complaint<sup>104</sup>

Similarly, a reference from a statutory authority may also be directed to be investigated by the director-general. If, in such a case, the director-general recommends that there is no contravention of any of the provisions of the Act, the Commission should invite comments from the central government or the state government, or the statutory authority, as the case may be. After a consideration of those comments and the report, the Commission should return the reference, if there is no prima facie case or proceed with the reference, if there is one treating the reference as a complaint. If the director-general recommends that there is a contravention of any of the provisions of the Act, and the Commission considers that further inquiry is necessary, it should proceed with the inquiry into the contravention in accordance with the provisions of the Act.<sup>105</sup>

---

<sup>103</sup> Supra note 5, 279

<sup>104</sup> 'What is the Competition Commission?' Competition Commission's Press Release, June 2003.

<sup>105</sup> Abdul Bari and Anr. v State of UP (2007) 2 SCC 640.

Section 20 of the Act sets out the procedure for the initiation of an inquiry into a complaint of an alleged violation of the provisions of Section 5. Subsections (1) to (2) of section 20 define the procedure. Subsection (4) states the factors that the Commission ought to consider in determining whether a combination would have the effect of, or is likely to have an appreciable adverse effect on competition in the relevant market. Subsection (4) has been discussed earlier, in the chapter on combinations<sup>106</sup>.

The Commission may inquire, upon its own knowledge or information, in the case of a combination, whether an acquisition under section 5(a), or acquiring of control under section 5(b), or a merger under section 5(c), has caused or is likely to cause an appreciable adverse effect on competition in India. But it is not permissible to initiate any inquiry under this subsection after the expiry of one year from the date on which such combination had taken effect. It may also commence an inquiry on receipt of a notice under section 6(2) from any person proposing to enter into a combination or a reference from a statutory authority under section 21(2).<sup>107</sup>

### **Negative Clearance**

Article 2 of this Regulation authorizes the Commission to issue negativity, clearances to the effect that, on *the* basis of the facts in its possession, there are no grounds under Article 81(1) or Article 82, for action on its part in respect of an agreement, decision or practice. A negative clearance will be considered on the application of an undertaking or associations of undertakings.<sup>108</sup>

### **Infringement of Articles 81/ 82**

Where on application or on its own knowledge, the Commission finds that there has been an infringement of any of these two Articles, it may be decision require the undertakings or associations of undertakings concerned, to bring such infringement to an end. An application for such a decision may be made by any member state, or any natural or legal persons who claim a legitimate interest. The Commission may, before making a decision requiring the undertaking or

---

<sup>106</sup> Report of the High Level Committee on Competition Policy and Law, 2000

<sup>107</sup> Karnataka Chemical Industries &Ors. v. Union of India & Ors. (2000) 10 SCC 13

<sup>108</sup> Paradip Port Trust v. Sales Tax Officer &Ors. (1998) 4 SCC 90.

associations of undertakings to bring the infringement to an end, make recommendations to them for termination of the infringement.<sup>109</sup>

### Seeking Exemptions

Under decision takings seeking exemption under Article 81(3) relating to agreements, they and concerted practices falling under Article 81(1) are to notify them to the Commission, and until they *are* so notified no decision on *the application* of Article 81(3) will be *taken*. Exempted from this requirement notify the Commission are: where the parties operate only in one member state and the agreements, decisions or practices do not relate either to import, or to exports between member states; vertical restraints; certain conditions of licenses of intellectual property; agreements that have as their sole object the development or uniform application of standards or types or joint research for improvement of techniques, provided the results are accessible to all parties thereto and may be used by each of them). An exemption is granted for a specific period and subject to conditions and may be revoked if the conditions are breached. The Commission has the sole power, subject to review by the Court of Justice, to declare Article 81(1) inapplicable pursuant to Article 81(3). The Commission has the power to apply Articles 81(1) and 82.<sup>110</sup>

The Commission is required to act in constant liaison with competent authorities of the member states and prior to taking any decision, in granting negative clearances, exemptions or renewal, amendment or revocation of any exemption. While applying Articles 81(1) and 82, the Commission should consult an Advisory Committee on Restrictive Practices and Monopolies, which will be composed of officials competent in the matter of restrictive practices and monopolies.<sup>111</sup>

---

<sup>109</sup> Paradip Port Trust v. Sales Tax Officer & Ors. (1998) 4 SCC 90.

<sup>110</sup> General Agreement on Tariffs and Trade 1994 (GATT 1994).

<sup>111</sup> Tata Engineering & Locomotive Co. v. The Registrar Of The Restrictive Trade Agreement (1977) 2 SCC 55

### **Investigation**

In making any investigation of a violation of Article 81 or Article 82, the officials authorized by the Commission are empowered: (a) to examine the books and other business records; (b) to take copies of or extracts from the books and business records; (c) to ask for oral explanations on the spot; and (d) to enter any premises; land and means of transport of undertakings.'

### **Fines**

Fines may be levied, depending upon the gravity and the duration of the breach, of up to 10 per cent of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently: (a) they infringe Article 81(1) or Article 82; or (b) they commit a breach of any of the conditions subject to which an exemption under Article 81(3) was given.<sup>112</sup>

### **Professional Secrecy**

Information obtained during the investigation shall be used only for the purposes of investigation. Also, the Commission or any of its officials and other servants shall not disclose information covered by obligations of professional secrecy. However, publication of general information or surveys that do not contain information of undertakings is not prohibited.

### **Special Study of Sectors**

It is to be noted that the Commission has been specially authorized to examine any sector of the economy showing indications of price movements, inflexibility of prices or other circumstances suggesting that in the economic sector concerned, competition is being restricted or distorted within the Common Market. In that event, the Commission may decide to conduct a general inquiry into that sector and towards that purpose it may request undertakings in the sector concerned to supply the information necessary for giving effect to the principles formulated in Articles 81 and 82 and for carrying out the duties entrusted to it. It may also ask the undertaking or associations of undertakings in the sector to communicate to it all agreements, decisions and concerted practices exempted from notification. In cases where it appears that, by reason of their size, undertakings or groups of undertakings could be occupying a dominant

---

<sup>112</sup> Continental T.V., Inc. v. GTE Sylvania, Inc. (1977) 433 U.S. 36

position, the Commission could ask for particulars of the structure of the undertakings and of their behavior as are requisite to an appraisal of their position in relation to Article 82.<sup>113</sup>

### THE COMPETITION COMMISSION, UK

Section 45 of the Competition Act, 1998, UK, provides for the establishment of the Commission. It is to have such functions as are conferred on it by or as a result of this Act. The Act dissolved the Monopolies and Mergers Commission and its functions were transferred to this Commission. Paragraph 3(1) provides that the Commission is to have a chairman appointed by the Secretary of State from among the reporting panel members. Reporting panel members are those appointed to form a panel for the purposes of the Commission's general functions. Paragraph 4 requires that the Secretary of State must appoint one of the appeal panel members to preside over the discharge of the Commission's functions in relation to appeals.

In the UK, the institutional mechanism relating to competition and consumer issues is as follows: The Department of trade and Industry sets the overall policy and legal framework for competition and consumer issues in the UK. The Secretary of State is responsible specifically for the appointment of Members of the Commission, for the provision and monitoring of its funding and for assessing the Commission's contribution towards agreed targets<sup>114</sup>.

The Commission has statutory powers and responsibilities covering competition issues. It conducts in-depth inquiries into mergers and markets. It makes decisions against the competition tests set out in the Enterprise Act, 2002. In the event of adverse findings, it decides on appropriate remedies. It also investigates references on the regulated sectors of the economy, each year, its Council of the Commission, using key performance indicators, will monitor the performance of the Commission in achieving high skills and expertise of staff and member. Cases involving serious abuse of a dominant position would also not be considered. They will not also be accepted in cases involving secret cartels between competitors, which include: price-fixing, bid-rigging (collusive tendering) establishing output restrictions or quotas, sharing markets, and/or dividing markets. But even in such cases, binding commitments

---

<sup>113</sup> 'Report on Competition in Professional Services' European Commission, *Communication From The Commission COM (2004) 83 Final*, Brussels, 9 February 2004.

<sup>114</sup> *The OFT's Guidance As To The Circumstances In Which It May Be Appropriate To Accept Commitments ANNEXE A to 'Enforcement'* Draft Competition Law Guidelines for Consultation, 01-T407a, April 2004.

may be accepted if the 'administrative cost involved in continuing the investigation and proceeding to a final decision would outweigh the benefits.'<sup>115</sup>

### **‘Privileged Communication’—During Investigation**

Section 30 of the Competition Act, UK, protects certain types of communications made during the Director's investigation as privileged communication that a person cannot be compelled to produce or disclose. 'Privileged communication' means a communication (a) *between a professional legal adviser and his client*, or (b) made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings, which in proceedings in the High Court would be protected from disclosure on grounds of legal professional Privilege.

Section 39 provides immunity from penalty to a 'small agreement', which is not a price-fixing agreement but one satisfying the criteria of combined turnover of the parties to the agreement, the share of the market affected by the agreement, as may be prescribed. This immunity may be withdrawn, if the Director considers that the agreement is likely to infringe the chapter 1 prohibition.<sup>116</sup>

Similarly, section 40 provides limited immunity in relation to Chapter II prohibition regarding 'conduct of minor significance'. It means conduct that falls within prescribed category and the criteria for prescribing that category would be the turnover of the person whose conduct it is and the share of the market affected by the conduct. This immunity may also be withdrawn if the Director considers that the conduct may violate Chapter II prohibition. The OFT's 'Draft competition law guideline for consultation' on enforcement<sup>117</sup> states: "The immunity applies only to financial penalties. An anti-competitive agreement or abusive conduct by such undertakings is still an infringement, and consequently the OFT may take other enforcement action, and the immunity does not prevent third parties from claiming damages for the loss caused by such an agreement or conduct."<sup>118</sup>

---

<sup>115</sup> (1979). 2 SCC 529

<sup>116</sup> *Infra* n. 27

<sup>117</sup> The OFT's 'Guidance As to the Circumstances in Which It May Be Appropriate To Accept Commitments', OFT407a, April 2004.

United Kingdom Agricultural Tractor Registration Exchange [1993] 4 CMLR 358 w

<sup>118</sup> *Ibid*.

## US—ENFORCEMENT

The Department of justice (DOJ) and the Federal Trade Commission (FTC) are the agencies that enforce the antitrust laws of the US. The principal enactments are: the Sherman Act, 1890, the Clayton Act, 1914<sup>119</sup>.

### Federal Trade Commission Act, 1914

Violations of the Sherman Act may be prosecuted as civil or criminal offences. The Department has sole responsibility for the criminal enforcement of the Sherman Act. In a civil proceeding the Department may obtain an injunction against prohibited practices. The Attorney General and the FTC are authorized to seek a court order enjoining consummation of a merger that would violate Section 7 of the Clayton Act<sup>120</sup>.

Under the FTC Act rendering unlawful 'unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce', the FTC is authorized to take administrative action against conduct that violates the Sherman Act and the Clayton Act, as well as anti-competitive practices that do not fall within the scope of the Sherman or Clayton Acts<sup>121</sup>.

## ENFORCEMENT WITHIN INDIA

Some important aspects of the process of investigation of an inquiry into the alleged violations of the Act may now be considered.

### The Mechanism

The duty of the Director-General (DG) is to assist the Commission to investigate into any contravention of the provisions of the Act, or any rules or regulations made there under. This he may do only when so directed by the Commission. For the purposes of investigation, he shall have the same powers that are conferred on the Commission under Section 36(2).<sup>33</sup> These powers relate to summoning and enforcing the attendance of any person and examining him on oath,

---

<sup>119</sup> Section 6 of the Clayton Act: Antitrust laws not applicable to labor organizations.

<sup>120</sup> Antitrust Enforcement Guidelines For International Operations'—Issued By The US Department of Justice and The Federal Trade Commission, April 1995.

<sup>121</sup> A. Ahlstrom Osakeyhtio and others v. Commission of the European Communities, Judgment of the European Court of Justice of 27 September 1988.

requiring the discovery and production of documents, receiving evidence on affidavits, etc. In addition, he shall also have the powers under Section 240 and 240A of the Companies Act, 1956, of an inspector, investigating the affairs of a company.<sup>122</sup>

A hearing is where parties make their respective representations before a court or other adjudicating authority. In an oral hearing, only oral representations are made. In cases of such urgency falling under this subsection, it is considered expedient to limit the proceedings to oral hearings only, towards saving time.<sup>123</sup>

### **Interim Relief**

Section 33<sup>124</sup> empowers the Commission to provide interim relief, during an inquiry, where it is proved to its satisfaction that a contravention of section 3(1), relating to anti-competitive agreements, etc., or Section 4, relating to abuse of a dominant position, or section 6(1), a combination in violation of the Act, has been committed and continues to be committed, or is about to be committed: An application for interim relief will need to be supported by an affidavit or other authentic information providing the facts, which are claimed to be the justification for interim relief till the conclusion of the inquiry. That interim relief will be in the form of a temporary injunction restraining any party from carrying on that act, until the conclusion of the inquiry or until further orders. The Commission may, in appropriate cases grant this temporary injunction without giving notice to the opposite party. This would depend upon the facts of the case and the need to preserve status quo.<sup>125</sup>

A similar application for interim relief may also be granted, on an application, in the case of import of any goods that are claimed to be in violation of the above-mentioned sections. On an application under these grounds the Commission will provide a copy of its order granting the temporary injunction to the concerned authorities.

The relevant provisions of the Code relating to temporary injunctions will apply to a temporary injunction issued by the Commission. The substance of the relevant part of the Code is: before granting an injunction, notice of the application for injunction should be given to the opposite party, unless the

---

<sup>122</sup> Official Journal L 173, 181 06/098 p. 0028-0031.

<sup>123</sup> In Re National Sulphuric Acid Association, [1980] 3 CMLR 429

<sup>124</sup> Section 33, The Competition (Amendment) Act, 2007

<sup>125</sup> Cholan Roadways Limited vs. G. Thirugnanasambandam [2004 (10) SCALE 578].

object of granting the injunction would be defeated by the delay; where it is decided to grant the temporary injunction without giving notice to the opposite party, the reasons for coming to the conclusion that the object of granting the injunction would be defeated by the delay should be recorded; the applicant seeking temporary injunction should be required to give the opposite party copies of his application, the affidavit and other documents on which he relies; an injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

### **Award of Compensation**

Before the amendments made by the 2007 Act, under section 34, the Commission had authority to award compensation to any person who makes an application seeking compensation from any enterprise for any loss or damage shown to have been suffered by him as a result of any contravention of any of the provisions of Chapter II (sections 3-6) of the Act by that enterprise.<sup>38</sup> This is what is called third party claims for compensation for antitrust violations. The claimant need not be the complainant or any opposite party. Where a number of persons claim to have suffered loss, one person may, with the permission of the Commission, pursue the claim on behalf of the others.

But after the amendments the power of making such awards is now with the Competition Appellate Tribunal as per Section 53A (1) (b).<sup>126</sup>

### **Review**

The Commission may carry out a review of its own order.<sup>127</sup> The conditions to be satisfied are: an application for review of any order made by the Commission may only be made by a person aggrieved by an order of appeal has been preferred against that order; the application for review shall be made within 30 days of that order.

But no order may be modified or set aside without giving an opportunity to the person in whose favour the order was given, and to the director-general, if he was a party to the original proceedings.

---

<sup>126</sup> Section 53A(1)(b), The Competition Act, 2002

<sup>127</sup> Section 37, The Competition Act, 2002

The shortcoming here is that the section does not give any clear indication of the grounds on which application for review is permitted. The scope of the power of review should have been explicitly stated in this section. Though the Act has stated that in the conduct of its proceedings, the Commission should not be bound by the *procedure* laid down in the Code, some principles of the Code have been borrowed by the Act. Though the grounds on which an application for review may be made are not stated, the substance of the provisions of the Civil Procedure Code, 1908 relating to review may be considered in dealing with such an application-so that an application for a review is not a disguised appeal.<sup>128</sup>

The grounds on which an application for review may be made, are: the discovery of new and important matter or evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or order made; some mistake or error apparent on the face of the record; or any other sufficient reason.<sup>129</sup> The duty of strict proof is enjoined on the applicant of his allegation of discovery of new matter or evidence as qualified by the above-mentioned sub-rule.<sup>130</sup>

### **Rectification of Orders**

Any mistake apparent from the record can be rectified by the Commission by an amendment of its order passed under the Act.<sup>131</sup> The explanation to this section prohibits any amendment of the substantive part of the order. The section could have been simply worded to provide that clerical or typing mistakes may be amended as provided therein. The Commission of its own motion or at the instance of any party to the order may do the rectification.

### **Exemptions**

The Central Government is empowered to exempt, by notification, from the application of the Act or any provision thereof and for specific periods, the following: (a) any class of enterprises if such exemption is necessary in the interest of security of the state or public interest; (b) any practice or agreement arising out of and in accordance with any obligation assumed

---

<sup>128</sup> Office of Fair Trading, UK (OFT) document '*Services of General Economic Interest Exclusion—Draft Competition Law Guidelines for Consultation*, April 2004.

<sup>129</sup> Rule 1(1), Order XLVII, Civil Procedure Code, 1908

<sup>130</sup> Rule 4(2), Order XLVII, Civil Procedure Code, 1908

<sup>131</sup> Section 38, Competition Act, 2002

by India under any treaty, agreement or convention with any other country or countries; or (c) any enterprise which performs a sovereign function on behalf of the central government or a state government but where such an enterprise is engaged in any activity including the activity relatable to the sovereign functions of the government, the exemption should be granted only in respect of the activity relatable to the sovereign Functions.<sup>132</sup>

Under the first sub-clause, exemption may be granted only to a class of enterprises and not to any individual enterprise.

Interests of security may arise in contracts for the supply of *defense* equipment, etc. The Defense Production Act of 1950, US, provides for exemption covering voluntary agreements among various approved industry groups for the development of preparedness programmes to meet potential national emergencies. Persons participating in such agreements are immunized from the operation of the antitrust laws with respect to good faith activities undertaken to fulfill their responsibilities under the agreement.

The US has granted immunity of varying extent from antitrust laws to a number of businesses. They range from agricultural and fishermen's marketing agencies to joint operating arrangements between newspapers for sharing production facilities, joint programme of research and that by small business, etc.

By virtue of Section 3(5) (ii) of the Competition Act, Section 3 dealing with anti-competitive agreements will not apply to any agreement relating to the supply of goods for export. The term 'public interest' is wide and any exemption on this ground should establish a reasonable justification and the public interest sought to be protected. Under the second sub-clause, exemption may be granted by the central government to any practice or agreement arising out of any treaty or convention. But this could have been limited to state that such exemption ought not to conflict with any of the provisions of the Act or its objective. Article 234 of the EEC Treaty is an example. It states that agreements entered into between member states and between any member state and any third party before the Treaty entered into force shall not be affected but if any agreement is not compatible with the Treaty, the

---

<sup>132</sup> Section 54, Competition Act, 2002.

member state or states concerned shall take all appropriate steps to eliminate the incompatibilities established.<sup>133</sup>

### **Non-Disclosure of Information**

Though the Act does not use the concept of a privileged communication, in the context of any inquiry or investigation, Section 57 provides for some protection against disclosure of information relating to an enterprise that has been obtained by or on behalf of the Commission for the purposes of the Act. Such information shall not, without the previous permission in writing of the enterprise, be disclosed otherwise than in compliance with or for the purposes of this Act, or any other law for the time being in force.

### **CROSS- BORDER ISSUES AND COMPETITION**

Shareholding is not necessary for this purpose and it could be through a distribution agreement, price-fixing arrangement, or exclusive dealing agreements that have as their object the elimination of a competitor or partitioning the market. There are overseas cartels operating from different countries and engaged in conspiracies to carry out such anti-competitive practices that are the serious concern of industrially advanced countries and they are grappling with the problem of methods of cooperation in rendering these cartels ineffective, as it is well understood that domestic legislation has only territorial effect.<sup>134</sup>

The section offers no indication of the type of order that may be passed in such cases and the recommended action that would disable the person not resident in India from continuing his anti-competitive arrangement that has effect in India. It should have been specifically stated in the section itself. The language of section 14 of the MRTP Act in this context may usefully be considered.

Where any practice substantially falls within monopolistic, restrictive, or unfair, trade practice relating to the production, storage, supply, distribution or control of goods of any description or the provision of any services and any party to such practice does not carry on business in India, an order may be made under this Act, with respect to that part of the practice which is carried on in India.

---

<sup>133</sup> Competition Commission of India (General) Regulations, 2009.

<sup>134</sup> European Commission's '*Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*' (2002/C 45/03) European Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services.

It is well recognized that declaring unlawful any agreement or practice and restraining the local enterprise that is a party to such an agreement is sufficiently effective to make the arrangement inoperative within the country enforcing its domestic law. This is how courts have been so far aided in giving effect to the provisions of any national law in such circumstances.

### **‘WOOD PULP CASE’**

This was a case where the EC had imposed fines on certain enterprises, having their registered offices outside the EC, for violation of Article 81. The charges against them were that they fixed, in concert, prices to customers in the EC, provided exchange of individualized data concerning prices with certain other wood pulp producers, and made price recommendations through the trade association. The appellants, producers of wood pulp and two associations of wood pulp producers challenged that decision in an appeal to the European Court of Justice.

The Commission had based its decision on the ground that all the addressees of the decision were either exporting directly to purchasers within the Community, or were doing business within the Community through branches, subsidiaries, agencies or other establishments in the Community, and that the action in concert applied to the vast majority of the sales.

The jurisdiction of the Commission to apply its competition rules to them was challenged by some of the appellants. The argument was that conduct outside the Community could not be sought to be regulated merely because the repercussions of that conduct were felt within the Community. Meeting that objection, the Court held: *“Where wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers that constitute competition within the common market.”*<sup>135</sup>

The Court pointed out that such conduct had two elements, one relating to the formation of the agreement or decision and the other, the implementation and that the place of implementation was the decisive factor. Holding that in as much as the place of implementation was within the Community, 'the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public

---

<sup>135</sup> A. Ahlström Osaakeyhtiö and others v Commission of the European Communities, European Court Reports 1988 -05193

international law', the Court added that when the overseas enterprises implemented their decisions within the Community, it was immaterial whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.<sup>136</sup>

## **WTO AND COMPETITION POLICY**

The Working Group on Trade and Competition Policy met in 1997 it noted that approximately 80 WTO member countries, including some 50 developing and transition countries, had adopted competition laws, also known as 'antitrust' or 'anti-monopoly' laws. In considering the inter-action between trade and competition policy, the Working Group studied the following: the impact of anti-competitive practices of enterprises and associations on international trade; the impact of state monopolies, exclusive rights and regulatory policies on competition and international trade; the relationship between the trade-related aspects of intellectual property rights and competition policy; the relationship between investment and competition policy; and the impact of trade policy on competition.

The Group issued in 1998 a report on its deliberations. At its meetings in 1999, the Group found a divergence of opinion among the members on the need for action at the level of the WTO to enhance the relevance of competition policy to the multilateral trading system. While some expressed support for a multilateral framework on competition policy in the WTO, others preferred bilateral agreements towards effective implementation of competition policies in their respective regions. The issue was left to be considered at the Seattle Conference, but the Working Group found that the objections to a multilateral framework were continued.

The direction of the Doha Ministerial Conference in 2001 to the Working Group on the Interaction between Trade and Competition Policy was 'to focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for

---

<sup>136</sup> 'Draft competition law guideline on Article 81 and the Chapter I Prohibition' April 2004 Office of Fair Trading, UK—(OFT 401).

progressive reinforcement of competition institutions in developing countries through capacity building.<sup>137</sup>

### **Role for WTO**

On the role of international organizations in dealing with competition issues arising out of international trade, this Committee stated: Specifically, this Advisory Committee sees efforts at developing a harmonized and comprehensive multilateral antitrust code administered by a new supranational competition authority or the WTO as both unrealistic and unwise. The Committee considered that the role for WTO would be in developing a common understanding of the issues surrounding the intersection of trade and competition policy but that it should concentrate on governmental restraints, which according to the Committee was the area of WTO's 'core competence'. Referring to the work of the Working Group of the WTO on Interaction between Trade and Competition Policy, the Committee recommended that the WTO undertake these illustrative and largely educative steps to make the WTO a more 'competition policy friendly' environment. But the Committee was against the WTO developing new competition rules under the WTO umbrella.

The Committee recommended that governments think of creating a new venue where government officials, private firms, non-governmental organizations and other bodies may exchange ideas and work towards solutions for competition law and policy problems.

The Committee felt that bilateral agreements were a desirable alternative till international agreements could be developed and agreed upon. On agreements providing for comity, the Committee states: 'to be, truly effective, positive comity requires correspondence between the parties' antitrust laws and enforcement commitment'. This is pursuant to the experience with some countries that are slow to act under such agreements, when the actions of the domestic enterprise had weakened the competitive ability of the overseas enterprise.

### **The 1991 Agreement between the US and EU- Important Clauses**

Under this Agreement of 1991, each party should notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the

---

<sup>137</sup> *Competition Law Bulletin* by Vaish Associates, Volume I No 2, November/December 2009.

other. They should share information of the following nature: information that will: (a) facilitate effective application of their respective competition laws; or (b) promote better understanding by them of economic conditions and theories relevant to their competition authorities' enforcement activities. The Agreement provides for periodic meetings of competition authorities from each party for exchanging information on their current enforcement activities and priorities, and information on economic sectors of common interest, discussing policy changes which they are considering and other matters of mutual interest relating to the application of competition laws.<sup>138</sup>

Towards cooperation and coordination in enforcement activities, the competition authorities of each party should also render assistance to the competition authorities of the other in their enforcement activities, to the extent compatible with the assisting party's laws and important interests, and within its reasonably available resources. The competition authorities of either party may, after giving appropriate notice to the other party, limit or terminate their participation in a coordination arrangement and pursue their enforcement activities independently.

Article V of this Agreement dealing with cooperation regarding anti-competitive activities in the territory of one party that adversely affect the interests of the other party is the crucial provision. This provides a procedure for notification and initiation of enforcement activity, where one party believes that anti-competitive activities carried out on the territory of the other party are adversely affecting its important interests. In such an event, the first party may notify the other party and may request that the other party's competition authorities initiate appropriate enforcement activities. It is for the notified party to take the final decision that shall be communicated to the notifying party, who should have the freedom to take such action as appropriate against the anti-competitive activities it complained about.

Since it was not established that a dominant position would be strengthened or created in the defense sector as a result of the proposed concentration the Commission limited the scope of its action to the civil side of the operation. This was only one aspect of the case and ultimately the concentration was approved on the undertakings given by Boeing.<sup>139</sup>

---

<sup>138</sup> 'European Union XXXIIInd Report on Competition Policy 2002'.

<sup>139</sup> *Price Fixing, Bid Rigging, and Market Allocation Schemes: An Antitrust Primer* The US Department of Justice, 2 January 2001, revised 28 September 2005.

## Comity

The word 'comity' is of Latin origin and means the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived from the voluntary consent of the latter and is inadmissible when it is contrary to its known policy or prejudicial to its interests.<sup>140</sup>

Antitrust Enforcement Guidelines for International Operations issued by the US Department of Justice and the Federal Trade Commission in April, 1995 explains 'comity' as 'a broad concept of respect among coequal sovereign nations' and continues stating that in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, the consideration would be whether significant interests of any foreign sovereign would be affected. Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws (1998). Some salient features of this agreement between the US and the EU on the application of comity principles in the enforcement of their competition laws may be noted.<sup>141</sup>

The scope of the agreement is to make provision for dealing with anti-competitive activities taking place in the country of one of the parties adversely affecting the interests of the other party, and where such activities are not permissible according to the competition law of the country in which the activities occur. The purpose of the agreement is to ensure that trade and investment flows between the two parties and competition and consumer welfare are not impeded by anti-competitive activities for which one or both the parties may provide a remedy. The objective is to 'establish cooperative procedures to achieve the most effective and efficient enforcement of competition law. This means that where anti-competitive activities occur principally in and are directed principally towards the one party's territory, the other party will leave it to the competition authorities of the first party, where they are able to take effective action.'<sup>142</sup>

---

<sup>140</sup> M/s. Gujarat State Electricity Corporation Limited v. M/s. South Eastern Corporation Limited & Anr., Coal India Limited

<sup>141</sup> Maharashtra State Power Generation Company Ltd. v. M/s. Western Coalfields Ltd. & Anr

<sup>142</sup> Asish Ahuja v. Snapdeal & Anr. Case No. 17 of 2014, dismissed by order under Section 26 (2) of the Act dated May 19, 2014.

Article III of this agreement defines 'positive comity'. It provides for the competition authorities of one party requesting the competition authorities of the other party to investigate and, if warranted, to remedy anti-competitive activities in accordance with the other party's competition laws. Such a request may be made regardless of whether the activities also violate the first party's competition laws, and regardless of whether the Competition authorities of the first party have commenced or contemplate taking enforcement activities under their own competition laws. It may be agreed between the parties that the first party, viz. the requesting party will defer or suspend pending or contemplated enforcement activities during the pendency of enforcement activities of the other party.<sup>143</sup>

## CONCLUSION

In Conclusion, it may be said that the Indian law with respect to competition policy, still being in a relatively nascent stage of development match up to, as far as possible, with the competition law and policies of countries like US and EU. The powers that have been bestowed on the Commission reflect the complexity of functions and in turn, the extent of development of the law-exercising authority over the competition policy. These powers appear to be quite sufficient in case of India.

For instance, the Commission even has the power to inquire into any agreement or abuse of a dominant position or combination as to whether the agreement, abuse or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India even if (a) an agreement referred to in section 3 has been entered into outside India; (b) any party to such agreement is outside India; (c) any enterprise abusing the dominant position is outside India; (d) a combination has taken place outside India; (e) any party to combination is outside India; or (f) any other matter or practice or action arising out of such agreement, or dominant position or combination is outside India.<sup>144</sup>

---

<sup>143</sup> M/s. Maharashtra State Power Generation Company Ltd. v. M/s. Mahanadi Coalfields Ltd. & Anr, Case No. 3 of 2012

<sup>144</sup> Section 32, Competition Act, 2002.

## REFERENCES

### Cases

A. Ahlström Osaakeyhtiö and others v Commission of the European Communities, European Court Reports 1988 -05193 .....	18
A. Ahlstrom Osaakeyhtio and others v. Commission of the European Communities, Judgment of the European Court of Justice of 27 September 1988. ....	11
Abdul Bari and Anr. v State of UP (2007) 2 SCC 640 .....	7
Asish Ahuja v. Snapdeal & Anr. Case No. 17 of 2014.....	21
Cholan Roadways Limited vs. G. Thirugnanasambandam [2004 (10) SCALE 578].....	12
Continental T.V., Inc. v. GTE Sylvania, Inc. (1977) 433 U.S. 36.....	9
In Re National Sulphuric Acid Association, [1980] 3 CMLR 429.....	12
Indian Foundation of Transport Research & Training v Sh. Bal Malkait Singh, President and Ors, Case No. 61 of 2012 .....	6
Karnataka Chemical Industries &Ors. v. Union of India & Ors. (2000) 10 SCC .....	7
M/s. Gujarat State Electricity Corporation Limited v. M/s. South Eastern Corporation Limited & Anr., Coal India Limited .....	20
M/s. Maharashtra State Power Generation Company Ltd. v. M/s. Mahanadi Coalfields Ltd. & Anr,Case No. 3 of 2012.....	21
Maharashtra State Power Generation Company Ltd. v. M/s. Western Coalfields Ltd. & Anr.....	21
Paradip Port Trust v. Sales Tax Officer &Ors. (1998) 4 SCC 90.....	7, 8
Tata Engineering & Locomotive Co. v. The Registrar Of The Restrictive Trade Agreement (1977) 2 SCC 55 .....	8
United Kingdom Agricultural Tractor Registration Exchange [1993] 4 CMLR 358 w .....	11

### Statutes

Rule 1(1), Order XLVII, Civil Procedure Code, 1908 .....	14
Rule 4(2), Order XLVII, Civil Procedure Code, 1908 .....	14
Section 18, The Competition Act, 2002.....	5
Section 19, The Competition Act, 2002.....	6
Section 21, The Competition Act, 2002.....	6
Section 3(1), The Competition Act, 2002 .....	6
Section 32, Competition Act, 2002.....	22
Section 33, The Competition (Amendment) Act, 2007 .....	12
Section 36(5), Competition Act. 2002. ....	14
Section 36, Competition Act, 2002.....	14
Section 37, The Competition Act, 2002.....	13
Section 38, Competition Act, 2002 .....	14
Section 4(1), The Competition Act, 2002 .....	6
Section 40, Competition Act, 2002.....	14
Section 46, Competition Act, 2002.....	15
Section 48, Competition Act, 2002.....	15
Section 53A(1)(b), The Competition Act, 2002 .....	13
Section 54, Competition Act, 2002.....	15
Section 6 of the Clayton Act .....	11
Section 7, The Competition Act, 2002.....	5
Section 8, The Competition Act, 2002.....	5
Section 9, The Competition Act, 2002.....	5
The Competition Act of India, 2002, Amended by the (Amendment) Act of 2007 .....	5

### **Other Authorities**

‘The Roles of The Competition Commission and the Department of Trade and Industry in Promoting Competition’ Competition Commission Press Release, June 2003. ....	5
‘What is the Competition Commission?’ Competition Commission’s Press Release, June 2003 ...	6
Antitrust Enforcement Guidelines For International Operations'—Issued By The US Department of Justice and The Federal Trade Commission, April 1995. ....	11
Competition Law Bulletin by Vaish Associates, Volume I No 2, November/December 2009.....	19
Draft competition law guideline on Article 81 and the Chapter I Prohibition' April 2004 Office of Fair Trading, UK— (OFT 401). ....	18
European Commission's 'Notice on Immunity from Lines and Reduction of Fines in Cartel Cases' (2002/C 45/03) European Commission Directive 2002/77/EC of 16 September 2002 .....	17
General Agreement on Tariffs and Trade 1994 (GATT 1994). ....	8
Office of Fair Trading, UK (OFT) document 'Services of General Economic Interest Exclusion—Draft Competition Law Guidelines for Consultation, April 2004. ....	13
The OFT's Guidance As To The Circumstances In Which It May Be Appropriate To Accept Commitments ANNEXE A to 'Enforcement' Draft Competition Law Guidelines for Consultation, 01-T407a, April 2004. ....	10
The OFT's 'Guidance As to the Circumstances in Which It May Be Appropriate To Accept Commitments', OFT407a, April 2004.....	11

### **Regulations**

Competition Commission of India (General) Regulations, 2009. ....	16
---	----

### **Books**

Paul A. Samuelson & William A. Nordhaus: Economics, 16th Ed. 1998, p 54, (Tata McGraw – Hill Publication Co. Ltd., New Delhi). ....	15
T.Ramappa, Competition Laws in India- Policy, Issues and Developments, (3 <sup>rd</sup> ed, 2014), 275 ...	5

**Articles**

Official Journal L 173, 181 06/098 p. 0028-0031.....12

*Price Fixing, Bid Rigging, and Market Allocation Schemes: An Antitrust Primer'* The US Department of Justice, 2 January 2001, revised 28 September 2005.....20

**Reports**

'European Union XXXIInd Report on Competition Policy 2002'. ....20

'Report on Competition in Professional Services' European Commission, *Communication From The Commission COM (2004) 83 Final*, Brussels, 9 February 2004. ....9

Report of the High Level Committee on Competition Policy and Law, 2000 .....7

---

## **JUDICIAL ACTIVISM IN APPOINTMENTS**

**V.G. Sreeram<sup>145</sup>**

### **ABSTRACT**

*“50. Separation of judiciary from executive –*

*The State shall take steps to separate the judiciary from the executive in the public services of the State”<sup>146</sup>* – Article 50 of the Indian Constitution

Article 50 embodies Montesquieu’s separation of powers doctrine. It is easy to appreciate the idea that the structure that governs us must be compartmentalized to ensure that there are no conflicts of interest; the interest being the interest of the people. But the extent of such separation is unclear.

This is where the controversy of judicial activism starts. It is pertinent to define what exactly is it to be “activist” when it comes to discharging judicial functions? And as a corollary what are judicial functions?

In this essay, I intend to explore the answers to these questions with respect to Judicial Appointments, a matter of controversy with the constitutional validity of the NJAC being tested last year.

In a 4-1 defeat for the NJAC Act, the court wrested permanent control over the appointment of Supreme Court and High Court judges, giving the collegium system basic-structure protection.<sup>147</sup>

The real question behind that judgment, alongside the cases collectively referred to as the Three Judges cases, is about the fundamental role of the judiciary in a democracy and the scheme therein envisaged by our constitution. If the judiciary’s role is purely interpretationist, then it is acting out of bounds. An unelected body cannot conflate legislative authority with its own jurisdiction. That is a clear violation of what Montesquie and Article 50 envisage.

---

<sup>145</sup> Student, Symbiosis Law School, Pune

<sup>146</sup> Constitution of India, 1950

<sup>147</sup> WRIT PETITION (CIVIL) NO. 13 OF 2015 SC

But in its current form, the collegiums system creates insulation for the judiciary from political malaise and populism. In the past, the executive has played politics with judicial appointments, not appointing judges with anti-centre rulings to the position of a CJI<sup>148</sup>, delaying appointments by not confirming the Presidential assent<sup>149</sup> and transferring judges with anti-centre rulings to outside their home state<sup>150</sup>.

The essay aims to put this evidence on trial. Given the track record of the political bias in executive decisions regarding appointments of judges to the Supreme Court and the High Courts, the judicial immunity created through the 4 judges' cases is a requirement in the scheme of Indian democracy. While nepotism is a valid harm under the collegiums system, the essay argues that judicial activism caveats an even greater harm; a corrupt judiciary.

## **INTRODUCTION**

Institutions and their functionality are more often than not, the physical manifestation of ideas and beliefs and in our country; the greatest of such institutions is the constitution. The constitution is what creates the judiciary, the legislature and the executive. And today, where the judiciary is being accused of trampling over its own creator, it is important to revisit the past and see who it is that is accusing the judiciary.

In 2015, the Supreme Court conferred the collegiums system basic structure protection, sheathing it from further legislative attacks<sup>151</sup>. The Union contends that the judiciary is usurping power, exceeding its constitutional privileges and rewriting the constitution to give itself unlimited power when it comes to appointments of judges to the Supreme Court and the High Courts of the country. In the process, the union is asking for a revision of the Second and Third Judges' cases. And while there is merit to their argument, in saying that the judiciary is exercising unbound, unchecked power in appointing judges, there is a need to see the greater picture.

## **THE ORIGINAL SYSTEM**

---

<sup>148</sup> Justice HR Khanna in *ADM Jabalpur v Shivkant Shukla* AIR 1976 SC 1207

<sup>149</sup> Prabhati Mishra, *Government returns 21 files related to confirmation of HC judges*, DNA India, Oct 20<sup>th</sup>, 2015

<sup>150</sup> Times of India, *Uttarakhand HC CJI, who quashed President's Rule, transferred to Andhra Pradesh HC*, May 4<sup>th</sup>, 2016

<sup>151</sup> WRIT PETITION (CIVIL) NO. 13 OF 2015 SC

The original scheme envisaged by the constitution for the appointment of judges to the Supreme Court and the various High Courts was laid down in Articles 124 (for the SC) and 217 for the High Courts.

***“124. Establishment and constitution of Supreme Court. -***

*(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:*

*Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted:*<sup>152</sup>

***“217. Appointment and conditions of the office of a Judge of a High Court***

*(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the chief Justice, the chief Justice of the High court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty two years Provided that”*<sup>153</sup>

It is pertinent to understand that a large section of the present discourse on Article 124,217 and the appointments controversy therein with stems from the records of the original constitution assembly debates on these articles. In the record of the original debates, the assembly, led by Dr. B.R. Ambedkar, deliberately chose to use the word “consultation” rather than “concurrence” in framing Article 122(later renumbered to 124). During the course of the Constituent Assembly debates, it was expressly proposed that the term “consultation” engaged in Articles 124 and 217, be substituted by the word “concurrence”. The proposed amendment was however rejected by Dr. B.R. Ambedkar.<sup>154</sup>

*“We do not want to create an Imperium in Imperio, and at the same time we want to give the Judiciary ample independence so that it can act without fear or favour of the Executive. My friends,*

---

<sup>152</sup> Constitution of India,1950

<sup>153</sup> Constitution of India,1950

<sup>154</sup> WRIT PETITION (CIVIL) NO. 13 OF 2015 SC

*if they will carefully examine the provisions of the new amendment which I have proposed in place of the original article 122, will find that the new article proposes to steer a middle course. It refuses to create an Imperium in Imperio, and I think it gives the Judiciary as much independence as is necessary for the purpose of administering justice without fear or favour.”<sup>155</sup>*

This creates a unique argument in favour of executive involvement. The Supreme Court on multiple occasions has held that the debates in Constituent Assembly can be relied upon as an aid to interpretation of a constitutional provision.<sup>156</sup>

*“Unlike a statute, a Constitution is a working instrument of Government, it is drafted by people who wanted it to be a national instrument to subserve successive generations.”<sup>157</sup>*

Here is where the role of judicial activism comes into play. While on the surface, it seems that the true intention of the Drafting assembly was to include executive action in the process contemplated under article 124, it is important to understand that it was the members of the Drafting Assembly and Dr. B.R. Ambedkar himself that clearly admit that the conceptualization of “independence of judiciary” clearly incorporates in its ambit appointment of judges.

*“...there is no doubt that the House in general, has agreed that the independence of the Judiciary, from the Executive should be made as clear and definite as we could make it by law...” The above assertion made while debating the issue of appointment of Judges to the Supreme Court, effectively acknowledges, that the appointment of Judges to the higher judiciary, has a direct nexus to the issue of “independence of the judiciary”.<sup>158</sup>*

The court in its judgment would go on to further explore the nature of the constituent assembly debates and would clarify that the assembly did explore the idea of a US-like system with the legislature holding the power to appoint judges to the higher judiciary but Dr. Ambedkar rejected it, fearful of creating a “politically committed” judiciary.

25 years from then, his words would ring true.

---

<sup>155</sup> Dr. BR Ambedkar in the Constituent Assembly Debates

<sup>156</sup> *Golak Nath v. State of Punjab* AIR 1967 SC 1643

<sup>157</sup> *Kesavananda Bharati Sripadagalvaru and Ors. v State of Kerala and Anr.* (1973) 4 SCC 225

<sup>158</sup> WRIT PETITION (CIVIL) NO. 13 OF 2015 SC

Despite arriving at the same conclusion as the Hon'ble Court, I differ slightly with the modus operandi. The court concluded with the idea that true intention of the usage of the word "concurrence" was to caveat the appointment process "*from executive and political involvement*"<sup>159</sup>

But in my opinion, the constituent assembly debates, with due respect to the members, posed a clear conflict. They simultaneously ascertained to the importance of independence in appointments while including executive action in their framing of article 124. And the sole jurisdiction to resolve this conflict lies with the Supreme Court, as the designated custodian of the constitution. Thus, in my opinion, the court has full rights to reinterpret the assembly debate and it is not a case of the "tyranny of the unelected" as the Centre would allege.<sup>160</sup>

The difference in my approach is that instead of saying that the Constitution, since its inception, intended to create a collegium system, I believe the Supreme Court can argue that the assembly debates themselves are in conflict about the interpretation of Article 124. Given that the Supreme Court is the only body that can interpret and rationalize any conflicting opinions regarding the assembly debates, the Court is vested with appropriate jurisdiction to decide upon the appointment process of judges in the country.

### **POLITICAL MALAISE AND THE 70s**

For the first 20 years of the operation of nascent India, Article 124 and 217 was interpreted in the literal fashion. The executive had the final say in the appointments and they developed a convention where the senior most judge of the Supreme Court was made the Chief Justice after the incumbent retired.

Meanwhile, in 1966, the Congress party moved leftwards on the political spectrum and elected a young woman by the name of Indira to lead the party. The wheels had been set in motion for the darkest decade for Indian polity. Indira Gandhi held the system hostage, centralized power like never before and sowed the seeds for would grow on to become the judicial appointments controversy.

---

<sup>159</sup> WRIT PETITION (CIVIL) NO. 13 OF 2015 SC

<sup>160</sup> Arun Jaitley, *Tyranny of the Unelected*, First Post India, 19<sup>th</sup> Oct, 2015

Following a poor show in the 1967 general elections, Indira led her campaign with leftward ideals. Her campaign motto "*Garibi Hatao*" was the tagline for what would go on to become the bid for nationalizing 4 of the largest private sector banks in the country, the rationale behind the belief being that it would increase the credit availability to small scale industry and agriculture.

On the evening of 18<sup>th</sup> July 1969, the acting President, V.V. Giri gave his assent to bank nationalization ordinance. The following day a shareholder in one of the nationalized banks, Rustom Cowaji Cooper along with others filed petitions in SC challenging the President's ordinance on the grounds of rights under Articles 14(equality before law and equal protection of law), 19(1)(f) and 31(right to property) being violated.

An eleven-judge bench of the SC met on 10 February 1970 and with a majority of 10 against one, the act was struck down. The lone dissenter was Justice A.N Ray.

Indira had also promised to abolish the practice of privy purses in her run up to the 1971 elections. But SC struck down the Presidential order that de-recognized the practice. In a 9-2 split against Indira's government, Justice Ray dissented in favour of the centre again.

In the following week, an enraged Indira Gandhi would move to dissolve the Lok Sabha and pass amendments that would allow the Union to have unlimited amending power, immune from judicial review. The Supreme Court stood up to protect the constitution and evolved the basic structure doctrine. This doctrine would later on be used in the case regarding the validity of Indira Gandhi's election.

But in all this, Indira Gandhi, recognizing that Supreme Court was an impediment to her attempt at political tyranny, tampered with the convention under Article 124 and appointed AN Ray as the chief justice, superseding three judges' superior to him. AN Ray, as mentioned above, had a fantastic pro- centre record when it came to judgments from the past half-decade. One of the judges he had superseded was Justice K.S. Hegde. Justice Hegde had led the bench that had admitted evidence against Indira Gandhi in the case regarding electoral malpractices.

Indira Gandhi had done exactly what Dr. Ambedkar had feared. With the increased involvement of the executive in the appointment of judges, Indira was trying to create a "politically committed" judiciary. AN Ray was being rewarded for dissenting in favour of the centre while the other judges

were being punished for standing up to Mrs. Gandhi. Both fear and favour had entered the scope of judicial appointments.

The day A.N Ray took oath 7000 lawyers in Bombay High Court and 3000 lawyers in Madras High Court boycotted the court in protest. The judiciary entered mutiny and the first steps towards judicial activism had been taken.

*“Indira Gandhi lost her election case on June 12, 1975 and on her appeal in the Supreme Court she was only granted a conditional stay. As a result, she could neither vote nor speak in the Lok Sabha. She became a dysfunctional Prime Minister. Immediately thereafter, on June 25, 1975, she proclaimed a state of Internal Emergency. In a midnight swoop, most of the prominent Opposition leaders, including Jayaprakash Narayan, Morarji Desai, Atal Bihari Vajpayee and L.K Advani, were detained without charges and trial. The fundamental right to life and liberty (Article 21) and equality (Article 14) were suspended.*

*A Bench of five judges of the Supreme Court (Chief Justice A.N. Ray) heard what has come to be known as the habeas corpus case (A.D.M. Jabalpur v. Shiv Kant Shukla)<sup>161</sup>. The only question before the court was whether a petition for habeas corpus and other similar petitions under Article 226 were maintainable (notwithstanding the suspension of the fundamental rights) on the ground that the orders were beyond the statute or were issued with mala fide or were not in accordance with law. Nine High Courts had ruled in favour of the petitioners.*

*On April 28, 1976, four judges decided in favour of the government, holding that the petitions were not maintainable. Justice Khanna was the lone dissenter. The government’s argument was accepted by the majority.”<sup>162</sup>*

The plan had worked. In what is famously referred to as the darkest hour of the Indian judiciary, a committed Chief Justice, AN Ray, upheld the detentions. During the Emergency, 16 judges were transferred from their home high courts to other high courts without their consent because they had ruled against the government in preventive detention cases.

---

<sup>161</sup> ADM Jabalpur v Shivkant Shukla AIR 1976 SC 1207

<sup>162</sup> Anil Divan , A profile in Judicial Courage, The Hindu, March 7, 2008

Not unexpectedly, Justice Khanna, though in line by order of seniority, was superseded to the post of Chief Justice by Justice Beg. Justice Khanna resigned in protest the very same day.

### JUDICIARY'S RESPONSE

The above context is the missing link to understand the formation of what has now come under the scanner as the collegium system. The collegiums system and the reinterpretation of Article 124 and 217 was never an attempt to create a peerless tyranny or an "*Imperium in Imperio*" as the constituent assembly feared. It was a reactionary move.

In a triad of cases, now known as the Three Judges' cases, the court developed the collegium system, keeping the political malaise of the 70s in mind. In the first one, the court ruled in favour of a literal interpretation of Article 124 and gave a nod to executive involvement<sup>163</sup>. But subsequently, in *Supreme Court Advocates on Record Association v Union of India*, in 1993 with a seven judge bench, the court overruled *SP Gupta* and ruled in favour of judicial primacy in the matter of appointments.<sup>164</sup> Later, in a Presidential reference under the advisory jurisdiction of the Supreme Court<sup>165</sup>, the court clarified that judicial primacy includes a plurality of opinion and that the Chief Justice is bound to consult the five senior most judges of the court for the recommendation to be binding on the government.<sup>166</sup>

The Union of India, then framed a Memorandum of Procedure on 30.6.1999, for the appointment of Judges and Chief Justices to the High Courts and the Supreme Court, in consonance with the above two judgments. And appointments came to be made thereafter, in consonance with the Memorandum of Procedure.

### THE CASE FOR INSULATION AND THE ROLE OF THE MODERN JUDICARY

Almost two decades after the collegium system was formalized in the Memorandum of Procedure, the system was brought back into political limelight, with the centre passing the NJAC bill. The court promptly struck it down, now enshrining the appointment procedure with basic structure protection.

---

<sup>163</sup> *SP Gupta v Union of India* AIR 1982 SC 149

<sup>164</sup> *Supreme Court Advocates On Record Association v. Union of India* (1993) 4 SCC 441

<sup>165</sup> Article 143, Constitution of India, 1950

<sup>166</sup> *In Re: Presidential Reference* AIR 1999 SC 1

*“Accordingly, I hold that primacy of judiciary and limited role of the Executive in appointment of judges is part of the basic structure of the Constitution. The primacy of judiciary is in initiating a proposal and finalizing the same. The CJI has the last word in the matter. The Executive is at liberty to give suggestions prior to initiation of proposal and to give feedback on character and antecedents of the candidates proposed and object to the appointment for disclosed reasons as held in Second and Third Judges’ cases.”<sup>167</sup>*

While the political executive of the nation has blemished the judiciary with averments of a tyrannical judiciary that is transgressing its constitutional limits by creating an Imperio in Imperium, it is important to understand the context under which the judiciary is operating.

In today’s India, the ruling government is trampling over free speech in universities, bypassing legislative process and chaining civil liberties at will. In all this is, it is important to understand that the union executive is the biggest litigant in India. It is the Union that is fighting cases against the Jawaharlal Nehru University in the Delhi High Court and it was the Union that fought the case against Vodafone in the Double Taxation case and it was the Union that fought the case against decriminalizing consensual homosexual intercourse.

An unbiased judiciary is the cornerstone of a federal governance structure. With the growing influence of national political parties at the regional level, the chances of a conflict of interest at the centre are more than ever.

Just as Mrs. Gandhi proved, allowing political intervention in the appointment procedure gives the executive a chance to create committed judges, acting with fear and/or favour in mind, like Justice Ray did.

For a neutral observer, the question comes down to a balance of harms. The collegiums system is far from perfect. It creates nepotism and favoritism in the judiciary, creating an entry barrier in the profession.

But as a first-generation lawyer-to-be, I think the other side of the story is far more daunting. The track record of executive involvement in appointments is far from reassuring. Even today, judges

---

<sup>167</sup> WRIT PETITION (CIVIL) NO. 13 OF 2015 SC

writing anti-centre rulings are transferred from their home courts and executive, from time to time, deliberately delays new appointments.

The threat of a committed judiciary is the threat of a corrupt judiciary. Judges with pre-conceived notions are no judges, but only play-actors. In our unique constitutional set-up, the legislature is almost always embroiled in political battles and the onus has fallen upon the judiciary to shape the nature of our nascent awakening. Supreme Court decisions have come to become the nations' map, in moving our country's morality forward. The fate of free speech and the future of privacy laws, rest with the judges of the Supreme Court of India. The judges of the highest court of our land are immune from the virus of populism and from the vagaries of political life. And it is only in this immunity, that they can usher India to its new life.

### **THE POSITIVE CASE FOR JUDICIAL ACTIVISM**

But the case for Judicial Activism is not limited to the notion that in the absence of said activism, there is threat of a committed judiciary. Judicial Activism cuts across the fault lines in democracies and factors out the largest impediment to social change.

Traditional democracies work on the belief that representation is the fairest form of governance. But the problem with representative democracies is that their central premise only work for those communities that have "political capital."

Political Capital is a measure of the power and ability to garner attention and action from the political class. This political capital is locked into numerical majorities that constitute major voter base electorates. The capital is also generated by interest groups like corporate lobbyists that influence political action by sponsoring the action itself.

This is evident in modern day democracies, including India. Large corporations that have corporate profits tied up in the economy actively oppose environmental legislation and other forms of welfare policies.

The political class in the country systematically ignores minorities like Muslims or Dalits in India and members of the LGBTQ community. These communities do not find representation in the Parliament and hence are at the receiving end of political apathy. The lack of Political Will means, that they there is hardly any scope for change for these sections of societies.

Judicial Activism cuts across this problem. Using their independence, the judiciary is able to empower those individuals that do not find adequate political representation. Under-trials detained unlawfully that had no financial or political capacity to get attention to their issues were rescued by judicial activism<sup>168</sup>. The judiciary diluted its traditional rules of *locus standi* to listen to this case. This was the first ever instance of a *Public Interest Litigation*.

This revolution has been carried forward by other activist judges like *Justice Kuldip Singh* have used judicial activism to bring about a radical change in environmental jurisprudence in the country. In harmonizing principles of international environment law with Indian jurisprudence<sup>169</sup>, Justice Singh has ensured that it is easier to hold perpetrators strictly liable for their actions.

More recently, the Supreme Court, in the case of *National Legal Services Authority (NALSA) v. Union of India & Ors*<sup>170</sup>, filed in October, 2012, held that transgender citizens have a right to be recognized as a third gender. The court held that the mere fact there is no law in status quo recognizing could not be continually used to discriminate them.

Thus, in my opinion, there is a two-pronged case to insulate the judiciary. The first is the negative case that argues that in the absence of such independence the very institution of the judiciary stands compromised as the executive gets inroads into controlling the composition of the judiciary. Operating in fear of removal or in the hope of favours from the political class is an impediment to the concept of fair trial that is envisaged at the core of our democratic institutions.

The second case, is the positive one. In remaining independent and insulated from populism, the judiciary can cut across the concept of social capital and truly be the agents of social change. For those that are powerless against the State or are deemed enemies by it, the Court, and its role as an activist, is the only guardian angel.

---

<sup>168</sup> *Hussainara Khatoon v. Home Secretary, State of Bihar* 1979 SCR (3) 532

<sup>169</sup> *Vellore Citizens' Welfare Forum v. Union of India* (1996) 5 SCC 647 : AIR 1996 SC 2715

<sup>170</sup> [Writ Petition (Civil) No. 400 of 2012]

**FORUM SHOPPING AND DISPUTE SETTLEMENT IN INTERNATIONAL  
INVESTMENT ARBITRATION: THE ROAD AHEAD**

**Vandana Kumari<sup>171</sup>**

**ABSTRACT**

Often preferential trade agreements allow parties to international investment arbitration treaties the option to file for dispute settlement regionally, unilaterally, or not at all. This leaves a wide scope for the parties in investor-state investment arbitration to choose the most suitable arbitral forum which can yield the most desirable award. This paper aims to highlight the motives of the parties in opting for forum shopping and the mechanisms which can be employed to curb this practice in international investment arbitration. The focus of this paper has been narrowed down to the forum shopping trends prevailing in ICSID, WTO DSU and NAFTA investment arbitrations along with reference to White Industries case to ensure a better understanding of this menace. The arbitral tribunals have adopted a reluctant approach towards consolidation of multiple arbitral proceedings which can be prove to quite effective in checking forum shopping and preventing a scenario where the investor's interest is pursued endlessly with little regards to public interest policy concerns.

**INTRODUCTION**

Forum shopping has been defined as a litigant's attempt "to have his action tried in a particular court or jurisdiction where he feels he will receive the most favourable judgment or verdict."<sup>172</sup> The term first appeared in judicial opinion in *Covey Oil & Gas Co. V. Checketts*<sup>173</sup> in the US Circuit Court.

The definition of forum shopping poses something of a conundrum. Selection of a forum has always been a part of the legal process; thus, it is never clear at what point it comes under the purview of 'forum shopping'. Parties are often able to choose the forum in which their case will

---

<sup>171</sup> Student, Gujarat National Law University, Gujarat

<sup>172</sup> BLACK'S LAW DICTIONARY 590 (5th ed. 1979).

<sup>173</sup> 187 F.2d 561, 563 (9th Cir. 1950).

be heard. This is particularly true of the plaintiff, the "master of the complaint."<sup>174</sup> It is also true that a party can be said to have indulged in forum shopping at any time when they take the minutest of decisions that may affect the forum of the judicial proceedings in any manner whatsoever. Thus, in order to determine whether or not there has been forum shopping, it is necessary to look at the motives of the concerned party.

Also, much importance is attached to avoiding forum shopping because by choosing the forum that addresses the dispute at first instance, the party concerned can choose the procedural aspects of the hearing and this is of vital importance on account of the fact that this adjudication of the facts at first instance will most likely be the only one, in accordance with the norms governing most dispute resolution mechanisms. Thus, the foundation of the adjudicatory process is strongly affected.

Moreover, when a party chooses the forum that decides the dispute, they also have the scope to influence the person presiding over the proceedings, who by virtue of being only human at the end of the day despite all formal obligations will be prone to bias. This too may get the party shopping for a favourable forum a decision in its favour.

Parties may also approach a particular forum in order to establish favourable precedent for the future. This holds true for judicial and alternative methods of adjudication. Such establishment of precedent makes for favourable conditions for the concerned party's future disputes that are likely to arise and be of a similar nature. They may also enable the complainant to file disputes against other litigants for similar matters with greater ease and a higher probability of success.

Nevertheless, most legal systems tend to treat forum shopping as unethical and inefficient; parties who forum shop are accused of having acted in abuse of the adversary system and squandering judicial resources and parties are generally looked down upon for having indulged in this practice.

## **FORUM SHOPPING IN INVESTMENT ARBITRATION**

Often preferential trade agreements allow parties to international investment arbitration treaties the option to file for dispute settlement regionally, unilaterally, or not at all. This leaves a wide

---

<sup>174</sup> Caterpillar, Inc. v. Williams, 482 U.S. 386, 398-99 (1987).

scope for practices like forum shopping. Many a time factors like overlapping memberships too contribute to the factors that widen the scope of such practices.

As per the trade agreements, there is often openness as to the seat of the arbitration and more often than not this vagueness results in inconsistent precedents being set on account of the difference in the procedural aspects of law in every country. Also, as the country varies, so does the arbitrator and as does the likelihood of a certain decision and the probability of bias, if any. Also, as arbitration is primarily consensual, there is often no absolute binding authority which further increases the incentive for forum shopping for the parties involved as they are free to choose the adjudicating authority, especially in an open-ended arbitration treaty.

In particular, an illiberal complainant is more likely to file regionally, and a liberal one multilaterally, even if they expect a more decisive legal victory over the defendant at the other institution. Yet, both will reverse their choice of forum if the expected value of future regional litigation is higher, an illiberal complainant because it will be less fearful of being sued by its more liberal multilateral trade partners, and a liberal one because it will be less concerned about suing its less liberal multilateral trade partners.<sup>175</sup>

Also, membership to international institutions is a significant factor in forum shopping in investment arbitration. Membership is “*an endogenous design choice*” that can later emerge as an exogenous constraint on the use of an institution.<sup>176</sup> This is precisely what is happening here, only that, where forum shopping is concerned, the issue is how the overlap of two (or more) memberships affects not only the relative use of these institutions (that is, where a case is filed), but whether these institutions are used at all (that is, if a case is filed). Importantly, while some institutions have few rules on overlapping memberships, others formally govern these relationships

The notion that forum shopping isn’t a good practice however stands good even in investment arbitration. It has been hotly debated in drafting a dispute settlement mechanism for the World

---

<sup>175</sup> Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade, Marc L. Busch accessed at <http://faculty.georgetown.edu/mlb66/Forum%20Shopping.pdf>

<sup>176</sup> Koremenos, Lipson, and Snidal 2001, 777

Intellectual Property Organization, where some members prefer to leave the choice of forum to the complainant, but where most "support the view that 'forum shopping' should not be allowed."<sup>177</sup>

There is ample opportunity for forum shopping, not least because, as with most other trade agreements, institutions like the WTO and NAFTA permit it. The WTO is less forthcoming than NAFTA on this point. On the one hand, the WTO claims "compulsory jurisdiction" over those disputes that arise among its members. On the other hand, the WTO approves preferential trade agreements under Article XXIV of the General Agreement on Tariffs and Trade (GATT), taking into account that many have dispute settlement mechanisms of their own, thus inviting forum shopping. For example, in reviewing the Canada-U.S. Free Trade Agreement (FTA), which preceded NAFTA, a GATT Working Group asked representatives of both countries what would happen "if the conclusions of the bilateral dispute settlement proceedings ... and those reached under the multilateral dispute settlement proceedings were different or even contradictory?"<sup>178</sup>

However, institutions need to strike a balance between legalization and liberalization or rigidity and stability, since too much of the former will always undermine the latter. There is always a trade-off between legalism (that is, rigidity), which aims at furthering compliance, and flexibility (that is, stability), which helps attract and retain members.

## **INTERNATIONAL INVESTMENT ARBITRATION AND ICSID**

The legal mechanism for bringing an investment claim by an investor is under the investor-state dispute settlement provisions of the modern investment treaties concluded between two states. The consent of the investor in writing for approaching the arbitration tribunal legally binds the state. The investor can directly bring a claim against the state without even seeking its consent.<sup>179</sup>

The ICSID was created by the Washington Convention<sup>180</sup> as a specialized institution for administering investor state investment arbitration disputes. The proceedings under the Convention are of international nature and gives primacy to party autonomy. The local courts and the local procedures have no applicability unless the parties have agreed to it. The non-exceed

---

<sup>177</sup> World Intellectual Property Organization Report 1990.

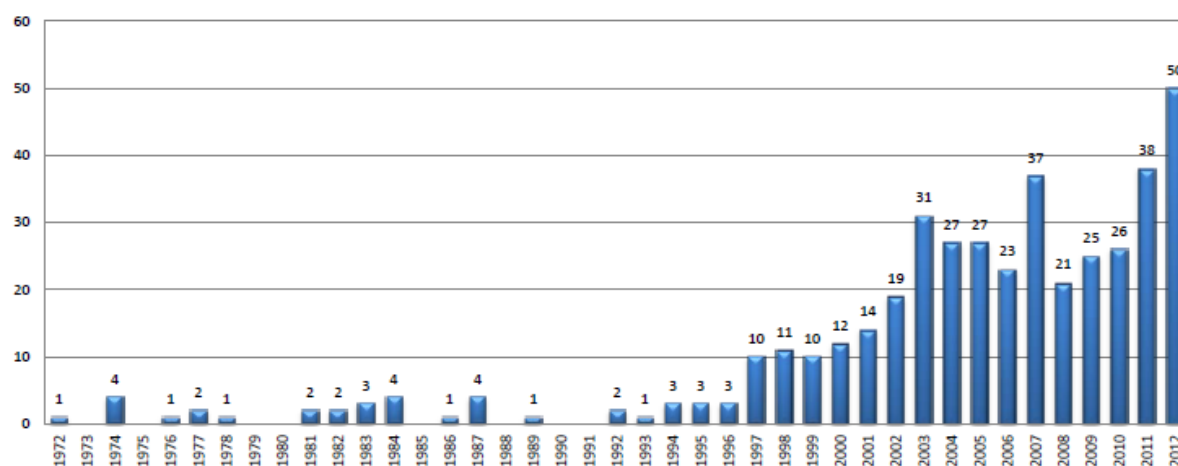
<sup>178</sup> GATT Basic Instruments and Selected Documents 1995, suppl. 38.

<sup>179</sup> Bernardo M. Cremades and David J.A. Cairns, "Contract and treaty claims and choice of forum in foreign investment disputes", *Dossiers Of The Icc Institute Of World Business Law*, 2005.

<sup>180</sup> 1965

states who are not party to the Convention can also proceed under the Additional Facility Rules for certain disputes which are not within the ambit of the Convention. Unlike proceedings under the Washington Convention, Additional Facility proceedings are potentially subject to the procedural law and courts of the “seat” of the arbitration.

The majority of the investment treaties, in order to ensure a broader protection to investor’s interests provide for one or both forms<sup>181</sup> of ICSID arbitration. As result of rapidly increasing number of BITs, there has been a surge in the investment disputes brought by the investors against the host states for arbitration before the ICSID.



Total number of ICSID cases registered by calendar year (source: The ICSID Caseload – Statistics 2013)

The total number of known treaty-based cases rose to 514 by the end of 2012. Since most arbitration forums do not maintain a public registry of claims, the total number of cases is likely to be higher.<sup>182</sup>

Investments treaties often offer a choice to the investors various forms of arbitration for the purpose of settling disputes with host States. The most frequent alternative to ICSID proceedings is “ad hoc” (or non-administered) arbitration in accordance with the stand-alone set of Arbitration Rules drafted by the United Nations Commission for International Trade Law (UNCITRAL). The rules provide greater flexibility to the parties in appointing an institution for administering the

<sup>181</sup> State-state arbitration and investor-state arbitration

<sup>182</sup> [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf) accessed on September 4, 2015 at 3:00 a.m.

proceedings. The Permanent Court of Arbitration has been increasingly being used for such ad-hoc arbitrations in the recent times.<sup>183</sup>

Forum shopping is motivated by two dominant concerns of the investors who are the primary complainants in the investment treaty disputes. Firstly, the complainant's expectation regarding the outcomes of the dispute and the likely verdict to be rendered by the regional and multilateral institutions. Secondly, the future precedential value of the order which can be used by the investors against the host states in case of further investment treaty disputes.<sup>184</sup>

Timeliness of proceedings is a determinative factor for forum shopping. If the timeliness of justice were a main determinant of the choice of forum, complainants might be expected to prefer arbitration to formal dispute settlement (i.e., alternative dispute resolution mechanisms under NAFTA or DSU Article 25 arbitration under the WTO), and yet they almost never do.<sup>185</sup>

In case of ICSID investment arbitration award the law of seat of arbitration normally dictates the legal standard applicable for annulment of the award which may be similar to forum shopping in litigation, where the choice of forum determines the standard for appeal. The consequences of choosing a standard of annulment of the award possibly having no bearing on the nationalities of the parties or the applicable substantive law cannot be exaggerated in international investment arbitration which involve parties with multiple nationalities with several bodies of law applicable. The selection of shopping of an arbitration seat may also have an impact on whether an arbitration already commenced will stand in face of a parallel forum shopping by an opposite party which intends to commence litigation on the same issues and the same parties. Article 8(2) of the UNCITRAL Model law could be a significant factor in this regard in case the chosen forum has enacted it. Article 8(2) if applicable will result in parallel or potentially contradictory awards. Under the Article, a litigation commenced can be heard and decided upon on the prior proof that the arbitration agreement is null and void. At the same time, it has no intentions of disrupting the arbitration proceedings as long as the matter is pending in the court. There are also considerations

---

<sup>183</sup> Investment Treaty Primer, Latham & Watkins International Arbitration Practice , Number 1563 | July 29, 2013

<sup>184</sup> Marc L. Busch, "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade", accessed on <http://faculty.georgetown.edu/mlb66/forum%20shopping%20IO.pdf>.

<sup>185</sup> Three cases have gone for DSU 25 arbitration at the multilateral level, two under GATT and one under the WTO, although the latter was conducted as a DSU 22.6 proceeding on authorization to retaliate, such that it can hardly be counted as a case of arbitration, as per the spirit of this provision. Nonetheless, recourse to arbitration under NAFTA or DSU 25 still hinges on a prior decision to file regionally or multilaterally.

of cost, convenience and user- friendliness. The motivations behind forum shopping in investment arbitration are complex unlike litigation.

Forum shopping has grave implications while estimating the choice of institutions an investor would favour for alternative settlement of investment BIT disputes. It raises the crucial issue of how the institutions intend to deal with the issue of overlapping memberships. It not only affects the choice of institutions but also whether these institutions will be used at all. Similar conflict arose where Mexico chose to pursue its challenge against a US safeguard measure under the provisions of the North American Free Trade Agreement (NAFTA).<sup>186</sup> Ideally Mexico should have approached the WTO DSU since the conflict pertained to the WTO law and interests of other states were also at stake. The legal scholars have been mapping this deviation in the alternative dispute settlement behavior of the states in addressing their investment disputes in cases where overlapping memberships are existent.

### **INDIA – AUSTRALIA BILATERAL INVESTMENT TREATY: AN INSIGHT**

BITs and Preferential Trade Agreements allow the investors to bring an arbitral claim directly against a country's national government for a breach of the substantive protections and treatment standards guaranteed under the treaty.<sup>187</sup> This dispute settlement proceeding is known as investor-state arbitration, though it is not arbitration in its real sense.

Article 3 of the BIT<sup>188</sup> between India and Australia stipulates the procedure for arbitration if the parties fail to settle their disputes by negotiation or conciliation. Article 3 states:

*“(a) if the Contracting Party of the investor and the other Contracting Party are both Parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965, and both Parties to the dispute consent in writing to submit the dispute to the International Centre for Settlement of Investment Disputes such a dispute shall be referred to the Centre;*

---

<sup>186</sup> 1996

<sup>187</sup> Russell Thirgood, “Bilateral Investment Treaties - Providing Unlimited Opportunities”, The Global Legal Post, 2014.

<sup>188</sup> 1999

*(b) if both Parties to the dispute so agree, under the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings; or*

*(c) to an ad hoc arbitral tribunal by either Party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976.”<sup>189</sup>*

Though ICSID has become the pre-eminent forum for settlement of investor-state disputes, all the claims under BITs with India, a non-signatory to the ICSID Convention are governed by the UNCITRAL Arbitration Rules.

However, in most of the investor state disputes the investors prefer the ICSID forum because it provides a higher level of independence from the judiciary of the host state. A complainant would usually approach the ICSID for primarily two reasons. Firstly, an ICSID award can be reviewed only, to a limited extent by a special committee set up by ICSID<sup>190</sup> as per Article 64 of the Washington Convention. Under other international arbitration the power of final review of the award lies with the supreme judiciary of the host state. Secondly, signatories to the Convention have agreed to treat and execute the ICSID award as the final decision of their own courts and consequently there is no requirement of a special enforcement procedure.

Following the furors in the aftermath of *Philip Morris versus Australia*<sup>191</sup>, the Australian government has decided to categorically exclude investor-state arbitration provisions from its BITs. It is the first developed country to do so however its impact on containing the surge in arbitration claims under investor-state provisions is yet to be assessed. The Australian investors will still have a forum shopping gateway by routing their investments through some other country's investment treaties. Assuming a scenario where an Australian investor wishes to invest in China. The Australia–China BIT contains a limited dispute resolution clause and for this reason an investor may consider channeling their investment through a holding company in India as the China–India BIT provides for arbitration of ‘any dispute’. In doing so, an investor would not have

---

<sup>189</sup> [http://www.iisd.org/pdf/2006/investment\\_india\\_australia.pdf](http://www.iisd.org/pdf/2006/investment_india_australia.pdf) accessed on 25th September, 2015 at 1:30 a.m.

<sup>190</sup> Art 64 of the Washington Convention the provision does not confer jurisdiction on the Court to review the decision of a Conciliation Commission or Arbitral Tribunal as to its competence with respect to any dispute before it. Nor does it empower a State to institute proceedings before the Court in respect of a dispute which one of its nationals and another Contracting State have consented to submit or have submitted to arbitration.

<sup>191</sup> [2012] HCA 43

to concern themselves with the question of whether the protection afforded by MFN clauses extends to incorporating more favourable dispute resolution clauses.<sup>192</sup>

An analysis of the investor-state brought against India in *White Industries Australia Limited v. The Republic of India*<sup>193</sup>, the UNCITRAL Tribunal in Singapore has held that the Republic of India breached its obligation under the India-Kuwait bilateral investment treaty (BIT) to provide investors with an “*effective means of asserting claims and enforcing rights*” through undue delay in the Indian court system.

White commenced UNCITRAL arbitration proceedings against India alleging that the judicial delay caused: (i) a denial of justice, in breach of India’s obligation to accord “*fair and equitable treatment*” to investors under the India-Australia BIT; and (ii) its investments to be treated less favorably than those of investors of a third country, namely Kuwait, contrary to the “most-favoured nation” clause of the India-Australia BIT. Article 4(5) of the India-Kuwait BIT<sup>194</sup> contained an obligation for India to “*provide effective means of asserting claim and enforcing rights with respect to investments* “. <sup>195</sup>

White Industries invoked the “effective means” standard in the India-Kuwait BIT by relying on the “most-favoured nation” clause in the India-Australia BIT. It brought a claim under the India-Australia BIT but relied upon the MFN clause to elicit benefits from more favourable investor protection under the India-Kuwait BIT.

---

<sup>192</sup> Bilateral Investment Treaties - providing unlimited opportunities, the Global View, 07 January 2014 accessed at <http://www.globallegalpost.com/global-view/bilateral-investment-treaties---providing-unlimited-opportunities-58721287/> on 18<sup>th</sup> September, 2015 at 5:41 a.m.

<sup>193</sup> UNCITRAL

<sup>194</sup> Each Contracting State shall maintain a favourable environment for investments in its territory by investors of the other Contracting State. Each Contracting State shall in accordance with its applicable laws and regulations provide effective means of asserting claims and enforcing rights with respect to investments and ensure to investors of the other Contracting State, the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice, for the purpose of the assertion of claims and the enforcement of rights with respect to their investments.

<sup>195</sup> Blanshard & Briana Young, “India liable under BIT for extensive judicial delays”, Emily Hong Kong, and Joanne Greenaway, London, HSF Dispute Resolution, PIL Notes.

The actions of White Industries, the first Australian company to successfully pursue an investor-state investment dispute in the international forum was certainly not in a good spirit and amounted to investor misconduct. However, it does not imply that such misconduct is in violation of the standards of the public international law. There is a fair possibility of investor misconduct arising in the investment dispute resolution process when the investors attempt to avail the fruits of investment treaty protection by engaging in sham transactions; undoubtedly a form of abusive forum shopping after the dispute has arisen.<sup>196</sup> In the context of investment treaty arbitrations, investor misconduct may have legally relevant repercussions at various stages of the arbitration proceedings depending on the timing, type and severity of the misconduct.

The arbitration tribunals have upheld such arrangements as long as these transnational corporations satisfy the definition of investors in accordance to the respective BITs which in itself is a matter of policy debate. An appropriate example would be the bilateral investment policies of the Netherlands which has adopted a very liberal definition of investment to bring almost all kinds of international investment within the ambit of investment.

### **CONSOLIDATION OF PROCEEDINGS: A POSSIBLE ANTIDOTE TO FORUM SHOPPING**

The investor state arbitration which has found its place in myriad BITs which have increased exponentially in the past decade has several inefficiencies and problematic aspects which the policy makers have realized once the investors started to target the states directly for realization of multiple compensation and damages. The BITs have gone too far in protecting the investor's interest in the host country and failed miserably in ensuring the responsibility of the states towards the safeguard of the public interest policy. BITs generated investment arbitration often leads to multiple proceedings being brought up resulting in conflicting or inconsistent awards by different forums and forum shopping by claimants relying on the most favourable BITs.

Indeed, there have been a few prominent examples where investors managed to pursue investment arbitration before different tribunals established according to different BITs, applicable to their

---

<sup>196</sup> Europe Cement Investment & Trade SA vs Turkey , ICSID Case no: ARB(AF)07/2 Award of 13<sup>th</sup> August, 2009(Europe Cement)

different corporate emanations. The **Lauder/CME Awards**<sup>197</sup> are still the most telling example because the two arbitral tribunals came to different conclusions, which taught host countries the simple, but painful lesson that it is not enough to win one case to escape unharmed. Rather, host States have to successfully defend all parallel cases brought against them, while investors need to win only one.<sup>198</sup> The Czech government in challenging the award in **CME-Czech Republic** invoked the ground of *lis pendens*. The Court of Appeal rejected the Czech government's claim that both the arbitration relates to same dispute under the Czech Republic- US BIT even if the claimants were not same and the arbitration was based on different BITs.<sup>199</sup>

The arbitral tribunal should be allowed to take a liberal approach in considering the economic realities of cross border investments. With respect of identity of the claimant, the arbitral tribunal should take cue from the European Court of Justice's "single economic entity" doctrine whereby the possibility of applying the substantial identity test can be realized to pierce the corporate veil and treat the majority shareholders and the company as a single economic entity. This could turn out to be one of the best possible solutions to avoid forum shopping by transnational corporations in investment arbitrations by coordinating two parallel investment arbitration proceedings in multiple forums into one single dispute claim.<sup>200</sup>

Arbitration tribunals lack the inherent jurisdiction to pass an order for consolidation of related proceedings. One of the major impediments in formal consolidation of investment arbitration proceedings is the requirement of party consent. The ICSID Convention and UNCITRAL rules are silent on consolidation.<sup>201</sup> Surprisingly, Article 1126 of the NAFTA Agreement does away with the requirement of the consent of any of the parties in order to consolidate NAFTA Chapter 11

---

<sup>197</sup> *Lauder v. The Czech Republic* (UNCITRAL), Final Award (Sept. 3, 2001), 9 ICSID Rep. 66 (2006), 14 World Trade & Arb. Materials 35 (2002) *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL), Partial Award (Sept. 13, 2001), 9 ICSID Rep. 121 (2006), 14 World Trade & Arb. Materials 109 (2002); *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL), Final Award (Mar. 14, 2003) (hereinafter *CME v. Czech Republic Final Award*), 9 ICSID Rep. 264 (2006)

<sup>198</sup> August Reinisch, "The Proliferation Of Preferential Trade Agreements", ICSID Review, Volume 24 (2), (2009) ,416-433.

<sup>199</sup> Zachary Douglas, Joost Pauwelyn and Jorge E. Vinuales (eds.), "The Foundations of International Investment Law: Bringing Theory into Practice", Oxford University Press, p. 524-525.

<sup>200</sup> Pauwelyn and Salles," Forum Shopping Before International Tribunals", Cornell International Law Journal, Vol. 42, Iss. 1, Article 4, pg 91,104

<sup>201</sup> Caron D.D and C. Lee, "The UNCITRAL Arbitration Rule: A commentary", OUP , 2013 at p. 57

two or more arbitration proceedings. The NAFTA Tribunals enjoys wide discretion in deciding partial or complete consolidation of chapter 11 claims.

The 40<sup>th</sup> session of the UNCITRAL discussed the necessity to revise the UNCITRAL rules to incorporate provisions with regard to consolidation of arbitral proceedings on the lines of Article 4(6) of the ICC rules. The delegations highlighted the pros of consolidation in pre-empting potentially inconsistent decisions by stating:

*“where several distinct advantages arose between the same parties under separate contracts or chain of related contracts containing separate arbitration clauses or to avoid a situation where a party initiated separate arbitration in respect of a distinct claim under the same contract in order to gain a tactical advantage.”*<sup>202</sup>

No matter what the benefits of consolidation are, it would not be in the interest of the claimants that is the investors and there is definitely lot reluctance on their part to consent for consolidation, consequently consolidation lying in dormant. Thus, it would not be inappropriate to state that the general requirement of the party's consent is acting like the Achilles heel of this potentially relevant principle.

### **LIMITATIONS TO FORUM SHOPPING FROM A LITIGATION PERSPECTIVE**

There is different method for guaranteeing that forum shopping, in any event in the prosecution setting, does not continue completely unrestrained, and entirely without respect to constraints postured by, e.g., due process, the privilege to be heard and the privilege to equivalent treatment.

In the first place, from the litigant's perspective, especially the outside respondent, the jurisdictional range of the state should typically be liable to a test of 'sensibility'. Among the criteria which may be connected are:

- (i) the degree of the outside litigant's intentional entry into the state,
- (ii) the weight on it of defending in that state,
- (iii) the presence of any contention with the respondent's home nation, and

---

<sup>202</sup> U.N. Doc. A/CN.9/619 N. 5 at p. 23, para. 117

- (iv) The state's enthusiasm for arbitrating the debate.
- (v) They likewise incorporate where the most productive determination of the suit is considered to be,
- (vi) the state's significance to the offended party's enthusiasm for successful and advantageous help, and
- (vii) The presence of an optional forum.

Here too there has been a late pattern to jurisdiction extended utilization of individual purview, most especially in mass tort cases in the United States (e.g., breast implants, asbestos, natural harmful torts, and so on.).

*Secondly*, forum shopping may be restricted in specific jurisdictions not just by their own systematized and case-law bases for activity of locale, additionally by reciprocal or multilateral traditions which administer, among different matters, purview between and among part state courts.

*Thirdly*, very separated from tradition bases, local law intended to control discussion shopping may be of discriminating significance. In this way, taking a gander at France as a case, under *Art. 15 of the French Civil Code*, regardless of the fact that there is no nexus between the exchange and France, insofar as the litigant is a French national, the French national can request that French courts have restrictive jurisdiction to hear debate emerging out of the exchange.

A remote judgment rendered against a French national that has declared an Art. 15 guard may be unenforceable in France. A French national can waive its Art.15 resistance either contractually or by taking an interest in remote procedures without first stating its Art. 15 rights. The Brussels and Lugano Conventions dispose of the Art. 15 resistance in debate among domiciliary of Contracting States. In the meantime, under the Brussels and Lugano Conventions a forum from a Contracting State that is domiciled in France may declare the Art. 15 resistances against a forum from a non-contracting State.

The general standard of jurisdiction normal to both the Conventions and the nearby considerate methodology law of sure of its contracting states is that a man must be sued in the courts of his nation of origin. Every different bas of jurisdiction is viewed as special cases to this general rule

and, consequently, deciphered prohibitively. As opposed to the ideas of 'least contacts' and 'due process' which are installed especially in United States methodology, under the Conventions a judge has basically no tact to either acknowledge or dismiss purview on a forum non-convenient premise or with reference to due procedure necessities of least contacts as portrayed previously.

Maybe, the imperative paradigm is whether one of the uniting variables indicated in the Convention or in nearby considerate methodology is available or not. Where nearby polite strategy accommodates a unique spot of jurisdiction for a sure claim, the offended party has a critical vital decision. He can get his action either a court at the respondent's general spot of jurisdiction or at the material unique spot of purview. Where nearby technique sets up an elite spot of purview, the offended party has no key decision, but instead must bring his activity at such place. Illustrations of restrictive spots of jurisdiction incorporate for cases which state a privilege of proprietorship, encumbrance or ownership as to genuine property, the spot where such genuine property is found and, for cases identifying with rented residences, the spot where such abiding is found.

*Fourthly*, the negligible actuality that a litigant has resources in the purview might possibly be adequate for the courts to practice jurisdiction over a specific debate. Additionally, it may not be adequate that the activity brought "touches" or "concerns" the area or property in the event that it doesn't likewise have an immediate impact on the property itself, its ownership or title.

In the United States, the presence of genuine or individual property in a jurisdiction is not the only one adequate, in activities disconnected to one side or responsibility for property, to practice purview over a litigant. That is, courts may practice jurisdiction over a property proprietor just if the proprietor has least contacts with the material forum and the activity of purview must be sensible.<sup>203</sup>

In Brussels and Lugano Convention cases, Art. 5 and Art. 16 of the Conventions offer a forum taking into account the property's area (discussion rei sitae). Under Art. 16(1) of the Conventions, the courts where steady property is arranged have restrictive locale in procedures which have as their article rights in rem in, or occupancies of, such property. This applies paying little mind to

---

<sup>203</sup> Arbitral Forum Shopping, 166 Dossiers of the ICC Institute of World Business Law Parallel State and Arbitral Procedures in International Arbitration

the litigant's residence, i.e., likewise on the off chance that it is domiciled outside the land territory of the Conventions.

As a recent after effect guideline, national law identifying with locale based upon the vicinity of undaunted property loses a large portion of its significance in admiration of global purview in Contracting States.

*Fifthly*, the best-known way in which to practice party independence over forum shopping is to look for release of the whole activity as to all or a few forums for discussion *non conveniens*. This thought alludes to the circumstance where the discussion is genuinely badly designed for, for this situation, the remote respondent, or a more advantageous option forum exists somewhere else where the outside litigant may be legitimately served. It might be that the option discussion's law can be pretty much good, the length of it gives no less than a plausibility of alleviation.

Among the matters which have been considered in connection to prudence to decrease to practice jurisdiction incorporate

- (i) the quality or shortcoming of the cases made,
- (ii) the strategy of practicing restriction before subjecting an alien to nearby purview, and
- (iii) whether the locale is an obviously wrong discussion. Among the applicable elements in the last case are whether the target impact of a procedures' continuation is vexatious or harsh as in it is unjustifiably oppressive, biased or harming to the outside respondent.

Additionally, considered are the accommodation and cost in connection to accessibility of witnesses and the trouble of report accumulation from remote jurisdictions, the law overseeing the important exchange, the spots where the forums separately live or bear on business, and whether a suitable option discussion for the knowing about the matter is fit for designation. In specific nations, especially in Continental Europe, a test to purview may not be founded on discussion *non conveniens* exclusively. Maybe, the premise would be that the association determined in the pertinent procurement of either the Convention, where relevant, or the local common strategy procurements is nonexistent or that the forums have consented to bar nearby locale either by a discussion or an intervention provision. In this manner, the regulation of discussion *non conveniens* is obscure to the Brussels and Lugano Conventions. A court having purview as per the

appropriate jurisdictional tenets of the Conventions must accept jurisdiction as an issue of law and can't decrease it by reference to contemplations of convenience.

*Sixth*, regardless of the possibility that every single important occasion occurred abroad, the local forum may not so much be obviously unseemly if the litigant is occupant in the discussion, if the offended party is inhabitant in the discussion and the agreement sued upon was gone into in the discussion, or if the option forum bars or seriously confines recuperation of harms or other alleviation.

The converse of this rule is that in a few locales the court of first case or whatever other occasion must deny its own purview where, regardless of the possibility that the respondent has entered an appearance, it gets to be obvious that jurisdiction has been missing from the earliest starting point or vanishes. In such case, the court then responsible for the case may cancel the procedures and reject the case.

*Seventh*, two-sided arrangements contain particular procurements whereby the respondent can confine its introduction by raising the *exceptio incompetenciae internationalis*. This protection does not influence the claim's mediation, but rather may restrict acknowledgment and implementation of the judgment to resources in the condition of judgment. This resistance may be accessible just if an outside respondent not enter an appearance, or when entering an appearance reserves express spot as to the *exceptio incompetenciae internationalis*.

A choice may then not be authorized outside that nation. It ought to be noticed that respondents domiciled in a Brussels/Lugano Convention state can't argue this special case. Respondents domiciled or occupant in non-tradition states with a respective arrangement may make utilization of it once they are sued in a nation which perceives the barrier. Eighth, yet not slightest, to maintain a strategic distance from the undeniable impediment which can emerge in parallel procedures and a 'race to judgment', parties before specific courts may ask for the issuance of a 'hostile to suit directive'.

## CONCLUSION

Forum Shopping is thus a practice that has both its pros and cons. Barring it completely would create barriers to justice and the prevalence of fairness would be hampered. Allowing it to rage rampant, too, however, would be an unwise decision. Thus, as discussed above, all international

eco systems for arbitration created by way of treaties along with the local laws of countries, with their differences strive to strike that balance that will allow them to let this age-old practice work to the best possible ends.

There are various ways of ensuring or at least attempting to ensure that arbitral form shopping does not proceed without any controls. Limits are necessary to take account of other dispute resolution mechanisms which the concerned parties may have agreed to, as well as to ensure mandates such as due process, the right to be heard and the right to equal treatment.<sup>204</sup>

---

<sup>204</sup> Michael Waibel, “The Backlash Against Investment Arbitration: Perceptions and Reality”

## REFERENCES

1. Investment Treaty Primer, Latham & Watkins International Arbitration Practice, Number 1563, 2013.
2. Pawelyn and Salles,” Forum Shopping Before International Tribunals”, Cornell International Law Journal, Vol. 42, Iss. 1, Article 4.
3. CARON D.D and C. LEE, “The UNCITRAL Arbitration Rule: A commentary”, OUP, 2013.
4. Zachary Douglas, Joost Pauwelyn and Jorge E. Vinuales (eds.), “The Foundations of International Investment Law: Bringing Theory into Practice”, Oxford University Press.
5. GUS VAN HARTEN, “Investment Treaty Arbitration and Public Law.”, Oxford University Press, Oxford, UK, 2007.
6. Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade, Marc L. Busch accessed at <http://faculty.georgetown.edu/mlb66/Forum%20Shopping.pdf>
7. August Reinisch, “The Proliferation Of Preferential Trade Agreements”, ICSID Review (2009).
8. Catherine Yannaca-Small, “Improving the System of Investor-state Dispute Settlement: An Overview”, International Investment Perspectives ,OECD, 2006.
9. Alan O. Sykes, “Transnational Forum Shopping as a Trade and Investment Issue”, The Journal of Legal Studies, Vol. 37, No. 2, June 2008
10. Aravamudhan Ulaganathan Ravindran, “International Investment Law and Developing Economies”, International Journal of Arbitration Law.
11. Blanshard & Briana Young, “India liable under BIT for extensive judicial delays”, Emily Hong Kong, and Joanne Greenaway, London, HSF Dispute Resolution, PIL Notes accessed on <http://hsfnotes.com/publicinternationallaw/2012/03/01/india-liable-under-bit-for-extensive-judicial-delays/>
12. Understanding on rules and procedures governing the settlement of disputes, WTO Agreement accessed on 7<sup>th</sup> September 2015 at 7:05 a.m.

13. Karl P. Sauvant with Michael Chiswick-Patterson, eds., *Appeals Mechanism in International Investment Disputes* (New York: Oxford University Press, 2008)
14. [http://www.law.yale.edu/documents/pdf/sela/Newcombe\\_Investor\\_Misconduct.pdf](http://www.law.yale.edu/documents/pdf/sela/Newcombe_Investor_Misconduct.pdf) accessed on 6th September, 2015 at 6:09 p.m.
15. Pauwelyn, Joost and Salles, Luiz Eduardo, "Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions," *Cornell International Law Journal*, Vol. 42, Iss. 1, Article 4, (2009).
16. Michael Waibel, Asha Kaushal, Kyo-Hwa Chung & Claire Balchin, eds., "The Backlash Against Investment Arbitration", *Kluwer Law International*, March 2010
17. [http://unctad.org/en/Docs/iteiit30\\_en.pdf](http://unctad.org/en/Docs/iteiit30_en.pdf) accessed on 7th September, 2015 at 4:30 p.m.
18. [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf)
19. <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx>
20. *Investment Treaty Primer*, Latham & Watkins International Arbitration Practice , Number 1563 | July 29, 2013
21. <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx>
22. *Investment Treaty Arbitration and Public Law.*, Gus Van Harten, Oxford, UK: Oxford University Press, 2007
23. *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, Marc L. Busch accessed at <http://faculty.georgetown.edu/mlb66/Forum%20Shopping.pdf>
24. <http://hsfnotes.com/publicinternationallaw/2012/03/01/india-liable-under-bit-for-extensive-judicial-delays/>
25. [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf)
26. *Transnational Forum Shopping as a Trade and Investment Issue* , Alan O. Sykes, <https://www.law.virginia.edu/pdf/olin/0708/sykes.pdf>

27. THE PROLIFERATION OF PREFERENTIAL TRADE AGREEMENTS, August Reinisch, ICSID Review (2009) 24 (2): 416-433.
28. By Michael Waibel, The Backlash Against Investment Arbitration: Perceptions and Reality , [Kluwer Law International](#).
29. Arbitral Forum Shopping, 166 Dossiers of the ICC Institute of World Business Law Parallel State and Arbitral Procedures in International Arbitration
30. GATT Basic Instruments and Selected Documents 1995, suppl. 38.
31. Koremenos, Lipson, and Snidal 2001, 777
32. World Intellectual Property Organization Report 1990.
33. Black's Law Dictionary
34. Pauwelyn, Joost and Salles, Luiz Eduardo (2009) "Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions," *Cornell International Law Journal*: Vol. 42: Iss. 1, Article 4
35. Forum Shopping Reconsidered, Harvard Law Review, Vol. 103, No. 7 (May, 1990) <http://www.jstor.org/stable/1341283>
36. Markus Petsche, "What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice" , The International Lawyer, Vol. 45, No. 4 (WINTER 2011)

\*\*\*

*We thank all authors for their valuable contributions which make the International Journal of Law & Management Studies worthy in terms of research, contribution to academic development and reform.*

EDITORIAL BOARD, IJLMS



PUBLISHED BY AGRADOOTWEB