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Editorial Note

The International Journal of Law & Management Studies has always sought to contribute towards the endeavour of strengthening and facilitating legal ease for businesses in India. The journal looks at development and evolution of commercial laws in light of judicial interpretation, authorities and other resources of value. Commercial Laws are the lifeblood of business in India and appropriate regulations and legislations should be in place in order to both facilitate and regulate business in India. The Editorial Board of IJLMS seeks to place emphasis on the evolving commercial law landscape in India particularly rover through the various contemporary developments of law and legal practice.

Among these developments, notable ones remain the introduction of Goods & Services Tax, the activist garb of the Competition Commission of India, the finance bill and its implication on the economic environment and the emerging of tribunals in India. The Competition Commission of India, a statutory body formed by the Competition Act, 2002 has enlarged its domain and dawned an activist role by penalizing businesses which do not correspond and attempt to impair free market spirit. Contributions from varied areas have been received in this edition. In the crucial field of Technology, contributions ranging from Strategic Policy Analysis of India and Canada in terms of Cyber security and Sustainable Development and the Concept of forgetting and removal of personal information from the internet. While in case comments, we have seen the Sector Wise Analysis of Mergers, Acquisitions in India and Appraisal of Unfair terms in Technology-Transfer Contracts in Nigeria and the Cauvery Water Dispute. Finally, manuscripts have been published relating to the Legality of Bitcoins, the effects of Ambush Marketing, Fan Fiction stuck in the Quagmire of Intellectual Property Law and the issues and implications of capital punishment among others. We hope to receive contributions on the areas focused above in order to expand our reach. While we thank our authors for their valuable contributions, we would also be gratuitous to our readers for their continued support and hope it would be an enriching experience.

Shruti Sharma

Editor-in-Chief

CAUVERY WATER DISPUTE

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ABSTRACT

Rajendra Singh famously known as "Water Man of India" and winner of Ramon Magsaysay award in 2001 and Stockholm water prize in 2015, had said that third world war is at our gate over water owing to the critical conditions of world's aquifers. The dispute is over Cauvery river between three States and one Union Territory of India Karnataka, Tamil Nadu, Kerala and Union Territory Puducherry is can be said that a little preview of what can happen in future if we did not take any cognizance as we can see the ugly and widespread vandalism in Karnataka and Tamil Nadu. This dispute originated for the first time way back in 1892 at the time of Britishers between the Presidency of Madras and Princely state of Mysore. In 1924 Mysore and Madras reached into an agreement which will be valid for 50 years so in 1974 that agreement ceases to be enforced and then to solve the issue in 1990 a tribunal was set up by government of India and in 1991 an interim order was issued by the tribunal ordering Karnataka to allow water to Tamil Nadu and this escalated the tensions which were already present because Karnataka said that in 1924 it has disadvantage position over Madras.

HISTORY OF THE CAUVERY WATER DISPUTE

The total volume of water in Cauvery river is equivalent to 740 TMC and out of this Karnataka adds 462 TMC, Tamil Nadu adds 227 TMC and 51 TMC is added by Kerala through their catchment area. After the final award by the tribunal in 2007, the Karnataka government did not complied with the order and as a result Jayalalitha the former and deceased Chief Minister of India went on to strike with a demand to publish the final award by the tribunal in the official gazette of India. So owing to the pressure in 2013 the notification of the final award was published in official gazette of government of India. Thus there was a lot of tension in brief pockets of the two states between 2007 and 2013.

Apparently, Karnataka seems to have more but gets less and this raises two questions first that has injustice is beinginflicted upon Karnataka and another is that is this a fault on part of tribunal but the answer to both these questions is clearly a NO. To explain this we have to go into history at the time when Cholas were ruling the southern India and it is being said that they had lot of vision and foresight, they build many checked dams and catchment area in Tamil Nadu and because of this Tamil Nadu generates 227 TMC of water through its catchment area and checked dams and this does not happen in Karnataka their first dam was KrishnarajaSagar in 1934 so this was the major disadvantage over Karnataka owing to lack of infrastructure and checked dams or reservoirs Karnataka is not able to add

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¹II year, B.A. LL.B (Hons.), Dr. Ram Manohar Lohiya National Law University, Lucknow

water to river that Tamil Nadu does so it seems that Karnataka has more but getting less but evidently Tamil Nadu has better infrastructure and groundwater table. Before the award Tamil Nadu was using 80 per cent of total water of the river Cauvery and Karnataka only 16 per cent but after the award Tamil Nadu uses only 57 per cent and Karnataka percentage had risen from 16 to 37 per cent of total river water.

Karnataka government had not followed the 2007 award completely so in 2016 Tamil Nadu government moved to Supreme Court to compel the Karnataka government to release water and on 5th September, 2016 Supreme Court orders the Karnataka government to release 15000 cusec of water till 15th but later it modified its order to 12000 cusec of water till 20th and this initiated the ugly and widespread violence in Karnataka causing death and huge loss to public property.

ROOT CAUSE OF THE DISPUTE

As mentioned above Cauvery river has total 740 TMC of total water which is divided between four states and according to the 2007 award Karnataka had to give extra 192 TMC of river water from its share to support irrigation to Tamil Nadu farmers and this irritates Karnataka Government especially in years when the monsoon is weak. Generally Karnataka releases more than the requisite amount of water that is 192 TMC in order to avoid flooding like situation in Karnataka but the problem arises only in years in which there is drought like situation owing to weak monsoons (as Cauvery river gets rainfall from both Southwest monsoon winds and from Northeast monsoon, despite that it does not received the required rainfall sometimes because of the climate change). Tribunal in its award of 2007 asked the Karnataka government to allow water to Tamil Nadu on monthly basis and it also specified the amount of water to be released, and all this goes well when the monsoon is normal but when monsoon is weaker then the problem arises.

There were many protest over this dispute, both these states had sour relations but in last year that is 2016, the protest took the most violent phase there were widespread vandalism leading to huge loss to property and even human lives and all this is happening in India which is water rich. It is not that we have now scarcity of water but the management is very poor, distribution of water is abysmal in India for example people in states like Uttar Pradesh or Bihar waste lot of water on daily basis not thinking about the hardships people are facing in arid states like Rajasthan. Our honorable Prime Minister Mr. Narendra Modi recently visited Israel leading nation in water management (being a water deficit nation it exports agriculture items that needs lot of water for irrigation) had signed various deal on strategic issues and one of them water management that involves transfer of technologies for efficient water management, which can surely alter the deteriorating condition of Indian rivers if implemented.

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SUPREME COURT JURISDICTION: INTER-STATE WATER DISPUTE

Ramaswamy R Iyer, a well-known water expert had said in his article that article 262 of our constitution along with Inter-State water Disputes Act, 1956 is a very good mechanism to tackle or arbitrate the inter- state river disputes and he says jurisdiction to Supreme Court can be given but only appellate not original.

Article 262 talks about the powers conferred to parliament for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of any inter-State river or river valley. It also empowers the Parliament to enact provisions barring the jurisdiction of Supreme Court or any other courts to adjudicate. So, why had the Supreme Court admitted the special leave petition under article 136 of our constitution, the answer to this question is not clear because it was never raised by any counsels who appeared in this case. The Inter-State Water Dispute Act 1956 was enacted as per the provisions of Article 262 of the Constitution which also contain provisions to bar Supreme Court jurisdiction in Inter-State Water Dispute. This act was amended in 2002 in accordance to the recommendations made by the Sarkaria Commission.

In the Constitution issues relating to river water are addressed in many places viz. in Entry 17 under the list –II that is state list of seventh schedule provides that water that is to say water-supplies,irrigation and canals, drainage and embankments are under the control of state. Entry 56 under list -I that is union list has conferred the central government with powers to regulate and develop Inter-State River to the extent declared by the Parliament by law to be expedient in the public interest². So the difference between the entry 17 and entry 56 is that state government can legislate over river water within the territory of a particular state but when comes the river water flowing in more than states the central government has the authority to make laws under article 262 of the constitution. Karnataka has problems on sharing river water to almost all its neighboring states as in another case of State of Karnataka v. State of Andhra Pradeshin which the judgment was delivered on 25th April 2000 and in this case section 11 of the ISWD act of 1956 was discussed that bar the jurisdiction of Supreme Court or any other court of India notwithstanding anything contained in any other law and clause 2 of Article 262 of the constitution also authorizes the parliament to make law excluding the jurisdiction of the Supreme Court or any other court per se in respect of a dispute or complaint while in Article 131 which gives original jurisdiction to Supreme Court to give its judgment on conflict between Government of India and one or more sate or among two or more states but the opening line of this article envisaged subject to other provisions of the constitution. Thus owing to Article 262, Supreme Court does not

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²ministry of Water Resources, River Development & Ganga Rejuvenation (July.22,2017,10:04PM), http://www.wrmin.nic.in/forms/list.aspx?lid=310

have the jurisdiction to hear or accept cases relating to water dispute between states, contrary to this statement in another case³ relating to Cauvery dispute only senior Supreme Court lawyer Shanti Bhusan representing the State of Kerala said that Article 262 is limited while the scope of Article 131 is wider in scope but according to the language used in article 131 carries different meaning what Shanti Bhusan had said and by a deep analysis of article 262 it can be deduced that it had given exclusive power to the Parliament to enact a law providing for adjudication of such disputes. The language of the Article 262 can also be differentiated from the Entry 17 and Entry 56 of state list and union list respectively which is explained above because clause one of the article talks about adjudication of any dispute or complaint and that too with respect to the use, distribution or control of waters of any inter-state river or river valley.

The act of 1956 dealing with inter-state water dispute was passed in the light of Article 262 contains in its Section 3 that if its appears to Government of any state that the water dispute with Government of another State of the nation has risen or is likely to arise, the State Government may request the Union Government of India to refer the matter to Tribunal for adjudication. Section 6 of the same act provides that decision of the tribunal is final and it is binding on the all the parties of the dispute. This act is also exclusive to Entry 17 and Entry 56 therefore parliament under Entry 56 and state legislative under article 17 cannot enact a legislation providing for adjudicating of the said dispute or in any manner affecting or interfering with the adjudication or adjudicatory process thus virtually making the decision of the tribunal decision fool and final and making its decision on any water dispute at par with the decision of Supreme Court for example the act passed by the Punjab government contrary to the decision of Supreme Court on the sharing river water with Haryana and so that act was declared null and void.

The Tamil Nadu government had approached the Supreme Court with the special leave petition under Article 136 which empowers the Supreme Court or rather say makes the Supreme Court highest appellate court as it says notwithstanding anything in this Chapter, the Supreme Court may, in its discretion can grant special leave to appeal from any judgment, decree, determination, sentence or order passed by any court or tribunal in the territory of India, thus contrary to what Article 262 but as it is established Supreme Court is the guardian of the constitution so its decision is final and further more pondering on Article 262 or section 11 of the ISWD act 1956 has clearly stated that no court has jurisdiction on any inter- state water dispute but the Tamil Nadu Government had approached the court because Karnataka government was not following the award of the tribunal, so to compel the Karnataka Government to release the 192 TMC of water to Tamil Nadu for its second season of crop,

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³ In the matter of: Cauvery Water.... Unknown AIR 1992 SC 522

because there is no mechanism in the act established the central government state that deals with state who is not following the tribunal award and also Supreme Court said that under Article 136 everyone is allowed to appeal directly to the court for justice. Thus this is Article 262 versus Article 136 and it is established whenever two or more provisions of the constitution are contrary the will or discretion of Supreme Court is being followed.

As the case is proceeding in the Supreme Court before the 3 judge bench constituted, the Counsel Fali Nariman representing the Karnataka Government is presenting its argument is that tribunal award of releasing 192TMC of water to Tamil Nadu is unfair to Karnataka's farmers and residents that Tamil Nadu cannot claim 192TMC of water rather it can claim only 132TMC of water and it is said by the Karnataka Government that it would balanced the uneven distribution of water and appealed the Supreme Court that the court should keep in mind the interested of both the states. On the final day of his arguments Fali Nariman for Karnataka criticized the burden imposed on the State by the Cauvery Water Disputes Tribunal. The State, he said, was equally effected by drought and lack of rain.

Furthering its arguments the Karnataka Government said the Cauvery Tribunal order is like ordering god to send rain because Karnataka Government is pleading that to release the requisite amount of water there should be enough water in river and due to weak monsoons for two consecutive year viz. 2015 and 2016 there is not enough water in the river to release water to Tamil Nadu. Karnataka's government argued before the bench that the tribunal award was given without taking the groundwater which is available in Tamil Nadu. It was also argued that the award had not take into consideration of the equity as also the farming families. It is said by the Karnataka that at the time of the 1924 agreement for water sharing, Tamil Nadu was entitled to develop only 21.38 lakh acres for irrigation. However, even as the 1924 agreement continue, the State had developed 28.2 lakh acres for irrigation utilizing 566 tmcft of Cauvery water. The solution was also proposed by the Karnataka Government before the apex court:

- Needs by taking into account the contribution of water by each State to the river valley.
- The population of each State in the basin depending upon the waters and
- The cultivable area of each State in the basin requiring application of water to raise crops.

CONCLUSION

No one in the History has ever thought of any water dispute within the nation like India which is water rich and known for its rivers. Unfortunately, we are now suffering from water crisis as most of the river water is polluted that even it can't be use directly for irrigation and full credits goes to the Industrial

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development which is dumping the polluted waste water into rivers thus not only polluting the water but also disturbing the ecosystem in the water. As the most of the rivers in South India are non-perennial that is they are rain fed unlike the rivers in North India which are snow fed. So whenever there is weak monsoon problem arises and this problem become more serious when two riparian states share the water from the same river like in this case Karnataka and Tamil Nadu for the river Cauvery though this conflict comprises Kerala and Puducherry but the main problem is between the Karnataka and Tamil Nadu.

Last year we saw the ugly face of this problem through violent protest and widespread vandalism on the streets of both the states. As a result Tamil Nadu government approached to the apex court because the Karnataka government was not following the order given by the tribunal established by the central government to adjudicate the Cauvery dispute and this also arises the some sort of Constitutional crisis whether Supreme Court has jurisdiction on the inter-state water dispute or not but as the Supreme Court accepted the Special Leave Petition under the article 136 thus solving or rather say ignoring the constitutional crisis which poses by the Article 262 of the constitution which empowers the Parliament to excluding any court to adjudicate in inter-state water conflict but as the Supreme Court is the guardian of the constitution so its decision is final.

The problem of Cauvery water is very old and complex so it was once contemplated to link the North India's perennial river with the South India river thus solving the water crisis in the southern part of the country but as the process is very complex because it will need huge finance, time and political will but it also hamper the ecosystem to a great deal thus instead solving the problem it may further aggravate it. As the problem arises only in those years when the monsoon is weak so it is burden on the government in respective states and the union government to form an effective water policy in the country and to enhance water management through schemes and spreading awareness among the citizens of the country against water wasting. It is very hard to digest despite being a very old and complex issue originating in 1892 it is still not solved by the any government as it can be concluded that it lacks any political will to solve the issue which is harassing the farmers of the both states. The last year violent protest that killed several people and damaged the public property because of the farmer protesting but it is very hard to believe that farmer who has not enough to feed himself and his family will burn the bus or took part in the vandalism. Political parties often took extreme positions and indulged in politics which makes problem solving through negotiations next to impossible.

Thus the problem will remain till the central government and state government does not arrive at a mutually beneficial solution leaving the petty politics side for once and solving the ages old issue thus giving the poor farmers of both the state a sigh of relief. Avery positive step is taken by the union

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government this year when Union Minister Uma Bharti had introduced the Inter-state River Water Disputes(Amendment) Bill, 2017 introduced in Lok Sabha in which there is a provision of Single Standing Tribunal (with multiple benches) instead of existing multiple tribunals thus making it more centralized. It also fixed the maximum time-period for adjudicating a dispute that is four and a half year and the decision of the tribunal shall be the final and binding with no requirement of publication in official Gazette. This bill is a revolutionary step in inter-state water disputes and it should be past from the parliament without any hurdles from the opposition parties by thinking for the people affected by these issues not for their political gains.



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EVOLVING LANDSCAPE OF TRIBUNALS IN INDIA

FINANCE ACT, 2017: A STEP IN THE RIGHT DIRECTION? & THE ENLARGEMENT OF JURISDICTION OF HC VIS-À-VIS FUNCTIONING OF TRIBUNALS

Anisha Singh & Ankit Singh⁴

ABSTRACT

The question of Political Parties misusing their power for political benefits which often comes up and the controversies which follow is nothing new for the Indian Parliamentary system. The cycle of Government trying to pass a bill and the opposition trying to not let this happen always finds lubrication in the form of controversies.

The latest fuel to this fire of controversy is the Finance Act 2017 and its controversial issues which again bring forward the conflict on whether a bill is a government's misuse of power or the resistance to it or on the other hand just an attempt of the opposition to play the politics game. For this, the authors have discussed the examples like the shifting of the tribunal's powers, power of raid given to Income Tax Officers.

The essay also tries to bring forth the conflict that exists between the Courts and Tribunals and the role of the judiciary in protecting the basic structure of the constitution and determining that who between the Courts and Tribunals should have the superior position stating examples like the Sampat Kumar and the L. Chandra Kumar case also discussing the power of judicial review that was jeopardized by the introduction of Article 323-A and 323-B in the constitution.

In the essay, the authors have discussed various reasons because of which a shadow of doubt has been casted over the Finance Act 2017 and also attempted to give a detailed description of the controversial co-existence of the High Courts and the Tribunals and the approach of the judiciary towards this issue while giving their own suggestions about what needs to be done for the solution of these issues.

INTRODUCTION

A Finance Bill is a Money Bill as defined in Article 110 of the Constitution. All money bills are financial bills, but all financial bills are not money bills. The Finance Bill is governed by Rule 219, Chapter XIX of the rules of procedure and conduct of business in Lok Sabha.

The recommendations of the government for levy of new taxes, alteration of the current tax structure or continuance of the current tax structure past the period affirmed by Parliament are submitted to

⁴Students, Chanakya National Law Universiy, Patna.

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Parliament through this bill. The Finance Bill is accompanied by a Memorandum containing clarifications of the provisions incorporated into it. The Finance Bill can be presented just in Lok Sabha. However, the Rajya Sabha can prescribe changes in the Bill. The bill must be passed by the Parliament within 75 days of its introduction.⁵

The passage of the Finance Act 2017 makes history on different numbers. Initially, an inauspicious broad spectrum enactment encompassing diverse subject's way past the restricted extent of Article 110 of the Constitution was taken on the appearance of a Money Bill. Also, hiding under cover of the special procedure held for passage of Money Bills, the government pushed the Bill by brute majority in the Lok Sabha overlooking the aggregate knowledge of the Rajya Sabha reflected in its several substantive amendment. There were 5 amendments done by the Rajya Sabha which was actually turned down by the Lok Sabha. The opposition sees this as an anti-democratic step.

CONTROVERSIAL ISSUES

Finance Act, 2017, is an assault on Article 110 of the Constitution. In toto, there are 40 non-financial issues which are dealt in the finance act. They have been tagged as a money bill and are passed as it is.

The authors have dealt with a few vital controversial issues that came along with the Finance Bill, they are as follows.

The Finance Bill, 2017, allows the central government to specify the appointments, tenure, removal, and reappointment of chairpersons and members of Tribunals through rules that lower the threshold of parliamentary scrutiny. There could also be a conflict of interest if the government were to be a litigant before a Tribunal, while also determining the appointment of its members and presiding officers.

It gives unchecked power to the Government, entitling them to essentially introduce political appointees to govern such tribunals, arguably dissolving the standard of the separation of powers between the executive, legislative and judiciary. This amendment could therefore, potentially compromise the autonomy of such quasi-judicial tribunals.

It ought to be noticed that the Supreme Court of India ruled in 2014 that appellate tribunals have comparable powers and functions to the High Courts in India, which incorporate the power to appoint judges and determine the terms and conditions for such appointments, affirming the general principle of non-intervention by the executive.

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⁵ http://economictimes.indiatimes.com/definition/finance-bill (last visited June 06,2017)

One more thing which the overall population has neglected to notice is the officially existing Tribunals getting supplanted by those Tribunals with no connecting rationale or logical nexus. Initially, such proliferated ever since Indira Gandhi's infamous 42nd amendment, which rolled out a few improvements to the nation's Constitution, was validated in 1976 amid the Emergency. Inter alia, the amendment sought the creation of tribunals under the Centre or the State to adjudicate on specific issues that were till then under the domain of India's independent judiciary.

The Finance Bill aims to reform a total of 27 tribunals. Of these, it seeks to shut down eight by merging them with the 19 remaining tribunals. From a legislative perspective, this is an enormous exercise because each tribunal has been set up under a different Act of Parliament.⁶ As a result, the Finance Bill is aimed at amending 27 legislations to do with tribunals alone.

Also, the retired members (which are basically the retired judges) from the current tribunals are given 3 months' pay and they have been expelled from their position. Talking about the principles of natural justice, this is absolutely unlawful. Likewise, it is specified in the conditions of tribunals, that the service condition can't be changed amid the administration of the tribunals. But, the government has succeeded in doing so through the finance bill. This has come as a fraud on the Constitution.

The second issue is Election Funding. The finance minister has introduced a new instrument called electoral bonds which will facilitate anonymous contributions to political parties. But the controversy lies wherein the donor can donate the bonds to one or more political parties but neither the donor nor the done is required to disclose the names in their returns.

Also, in the current scenario, a company may contribute up to 7.5% of the average of its net profits in the last three financial years, to political parties. The amendments to the Finance Bill, 2017 propose to remove the limit of 7.5% of net profit of the last three financial years, for contributions that a company may make to political parties.

The greater part of the commitment in the Election Funding is from the corporate body, for example, MNCs and other foreign companies since they require a favorable outcome from the government. So, they have legalized foreign funding to political parties. The end result of all this chicanery.

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⁶ PRASHANT REDDY ,*Finance Bill 2017 debate: Changes made to tribunals are unconstitutional and ill-considered*, https://scroll.in/article/832884/changes-made-to-tribunals-in-the-finance-bill-are-unconstitutional-and-ill-considered (last visited June 24, 2017)

As a result, companies which want tax deductions under Section 80GGC of the Income-Tax Act will donate anonymously by cheque. No revelation of the benefactor is required in their monetary record and the cash donation limited to Rs 2,000 per person. Jaitley, obviously, will spare expense for the exchequer on electoral bond donations as it's not only about the ruling government but this is for all the political parties as we know they bond together when it comes to issues like RTI, Election Funding etc. Yet people in general he serves will be duped of the most fundamental item it deserves: transparency.

Thirdly, Aadhar has become mandatory when applying for a Permanent Account Number (PAN), or filing Income Tax Returns. Every person holding a PAN is also required to provide his Aadhar Number, else the PAN will be invalid. In spite of the fact that, the SC has brought up issues on different grounds identifying relating to the data security breach of Aadhar yet the SC has no issue in making Aadhar an order for filing income tax returns or mobile verification. Over the long haul however, it can have a few issues.

In this context, it should be noted that two petitions have been filed with the Supreme Court of India for the assurance of the lawfulness of the compulsory prerequisite of Aadhaar Number for tax filings, under Section 139 AA of the Income Tax Act, 1961. This amendment has been questioned in light of a previous order given by the Supreme Court that the requirement of an Aadhaar Number shall be discretionary. The matter is currently pending with the Supreme Court of India.

Another controversial issue deals with the powers to income officials. The Amendment to gives the taxman power to not disclose to any individual or even an Appellate Tribunal the reason why he/she conducted the raid. Also, Section 132 of the IT Act provides the taxmen with the authority to provisionally seize any property of the person being raided for the vague reason-"interest of the revenue". The property could be any personal assets, or business assets, thus rendering one a bankrupt or an insolvent. The Bill presents draconian provisions giving unfettered power to taxmen to look and seize with no genuine responsibility. A clause added to this absurd provision is that the provisional seizure is only for 6 months.

An argument which conveniently overlooks the fact that losing any of the things for 6 months would be devastating, unless of course you are filthy rich and could just get more of them. And furthermore decides to conveniently overlook the glaring absence of any provisions dealing with:

• how temporarily attached property is to be protected amid the 6 months

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⁷K.S. Puttaswamy(Retd.) and Ors. v. Union of India and Ors. AIR (2015) SC 3081

- returned to its legitimate proprietor when the 6 months are up
- how a proprietor can recover his or her property back if it is not returned
- how a proprietor can assert remuneration if the property is damaged
- Another issue which has been raised by this Act is the survey of charities. There is an Amendment to Section 133A of the IT Act. Tax authorities now have unrestricted access to raid any property holding a charity event, to conduct surveys of the property, and also demand the proprietor or any employee to provide any information they want. Moreover, any individual present at the place, even a volunteer assisting the altruistic event, can be questioned to give any information regarding the books of accounts of the charity or any other information.

NGOs like Greenpeace & Compassion International have raised the questions of illegal crackdown by the Government on the NGOs.

- The Act likewise presents a cap on cash transactions above INR 2,00,000 (Indian Rupees two lakhs)
 - in aggregate from a person in a day; or
 - in regard of a single transaction; or
 - in regard of exchanges relating to one event or occasion from a person,

This amendment is expected to control substantial money exchanges from seeping back into the black economy.

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The Supreme Court has the power to question the government on the issues specifically dealing with the tribunal related issues which have got no relation to the money bill. Though the Supreme Court has not raised any concerns over this matter.

The question arises whether the change of tribunals, giving power to income tax officials, etc can be the part of money bill or not. If not, then why did not the Speaker raise the said issue and subsequently gave his/her assent to it.

This was done because of Article 110(3) of our Constitution which provides that the decision of the speaker of the Lok Sabha will be final in case a question arises regarding whether a bill is a money bill or not. This provision was taken by the United Kingdom's Constitution. But the Speaker in UK and Speaker in India work differently in this context.

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Judiciary as the protector of the basic structure of the constitution:

Whenever the Parliament tries to infringe the basic structure of the constitution as happened by the introduction of tribunals where the power of the judicial review of the courts under Article 226, 227 and 32 was taken away by the Tribunals act, the role of the judiciary begins to protect this very basic structure. This attempt of the parliament against the judiciary requires a detailed description discussed as follows:

The establishment of the first High Court in India dates back to 1862 when the Calcutta High Court was set up according to the provisions of the Indian High Courts act 1861 followed by the establishment of the Bombay and Madras High courts. Presently, 24 High Courts function in India. The High court's in every state are the states' highest judicial body created under Article 214 of the Indian constitution which mentions that there should be a high court for each state. Each High Court enjoys original and appellate jurisdiction over all the subordinate courts and tribunals within the territory of the state for which the High Court functions.

The ever increasing number of cases brought to the High Courts and unmanageable work load called for the creation of new and specialized dispute redressal institutions as a helping hand to these courts. As a result, by the forty second constitutional amendment in 1976, the tribunals were added to the constitution as part XIV-A to it having two Articles viz. 323-A and 323-B, the former deals with the creation of Administrative Tribunals, and the latter, with creation of Tribunals for other matters.⁹

A tribunal is an institution to deal with cases under special laws and provide specialized adjudications. Tribunals function like courts but are quasi-judicial in nature and are based on the principle of natural justice and fairness.

An Administrative Tribunal created under the provisions of Article 323-A adjudicates on issues regarding the recruitment or performance of services of any person appointed to public services and in connection with affairs of union or other local authorities within the territory of India¹⁰. The Indian Parliament passed the Administrative Tribunals Act in 1985 establishing Central Administrative Tribunal (CAT) for the Union and State Administrative Tribunals (SAT) for the states.

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⁸J. VENKATESAN, *3 new High Courts for NE*, www.thehindu.com/news/national/3-new-high-courts-for-ne/article4345372.ece (last updated Jan. 26, 2013)

⁹www.constitution.org/cons/india/p14a.html (last visited June 07, 2017)

¹⁰cgatnew.gov.in (last visited June 03, 2017)

Article 323-B provides for the establishment of Tribunals for a number of matters which include Taxation, Foreign Exchange: Import as well as Export, Industrial and Labor Disputes, Land Reforms, Elections to Parliament or State Legislatures, etc. ¹¹

Presently, over 35 Tribunals function in India, some of them performing even identical functions. Examples being the Central Administrative Tribunal, Debt Recovery Tribunal, Income Tax Appellate Tribunal, National Green Tribunal etc.

Though created with the intention of being the helping hand to the overburdened India judiciary, providing fast, cheap and specialized justice on issues concerned with the Tribunal. The co- existence of Tribunals and High courts has been a matter of controversy since the very inception of the Administrative Tribunals Act in 1985 the first instance being the case of *S.P. Sampat Kumar vs. Union of India.*¹²

The Supreme Court for the first time in Sampat Kumar case supported the creation of Administrative Tribunals recognizing them as effective substitute of the High Courts. While deciding upon the validity of Section 28 of the Administrative Tribunals Act which was alleged as unconstitutional because of it not recognizing the High Courts' authority of judicial review provided to them under Article 227. The Supreme Court in this case held that Judicial Review is a part of the basic structure of the constitution and that courts cannot be denied this power.¹³

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However, the Supreme Court also observed that creation of alternate institutional mechanisms as effective as the High Court's does not violate the basic structure, but since the Tribunals were to act as effective substitutes of High Courts, the Apex Court laid down strict guidelines for the procedure of appointing the chairman for the Tribunals, like not allowing the bureaucrats to act as the chairman of the Tribunals as it was stated in section 6(1)(c) of the act and gave the authority only to the retiring judges of High Court.

The landmark case of L. Chandra Kumar vs. UOI^{14} added to the controversy when 3 major issues were adjudicated upon in the case. The issues being –

- 1. The validity of the power of Tribunals to exclude the jurisdiction of all courts except the Supreme Court.
- 2. Competency of Tribunals to test constitutional validity of statutory provisions.

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¹¹Vagheshwarideswal, Specialized Courts: Such as Juvenile Courts, Mahila Courts and Tribunals

¹²Sujit Choudhry, Madhav Khosla &PratapBhanu Mehta ,The Oxford Handbook of the Indian Constitution

¹³https://indiankanoon.org/doc/1085310/ (last visited June 13, 2017)

¹⁴ https://indiankanoon.org/doc/1152518/ (last visited June 13, 2017)

3. Can tribunals be effective substitutes of High Courts regarding the Judicial Review?

In the judgment of issue 1, Supreme Court changed its earlier view of observing Tribunals as substitutes of High Courts the reason behind this being the unsatisfactory performance of the Tribunals, giving the power of judicial review to the High Courts.

On the 2nd issue the apex court, considering the backlog of cases and taking inspiration from the American Constitution decided that power of judicial review can be given to the Tribunals but keeping the supervisory power of the courts under Article 226, 227 and 32 intact.

Regarding the 3rd issue, the Supreme Court stated that Tribunals cannot be accepted as the substitutes of the High Courts and can only act as supplementing authorities. The Supreme Court on various occasions, in order to show the supremacy of High Courts, stated that the members of the tribunal are not judges and their order cannot be considered a judgment or decree under Section 2(9), CPC. Their statements can only be considered as orders for the purpose of arriving at a decision by the tribunal under the Administrative Tribunal's Act 1985.¹⁵

Over time the apex court has been inclined towards High courts having a supervisory position over tribunals as also happened in the case involving the creation of National Tax Tribunal Act, when the act, stating the grounds of giving specialized justice on tax related issues made an attempt to envisage the right of High Courts to decide on the same, the act was quashed by the honorable Supreme court and by a bench headed by justice R M Lodha, it was decided that even though Parliament had the right to create Tribunals, there must be certain trappings of the Courts and not doing this would affect the basic structure of the constitution and judicial independence. However, in the same case, the bench decided that Article 323-B could not be declared unconstitutional altogether.¹⁶

The Finance Act 2017 makes provisions for the government to merge major tribunals into one for example the merging of Competition Appellate Tribunal into the National Company Law Appellate Tribunal.

A step like this clearly affects the motive for which the tribunals were brought into existence i.e. as an institution providing speedy and specialized justice which after this act would lose their element of specialization regarding specific issues and if the tribunals are to function in a merged form, the

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¹⁵Tamil Nadu. v. S. Thangavell, (1997) 2 SCC 349: AIR 1997 SC 1183

¹⁶http://www.business-standard.com/article/current-affairs/sc-quashes-national-tax-tribunal-act-4092500599_1.html (last visited June 23, 2017)

question arises that in such a case why not the tribunals be abolished completely and the sole power be vested in courts as the tribunals would not be institutions providing specialized justice anymore.

Another aspect of the Finance act 2017 is Government taking over as the decision making body for the appointment of chiefs of these Tribunals which is contrary to the rule laid down by the Supreme Court in the L. Chandra Kumar case stated that the power to choose the heads of the tribunals must reside with the judiciary.¹⁷

Also, while the examining the issue of reappointments in the National Tax Tribunals case, the Supreme Court had again reiterated that the matters related to members appointment and reappointment must be free from the influence of executive so that the independence of judiciary is maintained.¹⁸ Therefore, such an attempt by the parliament of going against the will of the Supreme Court appears as an attempt of misuse of power by the government.

Another important question that needs answering is that what is the need of so many tribunals in India when with the creation of every new Tribunal, a new issue is added in the case lists of the High Courts and the Supreme Court and when it can be clearly inferred that Tribunals at times act as the puppets of the respective ministries which keeps them happy in forms of incentives like salary and Finance.¹⁹

Also at times the Tribunals make provisions for appeals to be made directly in the Supreme Court therefore avoiding the jurisdiction of High Courts and still remaining within the confines of law.²⁰ This again appears as the attempt of the parliament to exploit the loopholes of the Indian Judicial System.

The Parliaments attempt of making tribunals free from the jurisdiction of Courts by the Finance Act 2017 is a serious issue that needs to be tackled by the judiciary as it would infringe the basic structure of the constitution and as also stated by Denning LJ that "If the tribunal were to be at liberty to exceed their jurisdiction without any check by the court, the rule of law would be an end".²¹

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 $^{^{17}}Ibid$

 $^{^{18}}Ibid$

¹⁹MAJOR NAVDEEP SINGH, *Does India need so many tribunals?*,http://www.moneylife.in/article/does-india-need-so-many-tribunals/41605.html (last updated May 07, 2015)

²⁰ Ibid

²¹EMMJAY, Status Of Tribunal Justice System Under Indian Constitution (Special Reference To Service Tribunals), http://law-projects.blogspot.in/2013/11/status-of-tribunal-justice-system-under.html (last updated Dec 01, 2013)

CONCLUSION

The Finance Act has gained controversy due to few reasons. First being, the changes were not only applicable to taxes but also structural changes to institution and sectors. Secondly, this is not the first time that there is a creation of an independent agency to manage Government debt or the monetary policy committee to target inflation.

While demands for grants of different ministries in the Union Budget are analyzed by Parliamentary Standing Committees amid the Budget session, the tax proposals in the Finance Act are not. So, there is an urgent need to inspect or to investigate the Finance Act.

Benjamin Franklin had famously said that nothing can be certain, except death and taxes. With multiple onslaughts on the taxpayer, including demonetization and now the Finance Act, it seems that death by taxes and taxmen is the likelier scenario in this country.

So basically, the Government took the Money Bill route as it doesn't have the required strength in the Rajya Sabha, therefore undermining the importance of deliberation in Rajya Sabha and thus hereby leading to the murder of democracy.

The Finance Act 2017 do not appears as a step in the right direction as it clearly violates the rulings laid down earlier by the Supreme Court and exposes the attempt of the government to play the politics game for its own political benefits.

Discussing the issue between Courts and Tribunals both the mentioned cases were first of the many controversies that arose due to the co-existence of the High court's and Tribunals the conflict always on the question that whether Tribunals could substitute High Courts as effective judicial institutions, so far in which except for a few instances the Apex Court has been of the view that Courts should be having precedence over the Tribunals as stated by the examples of the Sampat Kumar case, L. Chandra Kumar Case and the National Tax Tribunals case.

RECOMMENDATIONS AND SUGGESTIONS

The authors have come up with the following suggestions for the abovementioned issues.

The shifting of the tribunal's powers, which now vest in the particular laws representing these tribunals, to the administration can prompt manhandle and control.

For instance: BSNL, a government claimed Telecom Company can now coerce TRAI for the ideal result. In case, the TRAI doesn't go on the requests of the government, then the government can utilize its power in expelling or reappointing the chairman.

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Also, there is a presence of Cyber Appellate Tribunal and National Highways Tribunal which is presently supplanted via Airport Appellate Tribunal (Under AAI Act, 1994). This clubbing of such peculiar bedfellows is generally perplexing. Even the chairpersons of the recently substituted tribunals would have no information in regards to the same. However, the government is silent on this issue.

The combination of tribunals would have unavoidably led to prompted somebody losing their occupation, yet the legislature ought to have in any event respected the judges' contracts by offering to pay them for the rest of the term for which they were appointed. It should have also clarified whether these judges are entitled to their pensions, retirement benefits and their right to practice law before the similar tribunals.

> To begin with the solution of election funding, reveal donors' names. If companies are honest, they will set up electoral funding trusts as the Tata's and Birla's have long done. Instead of encouraging other corporate to follow their transparent example, Jaitley's changes urge them to work behind a cover. Nothing could be more backward.

Moreover, bringing down the cash donation limit to Rs 2,000 from Rs 20,000 won't change much as individuals will simply get ten times the receipts they used to get before. For that cash donations should be completely stopped.

We have to contemplate as to why demonetization is immediately going after the Finance Bill and authorized in the Lok Sabha without the proper beliefs of Rajya Sabha?

Imagine, I have 500 crores of black money and I have not deposited in the bank before the stipulated time frame. What will happen to this money?

These 500 crores of black money alongside the serial number, which is known only to me is also known to RBI and the present government. RBI/Government can re-print the same currency with an indistinguishable number and deposit into their accounts as legitimate money. So how this can be deposited? Through Finance Bill, which enables political gatherings to accept accounts without any hints of who made these deposits?

Without holding, or at least enrolling for <u>Aadhaar</u>, it won't be plausible to pay taxes, and that would mean ordinary citizens without Aadhaar will wind up committing an offence, that of tax evasion and non-compliance of Income Tax Act, 2016. It also gives rise to black money. On the off chance that it is not considered as a fundamental duty then why there is a need to give biometric details.

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Coming to the issue of enormous powers in the hands of IT officers, this can bring about a new "Inspector Raj" and reign of "tax terrorism". Possible fallout could be raids on dissenters, journalists, whistleblowers, activists, human rights lawyers, among others who ritually call out the government on incompetence, authoritarian streaks and governmental overreach bordering on police state.²² In order to take political vendetta from the other party, it can serve as the best instrument for the government.

Coming to business communities, they are going to be get affected a lot from this amendment as we know the easy of doing business ranking in India is not at the par. Likewise, the business sentiments would also get affected.

Mark Twain's popular banter with regards to the distinction between a taxidermist and a tax collector being "the taxidermist takes just the skin" appears currently to be authoritatively implemented.

Since a serious invasion of rights, freedoms and privacy of the tax payer is involved, the power must be exercised strictly in accordance with law and only for the purposes for which it is authorized²³. If the action is maliciously taken or power is exercised for collateral purposes or without application of mind or without honest and bona fide formation of opinion, it is liable to be struck down.²⁴²⁵

- Most effective way of preventing cash from seeping back into the black economy post demonetization would have been to limit cash withdrawals from the banking system, forcing the uptake of internet-banking and other electronic methods of payment, leaving electronic signatures to the movement of large sums of cash.
- Discussing the issue of Courts and Tribunals, tribunals must exist only as a helping hand to the courts to decrease the backlog of cases without violating the basic structure of the Constitution.
- The number of tribunals in India should be reduced and the major tribunals be given the power of Judicial Review but with High Courts having a supervisory position over them.
- The merging of the Tribunals should not be done as it would lead to the Tribunals losing their functioning efficacy.

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²²http://www.dailyo.in/politics/finance-bill-2017-arun-jaitley-aadhaar-income-tax/story/1/16322.html (last updated March 22, 2017)

²³ITO v. Seth Brothers, (1969) SC

²⁴M/s Spacewood Furnishers, (2015) SC

²⁵Abhishek Singhvi, *Finance Bill 2017 could end tribunal autonomy and institute tax harassment as the norm* http://economictimes.indiatimes.com/news/politics-and-nation/view-finance-bill-2017-could-end-tribunal-autonomy-and-institute-tax-harassment-as-the-norm/articleshow/58003395.cms (last updated April 04, 2017)

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AMBUSH MARKETING AND ITS IPR ISSUES

-Anjali Kanagali²⁶

ABSTRACT

Ambush marketing has seen an exponential rise in these recent years, with corporations indulging in them unabashedly in order to exploit the international events like World Cups for their commercial gain through promotion without incurring the justified expense in doing so. It is said to be an unauthorised activity to associate a product, service or business without paying for its privileges. It's said to be done by giving away products which will featured in press or television coverage, sponsoring individual teams and athletes rather than the event itself and using advertising space in proximity to event grounds or official broadcast spots. This paper intends to study in detail the nature of ambush marketing, the rationale behind its existence and the eminent instances of ambush marketing. It shall specifically analyse the legal frameworks of certain countries to combat ambush marketing and presents some recommendations by the International Trademark Association (INTA) while forming a sui generis legislation for dealing with ambush marketing. The paper shall shed light upon ambush marketing and its nexus with Intellectual Property Rights protection.

Keywords: Ambush Marketing, International Trade Association, IPR, Legislations

INTRODUCTION

Ambush marketing is the hottest-trending market strategy used by companies to advertise and promote their brands in covert ways. The concept is more prevalent and popular among sporting events where companies capitalize to advertise themselves on the events, in which they are not an official sponsor.²⁷ The problem of ambush marketing has been plaguing the organizers of various sporting and other events for the last few years. Due to enormous losses caused by ambushed marketing, the sponsors have been reconsidering the decisions to shell out astronomical sums for sponsoring various events.²⁸

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"Ambush marketing is opportunistic commercial exploitation of an event. The ambush marketer does not seek to suggest any connection with the event but gives his own brand or other insignia, a larger exposure to the people, attached to the event, without any authorization of the event organizer."²⁹

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²⁶B.A. LL.B (Hons.), Hidayatullah National Law University, Chattisgarh.

²⁷ Pooja Shree, Ambush Marketing: Infringement in Disguise, SELVAM&SELVAM (Feb. 16, 2016),

https://selvams.com/blog/ambush-marketing-infringement-in-disguise/.

²⁸SudiptaBhattacharjee, Ambush Marketing-The Problem and the Projected Solutions vis-à-vis Intellectual Property Law-A Global Perspective, 8 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 375-388 (2003).

²⁹ ICC Development International v. Arvee Enterprises & Anr. 2003 (26) PTC 245 (India).

There are primarily four reasons as to why ambush marketing despite being an intellectual property infringement has survived-

- 1. All sporting events such as world cups Olympics etc. occur within a short period of time. Thus it is very difficult for the event organizers to exercise their legal options to curb such activity.
- 2. Existing laws may only have a general application to the problem of ambush marketing, and only a handful of cases have actually progressed, with the issue being addressed through the judicial system.
- 3. The ambushers have been successful in defending themselves from legal challenges against ambush marketing. Ex: In the case of Pepsi and Coca-Cola, during the cricket world cup 1994, coke was the official sponsor of the event but Pepsi ambushed coke by coming up with a catchy tagline "nothing official about it". Pepsi got away scot-free by using the popular strategy of issuing disclaimer "the company is not an official sponsor and has not paid to affiliate with the event" ³⁰
- 4. Affected parties usually do not take legal help as there is a lack of case laws regarding ambush marketing.

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I. DIRECT AMBUSH MARKETING:

Direct ambush marketing is an intentional use of symbols and trademarks associated with the mass event so as to give the consumers the wrong impression as to the actual sponsors of the event. Under Direct Ambush Marketing the marketer intentionally tries to claim the benefit of the event. Certain direct ambush marketing strategies are:

a. Predatory Ambushing: The direct ambushing of a market competitor, intentionally attacking a rival's official sponsorship to gain market share, and to confuse consumers as to who is the official sponsor. For example, the Amex campaign used against Visa during the 1992 Summer Games, These two card companies had been at war ever since Amex lost the Olympic rights to Visa after the 1984 Los Angeles Olympic Games, and hostilities rumbled on into 1992 and the Barcelona Olympics. In the US, Visa's tag line was 'the Olympics don't take American Express', with images of ticket windows being slammed shut in the faces of American Express card

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³⁰Charul Agarwal & Jyothi Byahatti, Ambush Marketing: Concept and Strategic Implications, Vol III Special Issue: X, APJR, (2013).

holders. American Express responded in style, pointing out in its own advertising campaigns that 'to visit Spain, you don't need a visa.'

- b. Coattail Ambushing: It is an attempt by a brand to directly associate itself with a property or event by "playing up" a connection to the property/event that is legitimate but does not involve financial sponsorship/ without securing official event sponsor status. In other words, it refers to the unsolicited association of a company to an event. For example, in Beijing Summer Olympics, 2008, following Liu Xiang's injury in the men's 110m hurdles, Nike released a full page ad in the major Beijing newspaper featuring the image of the disconsolate Liu, a Nike-endorsed athlete, and the tagline: "Love competition. Love risking your pride. Love winning it back. Love giving it everything you've got. Love the glory. Love the pain. Love the sport even when it breaks your heart". This affected Adidas who were the official sponsors of the event.
- c. Ambushing via trademark/license infringement: The intentional unauthorized use of protected intellectual property such as the logos of teams or events, or making use of unauthorized references to tournaments, teams or athletes, words and symbols in a brand's marketing as a means of attaching itself in the eyes of consumers to a property or event..
 - Ambushing "by degree" or sponsor self-ambushing: Marketing activities by an official sponsor above and beyond what has been agreed on in the sponsorship contract. For example, an "ambush by degree" of a sports event may involve a sponsor's handing out free promotional T-shirts without the permission of the sports league supervising the event. That sponsor may have already covered the stadium with its signs, or the sports league or participating teams may have made an earlier agreement perhaps even an exclusive one to let a different sponsor hand out shirts. In either case, ambush by degree clutters the available marketing space; takes advantage of the participating teams and supervising league to a greater extent than they permitted; and dilutes the brand exposure of official sponsors, including the other promotional efforts of the ambushing company.

II. "INDIRECT" AMBUSH MARKETING:

a. Ambushing "by association": The use of imagery or terminology not protected by intellectual-property laws to create an illusion that an organization has links to a sporting event or property

— This is different from direct "coattail" ambushing in that there exists no legitimate connection between the event/property and from direct ambush by infringement in that the sponsored event/property has no property rights in the images and/or words that create the illusion.

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- b. Values-based ambushing: Tailoring by a non-sponsor of its marketing practices to appeal to the same values or involve the same themes as do the event and/or its promotion, such that audiences attracted to the event or its marketing will likewise be attracted to the non-sponsor's marketing Essentially a reversal from "push" to "pull" of the causal processes through which direct "coattail ambushers" create sponsor/event-unapproved mental association with their products, this form of ambushing differs from "ambushing by association" in that the ambushing business begins by observing the event's promotional scheme and drawing inferences as to its existing thematic content, as opposed to observing the event's audience and creating new thematic content in hopes that consumers will associate the event with the thematic content created.³¹ It can be understood as making a direct reference to the event or property's theme or values to imply a link with the event in the mind of the consumers. For example, Puma, in the European Championship, 2008, in order to promote its football line used the tagline, June 2008: Together Everywhere, thus making a direct reference to the event being played that month.
- c. Ambushing "by distraction": this is done by creating the distraction in or around the place of event, which does not have any association with the event, in order to gain the attention from the event's audience and thus promote the brand's product. For example, in The Open Championship, 2008, Bentley set up a line-up of the Bentley cars outside Hill side Golf club which is adjacent to the Royal Birkdale, the host course of the Open, which attracted great attraction from the event audience.
- d. "Insurgent" ambushing: The use of surprise street-style promotions (blitz marketing) at an event or near enough to it that the ambushing business can identify and target audience members The "active" version of "passive" ambushing by distraction, insurgent ambushing not only takes advantage of positive externalities but creates negative externalities by intruding upon attendees' experiences of the event and detracting from those experiences' quality. Example: in 2008 French Open- Ronald Garros, K-Swiss ambushed the rivals Adidas and the clothing sponsor Lacoste by setting up a huge purple tennis ball on a crashed car on the major route to Ronald Garros.
- e. "Parallel property" ambushing: The creation or sponsorship of an event or property that bears qualitative similarity to the ambush target and competes with it for the public's attention An application of "ambushing by distraction" in which the ambusher-marketed product is the event/property itself, thus capitalizing on the main event's goodwill. Parallel-property

 $^{32}Id.$

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 $^{^{31}}Id$.

ambushing does not intrude upon the experience of audience members (who remain free to attend whichever event or patronize whichever property they deem more attractive), but it does divert audience dollars and attendance figures from the pre-existing event/property, interfering with the efforts of that event's/property's financial backers to recover their largely fixed production costs. For example, Nike organized a global contest "human race" in 24 countries around the world including Shanghai, where the Olympics, 2008 was taking place, which was continued for 7 days following the Olympics, and gathered a huge international marketing throughout Olympics centered around Nike and the marathon.

f. Pre-emptive Ambushing: When the official sponsor creates the marketing communication in order to usurp any possible ambush marketing campaigns of the rivals, thus prompting the ambush activities and distracting the focus from any of the other official sponsors of the event. For example, in the European Championship, 2008, Adidas produced 16 inflatable footballers wearing the jersey of each country participating in the event with Adidas logo and stripes including those countries which were sponsored by Nike and Puma.

III. INCIDENTAL AMBUSH MARKETING:

This comes into picture when the market communications of a company lead to such incidental ambushing of the official sponsors. It may be done in two ways:

- a. Unintentional ambushing: This is when the consumers incorrectly identify a non-sponsoring company as an official sponsor due to its previous association or due expectation of association with the event. For example, Speedo earned a considerable attention from media as result of success of swimmers wearing LZR racer swimsuits. This portrayed Speedo as official sponsor of the Beijing Games thus creating confusion in the market.
- b. Saturation "ambushing: "Saturation ambushers" increase their broadcast-media advertising and marketing at the time of an event but make no reference to the event itself and avoid any associative imagery or suggestion. It is a strategic increase in the marketing communication of a product through aggressive marketing in order to maximize the advertisement during the event by maximizing available advertising before, during and after the event. For example, Lucozade, during the Beijing Olympics indulged into aggressive marketing of its products much above its standard marketing featuring athletes and a variety of sports significantly. Saturation ambushing merely capitalizes on the increased broadcast media attention and television audiences surrounding the event.

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IPR REGIME IN INDIA

At present, India does not have any specific anti-ambush marketing laws. The laws that are used generally are:

(1) THE COPYRIGHT ACT, 1957

The Copyright Act is a capable tool which provides a remedy in a limited sense against "ambush marketing" i.e. where logos or other original works of authorship are used without license by third parties. The infringement should consist of two essential elements:

- There must be sufficient objective similarity b/w the infringing work and the copyright work.
- The infringing work must have been derived from the copyright work.

With regard to "ambush marketing" the Delhi High Court in case of *ICC Development v. Evergreen Service Station*³³, recognized a limited role of copyright law in granting an injunction preventing the defendants from using the logo of "ICC World Cup 2003" consisting of black & white strips and the mascot "dazzler" holding these to be "artistic work" protected under section 2(c) of the copyright Act, 1957. Now, in this case where although the contention was infringement of copyright and a prima facie case of passing off, unfair competition, ambush marketing and violation of publicity rights, an injunction was granted against the defendant only on grounds of misuse of the world cup logo because there was a copyright infringement as the logo was held to be an artistic work under the Indian Copyright Act and the concept of ambush marketing was over-looked. The concept of ambush marketing was over-looked.

(2) THE TRADEMARK ACT, 1999

Under the Indian Trade Marks Act, 1999 both civil and criminal remedies are simultaneously available against infringement and passing off. The registration of trademark is not mandatory, so even those who have not obtained any registration can enforce their rights in the court of law.

In the case of ICC Development V. Arvee Enterprises and Anr³⁶, it was said that for a plaintiff to find success in his claim, he must prove that there was "likelihood of confusion" in public mind that the defendants

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³³ICC Development v. Evergreen Service Station, (2003) 26 PTC 228.

³⁴KshitijParashar, Ambush Marketing: An Insight, LAW WIRE, http://www.lawinfowire.com/articleinfo/ambush-marketing-insight.

³⁵ Supra note 3.

³⁶ICC Development v. Arvee Enterprises, (2003) 26 PTC 245.

were sponsors or license of world cup. The defence of "nominative fair use" shall also be considered, the registrant of a trademark is not granted the right to limit the bonafide use by an unlicensed third party of his trademark to describe the character or quality of the trademarks registrant's good or services, so where a defendant uses a trademark to describe the plaintiffs product rather than its own, a fair use defence is available provided that the product or service in question is not identifiable without using the trademark, that only so much of the marks are used as is reasonably necessary to identify the product or service and the defendant has not done anything that would suggest a sponsorship. M S Dhoni, captain of Indian Cricket Team was in highlights for reasons relating to ambush marketing clause given in ICC Guidelines during cricket world cup 2011. He was a brand ambassador of Aircel Ltd who is directly in competition with an official sponsor of the world cup Reliance Communications. The contract said the players were prohibited from appearing in advertisements for companies which were competitors for the sponsoring company. However the contract just became the focus of a controversy and did not see the light of the day.

CASE LAWS

The very first case where the courts recognized the concept of ambush marketing was the Canadian case of *National Hockey League vs. Pepsi-Cola Ltd.*³⁷ In this, NHL had an agreement with Coca-Cola that it would be the official drink of the tournament, and a sum of whopping US\$ 2.6 million was paid by Coca-Cola for this purpose. However, the advertisement rights were given to its competitor Pepsi. When the dispute went to the court, Coca-Cola failed in its claim for passing off against Pepsi. It was held that not every kind of connection claimed can be termed as passing off. According to the court what needed to be taken into consideration was the degree of advertisement by Pepsi to the extent of misrepresenting to the public that NHL approved/authorized Pepsi's products and whether it misled the public in general that there were any business connections between the said parties. It was held that though it was a clear case of ambush marketing, there were no legal remedies.³⁸ It could be a case of trademark misappropriation, though not recognized by the courts.

In a trademark case of *Arsenal Football Club plc vs. Matthew Reed*³⁹, Reed was selling club merchandise unofficially without license from the club. The merchandise had the Club logo on it, which was trademark protected, and for which the club sued Reed. The court rejected Reed's argument that he wasn't using the Club logo on his merchandise as trademark but as merely the badges of allegiance.

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³⁷National Hockey League v. Pepsi-Cola Ltd., 92 DLR 4th 349.

³⁸Shristi Bansal, *India-Ambush Marketing: Where There Is Goodwill There Is A Way,* Conventus Law (Aug. 24, 2015),http://www.conventuslaw.com/report/india---ambush-marketing-where-there-is-goodwill/#sthash.sEw7FpAY.dpuf. ³⁹Arsenal Football Club plc v. Matthew Reed, (2001) RPC46 (HC).

The case of MasterCard International, Inc v. Sprint Communication & ISL Football AG, MasterCard⁴⁰ (sponsor of the 1994 football world cup) received exclusive rights on the use of word cup logos in association with 'all card based payment and account access devices" Sprint communication, which was an official partnership could only advertise in the fields of long distance communication. However, it started advertising in pre-paid telephone calling cards despite strong objections from Master Card. A claim was brought by Master Card under Federal Trademark Dilution Act against Sprint, that its continued acts would gradually erode the distinctiveness of MasterCard. It established that Spring infringed on its right to use the world cup logo. The court granted an injunction against this act holding that seeing Sprint card with the world cup logo, the consumers would mistakenly assume that Sprint had the rights in the category.

In the Case of NCAA v. Coors Brewing Co⁴¹, filed in the US, the grounds on which the suit was filed were breach of revocable license and unfair competition. Since the ground of ambush marketing was not recognised by law, NCAA used other means to ensure that they got a favourable judgement.

These cases show that the absence of specific legislation caused the defendants to get away, leaving the plaintiffs with no remedy. It is mostly passing off actions that have been successful against defendants.

need for legislation. MANAGEMENT STUDIES

Over the years, the nature and role of sports sponsorship has changed dramatically from altruistic patronage to calculated spend money, the expectation of concrete measurable 'return' on "investment" have become of paramount concern, the laws provided under trademark, copyright infringement, passing off or unfair competition can only be a stop gap arrangement and not a permanent solution.⁴²

A major international sporting event plays a very significant role in developing economy and sports and also in promoting tourism, these major sporting events do require sponsors and no sponsor would invest their money at the risk of tribulations of ambush marketing. They also looks for return on their money and without proper legislation it will not be easy to attract sponsors so in order to promote sports and attract major sponsors there is an urge for proper legislation.⁴³

LEGISLATIVE FRAMEWORK OF CERTAIN COUNTRIES

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⁴⁰MasterCard International, Inc v. Sprint Communication & ISL Football AG, MasterCard, 30 USPQ 2d 1963 (SDNY 1994).

⁴¹NCAA v. Coors Brewing Co., 2002 US Dist LEXIS 21059.

⁴²Manish Tiwari & Radhika Bhargava, Protect the Sports; Protect the Sponsors: Need for an Action against Ambush Marketing, Vol 4 Issue 4 ILJ.

I. SOUTH AFRICA

Section 9(d) of the Trade Practices Act, 1976 states that 'no person shall, in connection with a sponsored event, make, publish or display any false or misleading statement, communication or advertisement which represents, implies or suggests a contractual or other connection or association between that person and the event or the person sponsoring the event, or cause such statement, communication or advertisement to be made, published or displayed'.

Thus, during the FIFA 2010 World Cup which qualified as a sponsored event, any 'association' that would have suggested ambush marketing would have breached the Trade Practices Act. The Merchandise Marks Amendment Act, 2002 defines 'event' and 'protected event' and authorizes the Minister of Trade and Industry to protect certain events. The 2010 FIFA World Cup was designated a 'protected event' under Section 15A of the Merchandise Marks Act, 1941. Under this section 'for the period during which an event is protected, no person may use a trademark in relation to such event in a manner which is calculated to achieve publicity for that trademark and thereby to derive special promotional benefit from the event without the prior authority of the organizer of such event'. As a precaution, FIFA had applied to have all its official marks declared 'prohibited marks' under Section 15 of the Merchandise Marks Act, 1941 as a result of which the use of any such mark would be an offence. Offences under both the Trade Practices Act and Merchandise Marks Act carry fines and prison terms.

II. AUSTRALIA

Australia has taken the lead in its attempt to control ambush marketing. When the 2000 Summer Olympics came to Sydney, the Australian government passed the Sydney 2000 Games (Indicia and Images) Protection Act, 1996, and the New South Wales government passed the Olympic Arrangements Act, 2000. A significant part of both laws was Games-specific legislation enacted to prevent ambush marketing and provide for clean Games venues to equip New South Wales and Australia for future sporting and large marketing programs. Even after completion of the Games, the Australian government has enacted similar laws for hallmark sporting events, like the Melbourne 2006 Commonwealth Games Protection Act 2005. The Act contains a provision that the Registrar shall not register under the Trademarks Act, 1995 a trademark that contains or consists of any of the marks of the Olympic motto, symbol, torch and any other design related to the Olympics registered as an artistic work. Also, a protected Olympic expression is not permitted to be used for commercial purposes except by the Australian Olympic Committee (AOC).

III. NEW ZEALAND

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New Zealand has passed legislation to protect sponsors of important events from ambush marketing i.e., the Major Events Management Act, 2007. The purpose of the anti-ambush marketing portion of the law is to prevent unauthorized commercial exploitation at the expense of either a major event organizer or a major event sponsor. Specifically the law prohibits-

- (i) representations that suggest persons, brands, goods, or services have an association with a major event when they do not;
- (ii) advertising from intruding on a major event activity and the attention of the associated audience; and
- (iii) the use of certain emblems and words relating to Olympic Games and Commonwealth Games (and other designated events) without appropriate authorization.

IV. U.S.A.

In the United States, an event organizer who owns a federal, state or common law trademark can seek an injunction under Lanham (Trademark) Act, State law or common law against the unauthorized use of the trademark or a colourable imitation. The trademark owner must demonstrate a likelihood of confusion for ex. - which consumers would likely believe infringer was affiliated with or sponsor of event.⁴⁴

Also, the U.S.O.C (United State Olympic Committee) has a right to control the use of Olympic parks, images. U.S.O.C has been granted exclusive control over the commercial exploitation of Olympic and Paralympics related trademarks, symbols, and terminology through the Amateur Sports Act of 1978 passed by the U.S Congress.

In the case of San Francisco arts & athletics Inc v. United States Olympic Committee⁴⁵, it was held that the statute authorizing the U.S.O.C exclusive use rights in "Olympic trademark does not require the U.S.O.C to prove that unauthorized use caused confusion.

Section 43(a) of the Lanham Act expressly protects the sponsors & limits the competition it protects the sponsorship & endorsements by prohibiting a competitors false designation of origin when it is likely to cause confusion or to deceive as to the affiliation, connection or association of such person with another person, or as to original sponsorship, or approval of his or her goods, services or commercial activities by another person. The case of *MasterCard International, Inc v. Sprint Communication* Co⁴⁶ demonstrates the willingness of courts to protect sponsorship and licensing contracts under Section 43(a) even though there may be no actual consumer confusion.

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⁴⁴*Supra* note 17.

⁴⁵SanFrancisco arts & athletics Inc vs. United States Olympic Committee, 483 U.S. 522.

⁴⁶MasterCard International Inc vs. Sprint Communication Co., 1994 WL 97097 (S.D.N.Y. 1994).

V. ENGLAND

In 2006, England passed the London Olympic Games and Paralympic Games Acts, 2006 with a provision to reduce ambush advertising at the 2012 Summer Olympics. The law provides the framework for the enactment of regulations to control advertising and trading in the vicinity of the Olympic event venues in order to fulfil obligations imposed by the IOC, and gives official sponsors exclusive rights in relation to the use of any representation that may create an association between the official sponsor and the London Olympics. The law also states that any person who is not authorized to make a representation that may create an association between that person or company and the London Olympic Games in the mind of the public will be in breach of the Act and is punishable by fine.

INTERNATIONAL TRADEMARK ASSOCIATION

RECOMMENDATIONS ON LEGISLATION

The International Trademark Association, Board Resolution on Ambush Marketing recommends that ambush marketing legislation relating to major events should be based on the following principles and guidelines:⁴⁷

- a) A reasonable balance should be struck between the interests of the organizers, sponsors, local businesses and property owners, the local community in which the event will be held, and trademark owners.
- b) Prior to adopting ambush marketing legislation for the protection of a major event, event emblem or word, there should be consultation with potentially affected parties.
- c) The special protections granted to organizers and sponsors of a protected event should be limited in time so that they are in effect only for a certain amount of time leading up to the event and for a reasonable amount of time following the event.
- d) Restricted "ambush marketing" activities should be limited in scope and clearly defined so that only commercial activities that create or are likely to create a false implication of sponsorship or association for the non-sponsor or confusion among the public as to sponsorship are prohibited.
- e) Remedies in ambush marketing legislation should minimize the risk of sponsors using overreaching rights of action to the detriment of bona fide trademark owners.

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⁴⁷Board Resolutions Ambush Marketing Legislation, International Trade Association (Nov. 10, 2010), http://www.inta.org/Advocacy/Pages/AmbushMarketingLegislation.aspx.

- f) Special protection should not be granted to any single non-distinctive term or symbol and such terms and symbols should remain available for use by all traders, so long as use of such single term or symbol does not create a false impression of sponsorship of the event.
- g) The validity of pre-existing rights, whether intellectual property rights, tangible property rights, contract rights, and others, should be recognized and reasonably accommodated, especially when establishing such restrictions as "clean zones" and "clean transport zones."
- h) The effect of ambush marketing legislation on trademark applications, particularly for symbols, should be taken into account. For example, it may be appropriate to provide that a conflicting application remains in limbo pending expiry of a special protection period.
- i) Ambush marketing legislation should make it clear that the organizers and/or sponsors of the event are the only entities responsible for bringing, or entitled to bring, civil actions to enforce the legislation.
- j) Express exceptions to violation of ambush marketing legislation could include ongoing activities by existing organizations, registered trademarks and trade names. The categories of exceptions should be appropriately and carefully defined - for example the manner in which a registered trademark category is defined may also need to include device marks and "brand extensions." Pre-existing unregistered trademarks and trade names should be taken into account and descriptive and other permissible fair uses should also be excepted, so long as they do not create a false impression of sponsorship.
- k) In the interests of appropriately balancing the respective parties' rights it would be preferable for ambush marketing legislation to avoid presumptions of violations and rather make the inclusion of protected emblems or words a factor to be considered in assessing whether a violation has occurred.
- Ambush marketing legislation might provide for civil remedies as are available in other types of intellectual property matters, such as injunctions, damages, seizure of counterfeit goods, and corrective advertising, but should not provide for criminal penalties, such as criminal fines and imprisonment.

CONCLUSION

Ambush marketing is more than just an unethical business practice and attracts legal provisions of IPR infringements. Ambush marketing can't be seen as a marketing language or a business aggravation. It requires to be perceived in law to empower gatherings to bring the imperative activity against the individuals who confer the demonstration. Unless a choice is taken by the courts or lawmaking body,

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ambush marketing will keep on prospering and examples will just augment. In absence of specific legislation, infringers tend to get away with unlawfully hitching upon the repute of the official sponsors, without having to bear sponsorship commitment. In view of the rising of IPR infringement by ambush marketers, there is a pliant need for enacting specific legislations to counter Ambush Marketing.

The existing IP paradigm, in India, is not well equipped to deal with the ever increasing problem of ambush marketing. Sporting bodies should come up with better means to regulate ambushing of events organised by them. One way could be that all sporting bodies should make strict rules and regulations relating to sponsorships, player endorsements etc. suited to the particular event they are to organise. Another method would be to follow the UK method, where the state that organises such events legislates for the particular event like the Olympics or Commonwealth. However, a sui generis legislative framework to deal with the issue is best suited in order to accord wider protection to all cases of ambushing which may not necessarily be falling under the category of a sporting event.

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LEGALITY OF BITCOINS: THE NEED OF CLARITY AND



ABSTRACT

Bitcoin has become a much talked about concept, and the advent of virtual currencies like Bitcoins are posing a lot of questions as to the framework of laws and policies which are to regulate its use and transaction. The legal status and recognition for transaction in Bitcoins and other virtual currencies varies from country to country. Bitcoin was the pioneer virtual currency introduced in 2009, and later several other virtual currencies emerged, some of the popular being Litecoin, Namecoin, Peercoin etc.

Bitcoin is a totally decentralized system of transaction and the government is not having a role in its production or regulation, because they are generated and transacted within the network of computers, involving a complex mechanism of encryption. Therefore it is also known as a crypto currency. However the lack of regulatory policies and legislative backing creates confusion in the ambit of the compliances. The laws relating to Bitcoins are entirely lacking uniformity, and at a global level and national level, comprehensive laws are required for the regulation of Bitcoins.

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⁴⁸ Assistant Professor, Amity Law School, Amity University, Kolkata

Classification of Bitcoins is also a matter which decides what are the required laws and policies. There is no uniform clarification as to whether Bitcoins are currencies, commodities, securities or other instruments. Different countries have different laws and policies, and different ways of dealing with Bitcoins. Also whether the use of Bitcoins itself is legitimized is not clear. There are some countries like Japan or US who have legitimized the use of Bitcoins, and there are countries like UK and India, who have neither legitimized the use of Bitcoins nor made it illegal. And some countries like Bangladesh and Saudi Arabia have made it illegal as per their laws.

The use of Bitcoins cannot be done away with, but the lack of laws can prove to be detrimental and can lead to misuse and even pursuance of illegal activities taking advantage of the clandestine nature of the transaction. Therefore the need of the hour is proper legitimization and framing of regulatory policies having a uniformity, at state levels and also at a global level.

Keywords: Bitcoin, cryptocurrency, decentralized, legitimize, regulatory policies

INTRODUCTION NTERNATIONAL JOURNAL OF

Bitcoin is the latest buzz worldwide, and discussions and debate on the legality and usage of virtual currencies like Bitcoin is becoming more and more pertinent today. The legal status and recognition for transaction in virtual currencies varies from country to country. Bitcoin was the pioneer virtual currency introduced in 2009, and later several other virtual currencies emerged, some of the popular being Litecoin, Namecoin, Peercoin etc.

Bitcoin is a virtual currency, and is a kind of crypto currency. They cant be produced in physical form and have existence only in electronic form, secured using cryptography or digital signatures. Cryptography is a science of encryption of plain text into some specific codes which can be unlocked or decrypted only by the specific recipient for which it is intended. Therefore, Bitcoins are essentially like computer generated codes and can be transacted between specific users only, who can have access to those specific codes.

It is a digital currency also, though digital currency is a wider term. All real or physical currency that exist in digital form becomes digital currency, so when we transact money through net banking, mobile phones, and money is being transferred electronically, it becomes digital currency. So all virtual currencies are digital currencies but all digital currencies are not necessarily virtual currencies because they have physical existence somewhere in a bank account.

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All physical currencies or their digital versions are regulated and controlled by central banks and monetary authorities in all countries. The fiscal policy regulated by government of a country may cause the increase or decrease the print of the currencies and influx of currencies into the economy. The transactions are recorded in ledgers controlled by banks and financial institutions.

However Bitcoins are unregulated and it is a totally decentralized system and the government is not having a role in its production or regulation, because they are generated and transacted within the network of computers So there are no national banks or national mint which inputs them into the economy. Also there is no collateral or metal reserves behind the Bitcoins. The value of Bitcoins is the value contained in the bitcoin itself.

The transfer of Bitcoins are also therefore unregulated and there is no involvement of a third party like a bank or financial institution when a transaction is being carried out. Actually the history of virtual currencies can be traced back to as early as the 12th century. In 1100, King Henry I decided that pieces of wood, known as tally sticks, could be used as currency to pay for taxes, with a notch in the wood representing a payment. Demand for tally sticks rocketed because of the legitimacy they had been given.⁴⁹

However the legislative backing is required, otherwise it may create a confusion in the ambits of the compliances.

TECHNOLOGY OF BITCOINS Agradoot Web Technologies LLP | ISSN-2455-2771

To understand the working of Bitcoins and understand the required ambit of laws and policies required for the regulation of Bitcoins, it is necessary to understand the basic technology which works in the creation of Bitcoins and their transaction. The creator of Bitcoins is actually still unknown today. Though it was attributed to a person called Satoshi Nakamoto, it has been not proved and has been refuted by him. The most recent candidate was Craig Wright, a former Australian academic, who claimed to be the bitcoin inventor. Wright wrote blog posts and gave interviews to Wired, BBC and the Economist in 2015 and 2016 saying he was behind bitcoin. ⁵⁰Bitcoins are, in essence, electricity converted into long strings of code that have money value. ⁵¹

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⁴⁹Tom Rees, Regulating Bitcoin: how new frameworks could be a catalyst for cryptocurrencies, The Telegraph, 16th April, 2017, available at http://www.telegraph.co.uk/business/2017/04/16/regulating-Bitcoin-new-frameworks-could-catalyst-cryptocurrencies/ (Last visited on 25/08/17)

⁵⁰ Cara Mc Googan and James Titcomb, *What is Bitcoin, how does it work and what affects its price?*, available at http://www.telegraph.co.uk/technology/0/what-is-Bitcoin-everything-need-know-about-the-cryptocurrency/ (Last visited on 23/08/2017)

⁵¹ Paul Gill, What are Bitcoins? Hoew do Bitcoins work?, available at, https://www.lifewire.com/what-are-Bitcoins-2483146 (Last visited on 23/08/2-017)

They work on computer generated peer to peer transactions. The virtual public ledger where the entire transactions of Bitcoins are carried out is called 'blockchain'. It holds a decentralized record of all the transactions and is updated when users of the network create or transact in Bitcoins. The Bitcoin is generated by creating 'blocks' on the network which exists across boundaries. The blocks are created using cryptography by a particual computer and is added to the 'blockchain which keeps the entire network in comtinuity.

Bitcoins are 'minted' or created by the general public having a strong compter resource, the limit of the mining is restricted to 21 million Bitcoins, out of which already 11 million have ben minted already worldwide, and is in circulation. When bitcoin mining is done, the blockchain is continued when a new transaction is done and a 'block' is created. Each block contains a hash function of the previous block using SHA-256 hashing algorithm, linking it to the previous block. The new block is entered the block chain if it contains a 'proof of work which is basically finding a number which when hashed along with the contents of the new block, the required result is achieved, this may take the computer to nonstop carry out mathematical function before the particular result is achieved

Each bitcoin blockchain has three parts: its *identifying address* (of approximately 34 characters), and the *history* of who has bought and sold it (the ledger). The complex part of the bitcoin is its third part: *the private key header log*. This header is where a sophisticated digital signature is captured to confirm each and every transaction for that particular bitcoin file. Each digital signature is unique to each individual user and his/her personal bitcoin wallet. ⁵²

INTERNATIONAL STATUS AND LEGALITY OF BITCOINS

Legitimizing Bitcoins: the gap in practice and legal framework

Trading and transactions in virtual currencies are increasing day by day. Therefore the question and extent of regulation has become very pertinent as more and more transactions in virtual currencies are increasing day by day. Over the last few years, this question has been emerging before the various states worldwide. Many countries like US, UK and Japan have legalized the usage of Bitcoins, and there is an atmosphere which is pointing towards proper legislative frameworks and regulations for the transactions in Bitcoins. Few countries like Bangladesh and Saudi Arabia have completely banned the use and transactions and made it illegal.

But mostly on a global level what is lacking is the clarity on the legislative and regulatory framework on Bitcoins. This calls for immediate attention and India is no exception to this. As of now, there is no

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legal clarity on the use of virtual currencies. India has not yet legitimized the use of virtual currencies but it is also neither that is has been made illegal.

RBI has issued two public circulars which highlights the fact that there is a general indication towards keeping the people away from transaction in virtual currency. Same kind of message has recently been given by government by saying that since virtual currencies are not controlled or regulated by RBI, therefore could lead to "subjecting the users to unintentional breaches of anti-money laundering and combating the financing of terrorism laws"

However the food for thought is instead of restricting or banning the use of something, it is always better to legitimize and regulate something, because in today's digital age, there is no doubt about the fact that transactions in virtual currency is inevitable in the future. Therefore laws and regulations are a must in any public interaction to give sustainability and productivity, otherwise it may create chaos and lawlessness and therefore open the doors for misappropriation or crimes.

Japan

Japan is one of the countries where there is extensive growth in the usage of virtual currencies demanding a recognition and call for laws and regulations fore a long time. Therefore after several debates and proposals, Japan has finally amended its Banking Act and Payment services act, which now defines virtual currency.

Mt. Gox was the largest cyptocurency exchange dealing with almost 80% of the worldwide bitcoin transactions. Due to some technical collapse, there was embezzlement which resulted in the collapse of this giant exchange. After this more need was felt to pass laws and regulate transactions in virtual currencies.

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The new law places virtual currency exchanges under the control of the Japanese Financial Services Agency. The exchanges must be registered and must verify the identity of customers opening accounts.

Section 3 of the bill has been modified to include wording on virtual currency and is being called the Virtual Currency Act. Digital currencies like Bitcoin have finally received definition and recognition as a means of payment by the Japanese government. The Banking Act's Payment Services Act has also moved to define a digital currency as "property of value," meaning that it is usable for payment in the broader marketplace and that it may be bought or sold.⁵³

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⁵³ Nathan Reiff, *Japan Finally Recognizes Bitcoin After Long Battle*, available at http://www.investopedia.com/news/japan-finally-recognizes-Bitcoin-after-long-battle/ (Last visited on 24/08/2017)

VIRTUAL CURRENCY AS DESCRIBED IN THIS ACT REFERS TO:

- 1. Asset-like values (limited to those items electronically recorded by electronic or other equipment and excluding Japanese currency, foreign currency, and currency-denominated assets; the same applies to the item below) usable as payment to indefinite parties for the cost of purchase or rent of items or receipt of services and which can be transferred by means of electronic data processing systems;
- 2. Asset-like values that can be used in exchange with indefinite parties for those items described in the preceding item and which can be transferred by means of electronic data processing systems.

As per the new law, virtual currency is defined as assets, which can be transferred by "electronic data processing systems". Therefore, as per the law, Bitcoins would be considered as assets which are used as a form of payment method, and not currency itself. Therefore the tax implications and accounting practices will be the same as for assets. Also, the new law does not cover digital currencies, but specifically virtual currencies. As has already been explained above, digital currency is a wider term including any electronic transaction, however, the Virtual currency act regulates only virtual currencies, not digital currencies in general.

not digital currencies in general.

INTERNATIONAL JOURNAL OF

LAW & MANAGEMENT STUDIES

In UK also, use of cyptocurrrencies like Bitcoin is legal but there is again a lack of total clarity on the regulatory aspects and legal aspects.

The Financial Conduct Authority in UK is the regulator who is responsible for protection of consumers and market integrity, and provides financial services.

However the FCA has not given any constructive clarification on the usage of Bitcoin, and there is no regulation of virtual currencies by FCA, therefore as of now, Bitcoin businesses don't have to register themselves or get authorizations to operate from FCA.

A report released by Bank of England in 2014 said that only 1.2pc of Bitcoin trading was against sterling. However, the Bitcoin exchange platform Coinbase said it had recently seen a fivefold year-on-year increase in the number of UK users.⁵⁴

The uncertainty is in the very nature of Bitcoin, whether it is considered as a currency, or a commodity or is it some other nature. The status of Bitcoins are varying from the status of a commodity to the

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⁵⁴Supra note 1

status of a currency. Therefore, neither the laws are clear nor the people can understand the boundaries and nature of the transactions.

A clear legislative path is required like the efforts in Japan, till then the increasing use of Bitcoins remains in an uncertain state.

US

In US initially, Bitcoin business and transactions were totally self regulated, but recently there is emergence of laws and regulations and regulatory authorities have been trying to take the regulation of crypto currencies within their stride.

In US at state levels there are different frameworks for dealing with Bitcoins and other cryptocurrencies but laws and regulations at federal level is missing which may lead to lack of clarity and a total convoluted approach.

In 2015 the Commodity Futures Trading Commission (CFTC) designated cryptocurrencies as 'commodities', not currencies.

The CFTC may find it easier than other federal agencies to deal with cryptocurrencies. The CFTC's mandate covers all forms of trades and bets made on the future performance of a commodity, regardless of what it may be, so by classifying cryptocurrencies under this umbrella term, it can apply its existing regulatory framework to the asset class.

In contrast, other regulators such as the Securities and Exchange Commission (SEC), have found it harder to fit cryptocurrencies into their current taxonomy. ⁵⁵However, after initial hesitations even the SEC has been considering the possiblity of considering virtual currencies as securities.

On July 25, 2017, the SEC issued its investigative report on DAO and made it clear that US federal security laws are definitely not a complete do away when delaing withy virtual currencies.

"U.S. federal securities law may apply to various activities, including distributed ledger technology, depending on the particular facts and circumstances, without regard to the form of the organization or technology used to effectuate a particular [cryptocurrency] offer or sale."

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⁵⁵Maria Terekhova, *More Bitcoin regulations are coming*, available at http://www.businessinsider.com/more-Bitcoin-regulations-are-coming-2017-7?IR=T (Last visited on 24/08/2017)

The SEC, in an investigative report, focused on a virtual organization called the DAO, which issued virtual tokens last year in an IPO-like process.⁵⁶ Like an IPO dealing with stocks and shares, the SEC's investigation sought to determine whether The DAO Tokens and similar instruments constitute securities under the Securities Act of 1933 (Securities Act) and the Exchange Act. If an instrument is found to be a security, it becomes subject to federal securities laws which, among other things, require registration with the SEC as well as periodic reporting to the agency in the absence of an exemption from registration.⁵⁷

Therefore again the matter of classification become pertinent here. Regulating Bitcoins s would first and foremost require its classification; and deciding whether it is currency, because it can be used to buy and sell like physical currencies or whether they are commodities or whether they are securities like investing in stocks and shares. This clarity would ensure the relevant laws and policies which should be applicable.

INDIA

At present in India, the usage of Bitcoins are entirely unregulated, and there are no laws legitimizing the use of virtual currencies neither there are laws making its use illegal. The transaction of virtual currency is not authorized by RBI or any monetary authority in the country.

Bitcoins have not been recognized by the Reserve Bank of India ("RBI"), as a 'currency' in India, although RBI does have the power to include VCs within the definition of 'currency'. Currently, creation, trading or usage of VCs, as a medium of payment is not authorized by RBI or any other monetary authority in India. If Bitcoins can be considered as "currency", then RBI has the power to include them within the ambit of currency, because as per the Foreign Exchange Management Act, the definition of currency would include all such materials as has been already defined or as ther RBI may notify. ⁵⁸

Again they could also be considered as "securities", which includes other instruments as declared by the Central Govt.⁵⁹ If virtual currencies are considered as "computer programmes", as per Indian Copyright Act⁶⁰, then it can be regulated by foreign exchange laws and purchase of Bitcoins by an

instruments, as may be notified by the Reserve Bank;

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⁵⁶ Kevin Dugan and Carleton English, *SEC to regulate virtual tokens*, available at http://nypost.com/2017/07/25/sec-to-regulate-virtual-tokens/ (Last visited on 22/08/2017)

⁵⁷Securities and Exchange Commission Addresses Virtual Currencies and Blockchain Technology, available at, https://www.lexology.com/library/detail.aspx?g=9a1367e4-746d-4aae-b77a-a65d4cc3f26a (Last visited on 22/08/2017) ⁵⁸ S. 2(h) of Foreign Exchange Management Act, 1999 defines currency as "currency" includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travellerscheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar

⁵⁹ S. 2(za), Foreign Exchange Management Act, 1999

⁶⁰ 'computer programme', has been defined under the Indian Copyright Act, 1957, in S. 2 (ffc) as 'a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result.'

Indian resident, can be viewed as import of a software/computer programme into India, requiring compliance with applicable foreign exchange control laws including RBI's Master Direction on import of goods and services into India, with respect to imports being made in non-physical form.⁶¹

Bitoins can also be considered as "goods" under the sale of goods Act, and therefore it may carry direct and indirect tax implications, like sales tax in case of transfer, service tax in case of mining, and income tax in case of sale of Bitcoins. The privacy aspects related to the handling of Bitcoins are also a concern. The Information Technology Act, 2000 read with Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, also should govern the laws relating to the privacy and protection of data, concerning the use and transactions in Bitcoins. Any sensitive and personal data have to be regulated and certain standard security practices have to be ensured when dealing with sensitive personal data.

RBI released a press release in 2013, in which the users, holders and traders of virtual currencies like Bitcoins, were cautioned against the risks which are associated with the use of Bitcoins. They are unregulated and therefore there are potential risks against operation and customer protection, and also chances of absence of information of counterparties in such peer-to-peer anonymous/pseudonymous systems which could subject the users to unintentional breaches of anti-money laundering and could even carry huge implications as the financing of terrorism.

Again in 2017, the RBI has clarified that the users and investors are entirely at their own risk and there is no regulation of Bitcoins or such virtual currencies. It has denied to give any license or authorization. As per RBI-

The Reserve Bank of India advises that it has not given any licence / authorisation to any entity / company to operate such schemes or deal with Bitcoin or any virtual currency. As such, any user, holder, investor, trader, etc. dealing with Virtual Currencies will be doing so at their own risk.

CONCLUSION- PROBLEMS AND THE WAY AHEAD

In today's world where technological advancement is the order of the day, the increasing use and transactions of Bitcoins cannot be restricted. But what can be done is developing laws and policies to have standard regulatory practices throughout the globe. However absence of regulation leads to several abuse and Bitcoins, or such virtual crypto currencies are not an exception to this.

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⁶¹ Seema Jhingan, Neha Yadav and Saniya Kothari, Legal status of virtual currencies/cryptocurrencies in India, available at http://www.ilntoday.com/2017/04/legal-status-of-virtual-currenciescryptocurrencies-in-india/ (Last visited on 25/08/2017)

The use of Bitcoins in many illegal transactions or cybercrimes have been prevalent and is having the potential of being a threat at a global level.

Silk Road, one of the more popular underground destinations, was an online market that only accepted the virtual currency Bitcoin. Similar to Craigslist or eBay, users could buy or sell more than 200 different categories of goods. However, Silk Road was primarily used as a drug market and for other illegal services. The FBI put an end to Silk Road, but other sites emulating the original model are still in service. Some sites on the Deep Web that cater to cybercrime include services to purchase credit cards, weapons, false legal paperwork, and other illegal activities.⁶²

Bitcoins are also a very easy and clandestine way of funding terrorism activities. There is a lack of regulatory clarity and different countries have different regulatory approaches, which cause a significant loophole in unified enforcement of laws. Moreover, since virtual currencies are instantly at a global reach and can ease international transactions instantly at the same time ensuring the obscurity of the identity of the actual perpetrators being cryptocurrencies.

The U.S. government's 2015 "National Terrorist Financing Risk Assessment" cited cash and the banking system as two of the most significant terrorist financing risks that the United States faces. The assessment described virtual currencies only as a "potential emerging TF [terrorist financing] threat," 63

There may be technical problems associated with the payment of Bitcoins, as when Bitcoins are being transacted in peer to peer network of computers, double payment can be made using the same set of Bitcoins due to the time delay in processing of the first transaction. And before such dishonest transaction is detected or stopped, the transaction may go ahead with a significant progress

Also the very nature of Bitcoins make them irreversible transactions, and they are not subjected to any insurance coverage or reversal. And everytime the Bitcoins leave the wallet of a particular individual it is by all means irreversibly transferred to the recipient. The important point here is in India, by clarifying that we don't intend to make laws, as RBI has issues circulars, it is indirectly being said that the use of Bitcoins is illegal and no legitimacy will be recognized in these transactions.

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⁶²Cybercriminals Thrive Via Virtual Currencies, available at, https://www.mcafee.com/in/security-awareness/articles/cybercriminals-thrive-via-virtual-currencies.aspx (Last visited on 22/08/2017)

⁶³ Zachary K. Goldman, Ellie Maruyama, Elizabeth Rosenberg, EdoardoSaravalle and Julia Solomon-Strauss, Terrorist Use of Virtual Currencies Containing the Potential Threat, available at https://www.cnas.org/publications/reports/terrorist-use-of-virtual-currencies (Last visited on 22/08/2017)

It should be kept in mind that recognition and validity to Bitcoins fortified with proper laws and regulations are important rather than the regulatory authorities playing a silent role. Only clarity of laws and regulation and knowledge at the common man level and policy level can avert the undesirable and technical and legal loopholes.

AN APPRAISAL OF UNFAIR TERMS IN TECHNOLOGY-TRANSFER CONTRACTS IN NIGERIA

Dr. E. E. Udoaka64

ABSTRACT

This study is focused on the adverse effects of the restrictive clauses and onerous conditions that featured in technology licensing agreements which were submitted for registration in Nigeria, and the extent to which they frustrated licensing contracts. Data obtained from the National Office for Technology Acquisition and Promotion (NOTAP), and other relevant agencies in Nigeria revealed that most technology licensors incorporated coercive terms and onerous conditions in the licensing contracts, possibly to prevent the mastery and eventual transfer of the relevant technology to indigenous entrepreneurs. These included foreign jurisdiction clause, export restriction clause, restrictions concerning patterns of production, grant back provisions, ban on alternative or complimentary technology, package licensing and exclusive sales arrangements. The study also revealed that lack of domestic technological capabilities is the reason for licensing contracts. The study concludes that development of domestic industrial manpower in all fields of technology is imperative, if the country must reduce its reliance on licensing contracts. It also enjoins NOTAP to disallow these unfair licensing clauses, in line with Article 40 of the TRIPS Agreement.

INTRODUCTION

Technology licensing contracts submitted for registration in Nigeria often incorporate unfair terms and onerous conditions. Although article 40 of the *Trade Related Aspects of Intellectual Property (TRIPS) Agreement* enjoins member states to disallow these, it is still common practice for licensees to be saddled with restrictive clauses and onerous conditions in technology licensing agreements in Nigeria. The World

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Intellectual Property Organization has stressed that even though acquisition of foreign technology is indispensable for developing countries, the acquisition contracts should not imposeundue burden on their economies.⁶⁵ If their costs should exceed their values to the economy, there would be serious consequences like decline in the industrial growth rate, depletion of natural resources, unfavorable balance of trade, and misallocation of financial resources.⁶⁶

These clauses generally restrain competition, hinder the success of the projects involved, disallow effective assimilation and diffusion of the foreign technology, and entail a loss of benefits to the country. In the case of Nigeria, the problem is compounded by lack of domestic technological capacity could have reduced the need for licensing contracts on every kind of project, and enhanced the absorption of foreign technology involved in those licensing contracts that are successfully concluded, registered and executed in the country. Between 1983 and June 2006, a total of 3,918 technology agreements were submitted to NOTAP, covering all industrial sectors, while 2,427 of these were registered. The agreements registered involved patents, trademarks, soft-wares, management services, consultancy, etc.

This article examines the unfair terms that featured in technology licensing contracts that were submitted for registration in Nigeria, with particular reference to patents and know-how. It begins with an appraisal of the rationale for technology licensing, examines the Revised Guidelines on Acquisition of Foreign Technology, and indicates the proportion of licensing contracts that incorporated each type of unfair clause and the usual reaction of the authorities to it.

GUIDELINES FOR TECHNOLOGY LICENSING IN NIGERIA

The law regulating the registration of technology licensing contracts or agreements in Nigeria is contained in the *National Office for Technology Acquisition and Promotion (NOTAP) Act*,⁷¹ which applies to technology contracts generally. The existence of this Act is in line with UNCTAD directive which requires as follows:

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⁶⁵ WIPO: Intellectual Property Handbook: Policy, Law and Use, Geneva, 2004, p. 193.

⁶⁶Tbid. at p. 193.

⁶⁷It has been suggested that: "There is the need to strengthen public-private Partnerships for R&D as private sector tend to be cost-effective." A. B. M. Kolawole, "Patent Rights and Essential Medicines in Developing Countries: Is Access Compromised for Innovation in Nigeria", *Journal of Medicine and Medical Sciences*, Vol. 3(3) p. 133, March 2012.

⁶⁸Adequate indigenous technological capabilities is the pre-condition for success in producing inventions that are involved in licensing contracts. It has been stated that: "The effectiveness of compulsory licensing for local production is dependent on the existence of adequate technical competence, in other words, sufficient manufacturing capabilities in the pharmaceutical industry." A. Adewole, "Globalization, the TRIPS Agreement and their Implications on Access to Essential Medicine for Developing Countries: A Case study of Nigeria", in Confluence Journal of Private and Property Law, Faculty of Law, Kogi State University, Vol. 2, Nol. 1, p. 106, 2009.

⁶⁹ D. A. Okongwu, op. cit. at p. 8.

⁷⁰Ibid., at p. 21.

⁷¹NOTAP Act CAP. N.62, Laws of the Federation 2004, hereinafter referred to as the "NOTAP ACT."

States should, at the national or through regional grouping adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures for the control of restrictive business practices, including those of transnational corporations.⁷²

Also, the United Nations General Assembly Resolution 3202 requires that all efforts should be made: (b) to give access on improved terms to modern technology and to adapt that technology, as appropriate, to specific economic, social and ecological conditions and varying stages of development in developing countries... (d) To adapt commercial practices governing transfer of technology to the requirements of the developing countries and to prevent abuse of the rights of sellers.⁷³

The National Office for Technology Acquisition and Promotion Act provides for monitoring, on a continuing basis, the transfer of foreign technology to Nigeria.⁷⁴ Section 5 requires the registration of technology licensing agreements while Section 6 furnishes the guidelines for their registration. Here, certain contractual conditions are considered as unfair and harmful to the interests of the country and the licensee, and must be disallowed. The UNCTAD recognizes the adverse effects of these clauses, thus: "restrictive business practices can adversely affect international trade, particularly that of developing countries, and the economic development of these countries." These include cases where the contract is aimed at transferring technology that is freely available in Nigeria, cases where the price or royalty is not commensurate with the technology concerned, and where the provisions permit the supplier to regulate or intervene unnecessarily in the administration of any undertaking belonging to the transferee of the technology.⁷⁶

TheAct also disallows contracts with onerous or gratuitous obligations on the transferee to assign to the transferor or his nominee, patents, trademarks, technical information, innovations or improvements obtained by such transferee without assistance from the transferor or the nominee.⁷⁷ It prohibits clauses that impose limitations on technological research or development by the transferee, and those that contain obligations to acquire equipment, tools, spare parts or raw materials exclusively from the

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⁷²UNCTAD (1981) – The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Document No. TD/RBP/CONF/10/Rev. 1 (Geneva: UNCTAD) – Principles and Rules for States at National, Regional and Sub-regional levels 1.

⁷³ United Nations General Assembly Resolution 3202 (S-VI). Programme of Action on the Establishment of a New International Economic Order (1974): Official Records of the General Assembly: Sixth Special Session, Supplement No. 1 (A/9559) (New York: United Nations), pp. 3-12.

⁷⁴ See the Preamble to the NOTAP Act. See the Revised Guidelines on Acquisition of Foreign Technology under NOIP Act, prepared and published by the National Office for Technology Acquisition and Promotion, Abuja, 2003.

⁷⁵UNCTAD (1981) – The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Document No. TD/RBP/CONF/10/Rev. 1 (Geneva: UNCTAD) – Preamble.

⁷⁶ Article 6 (2) (a), (b), and (c) of the NOTAP Act.

⁷⁷ Article 6(2)(d) of ibid.

transferor or any other person or specified source. 78 It equally prohibits clauses that disallow or unduly restrict exportation of the transferee's products or services; those with obligations to sell the products manufactured exclusively to the supplier of the technology concerned or any other person or source designated by him, those that disallow the use by the transferee of complementary technologies, and those that require the transferee to use permanently or for any unconscionable period, personnel designated by the supplier of the technology. 79 The Act further prohibits contracts that limit the volume of production for sale, including those in which resale prices are imposed for domestic consumption, or for export in contravention of the Price Control Act or any other enactment relating to prices; those that retain the supplier of the technology as the exclusive sales agent or representative in Nigeria or elsewhere, and those that express the duration of the contract to be in excess of a period of ten years or of other unreasonable term where this is less than ten years. 80 It forbids contracts in which the consent of the transferor is required before any modification to products, processes or plant can be effected by the transferee. Moreover, it forbids contracts that impose obligations on the transferees for the introduction of unnecessary design changes; neither may the transferors seek to impose unnecessary and onerous obligations on the transferees, by means of quality controls or prescription of standards.⁸¹

Also not permitted are contracts with provisions for payment in full by the transferred for the transferred technology which remains unexploited by him; those that require acceptance by the transferee of additional technology or other matter, such as consultancy services, international sub-contracting, turnkey projects and similar package arrangements, that are not required by the transferee for or in connection with the principal purpose for which technology is acquired by him; and those that oblige the transferees to submit to foreign jurisdiction in any controversy arising for decision concerning the interpretation or enforcement in Nigeria of any such contract or agreement. 82In considering these clauses, it should be noted that UNCTAD has stated "the need to eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries."83

⁷⁸ Article 6 (2) (d), (e), and (f) of the NOTAP Act.

⁷⁹ Article 6 (2) (g), (h), and (i) of the NOTAP Act.

⁸⁰ Article 6 (2) (j), (k), and (l) of the NOTAP Act.

⁸¹ Article 6 (2) (m), (n), and (o) of the NOTAP Act.

⁸² Article 6 (2) (p), (q), and (r) of the NOTAP Act.

⁸³UNCTAD (1981) - The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Document No. TD/RBP/CONF/10/Rev. 1 (Geneva: UNCTAD) - Preamble. It also states in OBJECTIVES 4 as follows: "Taking into account the interests of all countries, particularly those of developing countries, the Set of Multilaterally Agreed Equitable Principles and Rules are framed in order to achieve the following objectives ... To eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries."

However, in any case where it is considered by NOTAP Governing Council that it would be in the national interest to do so, it can direct any contract to be registered notwithstanding the presence of onerous or unfair terms.⁸⁴ This discretion is important, in order to ensure that a very desirable venture is not foreclosed on the ground of non-compliance of the contractual terms with the guidelines. It is justifiable since "the main purpose of industrial property protection is to provide incentives for people to produce scientific and creative works that benefit society at large,"⁸⁵ and this incentive should not be disallowed in vetting licensing agreements. This is particularly so as some licensors usually worry about the secrecy of their technologies, particularly know-how and would, in most cases, be prepared to avoid the business collaboration if some clauses are not incorporated.⁸⁶ This normally informs their reluctance to comply with some conditions.

The existence of these guidelines seems to fulfill the requirement of the international regulation on transfer of technology. ⁸⁷However, notwithstanding these provisions, many unfair clauses featured in licensing contracts submitted for registration in Nigeria over the years, and are discussed here below.

UNFAIR TERMS CONTAINED IN LICENSING CONTRACTS IN NIGERIA

Unfair clauses have always featured in licensing agreements in Nigeria. As stated by the Director-General of the National Office for Technology Acquisition and Promotion, the period between 1970 --- 1980 was:

an era of indiscriminate import of technologies into Africa (developing countries: Nigeria especially) ... International code on transfer of technology was lacking ... technology transfer contracts contained very unfair conditions: monopoly pricing, restrictive business practices, export restrictions, high royalty rates, tie-in clauses ... little comprehensive training and management succession programs; poor/weak local $R \stackrel{\sim}{c} D$ activities, etc. 88

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⁸⁴ Article 6 (4) of the NOTAP Act CAP.

⁸⁵ K. M. Waziri "The Role of Industrial Property Protection in Advancing Technological Growth and Development in Nigeria", in Kogi State University Law Journal, Vols. 4 & 5, 267, 2010-2011.

⁸⁶After all, it has been stated that: "... intellectual property protection for business and trade secrets is justified since they accord protection to commercially valuable confidential information." See J. J. Ozzi, S. K. Mokidi, and E. E. Akhigbe, "Video Lending Libraries and the Right of Cinematographers", The Port Harcourt Journal of Business Law, Vol. 1, No. 1, Page 143, 2008

⁸⁷ States, in their control of restrictive business practices, should ensure treatment of enterprises which is fair, equitable, on the same basis to all enterprises, and in accordance with established procedures of law. The laws and regulations should be publicly and readily available. UNCTAD (1981) – The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Document No. TD/RBP/CONF/10/Rev. 1 (Geneva: UNCTAD)- Principles and Rules for States at National, regional and Sub-regional Levels 3.

⁸⁸ D. A. Okongwu, Director-General of NOTAP, at the National Workshop on Licensing of Intellectual Property Assets, organized by WIPO-FG-NOTAP: "Technology Transfer Through Licensing: The Experience of Nigeria," Abuja, March 29 – 30, 2004.

The problem seemed to have been common to the developing countries generally. It attracted the attention of the UNCTAD, which, in its *RESOLUTION 39(III)*, adopted without dissent at its 112th Plenary Meeting on 16th May 1972⁸⁹in order to improve. The National Office for Technology Acquisition and Promotion (NOTAP) was then established for the purpose of ensuring that technology licensing agreements were in line with the economic objectives of the country. In particular, they were to disallow all unfair contracts.

Data obtained by me from the National Office for Technology Acquisition and Promotion (NOTAP)⁹⁰ has revealed that licensing agreements meant for exploitation of foreign owned patents and know-how in Nigeria, submitted to NOTAP for registration over the years, contained a series of unfair terms and onerous conditions. In line with the guidelines analyzed above, NOTAP was constrained to reject these clauses, and to require the parties concerned to modify them. The onerous clauses concerned, and the percentage of the licensing contracts in which each clause featured are now discussed below.

4.1 Regulation of Licensing Agreement by Foreign Law

This is one of the two conditions that featured prominently in patent and know-how licensing contracts over the years, affecting 85% of the contracts which were submitted to the office for registration. It is considered that it is not in the interest of a country to accept it in licensing contracts, as the foreign law concerned may not be familiar to the local licensees. This tends to showthe concern of foreign investors about the legal protection of their investments, such that they would want their own national laws to govern their transactions in other countries. Moreover, their fears may be based on the events of the past during the military administration, and not with regard to the current period when the present democratic government has deliberately made laws to favour foreign investors.

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⁸⁹Concerning the aspect of "IMPROVING ACCESS TO TECHNOLOGY," the resolution: "(3) Invites the developing countries to establish institutions, if they do not have them, for the specific purpose of dealing with the whole range of complex questions connected with the transfer of technology from developed to developing countries, and takes note of the wishes of the developing countries that these institutions should inter alia:

⁽a) be responsible for the registration, deposit, review and approval of agreements involving transfer of technology in the public and private sectors;

⁽b) undertake or assist in the evaluation, negotiation or re-negotiation of the contracts involving transfer of technology;

⁽c) assist domestic enterprises in finding alternative potential suppliers of technology in accordance with the priorities of the national development planning;

⁽d) makes arrangements for the training of personnel to staff institutions connected with the transfer of technology;

⁽e) invites the developing countries to take the specific measures they deem necessary to promote an accelerated transfer of adequate technology to them under fair and reasonable terms and conditions". 89

⁹⁰ See official forwarding letter No. NOTAP/0/32/S.1/Vol..IV/226 of June 27, 2005, titled "Re: Research On the Legal Problems of Licensing of Patents and Know-how in Nigeria", in which the office responded to my enquiry on above thus: "I am directed to acknowledge the receipt of your letter in respect of the above subject matter and to forward herewith completed questionnaire on your area of research. We hope that the answers given will be useful for your area of research." I. J. Orizu, For: Director-General."

4.2Foreign Jurisdiction Clause

The data also indicated that over the years, 85% of patent and know-how licensing agreements submitted for registration required that disputes arising from the contracts would be settled in foreign jurisdictions. This condition is unrealistic and unfair to the Nigerian parties, most of whom cannot afford the costs of litigation abroad over disputes that might arise from the contacts. Settlement of disputes in Nigeria is cheaper for a local licensee rather than resort to a foreign jurisdiction. The inclusion of this clause deviates from the approved general practice. However, there is the need to ensure expeditious dispensation of justice, particularly in commercial disputes. In the *National Economic Empowerment and Development Strategy*, the government has promised to enforce intellectual property rights, and promote entrepreneurship, training, and partnerships.

4.3 Excessive Royalties for use of Technology

The charge of excessive royalties for licensing of patents and know-how in Nigeria is another problem that occurred frequently in licensing contracts over the years. 70% of patent and know-how licensing contracts submitted for registration were discovered by NOTAP to have been over-priced, and were usually disallowed. Although licensors must earn royalties to compensate for their research and development (R & D) expenses, the charge of excessive royalties is unreasonable. The demand for high royalties could hinder the licensing and working of patents locally. Perhaps this confirms the assertion that: "... the consideration for which patent rights may be enjoyed is nowadays not so much the introduction of a new invention as the possession of exceptional wealth."

4.4 Payment of Royalties after Expiration of Patent

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⁹¹It should be noted that in Nigeria, the Federal High Court has exclusive jurisdiction over intellectual property rights. Section 251(1)(f) of the Nigerian Constitution 1999 as amended, vests exclusive jurisdiction in the Federal High Court over "Any federal enactment relating to copyright, patent, designs, trade marks and passing-off, industrial designs and merchandise marks, business names, commercial and industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards." See also D. O. Ike, "Intellectual Property Crime in Nigeria," Journal of Commercial and Contemporary Law, p.148 June 2011.

⁹²That would then mean having no legal protection at all as far as the supply of the know-how or licensing of the patent is concerned. It has been stated on this issue as follows: "Most obviously the patent affords protection only when the patentee can afford to enforce his rights, which may mean that the poor has no protection at all. Macdonald, S., "Exploring the Hidden Costs of Patents," Quaker United Nation's Office Occasional Paper 4, <u>www.quno.org</u> Geneva, 2001, p. 3.It has also been stated as follows,

[&]quot;It is well recognized that a strong patent in weak hands is always less effective than a weak patent in strong hands". Wiener, N., The Human Use of Human Beings (1951) at p. 120. Quoted in T. A. B. White, op. cit., p. 1.92

⁹³ See the "National Economic Empowerment and Development Strategy" NEEDS, by the National Planning Commission, Abuja, p. 73.

⁹⁴ The WIPO Model Law for Developing Countries on Inventions, Vol. II, indicates that a state could refuse to register any licensing contract which obliges the transferee to make payments which are disproportionate to the value of the technology to which the contract relates. See WIPO: Intellectual Property Reading Material, WIPO Publication No. 476(E) (Geneva: WIPO: 1998), p. 187.

⁹⁵ NATURE: "The Giant of Invalid Patents", 9 November 1929, p.713, see Macdonald, <u>ibid.</u> pp. 3, 19.

According to the information obtained, 40% of the technology licensing contracts contained obligations for the licensees to continue the payment of royalties after the patent or know-how has expired, during which time, the technology concerned is in the public domain. A patent expires after its term of 20 years. Know-how on the other hand is in public domain when it is widely known and commonly applied within the industry as to be no more secret. There are also usually conditions preventing the licensee from using the technology after the end of the licensing contract. It is recommended that licensees of technology should specifically incorporate their rights to continue the use of the technology under these circumstances.

4.5 Unreasonably Long Term of the Licence

It was also gathered that 40% of patent and know-how licensing contracts submitted for registration contained unreasonably long terms, even when the continuation of such contractual relationships was unnecessary. Licensing agreements should not exceed a reasonable period within which the technology concerned should be mastered. However, where the applicable know-how is not yet in public domain, the licensee may not be free to use it without further payment of royalties, as it is still the exclusive property of the owner. Negotiations of licensing contracts should provide for periodic reviews where long term collaboration is envisaged, so that in such cases, the royalty should at least be reduced.

4.6 Export Restriction Clauses MANAGEMENT STUDIES

It was also indicated that 30% of the patent and know-how licensing agreements submitted for registration contained clauses restricting the licensees to selling only within the country, and not exporting to other territories. This may make it difficult for a licensee to earn enough profit, unless where the product concerned is in high demand locally. It has, however, been stated that transnationals habitually incorporate export restrictions that are reasonable in scope and duration, of and this, in exceptional circumstances ought to be allowed. However, it should not be imposed on customers of the licensees.

4.7 Technical Training of Indigenous Staff

The response also indicates that 30% of patent and know-how licensing agreements lacked provision for technical training of indigenous staff. The consequence of this would be endless reliance on the licensor's foreign technical staff and continuation of the licensing contract perpetually. Training of local technical manpower on the technology concerned was the main motivation for grant of patent

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⁹⁶ The WIPO Model Law for Developing Countries on Inventions, Vol. II states that the developing countries could reject any licensing agreement that establishes the duration of the contract to be too long, considering its economic function. However, any period that does not exceed the period of validity of the patent cannot be regarded as too long, WIPO, Intellectual Property Reading Material, ibid. p.187.

⁹⁷ M. B. Finnegan, "A Code of Conduct Regulating International Technology Transfer: Panacea or Pitfall." Op. cit., p. 62...

monopolies by sovereigns even before the introduction of formal patent statutes. ⁹⁸ The licensee has the duty to provide personnel who are both qualified for training and are trainable.

4.8 Lack of Provision for Succession of Expatriate Management

It was also indicated that 30% of these licensing contracts made no provisions for the take over of management by locals from expatriates. In other words, licensors usually prefer their nominees to hold on to management positions indefinitely. This is another problem that affects technology licensing in Nigeria, and NOTAP usually requires the modification of such conditions. Such problematic clauses should not be allowed, although there is the need to allow participation of the licensor's representative in order to ensure the quality of the product.

4.9 Obligations to Buy Spare Parts, Soft-wares, or Machinery from the Licensor or Suppliers Designated by Him

Another problem as indicated was that 20% of the patent and know-how licensing agreements submitted for registration contained tie-in clauses, restricting the sources of supply of raw materials, spare parts, soft-ware, machines, intermediate products and capital goods. Licensees were required to buy these from the licensor or from suppliers designated by him. This condition constitutes a restriction on the liberty of the licensee to search for cheaper and better quality of spare parts, softwares or machines from other suppliers in order to save funds and be able to operate profitably and pay the royalty. Some of the alternative sources could even be within the country, thus avoiding problems of transportation costs and delays. Tie-in clauses of this kindhave been said to be illegal, even under the U.S. anti-trust law.⁹⁹

4.10 Restrictions Concerning Patterns of Production

Another problem, as indicated, was that 20% of the licensing agreements contained restrictions on patterns of production. This could pose a problem for possible licensees if the approved pattern is not suitable to the local circumstances. For instance, the chosen pattern may be costly though not necessarily more useful. It is suggested that licensors should not interfere with the patterns of the products since the licensee is more conversant with the domestic market.

99 For instance, see the case of: International Salt Co. v. United States, 322, U.S. 329, (1947), cited in Finnegan, ibid.

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⁹⁸Concerning the situation in England, Mossoff has stated thus:-Beginning in the fourteenth century, King Edward III began issuing letters patent of protection for foreigners willing to come to England to train his subjects in their respective trades. A. Mossoff, op. cit. at p. 3.

4.11 Grant Back Provisions

Grant back provisions, making all improvements on the license to belong to the licensor, featured in 20 per cent of the licensing contracts submitted for registration. The problem with such clauses is that some improvements might be so substantial as to overshadow the original inventions. Moreover, intellectual property statutes generally provide for patents to be granted on improvements made to others' patents. For instance, section 1(1)(b) of the Nigerian Patents and Designs Act¹⁰⁰ states, that an invention is patentable "if it constitutes an improvement upon a patented invention and also is new, and is capable of industrial application."

The TRIPS Agreement¹⁰¹ allows compulsory licences to be granted to an improver to exploit his improvement independently, if it cannot be exploited without infringing on the original patent. However, this may only be granted where the improver has made efforts to obtain the authorization from the rights holder on reasonable commercial terms and conditions, and such efforts have not been successful within a reasonable period of time. Also, the invention claimed in the second patent must involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent.

Given this high level of recognition of improvement patents as belonging primarily to the improver, clauses in 20% of technology licensing agreements causing such improvements to revert back to licensors without compensation is unnecessary. Rather, there should be a reciprocal obligation on the two parties to exchange all technical information or improvements on the technology.

4.13 Provisions Absolving the Licensor from Liability for any Defect

Conditions absolving the licensor from liability for any defect inherent in the technology transferred featured in 10% of the above licensing agreements. Defect in quality of technology should rather constitute a breach of the contract, entitling the licensee to repudiate it and sue for damages. If the defect is minor, he could continue with the contract and sue for damages. A party who is in fundamental breach of a contract should not rely on an exemption clause to absolve himself from liability. A licensor should rather assure a licensee of the quality of the product.

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¹⁰⁰ CAP P.2, LFN 2004.

¹⁰¹ Article 31(l) of the TRIPS Agreement.

¹⁰² Article 31(b) of the TRIPS Agreement.

¹⁰³ Article 31(b) of the TRIPS Agreement.

4.14 Package Licensing

One of the clauses that also featured was package licensing, incorporating technology with know-how that were not required and demanding payment for them. It was contained in 5% of technology licensing contracts that were meant for registration during the period. This is forbidden under the UNCTAD principle, which enjoins enterprises to refrain from "Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee." ¹⁰⁴It has been held that its illegality arises from the coercive nature of the transaction. ¹⁰⁵

4.15 Obligation to Use Licensor's Staff

Another term that featured in 5% of the above contracts submitted for registration was the obligation to use staff designated by the licensor even when they were not needed. Ordinarily, the presence of staff designated by the licensor should add to the success of the venture, since they would be experienced technical personnel. It would only be wrong where they are not needed, and where they handle all technical operations without allowing the local personnel to participate and learn on the job.

4.16 Determination of Product Prices by the Licensor

In some of the contracts, licensors arrogated to themselves the right to determine the prices of the licensed products. The response from NOTAP indicated that 5% of patent and know-how licensing agreements submitted for registration contained this condition. It is doubtful if a foreign licensor could be in a better position to know and fix better prices than the Nigerian licensee.

4.17 Exclusive Sales Arrangements

Some of the licensing agreements submitted for registration also imposed the obligation on the licensee to sell the products to the licensor or to his nominees. Though it featured in only 5% of the contracts, it could hinder the licensee from canvassing for better prices and more lucrative markets. But where this arrangement is not mandatory, it would not be wrong as the licensor could help in securing more

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¹⁰⁴UNCTAD (1981) – The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Document No. TD/RBP/CONF/10/Rev. 1 (Geneva: UNCTAD) – Principles and Rules for Enterprises, including transnational corporations – 4(f).

¹⁰⁵Zenith Radio Corporation v. Hezeltine Research Inc. 395 U.S. 100 (1969); American Security Co. v. Shatterproof Glass Corp. 268 F.2d 769 (3d Cir.), see Finnegan M. B. op. cit. at p. 99.

buyers. According to UNCTAD rules and principles, "Enterprises should refrain from ... imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported." 106

4.18 Restrictions on Research and Further Development of Licensed Technology

It was also indicated that 5% of the above licensing contracts restricted the licensees from embarking on research or further development of the technology or license. This condition would make a licensee perpetually dependent on the licensor for developments and advancements in the field of technology concerned. The restriction has been described as being beyond the scope of the transferor's rights and an undue interference in the conduct of the business.107

4.19 Payment for Unexploited Technology

Another condition that featured in technology licensing contracts that were meant for registration was the obligation to make payment for unexploited technology. It is surprising how such payment could be expected, as the unexploited technology, even if originally ordered, would have contributed no profit to the licensee.

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CONCLUSION

This paper examined the prevalence of unfair terms and onerous conditions in technology licensing contracts that were submitted for registration and exploitation in Nigeria. The unfair conditions concerned were assessed and adjudged against the requirements in the Revised Guidelines for Licensing of Technology in Nigeria. The percentage of licensing contracts affected by each clause was indicated and their effects analyzed.

Ordinarily, it is not wrong for licensors to incorporate certain terms to protect their business interests. What is wrong is to include onerous conditions that would jeopardize the interests of the local enterprise that is acquiring the technology, which is definitely in a weaker bargaining position.

¹⁰⁷ Per M. B. Finnegan, op cit.

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¹⁰⁶UNCTAD (1981) – The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Document No. TD/RBP/CONF/10/Rev. 1 (Geneva: UNCTAD) – Principles and Rules for Enterprises, including transnational corporations – 4(f)(iii).

The issue of incorporating or disallowing onerous clauses in technology licensing contracts seems to be delicate, calling for subtle negotiation in each case to avoid discouraging either the licensor or licensee, since these business ventures are highly needed in the country. Perhaps that is why section 6 of the NOTAP Act allows the Governing Council to permit the registration of any licensing contract where it believes that it would be in the national interest to do so, notwithstanding the presence of onerous or unfair terms.108

It is important to enjoin the relevant authorities in Nigeria to be more focused on developing domestic technological capacity in order to reduce the need for licensing contracts on every kind of project, and enhance the absorption of foreign technology involved in licensing contracts that are successfully concluded, registered and executed in the country.



THE LAW AS A MARIONETTE: A TRYST WITH TRIBUNALS POST THE FINANCE ACT, 2017

Jigyasa Sharma¹⁰⁹

-H. L. Mencken

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[&]quot;But when politicians talk thus, or act thus without talking, it is precisely the time to watch them most carefully."

¹⁰⁸ Article 6 (4) of the NOTAP Act CAP.

¹⁰⁹Student, Rajiv Gandhi National University of Law, Punjab

ABSTRACT

In the much wrestled sphere of separation of powers, the Central Government has thrown a spanner in the works, making one of its most audacious moves by spearheading the Finance Act, 2017. The passing of the Act without getting it scrutinized by the Rajya Sabha is an unwelcome, though a somewhat bold move. The move has opened floodgates of criticism, given the Government's indirect approach of bringing the changes by means of a money bill. The merger of various tribunals in the Act has changed the face of tribunals in the country, alongside other equally questionable amendments. Though mushrooming tribunals only tend to make the justice delivery system laggard, a few that have been placed on the chopping board are a matter of concern. The crusade for specialization, which needs to run alongside the ordinary courts, is bound to suffer. What unfolded with the budget was the usual power scuffle between the two prominent hands of the State-the Executive and the Judiciary. While the Judiciary struck down the National Judicial Appointments Commission, the Executive bestowed upon itself rights over a hitherto uncharted territory, now being a regulator of quasi-judicial bodies. Clearly, the Government is running roughshod by resorting to political extortionism and defying essential procedures. If this goes on, institutional legitimacy is inconceivable because without the Executive ensuring adequate strength of institutions, the constitutional functions they were supposed to discharge-those of rendering speedy justice and offering specialized redressal mechanisms-are sure to fall flat.

INTRODUCTION

The doctrine of separation of powers underscores the exclusiveness of the organs of the government, namely the legislature, the executive and the judiciary. Though the Constitution does not recognize this in absolute rigidity, it does not contemplate the assumption of functions belonging to a particular organ of the State by another. Insulation of courts from any kind of coercion is but an extension of the requisite judicial independence. The makers of the Constitution were anxious that eventhe subordinate judiciary be insulated from executive interference, and this principle is part of the *basic structure* of the Constitution. Further, the separation of judicial power from executive power is also one of the facets of the principle of rule of law.

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In this backdrop of empyrean Constitutional antecedents, it is important to understand the working of the present rulers, and the ease with which every Executive inroad into the realm of our Constitution is reduced to a mere 'irregularity'. During every Budget Session, the Parliament introduces the Finance

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¹¹⁰M.P. JAIN AND S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW 713 (6th ed. 2007).

¹¹¹KesavanandaBharati v. State of Kerala, A.I.R. 1973 S.C. 1461; Indira Nehru Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299 ; I.R. Coelho v. State of Tamil Nadu, A.I.R. 2007 S.C. 861.

¹¹²Granville Austin, The Indian Constitution: Cornerstone of a Nation 175-176 (9th ed. 2005).

¹¹³Union of India v. SankalchandHimatlalSheth A.I.R. 1977 S.C. 2328.

¹¹⁴Minerva Mills v. Union of India, A.I.R. 1980 S.C. 1789; KihotoHollohon v. Zachilhu, A.I.R. 1993 S.C. 412; Supreme Court Advocates on Record Association v. Union of India, A.I.R. 1994 S.C. 268.

¹¹⁵H.W.R. WADE AND C.F. FORSYTH, ADMINISTRATIVE LAW 18 (10th ed. 2009).

Bill, with necessary proposals for tax and other important financial matters. A detour this year, by introducing non-tax related changes via the money bill, has been taken. One of the most pertinent issues is the merger of several tribunals, which has caused many a regulator to raise red flags. While the changes that have been affected are in the nature of administrative expediency, it will be interesting to see how the bureaucracy will react on having lost their much cherished, hunting grounds.

A BRIEF INTRODUCTION TO TRIBUNALS IN INDIA

Since the day India saw the dawn of an independent nation, its judiciary has been widely acclaimed as one of the most powerful in the world for its display of activism and grit. This stature has been threatened ever since, by despotic stewards of another pillar of the State-the Executive. A considerable energy has been directed towards divesting the country of its democratic attributes of judicial supremacy and tethering it with the tightly held rope of political hegemony. An actual manifestation of this intent can be seen from various quasi-judicial bodies called tribunals that have been established alongside regular courts.

The very purpose of introducing tribunals was to create consortiums of experts to whom are routed issues pertaining to narrowly defined jurisdiction. Such experts, being well acquainted with a particular subject matter, can be contradistinguished from generalist judges with matters spanning myriad areas of law. Realizing the limitation of general courts, the Supreme Court once said that leaving technical matters to the decision of the court is like giving surgery to a barber and medicine to an astrologer. Tribunals in India have had a variegated history, with the first of its kind coming up in the form of the Income Tax Appellate Tribunal. The Statement of Objects and Reasons of the Administrative Tribunals Act, 1985 enacted by the Parliament post the 42nd amendment, 119 is clearly indicative of its purpose, viz. to deal exclusively with service maters, that go a long way in not only reducing the burden of the various Courts and thereby giving them more time to deal with other cases expeditiously, but also providing the persons covered by such tribunals speedy relief in respect of their grievances. The objective was thus two-pronged-to provide speedy and affordable justice and to reduce the burden upon the generalist courts, thus steering clear of labyrinth litigation. 120

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¹¹⁶SANTOSH PAUL, CHOOSING HAMMURABI: DEBATES ON JUDICIAL APPOINTMENTS 235 (2013).

¹¹⁷Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization:* Lessons from Four Constitutional Revolutions, 25 LAW & SOCIAL INQUIRY 91–149 (2000).

¹¹⁸I.P. MASSEY, ADMINISTRATIVE LAW, 184 (2008).

¹¹⁹D.K.Jain, Central Administrative Tribunal-A Pulsating Vibrant Dispensation: An Introspection, (2011) http://highcourtchd.gov.in/sub_pages/top_menu/about/events_files/Address%20of%20Hon%27ble%20Mr.%20Justice% 20D.K.%20Jain.pdf (last visited May 29, 2017).

¹²⁰Varun Srinivasan, Evanescing of the Due Process? Abuse of the Writ Jurisdiction in Lieu of Alternate Remedy, (2016), http://www.livelaw.in/evanescing-due-process-abuse-writ-jurisdiction-lieu-alternate-remedy/ (last visited June 3, 2017).

MERGING EXISTING TRIBUNALS: REINS ON SPECIALISATION?

The Finance Act, 2017 entailed merging of several important existing tribunals. The Act has dismantled seven existing tribunals and their functions have been transferred to the already existing ones. For example, the functions of the Airports Economic Regulatory Appellate Authority (AERA) have been transferred to the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). This implies that TDSAT will now have to decide upon matters related to pricing of airport services. ¹²¹ Earlier in January 2000, the Telecom Regulatory Authority of India (TRAI) Act, 1997, was amended to set up the TDSAT and take over the adjudicatory and disputes functions from the TRAI. ¹²²

On the other hand, the merger of the Competition Appellate Tribunal (COMPAT) with the National Company Law Appellate Tribunal (NCLAT) is the most galling. The NCLAT is a financial, and not an economic regulator. Considering the working of the COMPAT, it has given certain laudatory judgments, exercising effective control over the process and analysis of the Competition Commission of India. In *Gujarat Industries Power Company Limited v. Competition Commission of India*, ¹²³ while cerebrating over the CCI decision, the COMPAT emphatically conveyed that it wasn't for the CCI to conduct a detailed examination of the allegations but a preliminary inquiry only. It also set aside the latter's decision in the Uber case which was a matter of alleged abuse of dominant position and anticompetitive practices. ¹²⁴ As the Idea-Vodafone merger is in the offing, it would be interesting to see how the NCLAT takes matters into its hands. ¹²⁵ India's competition law regime is in its nascent stages, and it is for the competition regulators to deliver orders that are not only procedurally sound but analytically robust too. Merging COMPAT has raised many eyebrows, given the specialized and complex nature of matters it deals with.

PRELIMINARY CONCERNS: ARE THE CHANGES JUSTIFIED?

Certain issues arise at a preliminary understanding of the changes that have been brought. Firstly, there is marked difference between 'rules' and a 'bill'. Rules, which the Central Government makes under a particular Act, are subject to scrutiny by the Parliament while a bill is debated before it. By allowing the government to determine the terms of service of members through rules, the threshold of Parliamentary

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¹²¹Prianka Rao, Finance Bill 2017: Independence of Tribunals could be Affected, HINDUSTAN TIMES, April 14, 2017, available at http://www.hindustantimes.com/analysis/finance-bill-2017-independence-of-tribunals-could-be-affected/story-StaETXJ9sjqNHqRjbriCTI.html.

¹²²JyotiMukul, A Case Against Merging Appellate Tribunals, (2017), http://www.rediff.com/business/column/column-a-case-against-merging-appellate-tribunals/20170403.htm (last visited June 3, 2017).

¹²³Appeal No. 3 of 2016.

¹²⁴ Meru Travels Solutions Private Limited v. Competition Commission of India and Ors., Appeal No. 31 of 2016.

¹²⁵AnshumanSakle, COMPAT v. CCI: A Power Tussle, (2017), http://competition.cyrilamarchandblogs.com/2017/05/compat-v-cci-power-tussle/ (last visited June 2, 2017).

scrutiny of these provisions is being lowered. Secondly, the resultant conflict of interests, whenever the government would be a litigant before such institutions, cannot be gainsaid. Examining this issue while delivering the 2014 National Tax Tribunal judgment, the Supreme Court had expressed its concern, saying that tribunals, having powers akin to those of High Courts, need to be made free from Executive manacles as members might be constrained to decide matters in favor of the former to ensure a reappointment. Thirdly, the Act provides that tribunals that have not been listed can also be attacked with a similar provision without obtaining prior Parliamentary approval, and gives rise to a cause of concern, given the fact that the same could result in excessive delegation of essential legislative functions.

THE PROBLEM WITH THE ACT

When the Conservative government in Canada tried to merge 11 independent tribunals into 'one mega agency', a change it insisted on being relatively minor, it suffered a fervid backlash from the members of the Canadian Bar Association. They were apprehensive as to the government's effort to introduce substantial changes in the name of expediency. In India too, the fundamental problem is not the merger itself, but the deep political machinations that have brought to fore the knavishness of the present Government. Since the ruling Bhartiya Janata Party is not in majority in the Rajya Sabha, nothing could be better than to give itself such overarching powers and allay the scope of any Rajya Sabha viewpoint altogether. The right approach could have been an amendment in the respective legislations governing the Tribunals. The government now has power to make rules with respect to the appointments, removal, resignation, term of office, qualifications, salaries and allowances and other service conditions of the members of these bodies. These provisions were earlier embodied in the relevant legislations.

As per the amendments, the term of office for the members shall not exceed 5 (five) years and such members shall be eligible for reappointment. The age of retirement has also been amended to: (i) 70 (seventy) years for chairpersons, chairmen or presidents; and (ii) 67 (sixty-seven) years for vice-chairpersons, vice-chairman, vice-presidents and presiding officers.¹²⁷

Critics of these changes suggest that it gives unchecked power to the Government, entitling them to essentially install political appointees to govern such tribunals, arguably eroding the principle of

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¹²⁶Bill Curry, Bar Warns of Conflict if Tribunals Merged under Bill C-31, (2014), https://www.theglobeandmail.com/news/politics/bar-warns-of-conflict-if-tribunals-merged-under-bill-c-31/article18652894/ (last visited June 16).

¹²⁷Ram Chakrabarty, AnubhaSital, *The Finance Act, 2017 - Implications & Constitutionality?*, (2017), http://www.mondaq.com/india/x/589176/Fiscal+Monetary+Policy/The+Finance+Act+2017+Implications+Constitution ality (*last visited June 2, 2017*).

separation of powers between the Executive, Legislative and Judiciary.¹²⁸ Having a say over how and by whom the tribunals would now be operated, these extra governmental bodies now stand bereft of the autonomy which will be potentially compromised in times to come. That said, it cannot be denied that tribunals would now be mere formal excrescence of the government's whimsical thinking.

Looking at this from a Constitutional perspective, the approach is not legally wrong. By means of its check and balance system, the Constitution ensures that the Speaker has the final say in deciding the nature of any bill introduced in the Houses. If the Constitution itself set much store by the judgment of an occupant of a high office, it was arguably intended that the occupant of the office must be trusted. If that trust is belied it would only follow that we have a loophole in the Constitution that can only be corrected by a Constitutional Amendment. However, any formal accusation of constitutional impropriety must take seriously political arithmetic (availability of votes necessary to pass the bill) as well as moral mathematics (politically the right governance thing to do). The former dictated the reign of the Lok Sabha, where the BJP has sufficient votes; the latter demanded an appropriate deliberation, a structural decoupling of the Finance Bill from other non-taxing laws. And thus was formed an omnibus Finance Act encroaching upon constitutional correctitude. However, and the properties of the sufficient votes are sufficient votes.

Very recently, in June 2017, the Madras Bar Association filed a writ petition against the aforementioned

Act, vehemently opposing the provisions for the merger of tribunals. ¹³¹ It reasoned that Article 50 of the Constitution is part of its basic structure, and is one example of a specific constitutional provision embodying the basic features of separation of powers and rule of law. Under the Finance Act, 2017, the rules empower the Central Government to derogate from these provisions by vesting unbridled powers in the Executive while constituting and fixing the terms and conditions of members in the judicial bodies such as the tribunals listed out in the Schedule to the rules. For instance, the leave sanctioning authority in case of the Chairperson vests with the Central Government. Similarly, the final deciding authority over the terms and conditions of service for the Board vests with the Central Government, thereby predominating Executive involvement in the functioning of a regulatory body.

This contrivance at simply circumventing the Rajya Sabha has been resorted to earlier. Both the Houses passed the Foreign Exchange Management Act, 1999 as a non-criminal law to replace the Foreign

131 Madras Bar Association v. Union of India, Writ Petition (Civil) No. 15147 of 2017.

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 $^{^{128}}Id.$

¹²⁹SomasekharSundaresan, *Without Contempt*, BUSINESS STANDARD, February 23, 2017, *available at* https://www.pressreader.com/india/business-standard/20170223/282600262648719.

¹³⁰UpendraBaxi, *Money Bills and Others*, INDIAN EXPRESS, April 4, 2017, *available at* http://indianexpress.com/article/opinion/columns/money-bills-and-others-4598231/.

Exchange Regulation Act, 1974.¹³² In 2006, the Finance Ministry suggested establishing a common appellate tribunal for power and petroleum, and its recommendations were made a part of the enabling legislation. The years 2014, and 2015 saw the widening of the jurisdiction of the Securities Appellate Tribunal, which was now to deal with appeals from orders from the Pension Fund Regulatory and Development Authority and the Insurance Regulatory and Development Authority.

Though quite sweepingly, the theme forming the undercurrent of these mergers has been taken forward by the Finance Act, 2017. By means of Sections 156-189, the Finance Act has violated the sanctity of the Constitution, and this is nothing but colorable exercise of Executive power. This has now become a repeated practice, as evidenced by the passing of the Insolvency and Bankruptcy Code, 2016 and the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016. The Supreme Court has many times held that abusing ordinance making power will be a fraud on the Constitution. The deliberate use of Article 110 to circumvent the need of Rajya Sabha approval is no different. The deliberations of law weren't challenged earlier as they weren't politically correct for a challenge. Now that a bigger gauntlet has been thrown, it may be possible that some may challenge it. The history of constitutional challenges to tribunals has been chequered. The National Tax Tribunal could not be set up while the NCLT despite of there being multiple conflicts has survived many challenges. The National Tax Tribunal could not be set up while the NCLT despite of there being multiple conflicts has survived many challenges.

The merger of tribunals, at first appears to be a laudable step, given that some tribunals did not have

The merger of tribunals, at first appears to be a laudable step, given that some tribunals did not have even two hours' work in a day. However, a further look makes it clear that not only are there higher chances of increase in pending matters, but a lengthier gestation period would be needed for new members to acquire the knowledge and understand the concepts related to the relevant laws. This is thus, bound to lead to inordinate delays. Though it may be expedient for administrative purposes, the merger does not appear to be a prudent move from the perspective of effective discharge of judicial functions. In an attempt to reduce the number of tribunals, merging those that are not connected with each other in terms of industry/applicable laws will lead to problems such as that of pendency. The purpose behind having a specialized tribunal gets diluted by creating multi-jurisdictional tribunals. If super tribunals are to be created, then there is no valid reason why they should be removed from the jurisdiction of the High Courts.

THE REPERCUSSIONS

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¹³² Supra note 12.

¹³³Krishna Kumar Singh v. State of Bihar (2017) 3 S.C.C. 1.

¹³⁴Supra note 20.

¹³⁵*Supra* note 6.

¹³⁶Finance Act: The Issues Surrounding De-tribunalisation, BAR & BENCH, (2017), http://thebetterlawyer.com/news/financeact-the-issues-surrounding-de-tribunalisation/.

This digression on the part of the government will now empower it to appoint experts to man these tribunals-members who will have a clinching say in the final orders. While such an appointment is inevitable due to the need for sectoral expertise, it implants a figurine of the Executive, rendering the member's opinion only nominal.

Parliamentary Standing Committees ensure that deliberations, scrutiny, expert feedback and public consultation on government proposals remain an essential aspect of the law making process. They examine the demands made by Ministries to seek grants, but the tax proposals in the Finance Bill aren't subject to any such scrutiny. Therefore, such instances where structural changes to laws are included in the Finance Bill bypass institutional checks and balances that ensure the role of both Houses of Parliament in lawmaking. The question is whether structural changes should be enacted without going through the established Standing Committee scrutiny processes that ensure a careful and rigorous assessment of the impact of legislative proposals of the government. The processes are the role of the impact of legislative proposals of the government.

To add to it, there has been no discussion how the NCLT, which took over the jurisdictions of Company Law Board, Board for Industrial and Financial Reconstruction and the Appellate Authority for Industrial and Financial Reconstruction, would make a foray into matters from these institutions. Besides, cases under the Insolvency and Bankruptcy Code, 2016, would also be routed to the NCLT. Despite there being multiple benches of the NCLT, there is only one for its appellate authority, the NCLAT. It is only obvious that a plenitude of appeals would now be stacked before the latter's benches. The tribunal will also be burdened excessively with the notification of various provisions of the Companies Act 2013, which has a barrage of pending and fresh cases relating to compromises, arrangements, mergers, amalgamations and winding ups to the tribunal.

This added caseload comes in the backdrop of the tribunals' previous responsibilities, including the settlement of cases of oppression and mismanagement, as well as adjudication of class action suits. ¹³⁹ As if matters were any less troublesome, the recent NCLAT ruling, ¹⁴⁰ which says that the 14-day timeline for rejecting or admitting a case under the Insolvency and Bankruptcy Code is only a directive, meaning courts do not have to necessarily adhere to it, adds fuel to the fire. The timeline of the Code is its strongest pillar, and the ruling causes serious concerns for investors willing to buy distressed assets. A

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¹³⁷Mayank Jain, *Finance Bill, 2017: How Tribunal Mergers Took Cover Under Money Bill,* (2017), https://www.bloombergquint.com/business/2017/03/23/finance-bill-2017-how-tribunal-mergers-took-cover-undermoney-bill (*last visited June 13, 2017*).

¹³⁸Mandira Kala, *How Finance Bill amendments affect Tribunals?*, INDIAN EXPRESS, March 27, 2017, *available at* http://indianexpress.com/article/explained/budget-2017-finance-bill-amendments-tribunals-arun-jaitley-4586925/.

¹³⁹VeenaMani,SayanGhosal, Budget hints at phasing out tribunals, COMPAT may be the first to go, BUSINESS STANDARD, February 1, 2017, available at http://www.business-standard.com/budget/article/budget-hints-at-phasing-out-tribunals-compat-may-be-the-first-to-go-117020101399_1.html.

¹⁴⁰J.K. Jute Mills Company Ltd. v. M/s Surendra Trading Company, Company Appeal (AT) No. 9 of 2017.

6th April, 2017 study by National Institute of Public Finance and Policy, New Delhi noticed that the new specialized tribunal (and its benches) had a disposal rate of 6,620 cases annually. Based on these numbers, the report said the NCLT would accumulate a backlog of 130,250 cases in five years. A mandatory timeline could have ensured a quicker disposal. To make the IBC proceedings more efficient, the current processes do not accord opportunity to debtors to argue against insolvency proceedings.¹⁴¹

Judgments such as these, post the Finance Act, 2017, and given the provision for merger of tribunals, only aggrandize unwanted issues.

Another shocking aspect of the Finance Act is Section 180, which calls for a premature termination of the office term of existing members, Chairpersons, Vice Chairpersons, who will be entitled to draw three months' pay and allowances in lieu of the same. Though this loss was inevitable, but strictly speaking, the Government should have offered to pay for the remaining terms of contracts of the judges. Legislations appointing judges to tribunals prohibit their service conditions from being changed after their appointments – the idea is to save the judge from being punished by the government for an adverse order. Yet, the government has chosen to go ahead and fire the judges on these tribunals. The long-term consequences of these firings are that it will shake the faith of potential appointees to these tribunals. If the government can simply terminate their contracts one fine day through legislation, why will a competent person accept an appointment to such a tribunal in the future?¹⁴²

Another major concern is the question of consultation with the Chief Justice of India for appointments to be made to these tribunals. The provisions of the Finance Act would apply prospectively, and it would be interesting to see what a total abscission of the CJI's views would look like, for the biggest probability is judges ruling for the government to ensure post retirement entry to these tribunals.¹⁴³

FORTMAN PAROLINE STORES

Clearly, the Executive tends to believe that like the Aadhaar Bill got passed as a money bill, 144 its crusade of substantive constitutional infractions would only be seen as procedural flaws, given the fact that procedural infirmities within legislature aren't subject to judicial review unless they are illegal and unconstitutional. 145 This includes the decision of a Speaker to decide the nature of a bill. 146 Though

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¹⁴¹Jayashri P. Upadhyay, NCLAT Ruling Weakens Insolvency and Bankruptcy Code, say Experts, (2017), http://www.livemint.com/Politics/6lpN1fHXHSZxu4jTGk4boJ/NCLAT-ruling-weakens-Insolvency-and-Bankruptcy-Code-say-exp.html (last visited June 18).

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¹⁴⁴SuhrithParthasarathy, What exactly is a money bill?, THE HINDU, February 27, 2017, available at http://www.thehindu.com/opinion/lead/what-exactly-is-a-money-bill/article17372184.ece.

¹⁴⁵Yogendra Kumar Jaiswal v. State of Bihar, (2016) 3 S.C.C. 183.

¹⁴⁶ Mohd. Saeed Siddiqui v. State of U.P., Writ Petition (Civil) No. 410 of 2012.

courts have always been cautious, a prolonged abuse of constitutional provisions might lead to reading down of provisions concerning the finality of Speaker's power to certify.¹⁴⁷

Certain questions that remained unanswered are-whether such an absolute power to one House impinges upon the deliberative and participative capacities of the other? How essential is the role of the Upper House, and does the government find its powers restricted there? Should this habit of dubbing major legislative proposals 'incidental' and introducing them via the Money Bill route, one which seems to be high on the growth curve, be curbed? Should the Supreme Court intervene to build a roadblock in this alternate route? Should the Speaker be asked to record reasons for his final word?

All this is aimed to render the judicial system a mere butt of ridicule. The intricate tapestry of India's legal regime, having borrowed from various legal systems around the world, has tried adjusting to the social, political and economic requirements of the nation. The era of globalization has, however, heralded a fragmentation of the regulatory framework. There is a need to engineer coherence into the system, providing necessary inputs to restore its structural identity.¹⁴⁸

CONCLUSION

Chief Justice Ahmadi (as he then was), was correct when he reasoned, in the much criticized *L. Chandrakumar v. Union of India*, that constitutional safeguards ensuring judicial independence weren't available to those who man tribunals. ¹⁴⁹ His words were but a wake-up call hinting at the possibility of Executive maneuvers to uproot judicial propriety. Though the concerns in this piece have been expressed on account of the well-known precedents existing in the nation's glorious past, it is pertinent to see how the changes that have been introduced fructify, if they will. The intent and the manner of the Executive in affecting these changes cannot be wronged, for it finds itself barred by no Constitutional provision. Still, such capricious and unreasonable drives need to be brought to a halt, for the unbridled horse knows no bounds. The temptations of absolute power, abjuring a modicum of constitutional discipline, must be resisted by all. The leaders and cadres of the BJP, with significant others, once valiantly fought the internal Emergency. This heritage should result now in a common cause to protect the freedom of speech, and public deliberation, inside and outside the House. ¹⁵⁰ This democratic expectation requires (to reiterate T.S. Eliot's words regarding Shakespeare) "... if we can never be right, it is better that we should, from time to time, change our way of being wrong".

¹⁴⁹L. Chandrakumar v. Union of India, (1997) 3 S.C.C 261.

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Vanya Rakesh, Aadhaar Act as Money Bill: Why the Lok Sabha isn't Immune from Judicial Review, (2016),
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https://www.researchgate.net/publication/304134655_Administrative_Tribunals_in_India (last visited June 14, 2017).

 $^{^{150}}$ Supra note 13.

It is important that the plug is pulled off in time. It is but necessary to ensure that the Constitutional glory which we proudly revel is not allowed to become the reason of our rights being descrated. If the impediments to the growth of the Constitution are not removed, the Constitution will suffer a virtual atrophy. While the law may empower, it may also endanger, and that cannot be undone even with the most precise endeavors. If the Indian parliamentary system is weakened, the political system will be in jeopardy. In South Asia, only the Indian democracy is a little deep-rooted. But if the decline of the parliamentary system continues unabated, if the Executive becomes reckless, if public opinion is ignored, if fruitful democracy and participatory system are lamentably overpowered, the country will be in peril. 152

"Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the morrow. It must have a principle of growth."

-Justice Benjamin Cardozo

INTERNATIONAL JOURNAL OF

Certain recommendations, which are sought to be made, are as follows:

a. Niche knowledge, which runs alongside a strict adherence to principles of natural justice, is essential to be reflected in decision making by specialized tribunals. A perfect example of this is the working of the Income Tax Appellate Tribunal, with members catering to the above said requirement.

- b. Subject matter expertise should be coupled with a disposed legal acumen. Care should be taken that such specialized judges aren't far removed from mainstream legal thought.
- c. The procedure for appointments should be free from Executive involvement. This is needed to prevent unworthy candidates entering untested waters and to bring in adept legal minds. The idea of tribunals is to foster effective and speedy decision making and not to act as retirement havens. These institutions being strong-armed by parent ministries would only render them

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¹⁵¹NamitSaxena, Devashish Chauhan, *India's Tryst with Tribunalization and Transfer of Judicial Power to Regulatory Bodies*, (2014), http://www.livelaw.in/indias-tryst-tribunalization-transfer-judicial-power-regulatory-bodies/ (*last visited June 15, 2017*).

¹⁵²Gurudas Das Gupta, *Trying Times for Parliamentary System*, (2013), http://www.thehindu.com/opinion/lead/trying-times-for-parliamentary-system/article5265654.ece (*last visited June 13, 2017*).

¹⁵³ Lawrence Baum, Probing the Effects of Judicial Specialization, 58 Duke Law Journal 1667–84 (2009).

formal playthings. Lobbying, guided by a potential paybacks by means of favorable decisions needs to be checked. Structural denotations of the Indian pattern of politically including members of judiciary and bureaucracy in regulatory bodies or tribunals is though beneficial in rendering more accountable decisions but a remote touch of political punctuations should not be overlooked.¹⁵⁴

- d. Ideas can be taken from countries such as France, England and Germany with structured and unified tribunal systems, acting as independent dispute resolution forums.¹⁵⁵ Our tribunals need to relieve the ordinary courts from an inflexibilities arising from subject matter caseloads being very high at a time to being reduced to a trickle later.
- e. Though the proliferation of tribunals shall not be the goal,¹⁵⁶ it shall be seen that mergers such as those under the Finance Act should not be done in future, throwing even highly specialized tribunals such as the COMPAT under the bus. Tribunals curtail forum shopping and conflicting decisions by benches in different geographical settings. ¹⁵⁷
- f. A watch dog committee to supervise the administrative tribunals should be constituted. It must be independent, permanent and autonomous body composing of men of the highest integrity, legal background and deep knowledge of administration. Because a body consisting of retired judicial or non-judicial members cannot work the same of zeal, courage and hard work as a direct recruit appointed on a permanent basis.¹⁵⁸
- g. Regulatory law, being a multidisciplinary space needs infusions from many disciplines. In this context training of specific skill sets judges and lawyers are critical in these areas. Citizens should be seen as consumers reorient dispute settlement procedures especially in to ensure faster and more effective redress of grievances.
- h. Given articles 226, much time is lost in filing review, revision and reference petitions. The need for drastic measures to elevate the standard of tribunals cannot be denied; however, more benches of High Courts to deal with appeals from these tribunals can be a viable alternative.

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¹⁵⁴*Supra* note 34.

¹⁵⁵ISAAC UNAH, THE COURTS OF INTERNATIONAL TRADE: JUDICIAL SPECIALIZATION, EXPERTISE, AND BUREAUCRATIC POLICY-MAKING 354(1998).

¹⁵⁶Arvind P. Datar, *Tribunals: A Tragic* Obsession, (2013), http://india-seminar.com/2013/642/642_arvind_p_datar.htm (*last visited June 4, 2017*).

¹⁵⁷ David Rottman, Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)? 7 Court Review22–27 (2000).

¹⁵⁸ L. Chandrakanthi, *Administrative Tribunals under the Indian Constitution: An Overview*, 2 International Journal of Legal Developments and Allied Issues 54 (2016).

- i. Recommendations of the Law Commission Report of 1958 ought to be brought into application. It was recommended that there should be a legislation for the functioning of tribunals which provides for a simple procedure reflecting the principles of natural justice, ¹⁵⁹ given the fact that lack of uniform procedures and consistent case laws results in multiple procedures being followed while also causing trouble to the persons affected as well as the adjudicators. ¹⁶⁰
- j. There is always a risk of a loss of flexibility in the development of the law if judgments are always delivered by the same limited number of persons. Keeping this in mind, the benches of different tribunals should be consistently changed after a period of time.

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SECTOR - WISE ANALYSIS OF MERGERS AND ACQUISITIONS IN INDIA

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ABSTRACT:

The changing policy framework associated with globalization, deregulation and technology in most economies have contributed to increased competition and facilitated a global spurt in Mergers and Acquisitions activities. The rapid pace of consolidation among the financial entities and the intense impact it could have on financial and economic stability has resulted in enormous literature in the advanced economies. However, very little information is available regarding Mergers

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and Acquisitions in Indian economy. The present study attempts to fill this gap in literature. Specifically, the study aimed to analyze the trends of sector wise Mergers and Acquisitions in various sectors with special focus on the financial and non financial sectors in India.

Keywords: Mergers and Acquisitions; Financial Services Sector; Non-financial services Sector; Deregulation; Globalisation.

INTRODUCTION:

Various sectors have witnessed differential involvement in Mergers and Acquisitions activities indicating higher participation by some sectors. Particularly, certain sectors such as financial services and pharmaceuticals have demonstrated higher Mergers and Acquisitions activities. One probable reason for differential participation could be the provisions in the Income Tax Act which may not be uniformly available to all sectors. The relatively higher Mergers and Acquisitions activities could simply be due to larger number of firms in one industry relative to others. To emphasize the differential importance of sectors in Mergers and Acquisitions activities, it is necessary to conduct a sector-wise analysis. Accordingly, this study attempts to investigate the differential representation of various sectors in Mergers and Acquisitions. Further, it explores the role played by India in the rising global Mergers and Acquisitions activities.

OBJECTIVES OF THE STUDY:

In this study, an attempt is made to examine the pattern of sector wise Analysis of Mergers and Acquisitions in India. The principal objectives of the study are as follows:

- 1) To identify the pattern of the number of mergers and value of substantial acquisition of share deals in financial services sector.
- 2) To analyse the pattern of the number of mergers and value of substantial acquisition of share deals in non-financial services sector.
- 3) To compare the sector wise financial and non-financial mergers and value of substantial acquisition of share deals.

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Now it is proposed to analyze the sector-wise mergers and value of substantial acquisition of share deals with a view to identify which sector of the Indian economy has attracted large number of mergers and highest value of substantial acquisition of share deals and which Sector has lost its importance. For the purpose of sector-wise analysis of mergers and the value of substantial acquisition of share deals, the Indian economy has been broadly classified into the following two sectors;

- I. Financial Services Sector.
- II. Non-financial services Sector.

I. FINANCIAL SERVICES SECTOR:

The financial sector plays an important role in smooth allocation of funds for investment. Several developments have resulted in sweeping transformation of this sector. Traditionally, its role was confined to provision of financial intermediation facilities such as inducing, mobilizing and allocating savings. Recently, its functions have broadened due to emergence of customized demand for sophisticated financial products such as financial derivatives, debt instruments including structured notes, syndicated loans, coupon strips, and bonds etc., based on investor's risk profile. In addition, the financial entities capacity to provide the sophisticated products has improved as a result of both rapid developments in finance and advancements in technology. Hence, the financial sector is expected to provide numerous facilities, apart from mobilizing savings and facilitating lending, such as trading, hedging, pooling, risk management, insurance, evaluating projects, monitoring borrowers, disciplining managers and exerting corporate control. Further, it is expected to facilitate exchange in an economy by providing adequate liquidity using technologically developed payment and settlement system. All these functions enable smooth conduct of economic activities and enhancing economic growth.

Mergers and Acquisitions, particularly in the financial sector, are gaining enormous importance in the recent times due to related forces of deregulation, globalization, financial innovation, technology and scientific knowledge etc.

ANALYSIS OF MERGERS AND VALUE OF SUBSTANTIAL ACQUISITION OF SHARE DEALS IN FINANCIAL SERVICES SECTOR:

In order to analyze number of mergers and the value of substantial acquisition of share deals the financial services sector broadly classified into the following five types:

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- 1. Banking services.
- 2. Asset financing services.
- 3. Fund based financial services.
- 4. Fee based financial services.
- 5. Other financial services.

The data of number of mergers and the value of substantial acquisition of share deals related to different types financial services is presented in the Table – I with a view to identified which type of financial services has attracted more number of mergers with the highest value of substantial acquisitions of share deals for the period of 1999-2000 to 2013-14.

1. Banking Services:

The demand of banking services is growing very significantly year after year. Many banks are before the Mergers and Acquisitions they strengthen their operative efficiency. Among the financial services sector value of substantial acquisitions of share deals banking services contributing the major portion. The data shows that the value of substantial acquisition of share deals in banking services is registered at a highest average of Rs. 1, 14,031.94 Million with an average of 6.2 numbers of mergers. The value of substantial acquisitions of share deals in banking services moved from Rs. 1930.80 Million in the year 2000-2001 to Rs.3, 96,957.40 Million in the year 2013-14, it was an abnormal growth. In the year 1999-2000 only 4 Mergers with Rs.3, 808.70 Million values of substantial acquisitions of share deals were taken place. But in the year 2000-2001 the number of merger increased by 75 per cent, however the value of substantial acquisitions of share deals decreased by 49.17 per cent due to the international unrest. In the year 2000 -2002 the value of substantial acquisition of share deals increased 244.64 per cent. In the year 2002-2003 there was significant outbound acquisitions were taken place with the abnormal value of substantial acquisitions of share deals with Rs.20, 559.70 Million which was increased by 208.16 per cent. After the abnormal high hike in the year 2002-2003, then it was deeply decline by 86.18 per cent in the year 2003-2004. Then after there was a continuous increase in the value of substantial acquisitions of share deals by 327.55 per cent, 110.13 per cent and 1415.88 per cent in the year 2004-2005, 2005-2006 and 2006-2007 respectively. In the year 2007-2008 it was declined by 77.2 per cent. It was noticed that no acquisitions was materialized in the year 2008-2009. However, Rs. 58, 678.40 Million values of substantial acquisitions of share deals was registered. From the year 2010-2011 and 2011-2012 it was increased by 264.74 per cent and 19.13 per cent respectively. There was slight decline by 6.09 per cent in the year 2012-2013. Based on the available statistical data it can be conclude that there was no clear cut

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trend emerged during the period under review. On an average the highest value of substantial acquisitions of share deals were observed during the study period.

2. Asset Financing Services:

Asset financing refers to the use of a company's balance sheet assets, including short-term investments, inventory and accounts receivable, in order to borrow money or get a loan. The company borrowing the funds must provide the lender with security interest in the assets. This differs considerably from traditional financing, as the borrowing company must simply offer some of its assets in order to quickly get a cash loan. Asset financing is most often used when a borrower needs a short – term cash loan working capital. In most cases, the borrowing company using asset financing pledge its accounts receivable; however, the use of inventory assets in the borrowing process is becoming a more popular and common occurrence. Thus, Asset finance is a type of lending that gives you access to business assets such as equipment, machinery and vehicles, or enables you to release cash from the value in assets you already own. Asset finance includes the following:

- i. Equipment leasing
- ii. Hire purchaseTERNATIONAL OURNAL OF
- iii. Finance leases & MANAGEMENT STUDIES
- iv. Operating leases

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v. Asset refinances

Nowadays different types of domestic and foreign asset financing services companies are showing much interest towards mergers and acquisitions to become the large scale operator. The average number of merger and the average value of substantial acquisitions of share deals in the financial services sector, asset financing services are placed third after fund based financial services.

The data of the number of mergers and value of substantial acquisitions share deals related to the asset financing services indicating that it's the third largest financial service sector to attractive the mergers and acquisitions in the period of study. The average substantial acquisition of share deals Rs. 36, 416.24 Million with average 14.8 number of merger was registered. In case of asset financing services the value of substantial acquisition of share deals moved from Rs.2, 317.20 in the year 2001-2002 to Rs.75, 790.20 Million in the year 2011-2012. In the year it was Rs.28, 468.40 Million but there is a continuously declined by 87.52 per cent and 29.11 per cent in the year 2000-2001 and 2001-2002 respectively. Then after there was continuous increase by 27.70 per cent , 103.03 per cent, 91.37 per cent, 304.73 percent

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and 46.39 per cent in the year 2002-2003, 2003-2004,2004-2005,2005-2006,and 2006-2007 respectively. The value of substantial acquisition of share deals slightly declined by 6.95 per cent in the year 2007-2008 but there was deep declined by 90.44 per cent in the year 2008-2009 due to uncertainty economy of the country. Immediately in the year 2009-2010 it was abnormally increased by 407.49 per cent and the value of substantial acquisition of share deals reached to Rs.33, 396.90 Million. Then after, it was continuously increased by 89.22 per cent and 19.92 per cent in the year 2010-2001 and 2011-2012 respectively. Again it was declined by 20.77 per cent and 5.01 percent the year 2012-2013 and 2013-2014 respectively. It is observed that there no clear cut trend emerged in the period of study however there is an aggregate increased in the value of substantial acquisition of share deals.

3. Fund based Financial Services:

Fund based financial services includes factoring, leasing, hire purchases, housing finance, bill discounting, venture capital etc. The different types of fund based financial services companies are very much attracting towards the mergers and acquisitions in India. The data reveals that the average number of merger and the average value of substantial acquisitions of share deals related to the fund based financial services companies reported at 29.73 and Rs.42, 364.32 Million respectively. The average value of substantial acquisitions of share deals of fund based financial services companies is placed in second position after the banking services among the financial services sector. The value of substantial acquisitions of share deals moved from the lowest Rs. 608.8 million in the year 2003-2004 to the highest Rs.2,23,054.10 million in the year 2010-2011. In the year 1999-2000 the value of substantial acquisitions of share deals is registered at Rs. 6,394.80 million, then after it was continuously declined by 11.01 per cent, 59.51 per cent, 44.58 per cent and 52.30 per cent in the year 2000-01,2001-02,2002-03 and 2003-04 respectively.

4. Fee based Financial Services:

Fee-based services can be broadly classified into corporate and retail fee-based services. Organizations avail of such services for meeting both their short-term and long-term financial requirements. The common fee-based services offered to corporate clients are: cash management services, letter of credit, bank guarantees, bill discounting, factoring/ forfeiting, forex services, merchant banking, registrar services, underwriting services, custodial services, lease and hire purchase, and credit rating. Retail fee-based services are availed of at large by the retail customers for payments, money transfers, personal wealth management, online trading, etc. While pricing of corporate fee-based services are relationship oriented and relatively flexible, retail fee-based services have standardized pricing. Though fee-based services are not promoted using the traditional promotion mix in a major way, their distribution is

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similar to that of banking products. For corporate fee-based services, marketers use branches extensively, whereas their retail counterparts use advanced technology channels such as the internet. For wealth management services in the retail segment, relationship-based personal selling is combined with the technology-oriented channels of distribution.

The active involvement of people is necessary for rendering fee-based services as the people factor decides the quality of service delivery. Many of the service providers recruit candidates from reputed colleges and institutions, and train them to handle the customer requirements. The process factor in service delivery can be analyzed in terms of the flow of activities, the number of steps involved in each activity, and customer involvement. Providers of fee-based services take all these factors into account for achieving high levels of service quality.

In India the fee based financial services are broadly classified into the following types;

- 1. Issue Management
- 2. Portfolio Management
- 3. Loan/Lease Syndication INTERNATIONAL JOURNAL OF
- 4. Corporate Counselling
- 5. Arranging Foreign Collaboration ANAGEMENT STUDIES
- 6. Advising on Acquisition or Mergers out Web Technologies LLF | 188N-2455-2771
- 7. Project Counselling
- 8. Advising on Capital Restricting.

A few numbers of companies which are providing fee based financial services in India are attracted towards the mergers and acquisitions. The data of the table explains that only 3.46 average numbers of mergers and acquisitions were taken place with the average value of substantial acquisition of share deals Rs. 7681.18 million during the period under review. The value of substantial acquisition of share deals in the fee based financial services moved from Rs. 276.8 million in the year 2001-02 to Rs. 29,485.80 million in the year 2005-06. A steep decline was observed by 59.54 per cent in the year 2006-07. Then after, it was increased to Rs. 26,791.70 by 124.60 per cent in the year 2007-08. Again the values of substantial acquisition of share deals were abnormally declined by 79.37 per cent in the year 2008-09 and 97.36 per cent in the year 2012-13.

5. Other Financial Services:

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The other financial services are the economic services provided by the finance industry, which encompasses a broad range of businesses that manage money, including credit unions, banks, credit-card companies, insurance companies, accountancy companies, consumer-finance companies, stock brokerages, investment funds and some government-sponsored enterprises. Other financial services companies are present in all economically developed geographic locations and tend to cluster in local, national, regional and international financial centers such as London, New York City, and Tokyo.

The other financial services companies usually have two distinct approaches to this new type of business. One approach would be a bank which simply buys an insurance company or an investment bank, keeps the original brands of the acquired firm, and adds the acquisition to its holding company simply to diversify its earnings. The mergers and acquisitions related to other financial companies are also playing significant role in the financial services sector value of substantial acquisition of share deals. It is observed from the data the average numbers of mergers were registered with the 13.06 with the Rs. 14,142.5 million value of substantial acquisition of share deals during the period 1999-2000 to 2013-14. The value of substantial acquisition of share deals in the other financial services moved from Rs. 972.6 million in the year 2002-03 to Rs. 62,723.50 million in the year 2011-12 which was an abnormal increase by 111.65 per cent when compared with the 2010-11. Actually in the year 2011-12 the numbers of mergers were decreased by 66.66 per cent in contrasts the value of substantial acquisition of share deals increased by 111.65 per cent. Then after it was declined by 52.75 per cent in the year 2012-13 and the same trend was continued in the year 2013-14 by declining 99.62 per cent.

TEST OF HYPOTHESIS:

Further, it is proposed to analyze the data by exercising ANOVA with the following null Hypothesis;

HO: There is no significant difference among the different types of financial services as far as the value of substantial acquisition of share deals is concerned.

Anova: Single Factor

SUMMARY

Groups	Count	Sum	Average	Variance
Banking				
Services	15	1710479	114031.9	2.09E+10

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Asset				
Financing				
Services	15	546043.8	36402.92	8.35E+08
Fund				
Based				
Financial				
Services	15	635465	42364.33	4.4E+09
Fee Based				
Financial				
Services	15	115217.7	7681.18	93048777
Other				
Financial				
Services	15	212137.5	14142.5	3.13E+08

ANOVA	7 IN	TER	NATI(dnai	. Jot	irnal of
Source of	LA	W &	Mana	GEME	ent St	TUDIES
Variation	SS	Df ished by	MS Agradoor	F Weh Tech	P-value	F crit
Between					E	
Groups	1.08E+11	4	2.69E+10	5.066789	0.001208	2.502656
Within						
Groups	3.71E+11	70	5.31E+09			
Total	4.79E+11	74				

It is evident from the above ANOVA result that the calculated P-value 0.001208 is less than the F-Crit value 2.502656. Hence the null hypothesis is accepted. Therefore, it has been statistically inferred that there is no significant difference among the different types of financial services as far as the value of substantial acquisition of share deals is concerned.

II. Non – Financial Services Sector:

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Non-financial services are the services which do not include brokering, banking, or anything related to investment. Generally Non-financial services companies do not deal with financial or investment—related goods or services. Therefore non-financial services are not linked to any type of investment activity. Non-financial services are principally related to the production of market goods and non-financial services and their financial transactions are wholly distinct from those of their owners. Non-financial services can be provided by the private and public companies, holding companies.

In order to analyze the number of mergers and the value of substantial acquisition of share deals, the non-financial services are broadly classified into the following five types:

- 1. Manufacturing.
- 2. Electricity.
- 3. Construction and Real Estate.
- 4. Mining.
- 5. Other services.

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ANALYSIS OF MERGERS AND VALUE OF SUBSTANTIAL ACQUISITION OF SHARE DEALS IN NON-FINANCIAL SERVICES SECTOR:

The data of number of mergers and the value of substantial acquisition of share deals related to different types of non-financial services is presented in the Table – II with a view to identified which type of non-financial services has attracted more number of mergers with the highest value of substantial acquisitions of share deals for the period of 1999-2000 to 2013-14.

1. Manufacturing:

Among the non-financial services manufacturing services are playing a vital role with regard to the number of mergers and value of substantial acquisition of share deals. It is observed that around 136.86 numbers of mergers were registered with Rs. 3, 19,448.42 million value of substantial acquisition of share deals during the period under review. However, there are some fluctuations also observed from year to year which leads to there is no clear cut trend for the increase or decrease of the value of substantial acquisition of share deals. The value of substantial acquisition of share deals moved from the lowest of Rs. 88,437.70 million in the year 2003-04 to the highest of Rs. 8, 52,940.10 million in the year 2013-14. This trend indicates that policy reforms that have been undertaken in the study period succeed in triggering dynamic forces of competition reflected in the industry restructuring toward larger scales of

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operation and consolidation through capacity building and mergers and acquisitions. Market structure; however, did not seem to change much.

2. Electricity:

India is one of the countries from the emerging economies to register a higher number of outbound deals than inbound deals. Outbound deals are not only taking place in emerging sectors, such as information technology (IT) and information technology enterprise solutions (ITeS), but also in electricity sector. The electricity companies are also acquiring large firms that are bigger than themselves. It is noticed that the electricity sector attracted the average of least number of mergers with the average amount of Rs. 27,181.73 million value of substantial acquisition of share deals in the period 1999-2000 to 2013-14. The total value of substantial acquisition of share deals moved between Rs. 6,211.40 million in the year 2004-05 and Rs. 70,532.30 million in the year 2013-14. The major driver for Mergers and Acquisitions deals has been the increased availability of debt financing. Indian participants acquired foreign firms to have access to better technology and make inroads into developed markets. Most Indian participants had to raise debt for the purpose of acquisition. The electricity companies that are highly leveraged will have to face challenges if the global economy continues to experience a slowdown. This situation will leave purchasers with high debt and insufficient equity, making it very difficult for them to overcome the challenge.

3. Construction and Real estate:

The construction and real estate firms have worked with owners, developers, project managers, operators and contractors. They are also concentrates on agreements in connection with development, design, establishment, construction, operation and maintenance of roads, bridges and highways. It is a very potential sector for Mergers and Acquisitions in the recent days. However, the least number of 24.2 mergers were registered with the amount of Rs. 35,249.42 million value of substantial acquisition of share deals during the period under review. The highest of Rs. 1, 09,826.10 million value of substantial acquisition of share deals were taken place in the year 2007-08 which is increased by 107.16 per cent when compared with the its previous year 2006-07. The value of substantial acquisition of share deals were moved from the lowest Rs. 3,424.40 million in the year 2001-02 to the highest Rs. 63,563.40 million in the year 2013-14. It can be concluded that there is a more scope for more number of Mergers and Acquisitions in the construction and real estate sector in the coming years.

4. Mining:

A wave of mining industry Mergers and Acquisitions has been sweeping the world since the beginning of 2003-04 with Rs. 1, 05,704.50 million value of substantial acquisition of share deals and has come

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back in 2010-11 with Rs. 1, 42,822.20 million value of substantial acquisition of share deals with intensified force after the temporarily slow down in the year 2005-06. The magnitude of the peaks is to some degree depending on a few mega-deals that inflate the dollar value for a specific year. The total value of substantial acquisition of share deals moved from Rs. 212.4 million in the year 2002-03 to Rs. 1,42,822.20 million in the year 2010-11. The average amount of Rs. 35,485.84 million value of substantial acquisition of share deals were recorded in the period of the study.

5. Other Services:

The services which are excluding the above mentioned Manufacturing, Electricity, Construction and Real estate and Mining are considered as other non-financial services. Among the non-financial services Mergers and Acquisitions the other services share is around 44 per cent when compared with the other specified services. It is noticed that the average number of 79.4 mergers with Rs. 3, 28,390.72 million value of substantial acquisition of share deals were recorded from the year 1999-2000 to 2013-14. The value of substantial acquisition of share deals in other services moved from Rs. 47,213.50 million in the year 2002-03 to Rs. 7,92,444.60 million in the year 2009-10. The steep decline was observed at 87.12 per cent in the year 2007-08, 62.98 per cent in the year 2010-11 and 58.70 per cent in the year 2012-13.

Test of Hypothesis: NTERNATIONAL JOURNAL OF

Further, it is proposed to analyze the data by exercising ANOVA with the following null Hypothesis;

HO: There is no significant difference among the different types of non-financial services as far as the value of substantial acquisition of share deals is concerned.

Anova: Single Factor

SUMMARY

Groups	Count	Sum	Average	Variance
Manufacturing	15	4791726	319448.4	4.17E+10
Electricity	15	407918.2	27194.55	5.57E+08
Construction and				
Real Estate	15	533233.3	35548.89	1.11E+09
Mining	15	532287.7	35485.85	1.75E+09

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ANOVA

Source of						
Variation	SS	Df	MS	F	P-value	F crit
					2.86E-	
Between Groups	1.53E+12	4	3.82E+11	13.63222	08	2.502656
Within Groups	1.96E+12	70	2.8E+10			
Total	3.49E+12	74				

It is evident from the above ANOVA result that the calculated P-value 2.86E-08 is more than the F-Crit value 2.502656. Hence the null hypothesis is rejected. Therefore, it has been statistically inferred that there is a significant difference among the different types of non-financial services as far as the value of substantial acquisition of share deals is concerned.

COMPARISON OF FINANCIAL AND NON-FINANCIAL SERVICES MERGERS AND VALUE OF SUBSTANTIAL ACQUISITION OF SHARE DEALS:

Now, it is proposed to compare the number of mergers and the value of substantial acquisition of share deals between financial and non-financial services sector to know the dominating in the form of Mergers and Acquisitions in the study period. For this purpose the sector-wise financial and non-financial mergers and value of substantial acquisition of share deals for the period 1999-2000 to 2013-14 is presented in the following Table – III.

It is evident from the data of the Table – III that the value of substantial acquisition of share deals in non-financial services is much higher than the financial services in the entire period of the study. The average value of substantial acquisition of share deals registered at Rs. 9, 61,362.3 million, out of this total financial services value of substantial acquisition of share deals represented at 22 per cent only whereas, the non-financial services value of substantial acquisition of share deals represented at the maximum of 78 per cent in the year period of the study. The number of mergers is also much higher in non-financial services when compared with the financial services. The value of substantial acquisition of share deals in financial services moved from Rs. 13,966.40 million in the year 2003-04 to Rs. 4,77,904.60 million in the year 2013-14. Similarly the value of substantial acquisition of share deals in non-financial

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services moved from Rs. 1, 75,245.80 million in the year 2002-03 to Rs. 14, 75,678.40 million in the year 2013-14.

CONCLUSION:

It can be concluded that the Mergers and Acquisitions are more attracted in the non-financial services sector because of the Government and other corporate bodies' restrictions are very less and liberal. Whereas financial services sector have been completely regulated and controlled by the SEBI, RBI and Central Government and they imposed strict restrictions. Thus, the corporate firms in the financial services sector are restricted for Mergers and Acquisitions. However, in the coming years the financial services sector also attract more number of Mergers and Acquisitions for better performance at overall.

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ANNEXURES

Table – I: Financial Services Sector Value of Substantial Acquisition of Share Deals

Year	Banking		Asset fin	Asset financing Fund		Fee base	d financial	Other financial		Total		
1 Cai	No.of	Rs.	No.of	Rs.	No.of	Rs. Million	No.of	Rs.	No.of	Rs.	No.of	Rs.
1999-	4	3,808.70	7	28,468.40	15	6,394.80	3	1,110.00	22	2,071.70	51	41,851.60
2000-	7	1,935.80	17	3,551.00	48	5,690.60	11	1,110.70	3	2,290.00	86	14,578.10
2001-	7	6,671.70	12	2,317.20	52	2,307.60	2	276.8	25	2,542.10	98	14,311.30
2002-	8	20,559.70	4	3,214.70	52	1,276.46	1	1,284.00	35	972.6	100	27,307.40
2003-	6	2,840.00	14	6,527.00	34	608.8	AL I	907,.2	$M \wedge 1$	3,083.60	65	13,966.40
2004-	4	12,142.70	19	12,491.10	25	36,907.30	2	471.3	18	4,259.00	68	66,271.40
2005-	29	25,516.00	5	50,556.10	$_{25}$ MA	24,262.70	MEN	29,485.80	$l_{25}IES$	8,544.20	89	138,364.70
2006-	9	386,793.30	4	74,011.60	31(24)	49,705.30	6	11,928.10	610000	27,835.50	56	550,273.80
2007-	10	86,147.60	16	68,860.50	21	45,344.80	1	26,791.70	7	33,990.80	55	261,135.40
2008-	1	-	14	6,580.70	11	30,462.00	4	5,524.80	2	1,785.90	32	44,353.40
2009-	2	58,678.40	13	33,396.90	13	6,893.60	2	4,876.30	15	17,054.40	45	130,899.60
2010-	3	214,025.90	42	63,195.76	16	223,054.10		6,182.60	9	15,238.30	70	521,696.60
2011-	1	254,976.30	17	75,790.20	38	175,733.50	10	17,528.80	3	62,723.50	69	590,702.30
2012-	2	239,425.70	34	60,046.00	57	10,301.30	2	461.6	4	29,635.40	99	339,915.40
2013-		396,957.40	4	57,036.60	8(-	16,522.10	3	7,278.00	17	110.5	32	477,904.60
Average	6.2	114,031.94	14.8	36,416.24	29.73	42,364.32	3.46	7681.18	13.06	14,142.5	67.66	214,648.2

Source: Various issues of CMIE Reports.

Table – II: Non – Financial Services Sector Value of Substantial Acquisition of Share Deals

Year	Manufacturing		Electricity		Construction and		Mining		Other Services		Total	
1 Cai	No.of	Rs.	No.of	Rs.	No.of	Rs.	No.of	Rs.	No.of	Rs. Million	No.of	Rs. Million
1999-	102	114,174.10		12,564.40	1	21,456.50		23,193.60	30	95,378.30	133	266,767.00
2000-	156	151,048.30	3	13,174.00	29	6,220.50		2,137.90	68	94,805.30	256	267,386.00
2001-	160	107,020.00	1	9,838.70	8	3,424.40		20	71	123,650.60	240	243,953.70
2002-	187	111,985.40		15,335.50	20	4991.1	3	212.4	72	47,213.50	282	175,245.80
2003-	132	88,437.70	3	17,283.90	21	1,270.90	2	105,704.50	71	86,777.90	229	299,475.00
2004-	122	238,084.10		6,211.40	11	12,846.70	1	33,324.30	71	182,445.60	205	472,912.00
2005-	194	340,844.40	3	40,947.80	75 N A	8,641.60	1 ₂ A L	655.3 R	107	349,009.70	321	740,098.90
2006-	164	374,927.10	1	16,362.90	40	53,013.40	1	36,851.80	120	1,158,955.10	326	1,640,110.40
2007-	164	311,386.60	1	37,807.30	18	109,826.10	MED	56,889.80	71 1 5	149,258.20	258	665,168.00
2008-	111	336,746.90	10	8,610.10	9м дот:	13,126.30	Techno	4,516.60	54	307,728.70	184	670,728.70
2009-	139	345,558.60	12	12,767.60	50	82,809.20		34,107.60	77	792,444.60	278	1,267,687.70
2010-	128	526,993.50	16	11,000.50	14	49,266.40		142,822.20	113	293,362.80	271	1,025,445.50
2011-	112	470,824.50	5	69,450.40	80	48,911.10	6	1,838.30	84	576,545.20	287	1,167,569.60
2012-	68	420,755.10	10	66,031.40	28	53,865.70	5	31,936.60	81	238,087.10	192	810,676.00
2013-	114	852,940.10	2	70,532.30	19	63,563.40		58,076.80	101	430,565.80	237	1,475,678.40
Average	136.86	319448.42	4.46	27,181.73	24.2	35249.42	1.6	35485.84	79.4	328390.72	246.6	745793.51

Source: Various issues of CMIE Reports.

Table – III: Sector Wise Financial and Non - Financial Mergers and Value of Substantial Acquisition of Share Deals

	Financial Serv	vices	Non-Financ	cial Services	Total	Total		
Year	No. of Mergers	Rs. Million	No. of Mergers	Rs. Million	No. of Mergers	Rs. Million		
1999-2000	51	41,851.60	133	2,66,767.00	184	3,08,618.60		
2000-2001	86	14,578.10	256	2,67,386.00	342	2,81,964.10		
2000-2001	(68.620)	(-65.16)	(92.48)	(0.23)	(85.86)	(-8.63)		
2001 2002	96	14,311.30	240	2,43,953.70	338	2,58,265.10		
2001-2002	(13.95)	(-1.83)	(-6.25)	(-8.76)	(-1.16)	(17.94)		
2002 2003	100	27,307.40	282	1,75,245.80	382	2,02,553.20		
2002-2003	(2.04)	(2.04) (90.81)		(17.5) (-28.16)		(-21.57)		
2003-2004	65 LAW & (-35)	13,966.40 (-48.85)	229 (-18.79)	2,99,475.00 (70.88)	294 (-23.03)	3,13,441.40 (54.74)		
	68 Fuhlished	66,271.40	205	4,72,912.00	273	5,39,183.40		
2004-2005	(4.61)	(374.50)	(-10.48)	(57.91)	(-7.14)	(72.02)		
2005-2006	89	1,38,364.70	321	7,40,098.90	410	8,78,463.60		
2005-2000	(3088)	(108.78)	(56.58)	(56.49)	(50.18)	(-98.51)		
2006 2007	56	5,50,273.80	326	16,40,110.40	182	21,90,384.10		
2006-2007	(-37.07)	(297.69)	(1.55)	(121.60)	(-6.8)	(149.34)		
2007-2008	55	2,61,135.40	258	6,65,168.00	313	9,26,303.40		
2007-2006	(-1.78)	(-52.54)	(-20.85)	(-59.44)	(-18.06)	(-57.71)		
2008-2009	32	44,353.40	184	6,70,728.70	216	7,15,082.00		
2000-2009	(-41.81)	(-83.01)	(-28.68)	(0.83)	(-30.99)	(-22.80)		

2009-2010	45	1,30,899.60	278	12,67,687.70	323	13,98,587.30
	(40.62)	(195.12)	(51.08)	(89.00)	(49.53)	(95.58)
2010-2011	70	5,21,696.60	271	10,25,445.50	341	15,45,142.1
	(55.55)	(298.54)	(-2.51)	(-19.26)	(5.57)	(10.47)
2011-2012	69	5,90,702.30	287	11,67,569.60	356	17,58,271.9
	(-1.42)	(13.22)	(5.90)	(14.08)	(4.39)	(13.79)
2012-2013	99	3,39,915.40	192	8,10,676.00	291	11,50,591.4
	(43.47)	(-42.45)	(-33.10)	(-38.56)	(-18.25)	(-34.56)
2013-2014	32	4,77,904.60	237	14,75,678.40	269	19,53,582.9
	(-67.67)	(40.59)	(23.42)	(82.03)	(-7.56)	(69.78)
Average	67.66	2,15,568.8	246.6	7,45,793.51	314.26	9,61,362.3
rce: Various issues of CMIE Reports.						

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ABSTRACT

In the ever-getting-complex tussle, over the appointment of judges and the independence of the judicial wing in entirety, between the Executive and Judiciary, Finance Bill 2017 (now an Act) is the latest addition. While the bill talks about several areas, the one that concerns for our purpose is that on the merging of several tribunals under the Bill. It has already been termed 'draconian' by many has been attacked on several grounds — the manner adopted, substance of the provisions and, the larger debate of Executive interfering in the realm that has traditionally been understood to stand better in the hands of Judiciary. The attack has been directed by citing the much-revered constitutional philosophies, that is, rule of law and separation of powers. This essay essentially seeks to discuss the reasons for the wide criticism of the Act, the draconian nature of the Rules notified by the Department of Revenue and, discuss what can now save our ailing tribunals.

Keywords: Finance, Revenue, Tribunal, Welfare.

INTRODUCTION NTERNATIONAL JOURNAL OF

The use of administrative tribunals as a mode of deciding disputes is widespread because it has all the advantages of a court without suffering from its limitations. The growth of administrative tribunals can be attributed to the intensive form of government assuming the role of Welfare State activities. These tribunals are set up as alternative dispute resolution mechanism to lessen the burden on Courts and for expeditious disposal of cases. Leven though there is unprecedented increase in the number of tribunals, their organization and working remains haphazard. Much needs to be done. It is undisputed that there should be uniformity in service conditions in all tribunals. Leven has been too much pendency in Tribunals defeating the purpose for which they are set-up. Leven Many a Tribunals are dysfunctional because the crucial posts have been lying vacant or the infrastructure facilities or manpower are not provided by the Government. Leven Leven Hamber of tribunals, and the midnineties. But nothing seems to have materialized. The UPA Government came up with The Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014 (currently stands withdrawn).

¹⁶³Sudents, Dr. Ram Manohar Lohiya National Law University, Lucknow.

¹⁶⁴ C.K. Takwani, Lectures on Administrative Law 244 (5th ed. Eastern Book Company 2012).

¹⁶⁵ Government of India, 2015. 74th Report: *The Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014*. Department-Related Parliamentary Standing Committee on Personnel, Pubic Grievances, Law and Justice.

¹⁶⁶ Id.

 $^{^{167}}Id.$

The Bill was scrutinized by the Standing Committee. The abovementioned Bill may not have been a masterpiece but it came through channels laid down in our Constitution. In contrast to this, major changes in Tribunals have been brought about by amendments in twenty-seven legislations through Finance Act, 2017 which was termed as a money bill. This was done to bypass Rajya Sabha and to circumvent the scrutiny by Standing Committee. Even the Rules under Section 184¹⁶⁸ have now been notified without inviting suggestions from the public. This is in blatant disregard of the procedures prescribed by law.

The Finance Bill 2017 took the entire nation by surprise and the most crucial part of it continues to be the merger of several tribunals with the other existing ones. Discussions began from questioning the very inclusion of such merger in a money bill and extended to highlighting anomaly in the provisions and bringing back to focus the executive-judiciary battle of independence that had lost our attention for quite a few months now. The last time it garnered our attention was when our then Chief Justice of India, Justice T.S. Thakur, had shaken the conscience of the entire nation with his tears expressing the plight of state of judicial affairs and what plagues our judicial system. No doubts the Government stood in shame. But what and how much has changed still needed to be seen. With the coming of this controversial piece of legislation, we now have an opportunity to do just that.

THE 'CHOSEN' MONEY BILL ROUTE JAGEMENT STUDIES

The Government gave back-door and entry to some provisions regarding Tribunals in the Finance Bill, 2017 terming it as a money bill because Lok Sabha enjoys absolute supremacy in in Money bill matters whereas the Rajya Sabha, in reality, plays almost no role. The decision of the speaker whether a legislation is a money Bill or not is final and binding¹⁶⁹. The speaker's decision, however flawed, would only amount to only a "mere irregularity", and thus be outside the ambit of judicial review.¹⁷⁰ Once passed by Lok Sabha, it is sent to Rajya Sabha for its recommendations. Rajya Sabha cannot reject or amend the Bill, and must return it within 14 days, after which Lok Sabha may accept or reject its recommendations¹⁷¹. In either case, the Bill is deemed to have been passed by both Houses. Since, the Government enjoys majority in Lok Sabha and not in Rajya Sabha, the route of Money Bill is chosen so as to bypass the Rajya Sabha without which no bill, other than a money bill can be passed. The provisions in the Finance Act 2017 regarding the tribunals, by

¹⁶⁸ Finance Act, 2017 § 184.

¹⁶⁹ Indian Const. art. 110(3).

¹⁷⁰Yogendra Kumar Jaiswal v. State of Bihar, (2016) 3 S.C.C. 183.

¹⁷¹ Indian Const. art. 109.

no stretch of imagination, fall under the purview of Article 110¹⁷² which defines money bill. This is not the first time that the Government has violated the provisions of the Constitution by terming an ordinary bill as money bill. Finance Minister has termed the amendments only 'incidental' under Art. 110.¹⁷³ Only those provisions that are related to taxation matters and absolutely consequential should be a part of money bill. In 2015, the speaker ruled that every effort should be made to separate taxation matters and other matters unless it is *impossible* to do so on constitutional or legal ground. The Finance Bill seeks to bring uniformity in service conditions in tribunals by laying down various non-fiscal provisions and one fiscal provision of pay structure. So, it seems that the *fiscal provisions are incidental rather than the other way around*. The provisions, discussed below, regarding Tribunals do not fall under money bill and are nothing but abuse of the privilege that the Speaker enjoys by virtue of the Indian Constitution. This is a clever way of successfully passing the Bill, in its own interest, without proper scrutiny resulting in making the bicameral legislative system redundant. It also establishes a very dangerous precedent for terming a bill as money bill by giving too wide an ambit of Money Bill which dilutes its sanctity as well as undermines the role played by Rajya Sabha.

'SPECIAL' PROVISIONS

The essential debate around the Act continues to be the mergers of Tribunals. Some of the merged tribunals like the AERAAT deal with a subject matter that has little to do with the matters being dealt with by the one it is being merged with (in this case TDSAT). The same argument stands for the National Highways Tribunal being merged with Airport Appellate Tribunal. The expertise of panelists required for one matter will not help them in adjudicating upon the second. It is to be noted that there is no logical nexus between these unrelated tribunals and yet are they are merged under cover of saving expenses. No mental acrobat sees synergy between the National Highways Tribunal and the Airport Appellate Tribunal or between the Cyber Appellate Tribunal & the Telecom Disputes Appellate Tribunal.

Also, certain Tribunals like the NCLAT happen to have a considerable workload already owing to the rising disputes in company related matters and it taking the workload of COMPAT, where again the cases have risen, is only going to exacerbate the load. The matters could go into limbo if there is no dedicated tribunal with expertise in the field which to a great extent will prejudice the regime.

¹⁷² Indian Const. art. 110.

¹⁷³*Id*.

¹⁷⁴Lok Sabha Debate: Finance Bill, 2017 (Mar. 21, 2017, 02:03 PM) 358.

 $^{^{175}}Id.$

The Act also gives the Central Government the powers to determine terms of service, qualifications, appointments, salaries, resignations, removals. Given the fact that the Tribunals are quasi- judicial bodies, the absence of provisions that involve the judiciary speaks of excessive interference by a party that may happen to be one of the disputing litigant before the tribunal and does not ensure independence of judiciary. Also, too many details in these regards have been put in the hands of the executive and it remains unclear whether these bodies will now come under the Ministry of Finance or the Nodal Ministry they now fall under and how either of the case is convincingly justified. Even under the rules recently framed under the Act, there hardly appears to be any role of the Judiciary. The same happens in case of inquiries against the judicial members and their removals. This changes the nature of the Tribunals from quasi-judicial bodies to purely administrative wing. Such amount of discretion becomes a precursor to arbitrariness.

In close to all Parent legislations that have established Tribunals there has so far been absolute assurance to maintain the respect attached to a judicial office that no term of service or salaries shall ever be altered to be disadvantageous to the post. In this light, the insertion of the provision in the Act that seeks to terminate services of existing members by payment of 3-month salary is insulting. This undermines the dignity that a judge has and deserves. This leads to an apprehension that a person of respect shall, in future, be wary of taking up such assignment position that is at the mercy of the executive and can be terminated at any time.

THE NEW ENTRANTS: RULES

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On the First day of June, 2017, the Department of Revenue (under the Ministry of Finance) notified the rules¹⁷⁶ in exercise of powers conferred by S.184.¹⁷⁷ These rules look like a helper set to advance the goals envisaged under the parent act and leave little or no scope of doubts that the executive has indeed set its eyes to have a *complete control* over 'alternative institutional mechanisms' (a concept of Tribunals as adopted in *Sampath*¹⁷⁸ case).

The rules provide for constitution of a search-cum-selection committee¹⁷⁹ whose *convener* shall be the secretary to the Government of India in the ministry under which the tribunal is.¹⁸⁰ The search-cum-selection committee, as laid down in the schedule, shall be different for every tribunal and most of them shall comprise four members out of which *only one person from the judiciary* shall be its member (except

¹⁷⁶ Finance Act, 2017 § 184, Rules.

¹⁷⁷*Supra* note at 5.

¹⁷⁸S.P. Sampath Kumar v. Union of India, (1987) 1 S.C.C. 124.

¹⁷⁹ Finance Act, 2017 § 184, Rule 4 (1).

¹⁸⁰ Finance Act, 2017 § 184, Rule 4 (2).

NCLAT where there shall be two members from Judiciary). There is <u>no balance</u> between the members from Judiciary and those from Executive in the selection of a person who shall essentially discharge a judicial function. This defeats the mandate of a landmark pronouncement¹⁸¹ where it was said that the selection committee must have equal number of persons from both the wings. The resignations of all judicial members, president, administrative members, chairperson, and vice-chairperson shall be required to be handed over to the Central Government.¹⁸² The removal provisions too are inclined towards working at the mercy of the Central Government, whose opinion has primacy over everything else.¹⁸³ This is a weird set-up as the Central Government will be a party in a lot of disputes to be decided by these tribunals and the same is going to decide matters on appointment, removal, re-appointment, etc. To ensure fairness and independence, all matters of appointment and extension of tenure must be shielded from executive involvement.¹⁸⁴ The step is such that can and is slowly beginning to embarrass the Central Government but for larger purposes it can be disastrous for the constitutional philosophies this Nation has pride on.

Something that is even more absurd and warrants a close scrutiny is the procedure for inquiry of misbehaviour or incapacity. All preliminary inquiries for complaints against the office of function shall be conducted by the ministry or department under which the tribunal is. If such ministry or department has reasonable belief and is of opinion that inquiry must be made by a committee which shall be constituted by the Central Government for that purpose.¹⁸⁵ This provision of preliminary inquiry by the nodal ministry itself sacrifices the independence of the judicial members or members discharging such functions because they shall then be at the mercy of the Central Government who might conduct a biased inquiry for such person who shall not toe their line while in office. Reiterating what has already been mentioned in the previous paragraph, it is never to be forgotten that the Central Government shall be one of the litigating parties before these Tribunals and on several occasions the decision might be against it. This is far from being "guided by principles of Natural Justice" (as the phraseology used under the rule). This also leads to violation of Rule against Bias. There is clear conflict of interest because these Tribunals are also dependent upon the Nodal Ministry for basic things like infrastructure and funding also.

The rule related to removal of members from office gets more arbitrary as it says that the Central Government may, on the recommendation of a committee constituted by it, remove a member from office

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¹⁸¹Union of India v. Madras Bar Association, (2010) 11 S.C.C. 1.

¹⁸² Finance Act, 2017 § 184, Rule 6.

¹⁸³ Finance Act, 2017 § 184, Rule 7.

¹⁸⁴Supra note at 18.

¹⁸⁵ Finance Act, 2017 § 184, Rule 8.

if the member has acquired other interest as is 'likely' to affect prejudicially his functions as a member 186. This is loosely-worded and vague in nature. It gives the Central Government and the Committee constituted by it an easy to prove and convenient ground to remove a member. There is no discussion on how this committee will be constituted. This leaves no doubt that the members of Tribunals will be under a valid and constant fear of being removed by the Central Government which might be a litigating party in many cases before it. Another arbitrary rule says that the Central Government has the 'power to relax' the rules with respect to any class of persons involved with the Tribunal if, in its opinion, it is expedient or necessary to do so 187. This will further influence and create pressure on the members to not go against the Government in a dispute.

The leave sanctioning authority shall also be Central Government.¹⁸⁸ In case of any question regarding the interpretation of the rules, the final deciding authority would be the Central Government.¹⁸⁹ The term of office too for most Tribunals has been set at three years¹⁹⁰which ignores all recommendations so far. If a person retires within two-three years of joining then by the time he would acquire expertise, knowledge and efficiency, it would be time for him to retire and he, therefore, would not be able to contribute much in improvement and advancement of Tribunals¹⁹¹. Their tenure has been set to be just three-years in the rules and the reappointment, as mentioned earlier, lies totally in the hands of the selection committee where the executive has taken control. To sum up, this is a huge departure from the structure that the Constitution of India envisages and digresses from the jurisprudence of Tribunals established in landmark judgments which have taken note of ailing Tribunals.

(IN)DEPENDENCE OF JUDICIARY?

Two debates central to the judicial wing have been Judicial Activism and Independence of Judiciary. There is no doubt that the Activism has been criticized by many over the years but looking at the change in the role that the justice dispensing mechanism today plays, it has found many to back it as well. But, when it comes to independence, almost everybody agrees that for there to be justice, independence of the judges has to be the very first thing to be ensured. Judicial independence takes within its ambit independence from all

¹⁸⁶ Finance Act, 2017 § 184, Rule 7(d).

¹⁸⁷ Finance Act, 2017 § 184, Rule 20.

¹⁸⁸ Finance Act, 2017 § 184, Rule 14.

¹⁸⁹ Finance Act, 2017 § 184, Rule 21.

¹⁹⁰ Schedule, Finance Act, 2017 § 184, Rules.

¹⁹¹ Law Commission of India. August 2009. 232nd Report on Retirement Age of Chairpersons and Members of Tribunals- Need for Uniformity;

Union of India v. Madras Bar Association, (2010) 11 S.C.C. 1.

pressures and prejudices. It has many facets like the fearlessness of other power centres, whether economic or political. Neither is a judicial service a service of the nature of employment because judges do not hold employment. They hold a public office in a manner similar to that of Council of Ministers and the members of Legislature. It has also been reiterated time and again by the Honourable Supreme Court that judges at all level represent the State and its authority and are over and beyond the personnel working in the other constitutional functionaries. In the other constitutional functionaries.

The purpose of creation of Tribunals may be many and good but the ends remain the same, that is, to ensure justice that is not only done but also seems to be done. Therefore, all that must be done and ensured to achieve the ends must be done for both. The courts too have endorsed this view and reiterated it in several following judgments. The independence of judicial thought has to be secured. The courts have ruled in favour of creation of tribunals by the legislature but when such judicial jurisdiction is transferred, the independence, security, capacity must also be transferred to the tribunals. It is because of this missing philosophy in the Act that this move is being seen as a masked attack after National Judicial Appointment Commission and a parallel way to hijack the independence of judicial thought.

The existence of detailed elaborate provisions for the salaries, tenures etc. indicate to a great extent that the framers wanted this wing to be protected from all interferences or encroachments by the executive or legislature. Thus, the judiciary has been entrusted with the task of safeguarding the Constitution as well as to ensure that the judicial decisions given by those who sit in office in the subordinate courts and the Tribunals do not fall short of legal correctness and judicial independence.¹⁹⁷ The same Judgment dates back to 1997 when the Supreme Court pointed out the problem that the Constitutional safeguards available for superior judiciary are not available for the subordinate judiciary or those who occupy the Tribunals created by a statute.¹⁹⁸ Today also, we are battling with the same situation even though the changes brought are justified basis the problems that have subsisted for long. The only difference now being that in order to cure them, new ones have been created while the old ones continue.

Tribunals were established with motives in sync with the much-needed reforms like faster dispensing, easier process etc. but over the years the criticisms also started pouring in inefficiencies crept in the system. But

¹⁹²High Court of Judicature at Bombay v. ShirishkumarRangraoPatil, (1997) 6 S.C.C. 339.

¹⁹³*Id*

¹⁹⁴All India Judges Association v. Union of India, (1993) 4 S.C.C. 288.

¹⁹⁵Supra note at 18.

¹⁹⁶*Id*

¹⁹⁷L. Chandra Kumar v. Union of India, (1997) 3 S.C.C. 261.

 $^{^{198}}Id.$

what contributed to this were the bureaucratic problems and apathy tops the chart. The ever-increasing number of tribunals, with intervals marked by insufficient members and tribunals remaining head-less, are evidences of apathy. The Copyright Board continued to remain non-functional for the last five years making the disputes pile upon other forums.

The move to leave the provisions like appointment, removal, resignations etc. substantiates the claim that the piece of legislation seeks to dilute the separation of powers. Provisions that deal with who should be appointed, how the appointment must take place is an important policy consideration and finds it origin in the constitutional philosophies. As an essential legislative function, the decision must remain within the hands of Parliament and must not pass on to the executive if the independence is to be protected.

CONCLUSION

The move taken in the form this legislation to merge tribunals and frame various other important policies in that regard is questionable on the grounds that the manner and mode adopted to bring it is an evasive process and has nothing do with a money bill as such. The constitutional scheme of the Constitution has been such that the Legislature can take away certain jurisdictions from existing Courts and vest them in Tribunals that shall specifically deal in certain matters but when such Jurisdiction is transferred, all aspects attached with the Court from whom the Jurisdiction is derived, must be carried over to the Tribunal. But this is not how the Legislature has been following so far.

Another important question could be whether High Courts must start acting as an Appellate Authority because the merging of Tribunals could lead to loss of specialized nature of these institutions. The answer should be in negative because it takes away one of the reasons for which these were carved out in the first place- to reduce unprecedented burden on the already existing Courts and specialized nature. This would only add to the woes of the litigants and would reduce their efficacy in taking their disputes to the Tribunals because of the compromised specialization. The specialization alone sets Tribunals apart from the Ordinary Courts. It would just be another added level for Appeals. In that case, it would become a waste process because if Tribunals lose specializations and High Courts become Appellate Authorities for that reason, it would only be logical to approach the High Courts in the first place and not the Tribunals.

This legislation comprises or rather attacks the independence that even Tribunals must possess to be able to dispense justice because at the end of the day what has been taken from the mainstream courts is jurisdiction. The independence, security, the purpose continues to remain the same, that is, speedy justice. It

is not disputed that reforms are needed in the tribunal system but the unconstitutional manner chosen in the name of 'reforming' by disrespecting the holy Constitution of India is nothing short of well-planned attack on the Nation's most sacred Document. The rules too have sharpened the attack by making the Executive take control of the alternative institutional mechanisms. The real loopholes suffered by this system – missing of appropriate infrastructure, lead posts remaining vacant, adequate appointments not being made have hardly been addressed so far. These loopholes never arose on their own but are due to government's own shortcomings and these can result into consequences as bad as making the entire institution hollow. Under the cover of saving expense and addressing the above-mentioned issues, the Finance Act, 2017 along with the rules, have worsened the situation by snatching the independence that these tribunals must possess. The sole purpose of setting up tribunals of providing effective and speedy justice is defeated by the Finance Act, 2017. If in an attempt to cure one disease, ten other fatal diseases are caused, it's wiser to leave that disease uncured or find another way to cure the same. For saving expenses and bringing uniformity in services, the independence of tribunals, the expertise and specialized knowledge required for speedy and effective disposal of cases that form the fundamental features of Tribunal set-up must not be compromised.

PROPOSED RECOMMENDATIONS TIONAL OURNAL OF

We may need to bring about a lot of reforms to enable the tribunals fulfill the purposes they are established for. But in order to do that, we certainly cannot compromise on the independence, security of the tribunals or their judicial members and most importantly abuse of provisions enshrined in our Constitution. If certain tribunals have been non-functional and the need for them to be merged is seen then they could probably share common resources like infrastructure with the others without compromising on the expertise. Some money can be raised by introducing fees in the tribunal system. These Tribunals suffer from systemic apathy. Filling vacancies on time and supplying of adequate manpower would save Tribunals from losing their expertise and come out of the dysfunctional mode. If the purpose of the move was to make same terms of service, it could have been done by bringing about an amendment in the parent legislations of all the tribunals and not just a few select ones.

The rights and duties of the Rajya Sabha and the interests of all the people of India should be protected. The bills and the relevant provisions that cannot be described as money bill, must be subject to proper democratic scrutiny in both houses of Parliament as they have serious implications for democratic functioning and effect all citizens. Democratic process should not be allowed to be abused under the facade of money bill route and thereby removing the Upper House's role crucial in passing of a bill. Decision of

the speaker to classify a money bill should be seen as a serious and 'substantive' error rather than merely a 'procedural' error.

In the United Kingdom, an independent body called Judicial Appointment Commission has been set up to select candidates. A permanent Tribunal service has also been established for manning the Tribunals.It is high time that necessary infrastructure, man-power, and financial resource to the Tribunals by the Government. A National Tribunals Commission should be created to oversee selection process, eligibility criteria for appointment introduction of common eligibility criteria for removal of Chairman and Members as also for meeting the requirement of infrastructural and financial resources. All Tribunals service should be placed under Ministry of Law and Justice for independent functioning of those bodies.¹⁹⁹

The need of the hour is that the inefficiencies be taken seriously and they alone must be targeted because most of them are procedural and routine. So far, they have only been a victim of Executive apathy. They need to stop being institutions of executive and have the same independence that mainstream Courts enjoy. The concept of being under the authority which in many cases shall be a litigant before it, its removing authority, at the mercy of its executive heads in whose hands the terms of services also lie, is only plaguing the Tribunals and making it junk.

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FAN FICTION STUCK IN THE QUAGMIRE OF INTELLECTUAL PROPERTY LAW

ABSTRACT:

Fan Fiction is a budding literary creation wherein vital ingredients of an original work, like characters and settings, are extracted by a fan, to beget another creative piece of fiction involving a new arrangement of sequence and events. Due to the advent of digitization, these amateur fan fiction writers publish their work online thereby being recognized considerably. But where the world seems comfortable for fan fiction writers, there lies a murkier world leading to legal issues pertaining to intellectual property violations resulting from fan fictions. Primarily, the paper highlights the issues revolving around copyright law as the copyrightability not only vests in the whole of the work but also in its elements, the legality of fan fiction has to be determined with respect to individual copyright protection given to such elements. The aim of the paper is to analyze which of such elements are independently copyrightable and they being so how does fan fiction work, even by appropriating such elements, implore its legality by seeking refuge under the fair use doctrine. The paper further enshrines upon the controversy regarding conflict of trademark law with fan fiction, wherein some cases the use of characters or titles from an original creation can dilute a mark or cause infringement. Akin to copyright law, trademark also provides for some fair use standards involving descriptive and normative use, which further could be used as a defense. The last segment of the paper mentions about the right to publicity given to famous individuals possessing the right to protect their identity which may be taken away by fan fiction writers. Therefore, a harmonious balance has to be struck between fan-fiction works, which are an epitome of creativity, and the exclusivity granted to owners of intellectual property.

Keywords: Copyright, Fan Fiction, Fair Use, Publicity Rights, Trademark

INTRODUCTION

We all have loved E.L. James' creation Fifty Shades of Grey, haven't we? Do we know that this work which became so popular was an imaginative creation of a fan who relied on the story of another popular work series *Twilight*. Another such creation is by Neil Gaiman called the "The Problem of Susan" which was a build-up on the life story of one of the four siblings, who was less described in the last part of Chronicles of Narnia by C.S. Lewis. Thus, fan fiction basically is as defined in Fancyclopedia is "fiction about fans, or

²⁰⁰ Students, Dr. Ram Manohar Lohiya National Law University, Lucknow.

something about pros, and occasionally bringing in some famous characters of stories."²⁰¹ Fan fiction is an imaginative work of a fan which leads to the creation of new expression, although assimilating features, characters and themes from the original creation of another author. This gigantic public response usually leads to the formation of a stumbling block for the original creator and thus raises some intellectual property claims involving copyright, trademark, right to publicity and unfair competition.

In the first part, the paper focuses on issues pertaining to copyright law wherein the vulnerable elements of fan-fiction work are counted upon by authors of original works to subject such works to the onslaughts of the copyright law. Fan works do not survive the repercussions of copyright law as whenever a fan work is published on a website, the original author intimates the website owner to claim against copyright infringement, and thereby he deletes the same. 3The part further delves into the enquiry as to how law can be maneuvered to satiate such vulnerability and clear the road for fan-fiction works.

The paper further highlights the concerns regarding infringement of trademark protected characters by fan fiction by the use of characters or titles from an original creation. It can further cause dilution or tarnishment of the image of the mark if involves commercial nature of fan fiction. Akin to copyright law, trademark also provides for some fair use standards involving descriptive and nominative use, which further could be used as a defense. The last segment of the paper mentions about the right to publicity given to famous individuals possessing the right to protect their identity which may debilitated by fan fiction writers if they start writing an altogether different story about their character's reputation.

LEGALITY OF FAN-FICTION WITH RESPECT TO COPYRIGHT LAW

A work of fiction is basically made of four elements: theme, setting²⁰², characters²⁰³ and the plot²⁰⁴.

Generally, what a fan-fiction author does is that it takes some elements of an original fictional work i.e. *characters* (both name as well as characterization) and/or *settings*, then puts it into a different *plot* which may or may not have a different theme.²⁰⁵ The argument against fan-fiction work is that though the whole work is

²⁰¹FANCYCLOPEDIA I: FASCISM, HTTP://FANAC.ORG/FANNISH_REFERENCE_WORKS/FANCYCLOPEDIA/FANCYCLOPEDIA_I/F1.

²⁰²Setting includes time, place, social environment, and other physical and non-human elements of the story.

²⁰³Characters are the human elements of the work, comprising of two components: (i) Name and (ii) Characterization.

Characterization is set of characteristics i.e. 'physical attributes and (other) personality traits' of the character.

²⁰⁴The plot can be defined as the sequence of events made in order to justify the theme.

²⁰⁵KATE ROMANENKOVA, THE FANDOM PROBLEM: A PRECARIOUS INTERSECTION OF FANFICTION AND COPYRIGHT, 18 INTELLECTUAL PROPERTY LAW BULLETIN, MAY 20, 2014, AT 183.

an expression, yet the individual elements of the work, especially the characters therein, are also expressions in themselves and are independently copyrightable and hence not only the reproduction of work but also the appropriation of such elements in some other work is a copyright infringement. Since *theme* is more or less an abstract idea which is not capable of being copyrighted, much fuss revolves around the copyright vested in *characters* and *settings* and that whether such characters and settings are abstract ideas or full-fledged expressions in themselves. Only if such characters are independently copyrightable, it can be said that the fan-fiction work infringes the copyright.²⁰⁶

When and Why does fan fiction not constitute misappropriation of Character?

Some characters and settings *are* copyrightable and hence the original authors/creators have exclusive right on them. What entails from this conclusion is that if such characters are used in some other fan-fiction work, it would lead to copyright infringement. Does it mean that no fan-fiction work can be based on such characters? The answer to this question is that a fan-fiction work based on such characters would not constitute copyright infringement if the subsequent fan-fiction work is an 'authorized derivative' of the former original work.

Fan-fiction: A kind of Derivative work

Published by Agradoot Web Technologies LLP [188N-2455-2771] In the arena of copyright, if various elements of a fictional work are considered as independent expressions in themselves, fan-fiction falls into the category of what is called as a "derivative work".²⁰⁷

For a fan-fiction work in order to *not* constitute infringement of copyright of the elements of the original work, it has to be a 'fair use' of the characters, so borrowed or appropriated and if it does not falls under the category of fair use, it would cause infringement of copyright. What remains to be decided is that what all conditions tilts the balance in favour of the conclusion that a fan-fiction work is 'fair-use' of the characters of the original work.

²⁰⁶Ibid, 200.

²⁰⁷As the name suggests, a derivative work, also known as secondary work, is a work which is 'derived from' or 'based upon' another 'underlying primary work' which has been already copyrighted. In other words, when *some or all of the components/expressions* contained in a pre-existing copyrighted work are borrowed in or used to create a new work, then the latter work is called a derivative of the former. Since, in case of fan-fiction work, some of the elements of the primary work (viz. character and/or settings) are reproduced and inter-mixed with new elements to create a new work, it can safely be concluded that fan-fiction work is a derivative of the original work.

Fair Use: Where the Safe Havens for Creativity Lie.

As Professor Weinreb defines "fair use is...an exemption from copyright infringement for uses that are fair." Thus fair use defenses fall into the category of what is called as the 'affirmative defenses' Weinreb further remarks that what is fair is fact-specific²¹⁰ and resistant to generalization²¹¹. However, being time and again pitted against the challenge of determining whether a particular use is fair or not, Justice Story in Folsom v. Marsh²¹² promulgated certain factors which are to be analyzed in case of judging as to when the borrowing of copyrighted elements in a secondary work would not constitute infringement of the copyright vested in them.²¹³

The aim of subsequent research is to discuss how the fair-use factors are interconnected to each other and in which cases a fan-fiction work would be able to take the shelter of fair-use doctrine. The four fair use factors have been discussed in detail in the decreasing order of their importance.

The effect fan-fiction work upon the potential market of the copyrighted work (market substitution) INTERNATIONAL OURNAL OF

An enquiry is made as to whether the fan-fiction work would act as a *substitute* of the original work. It is so because if it acts as its substitute, then it can happen that some of the target audience would prefer or access the subsequent work instead of the original, thus creating a competition for the latter and cutting its market. This phenomenon is called as *market substitution*. If there is demonstrable reduction of market by substitution, then the use is not fair. It is so because one of the objects of copyright law is to enable the author to enjoy the economic benefits of his creativity and labor.²¹⁴ Being the essence of the rationale

²⁰⁸ Lloyd L. Weinreb, Fair's Fair: A Comment on the Fair Use Doctrine, 103 Harvard Law Review no. 5 1137, 1138 (1990).

²⁰⁹The affirmative defenses are the defenses wherein the defendant does not deny that he has broken the law; rather he counts on the fact that he had a justification of doing so.

²¹⁰Lloyd L. Weinreb, Fair's Fair: A Comment on the Fair Use Doctrine, 103 Harvard Law Review no. 5 1137, 1138 (1990). ²¹¹ Inid.

²¹²Folsom v. Marsh, 9 F.Cas.342 (C.C.D. Mass. 1841).

²¹³These factors were (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. These factors have been adopted by many jurisdictions all over the world as guiding principle behind determining fair use. Apart from being invoked as principles in precedents, some countries like United States have opted to make these a part of statutory law.

²¹⁴Supplementary Report of the Register of Copyrights on the General.Revision of the U.S. Copyright Law, Revision Bill.81 (1965).

behind copyright, the effect on the market for the copyrighted work is "undoubtedly the single most important element of fair use"²¹⁵ and it would be seen later as to how around this factor all the other factors revolve. The central idea of the fair use principle is to excuse such appropriation of copyrighted works which in no manner whatsoever will have bearing on economic benefits of the author.

(1) Nature and purpose of subsequent work

i. The character/nature of the subsequent work (Transformativeness):

An enquiry as to whether or not such fan-fiction work is 'transformative' in nature. A use is transformative if it uses the copied material in a different manner or for a different purpose from the original and does not merely repackage or republish it.²¹⁶ According to the United States Supreme Court in the case of Campbell v. Acuff-Rose, transformative work "adds something new, with a further purpose or different character, altering the source with new expression, meaning or message". ²¹⁷A transformative use qualifies as fair use. The test of transformativeness involves accessing the intellectual value added by the secondary work to the primary work. ²¹⁸ To the extent that the secondary use involves merely an untransformed duplication, the value generated by the secondary use is little or nothing more than the value that inheres in the original. Therefore analysis has to be made as to what value does the fan-fiction work add to the original work. In Dr. Seuss Enters., L.P. v. Penguin books USA, Inc.²¹⁹, it was observed that if there is no endeavor to produce a work with a new expression, meaning or message, it shall not be considered as a transformative work. A derivative work portraying the same material in a different form, is not necessarily transformative in nature.²²⁰

ii. Cause-effect relationship of transformativeness and market substitution:

The test of transformativeness has a close nexus with the test of market substitution, as the former acts as the determinative factor for the latter. What would be the effect of a fan-fiction work on the market of the primary work depends on how far the work is transformative. If the work is not transformative and does not add something new or a different purpose, the secondary use would

²¹⁵Harper & Row Publishers, Inc. v. Nation Enterprise, 471 U.S. 539 (1985).

²¹⁶ Pierre N. Leval, *Towards a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1989-1990).

²¹⁷Campbell v. Acuff-Rose, 510 U.S. 569 (1994).

²¹⁸ American Geophysical Union v. Texaco Inc. 60 F.3d 913 (2d Cir. 1995).

²¹⁹Dr. Seuss Enters., L.P. v. Penguin books USA Inc., 109 F. 3d 1394, 1501 (9th Cir. 1997).

²²⁰Cariou v. Prince, 714 F.3d 694, 707-08 (2d Cir. 2013).

add no intellectual value to the primary work and the *intrinsic purpose* for both the works will coincide.²²¹ It would automatically and undoubtedly follow that such work would do nothing but to 'supersede the objects ²²² and 'supplant ²²³ the original work, thus acting as its substitute and hence cutting its markets. A secondary work that has no creative value of its own and has a negative effect on market for the original is hardly likely to qualify as fair use.²²⁴In *Twin Peaks Productions, Inc. v. Publications International Ltd* ²²⁵, the plaintiffs were producer of T.V. series called as *Twin Peaks*. The defendant who was a fan, created book called *Welcome to Twin Peaks: A Complete Guide to Who's Who and What's What.* The court refused to accept it as transformative because what it comprised of was, 'primarily of summarizing in great detail the plots of the first eight episodes plot summary ²²⁶which could act as an 'adequate substitute ²²⁷ for the serials. Transformativeness has direct cause-effect relationship with market substitution and thus, the two grounds of fan-fiction have to be studied together.

iii. Determining transformativeness:

To determine whether a fan-fiction work is transformative or not is a subjective enquiry and no objective or bright-line test can be laid for it. Thus transformativeness is essentially a question of fact to be decided on case to case basis.

In Castle Rock v Carol Publishing Group²²⁸ plaintiff owned a T.V. series named Seinfeld. The defendants released a book The Seinfeld Aptitude Test which contained quizzes about characters and events in Seinfeld. The book had no plot; it just contained events and characters from the episodes scattered throughout the work in a question-answer form. A number of dialogs from the show were copied as it is to form questions. The court held that the book had no 'different purpose' than the original episodes and hence it has just repackaged them in a different form. Due to lack of any transformative purpose the book would act as a substitute for the episodes.

In the case of *Blanch v. Koons*²²⁹, the defendant had made a collage named 'Niagara' which depicted four pairs of women's legs with feet pointing downwards towards a grassy surface where some confectionary and a background of Niagara falls. One of the pair of legs was appropriated from a

 $^{^{221}}Ibid.$

²²²Campbell v. Acuff-Rose Music Inc.,510 U.S. 569 (1994).

 $^{^{223}}Ibid.$

²²⁴Lloyd L. Weinreb, Fair's Fair: A Comment on the Fair Use Doctrine, 103 Harvard Law Review no. 5 1137, 1138 (1990).

²²⁵ TWIN PEAKS PRODUCTIONS, INC. V. PUBLICATIONS INTERNATIONAL LTD., 996 F. 2D 1366.

 $^{^{226}}Ibid.$

²²⁷ Ihid

²²⁸Castle Rock v. Carol Publishing Group, 150 F.3d 132 (2d Cir. 1998).

²²⁹Blanch v. Koons, 467 F. 3d 244, 253 (2nd Cir. 2006).

photograph called *Silk Sandals* which had been earlier clicked by the plaintiff, a professional photographer. The issue was whether such use of plaintiff's work is transformative. The court held the work to be transformative on the ground that the defendant had given an entirely different background and had altered the size and colors of the constituent objects. Moreover it connoted an entirely *different purpose and meaning* than the plaintiff's photograph. The court observed it be fair use as the total expression of the fine art painting was converted into a new expression.

iv. Fan Fiction affecting the original author's derivative work rights

An author, in addition to having sole right in reproduction of the work, has the sole right to prepare or license derivatives of his work. Hence, a fan-author has to keep in mind that his work does not have the bearing on the market of the derivatives.²³⁰Apart from the market of primary work, the potential market for derivative works should also be considered.²³¹In *Salinger v Colting*²³², the plaintiff had written a novel the Catcher in the Rye on which the defendant published a sequel portraying the same protagonist. The plaintiff had publicly disclaimed writing or authorizing of any sequel. Yet the district court held that the plaintiff had the right to change his mind, and if he does, then the market for such sequel would be affected by defendant's sequel, and confusion might occur as to which one is the actual sequel.

In Warner Bros. Entertainment Inc. v RDR Books²³³, suit was filed by the owner of Harry Potter series and Rowling, against the defendants who were owners of an online lexicon. The court observed that it did not qualify for fair use because the owner had already published companion books and Rowling had publicly declared her intention to launch her own lexicon.

v. The purpose of the subsequent work (Commerciality)

An enquiry has to be made under this factor as to whether the secondary work is of a commercial nature or is for non-profit purposes. If it is of a non-commercial nature defense of fair use is available. Most of the fan-fiction works are usually made by amateur fans *themselves*, not with the motive of earning profits. Hence they do not seek publication in print form but rather prefer

²³⁰ Frank Gaylord v. United States; 595 F.3d 1364 (Fed. Cir. 2010).

²³¹Lewis Galoob Toys Inc. v. Nintendo of America Inc., 780 F. Sup. 1283.

²³² Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010).

²³³Warner Bros. Entertainment Inc. v. R.D.R. Books, 575 F.Supp.2d 513.

This factor weighs heavily in the favour of fan-fiction work. But it must be remembered that all fan-fiction works are *not* non-commercial in nature. It depends upon the fan whether or not to commercialize his work and such work won't cease to be a part of fan-literature merely because the author has chosen to commercialize it. Special reference has to be made to referential fan-fiction works. They are a kind of *service* provided to the fans and therefore the authors usually tend to commercialize them.²³⁵

vi. Relationship of commerciality with transformativeness and market substitution

It has to be noted that fan-fiction work even if commercialized, may qualify as fair use, if it is satisfies the canon of *transformativeness*. Copyright holders are given monopoly not in the sense that they *solely own* the work or its elements, but only in the sense that the work or its elements are not used by others to decrease *their* own economic benefits. If any other person uses such copyrighted work or elements to earn profits, and thereby creates his own market, without at all cutting the markets of the original work, then it is not appropriate that such work should see the frown of copyright law.

On the other hand, it may happen that fan-fiction work made for non-commercial purposes may not avail the defense of fair use if it is not transformative and leads to market substitution. ²³⁶It is a mistaken belief that derivative works that are not made for economic benefit do not interfere with the underlying work's market. For example, an author writes a novel with suspense as its genre. A fan after reading the novel and being highly impressed by it, writes a summary of the novel on a fan-fiction website. Now what can be the effect of this is that any readers, who are not so much of puritans, would prefer to read the summary. The readers who would have opted to read the novel (the target audience) would not do so, either because they get to know of the climax or because the plot does not suit their taste. Thus the potential market would decrease.

Therefore it has been rightly held by court that transformativeness is the largest factor that affects all other factors. The U.S. Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*²³⁷, held that:

²³⁴ Karen Hellekson& Kristina Busse, *Introduction: Work In Progress, In Fan Fiction and Fan Communities in the Age of the Internet* 13 (McFarland & Company Inc.) (2006).

²³⁵Rachel L. Stroude, Complimentary Creation: Protecting Fan Fiction as Fair Use, 14 Marq. Intell. Prop. L. Rev. 191,194 (2010).

²³⁶Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

²³⁷Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).

"The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."

(2) Amount and substantiality of the work used

An enquiry to establish the amount and substantiality of the work involves two determinative factors: first is to analyze what is the amount of the original work taken (and whether it is so minute to be ignored) and second to determine whether the borrowed work happens to be the 'heart' of the whole original work i.e. whether it is *qualitatively substantial* part of the original work. In case of fan-fiction, the most controversial element which is borrowed into the new work is characters. Therefore, the issues which arise are whether the borrowing of just characters from the underlying work is miniscule enough to constitute fair use and if it is, whether the 'characters' constitute a substantial part so as to be called as the heart of the original work?²⁴⁰

The quantitative test is apt in cases of exact copying or reproduction of work, wherein it has to be determined what amount of work is copied. However, as described earlier, borrowing of characterization does not involve copying/reproduction of the original work. Hence it must be stated that it would be anomalous to determine *quantitatively* as to what 'amount' of the original work a character constitutes as character. Therefore, reliance must be placed on the qualitative aspect i.e. whether the alleged character is a substantial element of the plot or not. This depends upon the *importance* and *pervasiveness* of that character in the original plot.

Whether a character is a substantial part is a subjective question and depends from character to character. Though the 'story being told' has lost much of its significance after the *Air Pirates* case in determining the copyrightability of characters, yet, it is suggested that it can be instrumental in determining the *substantiality* of a character²⁴¹, whose copyrightability is not in dispute, in the plot. The correct course will be that the story being told test is applied to find out the substantiality of the character and if the character is found to be not substantial, its borrowing in the fan-fiction must be considered as *de minimis* and fair use defense must be given to it. The lesser the proportion the more are the chances that the fan fiction work can take the shade of *de minimis* rule.

²³⁸Campbell v Acuff-Rose, 510 U.S. 569 (1994); Harper & Row Publishers Inc. v. Nation Enterprise, 471 U.S. 539 (1985).

²³⁹Roy Export Co. Establishment v. Columbia Broadcasting System Inc., 503 F.Supp. 1145.

²⁴⁰ Meredith McCardle, Fan Fiction, Fandom, and Fanfare: What's All The Fuss?, 9 B.U. J. Sci. & Tech. L. 433, 459 (2003).

(3) Nature of the copyrighted work

Under this factor, an enquiry has to be made into the nature of the original work of whose infringement has been alleged or from which the characters have been borrowed in the fan-fiction work.

Courts generally give more protection to highly creative works like *works of fiction* and less to *works of fact* (like news, game scores, telephone directories, biographies etc.), especially those of scientific and social benefits and are therefore less prone to hold fair-use in case of the former.²⁴² Therefore this defense does not render much assistance in case of fan-fiction works because by the very definition it is clear that fan-fiction works are based on works of fiction like, novels, comics, television serials etc. It is less likely that there would be a *fan* of a work of fact.

LEGALITY OF FAN FICTION WITH RESPECT TO TRADEMARK LAW

Trademark is intended to ensure the marketable value of a name, picture or other sign in distinguishing the original source of goods or services, thereby in the long run to evade mystification.²⁴³ To avail benefits under trademark law the mark of the owner should serve as a "source identifier" for goods and services it is dealing with, and this can be established if the concerned purchasers and the originating source have developed a strong relationship, which in other words is known as secondary meaning.²⁴⁴ An owner of a trademark possesses an exclusive privilege to utilize or to get his mark licensed so that no one else could benefit from the same and the consumers would not have to deal with any likelihood of confusion.

Fan Fiction works are designed with the use of popular characters from other original works, which further catch the attention of the Trademark Dilution Laws. Even if there lies no possibility of confusion, there might be a claim for trademark dilution, covering fanfiction, but there should be an illicit noncommercial exploitation. With respect to fan creations, trademark claims are extremely weak if not entirely frivolous, as fan works do not use trademarked names, images, or characters as marks to identify the source of goods or services. Thus, no reasonable consumer could fail to distinguish a fan creation from an authorized work.²⁴⁵

To claim for trademark infringement a trademark owner must establish a likelihood of confusion, for which few factors need to be considered for fan fiction issues: I. Well known factor and distinctiveness of a mark.

²⁴²Fanfiction Dilemma: Is it Copyright Infringement or Fair

Use?,www.kentlaw.edu/perritt/courses/seminar/papers%202009%20fall/Susan%20Estes%20Seminar%20paper%20Final.pdf. 243 15 U.S.C. § 1125 (2010).

²⁴⁴Ivan Hoffman, The Protection of Fictional Characters, http://www.ivanhoffman.com/characters.html.

²⁴⁵Peter K. Yu, Intellectual Property and Information Wealth 261 (2006).

II. Comparing the similarity of the marks and goods and services of the owner and the alleged infringer. III. Whether there was any intention to deceive or to benefit from the already established goodwill on part of the alleged infringer; IV. Dependence on the consumers V. was there any kind of likelihood of confusion on part of consumers?²⁴⁶ Be that as it may, fanfiction creators most often do not have any *mala fide* intent to deceive the common public with regards to the established goodwill of the original and thus mostly do not lead to any conceivable disarray.

Dilution Caused By Fan Fiction

Fan fiction is not only likely a copyright violation unless it is a protected fair use, but may also constitute a trademark violation or dilution of a mark if the fan fiction tarnishes a mark.²⁴⁷ In most of the cases a trademark owner cannot win against a fan fiction creator, as the commercial factor in the statue favors the fan fiction creator.²⁴⁸ This was further observed in the case of *L.L. Bean, Inc. v. Drake Publishers, Inc*²⁴⁹that there lies no cause of action for trademark dilution matters, if there is a non-commercial use of trademark. This case was supported by the House Report to the Federal Trademark Dilution Act, that a tarnishment or dilution claim lies only when there is some form of commercial exploitation.²⁵⁰

Dilution involves diminution or "whittling away" or blurring²⁵¹ of the value of a name or mark's hold on the public mind. It works on the presumption that a recognized mark should be provided the protection given to property under the statues, and for any misappropriation claims the mandatory element of likelihood of confusion in the minds of consumers should not be relied upon.

Thus, this dilution theory helps to protect the distinguishable features of various recognized characters, but it has also been put to use in various infringement claims to disallow compensation.²⁵² The protection against trademark dilution is available only if certain factors exist:

- The alleged dilution causing mark is impossible to tell apart or similar to the original mark.
- There is an existing reputation and goodwill of the original mark.

²⁴⁶Legal Issues with Fan Fiction-Trademark Law, http://www.liquisearch.com/legal_issues_with_fan_fiction/trademark_law.

²⁴⁷ Deborah E. Bouchoux, *Intellectual Property: The Law of Trademarks, Copyrights, Patents, and Trade Secrets for the Paralegal* 201 (2008). ²⁴⁸15 U.S.C. § 1127 (2010).

²⁴⁹L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F. 2d, 26-33 (1st Cir. 1987).

²⁵⁰ H.R. Rep. No. 104-374, at 4 (1996), reprinted in 1996 U.S.C.C.A.N. 1029, 1030.

²⁵¹Original application artworks, Inc. v. Topps Chewing Gum Inc., 642 F. Supp. 1031, 1039 (N.D. Ga. 1986).

²⁵²Kenneth E. Spahn, *The Legal Protection of Fictional Characters*, University of Miami Entertainment & Sports Law Review 331 (Jan. 1, 1992), http://repository.law.miami.edu/umeslr/vol9/iss2/6.

- The alleged dilution causing mark has been used without any bonafide reason.
- The alleged dilution causing leads to some kind of inequitable gain deteriorates the distinctiveness and the reputation or goodwill of the already established mark.

Unlike in infringement of trademark in relation to similar goods or services where the onus to prove dissimilarity is on the defendants, in claims regarding dilution there lies no presumption.²⁵³ Where the defendant's mark is identical with the plaintiff's mark, the plaintiff has not to prove that the defendant's use is likely to deceive or cause confusion.²⁵⁴

Usage of existing trademark protected characters, themes and settings may lead to dilution. Any abuse or despicable utilization of a mark, notwithstanding when it doesn't make purchaser disarray, can diminish the mark's uniqueness and esteem as a source identifier, is the major idea on which trademark dilution relies upon. A trademark dilution case requires that the mark being referred to be popular all through general consumers and that the utilization of the mark makes a probability of either "obscuring" or "tarnishment." A probability of blurring and tarnishment happens when the utilization of the mark makes a relation that is probably going to hinder the goodwill and reputation of the renowned mark; when the utilization of the mark makes a connection that is probably going to hurt the notoriety of the acclaimed mark.

Though, trademark law protects marks which possess a certain amount of distinctiveness with respect to some goods and services, it has been on and off recognized by the courts that the marks that already have an established goodwill in the market, have to be protected against disparate goods and services, even though they might be totally unrelated.²⁵⁵

Trademark Dilution also involves the concept of unfair competition where ambiguity or mystification regarding source identification of a mark is the essential element. Although it still remains a intricate concept while talking about characters owned by someone else originally. Such concerns were raised in the Wind Done Gone Case. ²⁵⁶Unfair competition is a trespass, and no trespasser can justify by setting up the right of one to whom he is legal stranger. ²⁵⁷

²⁵³Elizabeth Verkley, *Intellectual property* 253 (1st ed., Eastern Book Company) (2015).

²⁵⁴Health and Glow Retailing (P) Ltd. v. Dhiren Krishna Paul, (2007) 25 PTC 474 (Mad).

²⁵⁵Health and Glow Retailing (P) Ltd. v. Dhiren Krishna Paul, (2007) 25 PTC 474 (Mad).

²⁵⁶Copyright in Fictional Characters: Can I Have Don Draper Make a Cameo Appearance in My Novel? (April 8, 2011),

http://www.rightsofwriters.com/2011/04/copyright-in-fictional-characters-can-i.html.

²⁵⁷National picture Theatres v. Foundation Film Corporation, 266 Fed. 208.

It was observed by the court in the *Dynamite Entertainment*case, that since the defendant's work resulted in an irretrievable loss to the plaintiff as he caused a trademark infringement and unfair competition to the plaintiff's comic series. In an earlier case, of *Universal City Studios, Inc.*²⁵⁸ the Supreme Court had stated that "every commercial use of copyrighted material is presumptively...unfair." Thus, it is observed that unfair competition clearly leads to infringement of intellectual property laws.

If a person uses a character which belongs to the original author and is exclusive and distinctive to him, it results in deception.²⁵⁹ It was further observed in a case concerning dilution that where a person uses trademark similar to another person's to dilute the trademark; such use does not cause confusion among consumers but takes advantage of the goodwill of another and constitutes an act of unfair competition.²⁶⁰

Fair Use and Descriptive and Normative Standards

The fair use standards under the Trademark Law differs entirely from the Copyright Fair Use standards, as in trademark statutes there exist two categories of fair use provisions: the descriptive and nominative standards.

Descriptive marks are allowed to be exploited in a descriptive manner i.e. to define the consumer's products and services and are further protected by the fair use standard under trademark law. In *U.S. Shoe Corp. v. Brown Group*²⁶¹ it was observed that even if an advertisement takes away the trademark of some other production company, it does not infringe the trademark law.

The nominative defense is used when a trademark owned by a person is used by another party in a different manner not covered under trademark law, such as parody, advertising, commentary. This is considered as a fair use as they will act in different markets. This doctrine evolved as a result of major landmark cases then converted into the statute by the addition of 15 U.S.C. § 1125, "which provides for exclusions that the following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection:(A)

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²⁵⁸Sony Corp. of America v. Universal City Studios Inc, 464 U.S. 417 (1984).

²⁵⁹DivyakantLahoti, Copyright and Trade Mark Protection in the Title of a Movie and Characters, [2010] PL June S-2.

²⁶⁰D.M. Entertainment Pvt. Ltd. v. Baby Gift House &Ors, CS (O.S.) No 893 of 2002.

²⁶¹U.S. Shoe Corp. v. Brown Group, 740 F.Supp. 196 (1990).

Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person's own goods or services."262

Fan fiction majorly involves the nominative fair use standard as the fan fiction works meet the three essential elements of nominative standard. Another major defense for trademark violation cases involving infringement and dilution is the Freedom of Speech. In the case of Mattel v. MCA Records²⁶³the court allowed the usage of the plaintiff's trademark as firstly the usage was necessary for the song and secondly there was no likelihood of confusion as to find out the source destination of the mark. The defense provided by the First Amendment is not available in cases where there some deception or confusion.²⁶⁴ Usually, cases involving this concept do not reach to the appellate reports, as there exists no evidence of deception or any likelihood of confusion from such uses, and thus the reparation cannot be ascertained.

I. **RIGHT TO PUBLICITY**

The publicity right is for the mostly characterized as an individual's entitlement to control and benefit from the business utilization of his/her name, resemblance and persona. Shielding the person from the loss of business value deriving out because of the misappropriation of an individual's personality for business reasons is the major concern of the law.²⁶⁵

The main objective of the law protecting publicity rights is to protect the celebrities' images from being commercially browbeaten even though there exists no confusion. Fan fictions can affect publicity rights mostly in a visual manner taking ideas from movies or TV shows. Though some problems occur in claiming infringement of publicity rights by fan fiction as according to the First Amendment, only commercial uses are involved, and most fan fictions are non-commercial in nature. A case involving transformative work and publicity rights was Winter v. DC Comics²⁶⁶ where it was observed that since the characters in the comic book were expressed in a new manner thus being transformative in nature, and thereby do not violate any celebrity's publicity rights.

Traditional privacy- based torts, rather than intellectual property claims, seem more naturally suited to non-commercial depictions of real people in possibly unflattering situations. Given that RPF is inherently presented as fictional, it might be extremely difficult for a celebrity to recover against a

²⁶²15 U.S.C. § 1125- False designations of origin, false descriptions, and dilution forbidden, Cornell University Law School, https://www.law.cornell.edu/uscode/text/15/1125.

²⁶³Mattel v. M.C.A Records, 296 F. 3d 894 (9th Cir. 2002).

²⁶⁴Meredith McCardle, Fan Fiction, Fandom, and Fanfare: What's All The Fuss?, 9 B.U. J. Sci. & Tech. L. 433, 459 (2003).

²⁶⁵Right of Publicity, http://corporate.findlaw.com/litigation-disputes/right-of-publicity.html.

²⁶⁶Winter v. D.C. Comics, 30 Cal. 4TH 881,890.

fan author for defamation, even if a story portrays him as a serial killer. Labeling a work as fiction will not save against defamation claims, because the audience will perceive the work as roman a clef and thus believe that the fictional work tells the truth about real people.²⁶⁷ Fans generally produce RPF for their own satisfaction. Fan fiction involves a concept of "actorfic" when the art or fiction depicts or makes reference to the actor or other performer, as opposed to the character they play, in the form previously referred to. There is however no availability of fair use doctrine for infringement of publicity rights by fan fiction. What has, however, likely been the reason there are no cases of celebrity's bringing ROP claims against fan fiction is the lack of provable damages, lack of evidence of use for commercial advantage, and the general lack of interest in this kind of fan art and fiction in mainstream fandom.²⁶⁸

CONCLUSION

From the analysis it can be concluded, the legal problem in case of fan-fiction arises because some of these characters are in themselves copyrightable independently of the original work, as soon as they are elevated from an idea to expression. However it does not tantamount to a conclusion that fan-fiction works cannot be based on such characters. Fan-fiction works can be protected by what is called as the *fair use defenses*.

These defenses are tailor made for secondary/ derivative works which involve reproduction or copying of the original creation. Since, for appropriation of characters, none of the above is required, that is why of these defenses lose their individuality to the most important fair-use factors i.e. transformativeness and market substitution. Since a sacrosanct aim of the copyright law is to protect the economic interests of the authors, market substitution is the kernel of fair use doctrine and since transformativeness has a direct relation with market substitution it becomes the most important defense. Since fan-fiction works are rarely commercial in nature the defense of commerciality weighs in favor of fan-authors. Yet non-commercial fan-fiction work would have to satiate the canon of transformativeness because even such works cannot be risked to affect the market of the original work. Most of the times fan-authors take the protagonists from the original work and that is why the amount and substantiality test weighs in favor of the original authors. However, if it is shown that the amount of work taken was necessary to fulfill the transformative purpose, then the factor

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²⁶⁷ Peter K. Yu, Intellectual Property and Information Wealth 261 (2006).

²⁶⁸ Marc Greenberg & Linda Kattwinke, Fan Fiction And Fan Art: Copyright And Trademark Issues Involving User-Generated Content, The State Bar Of California Intellectual Property Law Section, 6 (November 11, 2016), 07_Fan_Fiction_and_Fan_Art_-_Copyright_and_Trademark_Issues_Involving_User-Generated_Content0(1).pdf.

can be ignored. Therefore it must be ensured by the fan-authors that their works are transformative in nature. If it is so, then other factors weighing against them would be dwarfed.

Considering the above mentioned aspects of Intellectual Property Law, it is clear that fan fiction is not something which can act freely within the public domain. Even if these writers are able to strike down the web created by copyright law, there can be issues pertaining to trademark infringement or trademark dilution. Thus, fan fiction author should always keep tabs on any kind of concern arising out of trademark laws which could occur if any fanfic creator formulates a different story on characters already under the ambit of trademark protection. Such work could also lead to tarnishment, blurring or whittling away of the goodwill established by the original author relying on such characters, which leads to trademark dilution. But to win in cases of trademark tarnishment there should be a commercial use factor which is essential to be proved, and the unavailability of this in fan fiction cases, destroys the strength of the claim. Further, such dilution claims lead to the issue of unfair competition where the tarnishment causes a loss in the market value of the trademark owner. Another concept and rights which might get affected by fan fiction are publicity rights which mean that famous people or celebrities are given the right to bar anyone from commercially exploiting the image created by them and the personality they depict. Fan fiction is usually protected in this aspect as it is non-commercial in nature and mostly publicity rights deal with commercialization of the work. Thus, with respect to intellectual property rights pertaining to trademark and publicity of the celebrities fan fiction, being noncommercial in nature, do not seem to trespass these rights. Therefore, a harmonious balance has to be struck between fan-fiction works, which are an epitome of creativity, and the exclusivity granted to owners of intellectual property.

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EVOLVING ROLE OF EMPLOYMENT LEGAL LEADERSHIP IN CORPORATE GOVERNANCE AND MANAGEMENT

DrSagar Suresh Dhole²⁶⁹

INTRODUCTION

Corporate governance and Compliance of law are exclusively concomitant with each other, without such cohesive linkage even the finest entity will be struck by chaos. Corporate governance is the dynamic system of rules, practices and procedures through which an entity is directed and governed, encompassing its objectives to its ultimate result. Corporate governance embraces the progression through which corporations' objectives are set and effectively pursued in the context of the socio-economic, regulatory and market environment. Corporate governance essentially involves balancing the interests of an entity with its external and internal influencing factors. Since corporate governance also provides the disciplined framework for achieving objectives of entity, it encompasses sphere of management, from action plans and internal administration, performance to its objectives affecting its extant stakeholders. One of the most crucial stakeholder includes management and its employees. With the recent change in employment laws across global legal system, employees are characterized under two crucial set of categories one is white collar employees and other is blue collar. Government through various collaborative summit has taken initiates to protect legal rights of employees both white and blue collar, carving a new dawn for employees and shouldering decisive responsibilities on Employment legal leadership in management and Corporate Governance.

Thus elite endeavours are made in this paper to explain the need, role and responsibility, contribution and interpersonal trait of employment legal leadership in corporate governance. This article will also guide employment legal leadership to understand the expectations from purview of both Management and employees, Competencies, required Behavioural Indicators and leadership traits required to govern the management to attain its goals and prosperity.

- I) Understanding Corporate Governance and need for Employment legal leadership.
- II) Evolution of Employment legal leadership

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III) Role and responsibility, contribution and interpersonal trait, competency of employment legal leadership in corporate governance

IV) Conclusion

I.UNDERSTANDING CORPORATE GOVERNANCE AND NEED FOR EMPLOYMENT LEGAL LEADERSHIP.

Corporate governance is the dynamic mechanisms, processes and relations by which corporations are controlled and administered.²⁷⁰Governance structures and principles identify the distribution of rights and responsibilities among diversemembers in the entity (such as the board of directors, managers and employees, shareholders, creditors, auditors, regulators, and other stakeholders) and includes the systematic rules and procedures for making decisions in corporate affairs. Corporate governance includes the processes through which corporations' objectives are set and pursued in the context of the social, regulatory and market environment.²⁷¹ Governance mechanisms include monitoring the actions, policies, practices, and decisions of corporations, their agents, and affected stakeholders. Corporate governance practices are affected by attempts to align the interests of stakeholders.

The Securities and Exchange Board of India Committee on Corporate Governance defines corporate governance as the "acceptance by management of the inalienable rights of shareholders as the true owners of the corporation and of their own role as trustees on behalf of the shareholders. It is about commitment to values, about ethical business conduct and about making a distinction between personal & corporate funds in the management of a company.²⁷²

1) Principles for corporate governance

Contemporary discussions of corporate governance tend to refer to principles raised in three documents released since 1990: The Cadbury Report (UK, 1992), the Principles of Corporate Governance (OECD, 1999, 2004 and 2015), the Sarbanes-Oxley Act of 2002 (US, 2002). The Cadbury and Organisation for Economic Co-operation and Development (OECD) reports present general principles around which businesses are expected to operate to assure proper governance. The Sarbanes-Oxley Act, informally referred to as Sarbox or Sox, is an attempt by the federal

²⁷⁰Shailer, Greg. An Introduction to Corporate Governance in Australia, Pearson Education Australia, Sydney, 2004

²⁷¹Goergen, Marc, International Corporate Governance, (Prentice Hall 2012) ISBN 978-0-273-75125-0

²⁷²Report of the SEBI Committee on Corporate Governance, February 2003. Securities and Exchange Board of India Committee on Corporate Governance. Retrieved 2011-07-20.

- government in the United States to legislate several of the principles recommended in the Cadbury and OECD reports.
- a) Rights and equitable treatment of shareholders: [273] [274] Organizations should respect the rights of shareholders and help shareholders to exercise those rights. They can help shareholders exercise their rights by openly and effectively communicating information and by encouraging shareholders to participate in general meetings.²⁷⁵
- b) Interests of other stakeholders:²⁷⁶ Organizations should recognize that they have legal, contractual, social, and market driven obligations to non-shareholder stakeholders, including employees, investors, creditors, suppliers, local communities, customers, and policy makers.
- c) Role and responsibilities of the board:²⁷⁷ The board needs sufficient relevant skills and understanding to review and challenge management performance. It also needs adequate size and appropriate levels of independence and commitment.
- d) Integrity and ethical behavior: ²⁷⁸²⁷⁹ Integrity should be a fundamental requirement in choosing corporate officers and board members. Organizations should develop a code of conduct for their directors and executives that promotes ethical and responsible decision making.
- e) Disclosure and transparency:²⁸⁰²⁸¹ Organizations should clarify and make publicly known the roles and responsibilities of board and management to provide stakeholders with a level of accountability. They should also implement procedures to independently verify and safeguard the integrity of the company's financial reporting. Disclosure of material matters concerning the organization should be timely and balanced to ensure that all investors have access to clear, factual information.

Internal factors its stakeholders, such as shareholders, management and employees, customers, suppliers, investors, government and the community at large.

2) Codes and guidelines:

²⁷³Cadbury, Adrian, Report of the Committee on the Financial service Aspects of Corporate Governance, Gee, London, December, 1992, Sections 3.4

²⁷⁴Sarbanes-Oxley Act of 2002, US Congress, Title VIII

²⁷⁵OECD Principles of Corporate Governance, 2004, Articles II and III". OECD. Retrieved 2011-07-24.

²⁷⁶OECD Principles of Corporate Governance, 2004, Articles II and III". OECD. Retrieved 2011-07-24.

²⁷⁷OECD Principles of Corporate Governance, 2004, Preamble and Article IV" (PDF). OECD. Retrieved 2011-07-24.

²⁷⁸Cadbury, Adrian, Report of the Committee on the Financial Aspects of Corporate Governance, Gee, London, December, 1992, Sections 3.2, 3.3, 4.33, 4.51 and 7.4

²⁷⁹Sarbanes-Oxley Act of 2002, US Congress, Title I, 101(c)(1), Title VIII, and Title IX, 406

²⁸⁰OECD Principals of Corporate Governance, 2004, Articles I and V" (PDF). OECD. Retrieved 2011-07-24.

²⁸¹Cadbury, Adrian, Report of the Committee on the Financial Aspects of Corporate Governance, Gee, London, December, 1992, Section 3.2

Corporate governance principles and codes have been developed in different countries and issued from stock exchanges, corporations, institutional investors, or associations (institutes) of directors and managers with the support of governments and international organizations. As a rule, compliance with these governance recommendations is not mandated by law, although the codes linked to stock exchange listing requirements may have a coercive effect.

Organisation for Economic Co-operation and Development principles:

One of the most influential guidelines on corporate governance are the G20/OECD Principles of Corporate Governance, first published as the OECD Principles in 1999, revised in 2004 and revised again and endorsed by the G20 in 2015.282 The Principles often referenced by countries developing local codes or guidelines. Building on the work of the OECD, other international organizations, private sector associations and more than 20 national corporate governance codes formed the United Nations Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting (ISAR) to produce their Guidance on Good Practices in Corporate Governance Disclosure.²⁸³ This internationally agreed benchmark consists of more than fifty distinct disclosure items across five broad categories:²⁸⁴²⁸⁵

- i. Auditing
- Board and management structure and process EMENT STUDIES
- Corporate responsibility and compliance in organization
- Financial transparency and information disclosure iv.
- Ownership structure and exercise of control rights v.

The OECD Guidelines on Corporate Governance of State-Owned Enterprises are complementary to the G20/OECD Principles of Corporate Governance, providing guidance tailored to the corporate governance challenges unique to state-owned enterprises.

In India, Companies Act 2013 and Securities and Exchange Board of India lays down greater emphasis on governance through the board and board processes. Amendment dated 2014 focuses on adopting best practices on corporate governance and aims at making the corporate governance framework more effective.

²⁸²OECD Principles of Corporate Governance, 2004". OECD. Retrieved 2013-05-18.

²⁸³Guidance on Good Practices in Corporate Governance Disclosure

²⁸⁴TD/B/COM.2/ISAR/31

²⁸⁵International Standards of Accounting and Reporting, Corporate Governance Disclosure". United Nations Conference on Trade and Development. Archived from the original on 2008-11-23. Retrieved 2008-11-09.

CRUCIAL ROLE OF EMPLOYMENT LEGAL LEADERSHIP:

"The Holy Grail for the Legal Counsel is to have prodigious impact and influence – to be viewed as trusted business adviser whereby Legal Counsel is to be considered as Guardian Priest in the temple of Justice."-Hon'ble Suresh P. Dhole (Advocate Bombay High Court)

Once regarded purely as purveyors of practical advice, and as conduits between the business and the legal profession, Employment Legal Counsel today have emerged as critical strategic operators integral to the growth of businesses. Corporate expects General Counsel, Employment legal counselling. The modern Employment Legal Counsel is a commercially savvy legal professional who provides practical solutions and drives the business strategy of the company by managing legal, regulatory and reputational risks.

Developing effective strategies to tackle these multiple environments can make the difference between business success and failure. This is where Employment Legal Counselcomes into the picture. They are now directly involved in developing Employee-business strategy, brainstorming Management and working to meet required goals. In the face of the increasing complexity of legal compliance works caused by the nature of multijurisdictional legislations and regulations of new developments, innovation from different perspectives is required for our work. This includes legal advisory, commercial viability analysis, risk management and liaison with stakeholders and especially shareholders which set out the foundation for a multi-functional role of a Employment Legal Counsel. This is particularly true across Asia, where the legal system of almost every country are different, and in some cases underdeveloped, require the company and its legal personnel to adapt to keep up with rapid economic and social change.

The working relationship between Legal counsel and Corporate Governance is a critical one. Both roles have a charge to guide practices and make decisions to protect the legal, financial and reputational interests of the organisation. Legal Counsel's role is to provide proactive professional advice on critical strategic and legal issues and to support the organisation with finest suitable legal guidance. Corporate Governance does the same thing through business practices and processes, effectuating an inclusive, collaborative, safe, legal and efficient working environment. Alignment of Management and legal counsel is vital to protect the interests of the organisation and to ensure a collegial, collaborative working relationship.

"Discourage litigation. Persuade your neighbours to compromise whenever you can. As a peacemaker the Legal Counsel has superior opportunity of being anelegant corporate leader."

In the Corporate legal context, employment law includes a plethora of central and state specific employment laws, administrative regulations as well as judicial decisions. Applicability of the statutes is contingent on multiple factors including the industry, nature of work done by the employees, strength of the workforce, remuneration, duration of service, etc.

Within the businesses themselves a transference is also underway, a transference that is changing how legal departments are seen. Legal and compliance professionals are increasingly seen less as cost centers and more as business partners. This has required open discussion and strong links to the business.

As long as Employment Legal Counsel can demonstrate that costs related to manpower, external legal spend, training and automation are essential from a governance perspective to support the business and the board more effectively, senior management are much more receptive to any recommendations that Employment Legal Counsel might put forward. This is particularly important given that modern companies prefer to limit what they outsource to cut costs. For day-to-day operations, everything is done in-house. The senior managers of the business side of the company have an in-house legal counsel assigned to them to assist them through legal and compliance.

It's important for the Employment legal counsel to ask corporate executives to explain business goals related to incidental matter, and then explain to them, in simple terms, way ahead and the tolerance of risk for that venture with respect to employment labour laws with its repercussion.

II. ROLE AND RESPONSIBILITY, CONTRIBUTION AND INTERPERSONAL TRAIT, COMPETENCY OF EMPLOYMENT LEGAL LEADERSHIP IN CORPORATE GOVERNANCE

"The good lawyer is not the man who has an eye to every side and angle of contingency, and qualifies all his qualifications, but who throws himself on your part so heartily, that he can get you out of a scrape." – Ralph Waldo Emerson

General Roles and Responsibility of Employment Legal leadership Role could be framed as below:-

- Handling employment and labour laws matters for entities (all being private, limited companies, etc) and advice on Employment legal Strategy and Documentation
- Drafting and reviewing employment documentation including offer letters (Appointment letter and related documents) and employment agreements, confidentiality agreements, IP assignment agreements, non-

- compete and non-solicit agreements, consultancy agreements, secondment and deputation agreements, release agreements, recruitment agreements, documentation for employee events, adherence to anti-sexual harassment regulations including running committees, ensuring relevant filings are done in time etc.
- Drafting, reviewing, revising Employee Policy Handbooks, detailed clauses on standard employment
 practices including in relation to vacation / leave policies, prohibition of harassment, employment benefits,
 non-solicitation provisions, discipline and grievance, separation, confidential information, intellectual
 property rights, etc.
- Advice on the applicability of various (Employment Laws) labour Laws including local and International.
- Advise stakeholders etc. on applicability of Employment Laws, the obligations and compliances thereunder, and the consequences of non-compliance, issues related to provident fund contributions, payment of gratuity, payment of bonus, superannuation/retirement benefits, termination of employment, hours of work, leave/ holiday entitlement, employee health and safety regulations, discrimination and harassment issues, etc.
- Advise on structuring employee benefits and incentives, employee stock options, applicable labour laws, employment laws, clauses on confidentiality, data protection and ensuring that clauses are adequately drafted and risks are mitigated.
- Review, advise and documentation on matters relating to deputation, secondment or on employment, expatriate matters etc.
- Handling employment litigation cases including the litigation strategy, drafting and issuing legal notices, responding to legal notices, drafting claim documents, coordinating with local counsel to pursue litigation in the appropriate courts across India
- Responsible to ensure adherence to data privacy requirements including creation of policies, ensuring consents, adherence to data protection requirements in other jurisdictions.
- Monitoring of changes in the local-global legislation and strategizing compliance activities accordingly with stakeholders.
- Advice on crucial aspects of Expatriate Taxation, Social Security & Immigration for employees on deputation and assignment- Employment Legal leadership represent entities in employment related immigration matters, etc. Thus they need to advice to companies and employees who required to travel on deputation, secondment or on employment, advice on expatriate taxation etc.
- Conduct periodic Legal audits- The legal audit typically encompasses assessment of the level of compliance with applicable labour laws, taxation laws and corporate laws relating to hiring/ firing of employees, terms

of employment, employee compensation, stock option plans, to name a few. It also includes review of the employment-related documentation and the policy and procedure manual of the company, especially with respect to such issues as confidentiality, assignment of intellectual property and non-competition. The Employment legal Audit enables entity to suggest measures for legal process re-engineering.²⁸⁶

• Advice on Employment separation, Termination Downsizing, Transfer: Now adays Companies does not envisage an "at-will' employment relationship, thus is crucial advise on strategies for employment separation, termination, downsizing and reduction in force. This includes advising on applicable labour laws and employment laws, apart from guidance on regulatory requirements mandated for employers. Employment legal understand that the interest of the employer should be well secured in the event of termination of the employee's employment, for which purpose we ensure that clauses on confidentiality, post-employment non-solicitation, data protection are adequately drafted. In cases where there is a transfer of one undertaking to another by way of merger/ acquisition/sale of assets or otherwise, issues such as the transfer of employees of the transferor to the transferee creates certain legal complications. Employment legal needs to advise management on the various labour law implications arising out of such transactions and assist clients in structuring such transactions in a manner so that the transfer of employment complies with all statutory requirements.²⁸⁷

	AW & M.	4, 1	Jagement Studies
Proficiencies			Professional trait Indicators
Professional	Knowledge a	ınd	Comprehensive knowledge of labour laws and
Conduct			Compliances, Strong written and verbal skills,
			Handling litigations, dispute resolutions,
			contentious issues Strong strategic thinking
			ability, Self-motivated, initiative, and positive
			personality. Ability to work in Cross Functional
			teams, across multiple locations & cultures
Culture &	Conduct Buildi	ing	Aware of own impact Respectful attitude
Professional	Integrity Se	elf-	Professionalism Gets involved
Awareness			

²⁸⁶ Gillian Wong, "Gender Diversity in the Legal Profession – The Role of In-house Counsel" (2015) Portia 42 (Victorian Women Lawyers).

²⁸⁷http://www.nishithdesai.com/information/areas-of-service/practice/human-resources-law-employment-and-labour.html

Client-Compliance-Centricity & Business Acumen Commerciality Analytical Thinking & Problem Solving	Product / service knowledge Responsive, accountable Detail orientated Offers options/solutions
Innovation &Strategic Thinking; Change Decision Management& Judgment Agility	Stays up to date Thinks differently Demonstrates entrepreneurial thinking Translates strategies into plans Stays one step ahead Open to new ways of thinking
Leadership & Collaboration Managing Talent Recognizing and Motivating Supporting, Developing & Collaborating, Conflict Management	Stays up to date Open to new ways of thinking Sees when to escalate Provides logical rationales Shows initiative to develop Leverages resources
Communication & Connectivity Articulation & Receptiveness Impact Connectivity	
Communication & Influence Articulation and Receptiveness Impact Connectivity	Speaks/writes clearly Aware of non-verbal- behaviour Demonstrates active listening Conveys a positive image Shares information keeps people informed Builds strong relationships
Execution & Delivery Driving Performance Execution-Focus Planning & Organizing Adaptability	Maintains can-do attitude Sees tasks to completion Manages day-to day work Prioritizes/meets deadlines Asks questions to gain understanding Responds positively to feedback

CONCLUSION:

In past few decades, General Counsel and Employment Legal leadership role was considered as burgeoning in the corporate scheme and governance. They were the people who kept a check on the compliances and played a diminutive part in the matters related to strategy and risk for business. Over the years with emerging radiant facets of corporate laws and extensive business, Employment Legal leadership role took on more crucial and responsible roles in the corporation. This led to a significant transformation in the perspective of General Counsel and Employment Legal leadership role.

The market turmoil following the enhance of the IT effervesce in early 2000, the ensuing corporate scandals, ever-growing litigiousness and, most recently, the issues of employment laws, risk and liability raised by a worldwide economic crisis unparalleled for generations, together with the ongoing vulnerability of private and public finances and labour laws have all contributed to a renewed focus on the chief steward of the legal and ethical behaviour of a company. Therefore, it is no surprise that their expertise is required more extensively and at an earlier stage for critical management decisions. Anyone who has been observing the corporate world as an outsider can see that the role of General Counsel and Employment Legal leadership role has undergone an enormous transformative change. This transformation of the role has led to a revolution in roles, responsibilities and expectations. The General Counsel²⁸⁸ includes the Employment Legal role of today and is positioned within the highest ranks of senior management, while also serving as a legal advisor to the board of directors, management, employees and stakeholders. As Employment Legal Leadership is being vested with a weighty tome of (ever-growing) responsibilities, they are evolved as indispensable. With the laws and regulatory compliances becoming more complex and vital, companies face numerous risks and challenges. If one can manage the complexity and the risk, one may become a successful Employment Legal General Counsel, but in order to achieve that, they must first understand the business, environment and employment legal strategies. And once this is accomplished, the Employment Legal General Counsel will be able to become the expert of their evolving turf. The extent of the role and the influence of a particular General Counsel and Employment legal will depend not only on the individual's functional expertise, business acumen, and leadership skills, but also to a substantial degree on character the indisputable level of integrity, trustworthiness, and values that makes the General Counsel and Employment legal someone board members and top leaders alike naturally turn to for wise counsel.

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²⁸⁸Association of Corporate Counsel, Leading Practices in Law Department Diversity and Inclusion Initiatives: Company Best Practices (2013)

- "The supreme quality for leadership role is unquestionably integrity"
- -By Hon'ble Suresh P. Dhole (Advocate Bombay High Court, Director Amenity Exports Private limited, Chairman- of NGO Magnum Foundation)"

TRACING THE HISTORICAL EVOLUTION OF TRIBUNALS IN INDIA

Shreya Rajan²⁸⁹

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ABSTRACT

The essay studies the history of the tribunals in India, and the legal system that was adopted during various phases, i.e. during the Vedic Age, during the reign of the Mughals, during the British regime in India, and the post- Independence scenario. The essay contemplates finding not only the judicial or legal system that was followed, but also analyses the similar ground between all of the phases, and tends to gain a wider and better perspective of the historical background of the legal system that is followed in the country today.

INTRODUCTION

The judicial system that we know of today was not a sudden creation. It has primarily evolved from religious views and carries an imprint of different periods of Indian history, thus making its way over the secular legal

system as well as the common laws. India's legal history can be traced back to the Vedic ages, enriched by practitioners from various Hindu philosophical schools and later by Jains and Buddhists as well. It is also believed that there was some sort of legal system during the Bronze Age and the Indus Valley Civilization.

Secular law in India varied from ruler to ruler, and excellent secular court systems existed during the reign of the Mauryas and the Mughals. If it can be said so, the Indian legal system is mostly based on the evolution of the Hindu law, the Islamic law being relevant only during the middle ages.

ANCIENT LAW IN INDIA

HINDU LAW

Earlier, the term "Hindu" was an ethnic label, and the Persians and Greek used it to describe Indians. Later on, with the advent of the British in the 19th century, the term came to be used as a religious label, distinguishing the Hindu religious group from Islam and Christianity.

International Journal of

The Hindu Law can be categorised into three, namely —

1. Classical Hindu Law hed by Agradoot Web Technologies LLP [188N-2455-277]

It consists of the legal practices connected with Vedic traditions. It refers to any and every law that is based on a certain scheme of values or morals, history, society, etc. It was a unique system based on religion, and, even though it appeared to be centralized, with the Vedic scholars playing a major role, it was in reality a decentralized system. The laws were decentralized and practices varied between different communities, locations, etc.

The main elements of Classical Hindu Law were:

- a. Dharma- Dharma in Sanskrit means 'righteousness, duty and law'. It has a much wider meaning than what is known today. It embraces both legal as well as religious duties. Hence, it includes not only laws and legal procedures but also the guidance to lead one's life. The Vedas, Smritis, and Achara are the main sources of Dharma.
- b. Dharmashastra- An example of Smritis, these are written Sanskrit legal and religious texts. The Dharmashastra consists of three topics: the achara (duties and liabilities), vyavahara (morals or laws and procedures), and prayaschitta (punishments and rewards). The

Dharmashastra uses the textual hermeneutics known as 'Purva Mimamsa' (one of the six orthodox Hinduism schools for the critical investigation on Dharma) to interpret its texts. The modern laws of 'Interpretation of Statutes' can also be said to be a form of textual hermeneutics.

2. Anglo- Hindu Law

This was evolved from classical Hindu law during the British rule in India from 1772 to 1947. The Anglo- Hindu Law can be divided into two phases, first, when the British ruled over the state of Bengal, and second, when the British ruled over the entire nation:

- a. The First Phase (1772-1864) During this phase, the three main developments took place in the legal system. First, the compilation of the Dharmashastra and its translation by the British administrator- scholars. The rules from these texts 0were then applied to the Hindus so as to expand the British rule in India. Second, the court pandits were used in the British courts to aid in the interpretation of Dharmashastras and implementation of the Classical Hindu Law. Third, the court pandits became inessential due to development of case laws of precedent value.
- b. The Second Phase (1864-1947) This phase witnessed the departure of the legal system from the Dharmashastra tradition. The system of court pandits had been done away with, this brought up problems in implementing the Classical Hindu Law. The British then started legislating and codifying various laws in the form of English Legal System, or what is the modern form of law. They also compiled various customary practices in different communities and use them as consultative resources for the courts.

3. Modern Hindu Law

The British adopted the English Legal System and replaced the existing Indian laws, except for family or personal laws, like matters relating to marriage, inheritance, etc. The family and personal law applicable to Hindus is the Modern Hindu Law. During the early 1950s, few parliamentarians suggested for uniform family laws for all the communities, much like today's Uniform Civil Code. However, the proposal did not get unanimous support, and hence, was turned down.

In 1955-1956, four major legislations governing family and personal matters of the Hindu community were passed by the Parliament, the same being- The Hindu Marriage Act (1955), The Hindu Succession Act (1956), The Hindu Minority and Guardianship Act (1956), and The Hindu Adoption and Maintenance Act (1956).

ISLAMIC LAW

The first Muslim settlers arrived in India in the early 7th century AD, followed by Arab merchants arriving at the Malabar coast in South India. The Turkish invasion in the 12th century also brought Islam to India. Later, the advent of Mughal Empire in the mid-16th century introduced the Mughal judicial and administrative system in India, which was later on replaced by the English Legal System in 1772, when the British adopted rules for the administration of justice in Bengal.

ADMINISTRATION OF JUSTICE IN BRITISH INDIA

The British rule in India is responsible for the establishment of common law in India. The introduction of the British Common Law can be traced back to the arrival and expansion of the East India Company in the early 17th century. The British had gained foothold in India in 1612, when the Mughal emperor Jahangir granted it the rights to establish a factory in Surat. In 1640, the East India Company established its second factory in Madras (now Chennai), and in the year 1668, the Bombay Island that was gifted to England as dowry in the marriage of Catherine of Braganza to Charles II, was leased to the Company.

In the earlier days, the British Crown, through a series of Charters, established judicial system in the Presidency towns of Calcutta, Bombay, and Madras for the administration of justice within the establishments of the East India Company. The Courts of Bombay and Madras were known as the Admiralty Courts, while the Court of Calcutta was known as the Collector's Court. These Courts had jurisdiction for both criminal and civil matters and derived their authority from the East India Company, and not from the Crown.

The Charter of 1726 issued by King George I forms the basis of the establishment of Crown's Court in India. The British East India Company requested King George to issue a Charter by which special powers could be granted to the Company. This was followed by the establishment of Mayor's Court in the Presidency towns. These Courts were not courts of the Company, but of the King of England. Mayor's Courts superseded all existing courts and were authorized to try, hear, and determine all civil suits, questions, and pleas arising within the three towns. Each court consisted of a Mayor and nine Aldermen, seven of whom, including the Mayor, had to be naturally born British men. Aldermen were elected from among the leading inhabitants of the settlement to hold positions for life, while the Mayor was elected from

the Aldermen. These Courts followed the English Law, known as the *lex loci* of the settlement. The inhabitants were thus, irrespective of their nationality, governed by English laws.

The Charter of 1726, however, did not specify the law to be applied by the Mayor's Courts, and merely stated that the court was required to accord judgement and sentence according to justice and right. It indirectly brought into application the common law as well as the statutory laws of England to the three British settlements in India. Appeals from the Mayor's courts were made to the Court of Governor and the Council. The Governor and the five Council members were appointed as the Justices of Peace and constituted a criminal court of *Oyer* and *Terminer* (it is a partial translation of the Anglo- French *oyeretterminer*, meaning 'to hear and determine'). The Court of the Governor and the Council were required to meet four times a year for the trial of offences, except that of high treason. A second appeal in cases valued at 1,000 pagodas or more were available to the King-in-council in England.

The Mayor's Courts, however, had certain drawbacks. First, there was no clarity regarding the applicable law, although the Company made considerable efforts to apply the English law. Second, the jurisdiction of Mayor's courts over natives was very uncertain. Many a times, the Mayor's courts irked the natives by applying the English law and completely disregarding their personal laws or customs.

In 1746, the French occupied Madras, following which the Mayor's Court was suspended in the city. However, the French surrendered Madras to the British after the conclusion of the peace treaty of Aix-la-Chapelle in 1749. The Company grabbed this opportunity and requested the King to remove the difficulties earlier faced by Mayor's Courts. King George II issued the Charter of 1753, by virtue of which the Mayor's courts were then re-established in the Presidency towns with a few changes. The Mayor was to be now elected by the Governor and Council, and not by the Aldermen, so as to avoid any dispute. Furthermore, suits and other actions by the natives were expressly excluded from the jurisdiction of Mayor's Courts, and the jurisdiction of these courts was restricted to suits of value of over five (5) pagodas.

Mayor's Courts were established mainly to decide cases of British natives or other foreigners. This meant that different courts existed to decide the cases of natives (Indians) in all the three settlements. Choultry Courts existed in Madras to hear cases upto the value of 20 pagodas. These courts mostly heard petty cases, and continued till the year 1800. Calcutta saw the establishment of Zamindar's Courts and were administered by the East India Company. These courts heard cases on civil matters such as matters involving land, property, and personal wrongs. However, disputes cropped up between the Zamindar's Courts and the Mayor's Courts relating to jurisdiction on certain civil matters. Justices of Peace were

appointed in Calcutta to decide criminal cases. The presidency town of Bombay did not see the establishment of any separate court for the natives. This was because the Company claimed complete sovereignty over the island, and therefore, it did not treat the natives differently.

REGULATING ACT, 1773

This Act was a landmark towards India's constitutional development. Judicial functions of the East India Company expanded post its victory in the Battle of Plassey in 1757. This led to establishment of the Company rule in Bengal. After the battle, the real authority of the Nawabs of Bengal passed to the British. In 1765, Robert Clive secured the Diwani of Bengal, Bihar, and Orissa from Emperor Shah Alam in perpetuity for the East India Company, for a payment of Rs 26 lakhs. This meant that the Company had now become the virtual sovereign and master of these territories. At that time, the Nawab, who was also the Subedar of Bengal, was the representative of the Mughal Emperor. The Nawab performed two main functions- collection of revenue and civil justice (Diwani), and, military power and criminal justice (Nizamat). The East India Company obtained the Diwani rights from the Mughal Emperor, and the Nizamat rights were given to the Company by the Nawab. The power of administration of criminal justice was left with the Nawab.

Even after its success in Bengal, the East India Company was deep in debt, as it had to pay significant money to the British Government to maintain its monopoly in India. The affairs of the Company were poorly managed, and in 1773, Lord North, the then Prime Minister of England, decided to introduce some form of legal government to manage the possessions of the East India Company in India. This led to the British Parliament passing the Regulating Act in 1773. The Act was passed to control the management of the East India Company in India, and to bring it under the direct hands of the King. The Act appointed a Governor General and four councilors at Fort William (Calcutta). The presidencies of Bombay and Madras were made sub-ordinate to that of Calcutta. This was the first attempt of the British Parliament to construct a regular government for India and intervene in the control of the Company's administration. It was also a major step towards creating a separate and independent judicial organ under the direct control of the King of England, who also appointed the Chief Justice and other *puisne* judges. The Act also empowered the Crown to establish, by virtue of Charter, a Supreme Court of Judicature at Fort William.

On 26th March 1774, a Letters Patent was issued to establish the Supreme Court which was to consist of a Chief Justice and three other junior judges being barristers of at least five years of standing. The first Chief Justice to be appointed by the King was Sir Elijah Impey, who held the post till 1787. The power to

administer justice and equity was an important feature of the Crowns Court in Britain and was passed to the Supreme Court and the subsequent Charter High Courts as well. This practice continues to have influence in India even today. The Supreme Court was a court of record and had powers and authorities similar to the King's Bench in England. The Court had jurisdiction not only over civil and criminal matters, but also on matters of admiralty and ecclesiastical matters. It had the power to issue writs of mandamus and certiorari, much like the present day High Courts and the Supreme Court, and also the power of 'Oyer and Terminer'. Appeals from this court were to be made to the King-in-council in England.

However, the Charter of 1774 did not set forth the bounds of jurisdiction of the Supreme Court, and the Court often overstepped the limits of its jurisdiction. Following this, an era of confusion commenced in Bengal, described by Macaulay as the 'reign of terror'. The power and jurisdiction of the Court with respect to the natives was controversial. The Act of Settlement (1781) partly resolved these issues by taking away the application of these laws to the Hindus and the Muslims in contract matters and other matters enumerated in the statutes.

The Regulating Act, however, came with several defects. It did not lay down the provisions as to the relationship between the Supreme Court and the Company's Courts. The Act made the jurisdiction of the Supreme Court partially concurrent with that of the Adalats. On several occasions, the Governor General and the Council supported the Adalats, leading to friction between the Supreme Court and the Council. Also, the system of checks and balances made the Governor General powerless before his Councils and the Executive powerless before the Supreme Court. Also, no such courts were established in Madras or Bombay, in fact, an Act of the British Parliament made in 1797 abolished the Mayor's Courts in both these towns. The same Act authorized the Crown to issue a Charter to establish a Recorder's Court in Madras, comprising of a Mayor, three Aldermen, and a Recorder. The Recorder was the President of the Court, and was appointed by His Majesty from lawyers having at least five years of experience at the Bar.

Soon, Supreme Courts were also established in Madras and Bombay in the reign of King George III. By virtue of an Act passed in 1800 by the British Parliament, Recorder's Court at Madras was replaced by the Supreme Court having the same jurisdiction and restrictions as the Supreme Court in Bengal. The Recorder's Court in Bombay continued to function until 1823, after which it was replaced by the Supreme Court in the same manner as in Madras.

LAW REFORMS IN BRITISH INDIA

During the late 18th and early 19th century, Indian cities were poorly administered and policed. Warren Hastings had attempted to make changes in policing and administration of justice, but with little success. Later, William Jones, an expert at language and legal system in ancient India, translated the existing Hindu and Muslim penal codes to English with the limited objective that these principles could be evaluated and applied by the English speaking judges. Lord Cornwallis realized the importance of police reforms. In 1787, he gave limited judicial powers to the Company's revenue collectors, who had already served as civil judges. These collectors were divested of judicial and magisterial powers, and entrusted with the duty of administration of revenues.

In 1790, the Company took over the administration of justice from Nawab, and Cornwallis introduced a system of circuit courts with superior court that met at Calcutta and had the power to review decisions of the circuit courts. Most of the judges, however, were non- native. Lord Cornwallis had also made efforts to harmonize different codes existing during that time, which later came to be known as the Cornwallis Code. However, Lord Cornwallis' reforms led to discrimination in the country through judicial reforms. In 1791, he issued an order that any person being a son of a native Indian shall not be appointed to this court of employment in civil, military, or marine services of the East India Company. This led to the development of an elite class of English judges in India.

CHARTER OF 1861

Following the First War of Independence in 1857, the control of East India Company over the Indian territories passed to the British Crown. The Government of India Act 1858 authorized the Crown to take over the administration of all territories from the East India Company. It also vested the power to appoint the Governor General in the hands of the Crown. Several other changes were made, along with the passing of The Indian High Courts Act and The Indian Councils Act by the Parliament in 1861. This gave Her Majesty the power to issue Letters Patent establishing High Courts in the three Presidency towns. Under the provisions of the former Act, the Supreme Court of Judicature and the SadarDiwaniAdalats were abolished, and High Courts were established in the three Presidency towns. The Chartered High Courts remained the highest Courts in India till the establishment of Federal Court of India by the Government of India Act, 1935. Section 16 (a) reserved the power to Her Majesty to constitute similar High Courts in other territories not within the local jurisdiction of any of the three proposed High Courts. The Indian Councils Act gave power to the Governor General to create legislatures in various provinces.

Initially, the Chartered High Courts administered jurisdiction only within the Presidency towns, but later, its powers extended to the entire Presidency. These courts had the power to issue writs, which were the normal method of commencing a local action in King's Court such as High Courts. The power to issue the writ of habeas corpus was curtailed by Section 491 of the Code of Criminal Procedure 1898, but was later restored by the Government of India Act 1935. Also, during this period, the Privy Council acted as the highest court of appeal, and served as a bridge between the Indian and English legal systems. The Council has rendered several landmark decisions, many of which influenced the evolution of law in India. However, post-independence the jurisdiction of the Privy Council was abolished by the Abolition of the Privy Council Jurisdiction Act, 1949.

ESTABLISHMENT OF FEDERAL COURT

By virtue of the Government of India Act, 1935 the structure of Indian government changed from 'unitary' to 'federal'. The distribution of powers between the Centre and the Provinces required the balance to avoid disputes which would have arisen between the constituent units and the Federation. The federal system demanded the establishment of a Federal Court which would have dominance over the States as well as the Provinces.

Section 200 of the Government of India Act, 1935 provided for the establishment of Federal Court at New Delhi. An appeal from any judgment, decree, or order could be made before the Federal Court if the High Court certified that the case involved a substantial question of law. This Court also had appellate and advisory jurisdiction. The appellate jurisdiction was extended to civil and criminal matters. The Federal Court was empowered to give advisory opinion to the Governor General over matters of public importance. The Supreme Court of India was also established on the same principles and jurisdiction as the Federal Court.

ESTABLISHMENT OF OTHER HIGH COURTS AND SUPREME COURT OF INDIA: POST INDEPENDENCE

The Constitution of India came into being on 26th January 1950. The transformation from the Federal Court to the Supreme Court of India (SCI) was unseamed. Justice Kania became the first Chief Justice India. As per the original Indian Constitution, the Supreme Court comprised of a Chief Justice and seven other *puisne*judges. The number of judges could be increased by the Parliament, and was subsequently increased to 30 judges by virtue of the Supreme Court (Number of Judges) Amendment Act, 2008.

The Supreme Court has a threefold jurisdiction. As a federal court, it has the exclusive jurisdiction to decide matters of dispute between States, the Union and States, and the Union and State(s) on one side and one or more States. As an appellate court as well as an advisory court, it can hear appeals from the State High Courts over civil, criminal, and constitutional matters. The Court has a very wide appellate jurisdiction and can even grant special leave to appeal, under Article 126 of the Constitution, from any judgement, decree, sentence, or order passed by any court or tribunal within the territory of India. The Supreme Court also has the jurisdiction to hear statutory appeals provided under separate legislations. Also, the Supreme Court exercises advisory jurisdiction over matters specifically referred to it by the President of India under Article 143 of the Constitution. Furthermore, it also has a concurrent original jurisdiction along with the High Courts, that of enforcement of fundamental rights under Article 32 of the Indian Constitution.

The jurisdiction of the Supreme Court can be enlarged by the Parliament of India. The Court enjoys the highest jurisdiction in the country, as a result of which any law declared by the SCI is binding on all the courts within the territory of India. Not only this, the Supreme Court of India also has the authority to exercise several other judicial powers. It has the power of judicial review, and can strike down or invalidate any legislative or executive action that is in contrast to any of the provisions of the Indian Constitution. The Court has the responsibility to administer justice, equity, integrity, dignity and to enforce the ideals of democracy and values laid down in the Constitution of India.

The High Courts in various states serve as the apex judicial body in each State, presently there being a total of 24 such Courts in India. The High Courts entertain appeals from the lower courts and writ petitions under Article 226 and 227 of the Constitution. Any civil or criminal matter that does not fall under the jurisdiction of any of the subordinate courts of a particular State can be heard by the High Court of that State. Also, as per the laws laid down by the legislature, certain matters falling under the original jurisdiction of the High Court are heard and adjudged by such courts.

CONCLUSION

We can, therefore, trace the history of the legal system in the country back to the Vedic ages. One aspect that we find similar in all the phase is the system of reward and punishment, and duties and liabilities of the citizens.

Also, since the Indian judicial system is based mostly on what was left in the country by the British, the legal system that we follow today is very common to what was followed earlier, as well as the current system of judiciary in Britain, with changes only in the authorities and the powers of the institutions.

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TO FIND OR BE FORGOTTEN: THE CONCEPT OF CTRL + Z IN THE DIGITAL AGE

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ABSTRACT INTERNATIONAL JOURNAL OF

The aim of this paper is to study and evaluate the right to be forgotten and its effects in the digital era. The right to be forgotten is the concept where individuals have the right to request the removal of their personal information from the Internet. The paper initially develops on the idea by mentioning about the origin and development of the right to be forgotten and discusses about the famous case which led to the uplifting of the consciousness of the right in the internet world. Then it goes on to discuss the recognition of the right in various countries and evaluates how it has different meanings and ways of implementation at different places. It then discusses about the tug of war between the right to privacy and freedom of expression and attempts to point out its relation with the right to be forgotten. Further, we discuss about the advantages and disadvantages of the recognition of the right, focusing on how it has led to the enhancement of the digital era and where it lacks in structure. We then attempt to draw suitable conclusions regarding the current status of the right and thus try to suggest measures to improve its effect and implementation.

Keywords: right to be forgotten, right to oblivion, privacy, free speech, freedom of expression

INTRODUCTION

Have you ever strived to have some information about yourself deleted from the web? How successful were you? Perhaps you've got rid of Facebook or sworn off all social networking completely.

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The right to be forgotten can be understood as a concept that individuals have the civil right to request their personal information be removed from the Internet. It is essentially the right of individuals to have their data fully removed when it is no longer needed for the purposes for which it was collected.²⁹¹ The issue has come into light from desires of individuals to ascertain the development of their life in an autonomous way, without being periodically or perpetually stigmatized as a consequence of a particular action executed in the past.²⁹²

In what could be a landmark case for internet privacy, the ECJ (European Court of Justice) held that search engine Google was subject to EU (European Union) data protection law, it had responsibilities under that law, and thus it was required to remove search links when requests from citizens to do so met certain criteria. This decision marks the origin of the 'right to be forgotten'. In May 2014, a man from Spain failed to secure the deletion of an auction notice of his repossessed home dating from 1998 on the website of a mass circulation newspaper where he asked Google to remove links to the newspaper article, claiming there was no legitimate reason for the outdated information to remain accessible online. The European Court of Justice ruled that under European law, search engines are data controllers so they must consider all requests to stop returning irrelevant or obsolete information in search queries. ²⁹⁴

The EU Court of Justice efficiently ruled that individual privacy rights is a decisive overriding factor over almost all other considerations when it comes to personal data or reputation. This was the formal establishment of a 'right to be forgotten' in Europe. According to the judgement of the Court, individuals have a right to control their private data, especially if they are not public figures. These days, more and more individuals are claiming that they have a 'right to be forgotten', remarkably when the internet pulls up personal information which may appear one-sided or unfair. 96

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²⁹¹ European Commission Press Release Database, Data Protection Reforms- Frequently asked questions (4 November 2014), available at http://europa.eu/rapid/press-release_MEMO-10-542_en.htm.

²⁹²Mantelero, Alessandro, *The EU Proposal for a General Data Protection Regulation and the roots of the 'right to be forgotten'*. Computer Law & Security Review. (2013). 29 (3): 229–235. doi:10.1016/j.clsr.2013.03.010.

²⁹³Google Spain SL and Google Inc v. AEPD and Mario Costeja Gonzalez, C-131/12 (2014, European Court of Justice). (and usually known as 'Google Spain')

²⁹⁴ Margaret Rouse, Right to be Forgotten, Tech Target Search Content Management, (June 2014) available at http://searchcontentmanagement.techtarget.com/definition/The-right-to-be-forgotten.

²⁹⁵ Greg Sterling, *The* "Right To Be Forgotten" – EU Court Gives People Ability To Delete Their Google Search Results, Search Engine Land (May 13, 2014) available at, http://searchengineland.com/right-forgotten-eu-court-grants-people-control-control-search-191198. ²⁹⁶Right to be forgotten: have you ever wanted something deleted from the web?, The Guardian, (13 May 2014), available at, https://www.theguardian.com/technology/2014/may/13/right-to-be-forgotten-have-you-ever-wanted-something-deleted-from-the-web-google.

While the right to be forgotten aims to support personal privacy, the concern is that it conflicts with the open nature of the Web and the free flow of information. The interests of one individual in removing information from the Web may conflict with the interests of another individual or group.²⁹⁷

ORIGIN & DEVELOPMENT OF THE RIGHT

In the last few decades there has been a rapid growth and progress of human existence particularly in terms of new technological devices as well as expansion of internet. As a consequence several new concepts such as electronic surveillance, virtual persons, virtual currency etc have emerged. Moreover, there has been a rise in the debates including the liability of service providers, access to internet as a human right, efficacy in protecting rights with respect to clash between the right to privacy and freedom of speech & expression. The right to be forgotten represents a natural step further in a rapidly digitalizing era that brings upon new challenges that change the way people perceive the world they live in.

The rationale behind this right was to allow criminal offenders who have already served their sentence to object to the publication of information regarding their crime and conviction. This was done to ease their process of social integration.²⁹⁸ The notion of 'the right to be forgotten' is derived from numerous pre-existing European ideals. There is an age-old belief that after a certain period of time, many criminal convictions are 'spent', meaning that information regarding said person should not be taken into account when obtaining insurance or seeking employment. Similarly, France values this right - *le droit d'oubli* (a right to oblivion).²⁹⁹ The French right to oblivion recognised the right of individuals to demand the erasure of personal data when the data is no longer relevant. It was also used as a way to ensure rehabilitation as a component of justice.

This right has been conceived as a natural reaction to the new challenges posed to maintaining an adequate balance between different interests: consumer's rights versus businesses' rights; individual's rights versus governments' rights; Internet user's rights versus service provider's rights. Governments and courts together have reacted promptly trying to find solutions to these newly born problems, sometimes successfully, but

²⁹⁷ Supra 4

²⁹⁸Kasturika, "The Right to be Forgotten": Balancing Personal Privacy with the Public's right to access Information, CCG NLU Delhi, (12 October 2016) available athttps://ccgnludelhi.wordpress.com/2016/10/12/the-right-to-be-forgotten-balancing-personal-privacy-with-the-publics-right-to-access-information/.

²⁹⁹ Charles Arthur, Explaining the 'right to be forgotten' – the newest cultural shibboleth, The Guardian, (14 May 2014) available at https://www.theguardian.com/technology/2014/may/14/explainer-right-to-be-forgotten-the-newest-cultural-shibboleth.

frequently lacking a clear direction and awareness of what is actually happening, and what its implications are. This led to several other problems such as a lack of uniformity in court's decisions, different and even contrasting views adopted by States, and a general lack of predictability for both companies and users.³⁰⁰

RECOGNITION OF THE RIGHT

EUROPEAN UNION

Pursuant to the judgment in the Google Spain case, the European Union adopted the Data Protection Reforms which includes the right to be forgotten as an essential right under Article 17 of the Data Protection Regulations³⁰¹. It sets out the conditions under which either the erasure or restriction of processing of data may be sought. The Regulation also provides that this right may be exercised only against 'data controllers'. A data controller is defined as an entity that "determines the purposes and means of the processing of personal data". However, it remains unclear as to what entities will be covered under the definition of data controllers.

The Google Spain case lays down that search engines are viewed as data controllers, but other websites including social media platforms such as Facebook, Twitter etc are not clear cases. These websites may be more fairly seen as data hosts or processors, where the individual user is the controller, deciding what information to post and how and when to delete it. Here, the extent to which the website manages the data posted may be relevant in determining its role under the Regulation.³⁰³

GERMANY

In Germany, a version of the right to be forgotten has been recognized as an extensive interpretation of the "right to personality", referring most often to the cases of convicted criminals whose reintegration prevails over the interest of the society to be informed about one's criminal history. The right is thus used mostly in connection with potential restrictions on mentioning again events that happened in the past, but does not

³⁰⁰IoanaStuparia, Defining the Right to be Forgotten. A Comparitive Analysis Between the EU and the US, Central European University, (March 27, 2015) available at www.etd.ceu.hu/2015/stupariu_ioana.pdf.

³⁰¹Draft Regulation XXX/2016, of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), annex, 102-05, *available at* http://static.ow.ly/docs/Regulation_consolidated_text_EN_47uW.pdf.

 $^{^{302}}Id$ at pg 79

³⁰³ Daphne Keller, *The Final Draft of Europe's "Right to be Forgotten" Law,* The Center for Internet and Society, Stanford Law School (December 17, 2015) available at http://cyberlaw.stanford.edu/blog/2015/12/final-draft-europes-right-be-forgotten-law.

interfere with the legality of the articles that have already been published, which remain available and, as a consequence, could be found in the list of results displayed by search engines.³⁰⁴ This shows how courts have vigilantly balanced the losses caused by censorship of the press and the harms caused to individuals by publishing such sensitive information, in this case the latter prevailing as it is considered more impactful.

INDIA

The data protection regime and data privacy laws of India are not comprehensive and dynamic enough to respond to technological advances in the modes of collection, transfer and use of personal information. The Information Technology Act, 2000 (IT Act) and the rules framed under the Act make up the primary legal framework that governs this subject. The Delhi High Court is currently hearing a matter³⁰⁵ where the petitioner has requested for the removal of a judgment involving his mother and wife from an online case database. The petitioner claims that the appearance of his name in the judgment is causing prejudice to him and affecting his employment opportunities.³⁰⁶

Considering that privacy is a recognized fundamental right in India³⁰⁷, and based on the provisions on the IT Act and rules framed thereunder, it could be concluded that in a similar situation, Indian courts are also likely to follow the line of thinking followed by the EU Court. Individuals will thus get the right to seek removal of irrelevant and incorrect personal data from the search results.³⁰⁸

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Italy and Spain already had a recognized right to be forgotten.

Italy's "dirittoall'oblio" was already mentioned in Italian case law in 1998. In a case judged by the Italian Supreme Court³⁰⁹, the Italian Data Protection Agency (*Garante per la pratezionedeidatipersonali*) used this in its

³⁰⁴Joris van Hoboken, 'The Proposed Right to be Forgotten Seen from the Perspective of our Right to Remember, Freedom of Expression Safeguards in a Converging Information Environment' (May 2013) Prepared for the EU Commissions, available at http://www.law.nyu.edu/sites/default/files/upload_documents/VanHoboken_RightTo%20Be%20Forgotten_Manuscript_2013. pdf.

³⁰⁵LakshVir Singh Yadav vs. Union of India, WP(C) 1021/2016

³⁰⁶ Supra 8.

³⁰⁷ Article 21 of the Indian Constitution 'Right to life and personal liberty'

Rajesh Vellakkat, *The Right to be Forgotten*, Business Standard (June 30, 2014) available at http://www.business-standard.com/article/beyond-business/the-right-to-be-forgotten-114063000528_1.html.

³⁰⁹ Italian Supreme Court [1998] 3679

later argumentation for a right to be forgotten, justifying it by invoking the "character of the Internet, on which information can easily be found with search engines".³¹⁰

Spain's version of the right, "el derecho al olvido"³¹¹, has been strongly promoted for by the Spanish Data Protection Agency (AEPD). In 2011, Spain has introduced a new regulation enhancing the right to be forgotten giving the AEPD the competence to evaluate complaints from citizens when they considered their privacy was being harmed.³¹²

UNITED STATES

In America, transparency, the right of free speech according to the First Amendment, and the right to know have typically been favoured over the elimination of truthfully published information regarding individuals and corporations. The term 'right to be forgotten' is a relatively new idea.³¹³ US privacy protection is scattered and spread across a variety of state and federal laws that typically apply to specific groups of people.³¹⁴

Reflection of the right to be forgotten can be seen in US case laws, specifically in *Melvin v. Reid³¹⁵* where the Court supported the claims for privacy invasion based on reference to out-of-date information. In this case, an ex-prostitute was charged with murder and then acquitted; she subsequently tried to assume a quiet and anonymous place in society. However, a film 'The Red Kimono' in 1925 revealed her history, and she sued the producer. The court reasoned that "any person living a life of rectitude has that right to happiness which includes a freedom from unnecessary attacks on his character, social standing or reputation." Bankruptcy laws in US are incorporated with provisions related to the principle of "legal forgiveness". For example The Fair Credit Reporting Act is aimed at protecting consumer's reputation, preventing the spearheading of false information or illegitimate infringement on consumer's right to privacy³¹⁸.

³¹⁰ Supra 14

³¹¹ The concept related to Habeas Data and the protection of personal data, the right to honor, privacy and image.

³¹² Meg Leta Ambrose, JefAusloos, 'The Right to be Forgotten across the Pond' (2013) Journal of Information Policy, Penn State University Press, available at http://www.jstor.org/stable/10.5325/jinfopoli.3.2013.0001.

³¹³ Bernard Keenan, 'France takes the Right to be Forgotten global' The LSE Cyberlaw Student Blog (27th July, 2016) available at http://lsecyberlaw.blogspot.in/2016/07/france-takes-right-to-be-forgotten.html?view=flipcard.

³¹⁴ Victor Luckerson. Americans Will Never Have the Right to Be Forgotten (2014) available at http://time.com/9S5541/right-to-be-forgottenl.

³¹⁵Melvin v. Reid, 112 Call. App. 285, 297 P. 91 (1931) at 852-853

³¹⁶Ibid.

³¹⁷Treadway v. Gateway Chevrolet Oldsmobile Inc., [2004] 971 978 (Cir 7th).

³¹⁸ In re Grand July Subpoena to Credit Bureau of Greater Hatrisburg, [1984] 594 F.Supp. 229 (M.D.Pa.).

Moreover, Laws such as the California Online Privacy Protection Act of 2003³¹⁹ and Law on "Online Eraser" for Minors shows that there has been a progress towards ensuring an adequate protection to the personal and private information of consumers.³²⁰ Therefore, the right to be forgotten does exist in the US system though it may be present in a sketchy or fragmentary version.

RIGHT TO PRIVACY v. FREEDOM OF EXPRESSION

Internet acts as a tool for human beings to develop their own ideas and express their opinion without previous filters and thus, helps in growth of a democratic culture.³²¹ This was possible only by virtue of right to freedom of opinion and expression guaranteed by nations to its citizens. Even the Universal Declaration of Human Rights³²² has incorporated this right of freedom of opinion and expression.³²³

While the judgment in the Google Spain case is a step in the right direction, it leaves much to be looked-for. The case is one of the many instances where the European Court has upheld the right to privacy of an individual, and while the ruling is an important win for individual rights, the judgment raises concerns about protection of free speech and expression on the internet.³²⁴ The Court did not set out any guidelines or parameters to filter out information as 'inadequate' or 'irrelevant' or 'excessive'. It has thrust the onerous task of balancing the right to privacy of an individual and the public's right to access information on private search engines like Google.³²⁵

The relationship between the right to freedom of expression and the right to privacy is a complex one. On one hand, the protection of the right to privacy in online communications is essential to ensure that

Scott Allen, *California Online Privacy Protection Act of 2003* — *Good Practice, Bad Practice*' (2014) available at http://entrepreneurs.about.com/od/internetmarketing/i/caprivacyact.htm.

³²⁰ Thomas R. Burke, Deborah A. Adler, Ambika K. Doran, Tom Wyrwich, 'California's "Online Eraser" Law for Minors to Take Effect Jan. 1. 2015' (dwt.com 2014) available at http://www.dwt.com/Californias-Online-Eraser-Law-for-Minors-to-Take-Effect-Jan-1-2015-11-17-2014

³²¹Cláudio de Oliveira Santos Colnago, *The Right To Be Forgotten And The Duty To Implement Oblivion: A Challenge To Both "Old" And "New" Media*, available at http://www.jus.uio.no/english/research/news-and events/events/conferences/ 2014/wcclcmdc/wccl/papers/ws14/w14-colnago.pdf.

³²² UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) available athttp://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (hereinafter referred to as UDHR).

³²³ Article 19 of the UDHR states that "Everyone has the right to freedom of opinion and expression; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance".

³²⁴Devika, Right to be forgotten: A Threat to Freedom of Speech & Expression, Spicy IP, (May 15, 2015) available at https://spicyip.com/2015/05/right-to-be-forgotten-a-threat-to-freedom-of-speech-expression.html.

³²⁵ Supra 16

individuals have the confidence to freely exercise their right to freedom of expression (for example, by retaining their anonymity).³²⁶ However, the publication of private information constitutes a clear infringement of the right to privacy.

At the same time, both rights can be limited under certain circumstances, subject to the three-part test namely legality, necessity and proportionality. This means inter alia that States are not required to adopt measures that would protect the right to privacy where that would constitute an undue restriction on freedom of expression.³²⁷ Simultaneously, under international human rights law, States are obliged to provide remedies for violations of either right.³²⁸

In other words, freedom of expression and the right to privacy are mutually reinforcing but occasionally conflicting rights. These conflicts can be especially difficult to manage when the information at issue is both private and public.³²⁹

The underlying basis for 'the right to be forgotten' lies in the argument that information may lose importance over time and that access to it should therefore be restricted. While implementing the right to be forgotten, a very fine balance has to be struck between the right to freedom of speech and expression, public interest and personal privacy.

The right to be forgotten is different from the right to privacy, as on one hand the right to privacy comprise of the information that is not publicly known, and on the other hand the right to be forgotten involves removing information that was publicly known at a certain time and not allowing third parties to access that information. While the right to be forgotten aims to support personal privacy, the concern is that it conflicts with the open nature of the Web and the free flow of information. The interests of one individual in removing information from the Web may conflict with the interests of another individual or group.³³⁰

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³²⁶ UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 23rd Session, Human Rights Council, A/ HRC/23/40, at paras 24-27, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf.

³²⁷ For example, a requirement for newspapers to notify the subjects of a news article before its publication; European Court, Mosley v. the UK, Appl. no. 48009/08, 10 May 2011.

³²⁸ 'The "Right to be Forgotten": Remembering Freedom of Expression', Article 19, A Policy Brief (2016) available at https://www.article19.org/data/files/The_right_to_be_forgotten_A5_EHH_HYPERLINKS.pdf\.

³²⁹ European Court, SatakunnanMarkkinapörssi Oy and Satamedia Oy v. Finland, Appl. no. 931/13, 21 July 2015.

³³⁰Right to be Forgotten (January 3, 2015) available at http://brandassetprotect.com/2015/01/right-forgotten/.

The express acknowledgment of a right to be forgotten has triggered many criticisms pointing out that a strong affirmation would impair the exercise of freedom of expression.³³¹ In fact, any company processing personal data of EU citizens, even from outside the European borders, will be subject to the single law that the Regulation is intended to introduce and, accordingly, forced to remove personal data.³³²

These concerns are justified on the basis of the protection of free speech and expression granted under Article 19 of the Universal Declaration of human Rights.³³³ Enforcing individuals' right to have their personal data deleted and no longer processed would determine an impermissible violation of the scope of the right to free expression. The relationship between freedom of information and right to be forgotten, therefore, is not governed by a balance but rather results in the prevalence of former in spite of the latter.³³⁴

THE GOOD, THE BAD AND THE RIGHT TO BE FORGOTTEN

The right to be forgotten can be seen as a positive development for an individual's self determination in this digital age. Recognition of this right have resulted in arguments which are in support of this right. Such arguments include -

• Right to control one's personal information and identity - Information communication technologies allow both government and private entities to significantly interfere with an individual's right to privacy by enabling them to track and record all activities online. Meanwhile, individuals are encouraged to share a considerable amount of information about themselves on social media in an unprecedented manner. It is therefore the responsibility of governments and lawmakers to protect the right to data protection and privacy lest people lose their ability to manage their identity and personal integrity. Moreover, individuals should have ownership of their personal information. The "right to be forgotten" thus empowers people to regain control over their digital lives.

³³¹ J. Rosen, *The Right to Be Forgotten*, Stanford Law Review Online, (2012), 64, 90; R.K. Walker, *Forcing Forgetfulness: Data Privacy, Free Speech and the Right to be Forgotten*, Hastings Law Journal, (2012), 101, 114.

³³² This is, indeed, another issue that the CJEU will have to examine in the preliminary ruling mentioned above, i.e. whether an organisation which operates a search engine established in the US and having a subsidiary located in a Member State or using equipment for the processing of personal data located in the EU may be subject to the Directive on data protection.

³³³ Supra 33.

³³⁴ J.Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, in Yale Law Journal, 2004, 113, 1161; S.C. Bennett, *The Right to Be Forgotten: Reconciling EU and US Perspectives*, in Berkeley Journal of International Law, 2012, 30, 168.

- Maintain right to privacy The right to privacy³³⁵ states that there shall be respect for a person's private life including respect for private and confidential information, storing and sharing of such information and controlling the broadcast of such information. The right to be forgotten will help to remove an emotional burden on people who have had to undergo some sense of breach of privacy which has emotionally hurt them.
- Opportunity for fresh start People have a right to make mistakes without being haunted by them indefinitely. This is good for people who want to start afresh or who have been accused for something they didn't do. Failure to recognise the "right to be forgotten" allows a distorted view of individuals to be presented by search engines which list links to juvenile or other errors in top search results for a person's name. Taking for instance someone who shoplifted when he/she was a teenager should be given the opportunity for a fresh start and allowed to move on with their life. 336
- No right to access information unlawfully present in public domain: Certain personal information in the public domain is there unlawfully, such as intimate photos distributed on the Internet without consent. There is no justification for other people to have access to such information. The right to be forgotten ensures limited access to such information which is unlawfully present in the public domain.³³⁷

But every coin has two faces, every argument has two sides and this right is no exception. Proponents of the right to be forgotten while appraising the right argue that it has more disadvantages than advantages. Such arguments include -

• Subtle Censorship - One of the most repeated arguments against a 'right to be forgotten' is that it would constitute a concealed form of censorship. ³³⁸ By allowing people to remove their personal data at will, important information might become inaccessible, incomplete and/or misrepresentative of reality. There might be a great public interest in the remembrance of information. One never knows what information

³³⁵ A right to privacy is explicitly stated under Article 12 of the Universal Declaration of Human Rights: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."

³³⁶Osagie Godwin Emmanuel, 'Pros and Cons of the Right to be Forgotten' Weebly (19th November 2014) available at http://rightobeforgoten.weebly.com/blog/pros-and-cons.

³³⁷ Supra 38

Peter Fleischer, Foggy thinking about the Right to be Oblivion', (9 March 2011), available at http://peterfleischer.blogspot.in/2011/03/foggy-thinking-about-right-to-oblivion.html.

might become useful in the future.³³⁹ The implementation of a full-fledged 'right to be forgotten' might conflict with other fundamental rights such as freedom of expression and access to information.³⁴⁰ Defamation and privacy laws around the globe are already massively abused to censor legitimate speech. The introduction of a 'right to be forgotten', arguably, adds yet another censoring opportunity.³⁴¹

- Conflict of Jurisdictions Disputes about conflict in jurisdictions are bound to come up when the issue involves more than two nations with different laws relating to privacy and freedom of speech. Further, with no uniform law, content lawfully published in one country may be struck down by some other nation considering it inappropriate. Further, as we have already seen that the European Court of Justice has ruled that if the physical server of a company which is processing the data is situated somewhere outside Europe, EU Data Protection rules would apply to their search operations. This would be the first time in history that a European would control a company like Google situated in the United States. But technically, international law subjects a State to limitations on its authority to exercise "prescriptive, adjudicative, and enforcement jurisdiction". So there is an urgent need to solve this conflict of jurisdictions between different nations with different laws.
- **Limited Scope** The right to be forgotten seems to presuppose a contractual relationship. It can only be applied in situations where the individual has consented to the processing of personal data. The concept is not suitable to cope with privacy issues where personal data is (legally) obtained without the individual's consent. Moreover, it is important to remember the right only provides an ex post solution to privacy issues.³⁴⁴
- Practical Difficulties One could request 'personal data' to be deleted on one site, but meanwhile the information might have been copied and/or 'anonymised' already. All these potential third-party uses

³³⁹ Viktor Mayer-Schonberger, Delete the Virtue of Forgetting in the Digital Age, Priceton University Press, 2009.

³⁴⁰ Daniel J. Solove, 'The future of Reputation: Gossip, Rumor, and Privacy on the Internet', George Washington University Law School (2007) available at http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2081&context=faculty_publications.

³⁴¹ Supra 46

³⁴²Supra 50

³⁴³Kathleen Hixson, Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States, Fordham International Law Journal (1988), available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1207&context=ilj.

³⁴⁴JefAusloos, *The 'Right to be Forgotten' – Worth Remembering*, Forthcoming Computer Law & Security Review (2012) available at http://derechoaleer.org/media/files/olvido/SSRN-id1970392.pdf.

are practically untraceable and do not necessarily take into account deletion of the primary material.³⁴⁵ Moreover, the right also raises some technical implementation issues with regard to ubiquitous and opaque cross-platform data transfers.³⁴⁶

• The "right to be forgotten" is more restrictive of freedom of expression - The right of reply or the right of correction enables individuals to either present their side of a story or correct factual mistakes without the information in question being made more difficult to locate. On contrary, the "right to be forgotten" allows individuals to remove or render information about them far less accessible and is therefore much more problematic for freedom of expression.³⁴⁷

Report by European Union Committee of the House of Lords³⁴⁸ has called the 'right to be forgotten' ruling as "unworkable, unreasonable, and wrong in principle". The Lords gave two reasons for terming the right to be 'unworkable'. Firstly, it does not take into account smaller search engines which might not have the required resources to process removal of unwanted links. Secondly, the search engines cannot be given the task of deciding what to delete and what not to that too based on "vague, ambiguous and unhelpful criteria". The Royal Committee of Lords and Lords and Lords are required resources to process removal of unwanted links. Secondly, the search engines cannot be given the task of deciding what to delete and what not to that too based on "vague, ambiguous and unhelpful criteria".



CONCLUSION

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In conclusion, we can see that although the 'right to be forgotten' is recognised in some jurisdictions, it is more difficult for it to be allowed on an international level and towards search engines. While conflict of laws principles may need to be applied here, one must not lose sight that 'right to be forgotten' is never an absolute right, not actually explicitly defined or granted in any international human rights conventions. One may phrase it as a non-absolute right, subject to and only to the necessary restrictions, but again, the

³⁴⁵ Emily Steel & Geoffrey A. Flower, *Facebook in Privacy Breach*, TheWall Street Journal, (18 October 2010) available at https://www.wsj.com/articles/SB10001424052702304772804575558484075236968.

³⁴⁶ Jonathan L. Zittrain, *The Future of the Internet -- And How to Stop It*, Yale University Press & Penguin UK (2008), Digital Access To Scholarship At Harvard, available at

https://dash.harvard.edu/bitstream/handle/1/4455262/Zittrain_Future%20of%20the%20Internet.pdf?sequence=1 347 Supra 47

³⁴⁸European Union Committee – Second Report on EU Data Protection law: a 'right to be forgotten'? Available athttp://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/40/4002.htm.

³⁴⁹ Alex Hern, *Lords describe Right to be Forgotten as 'unworkable, unreasonable, and wrong'*, The Guardian(30 July 2014), available at http://www.theguardian.com/technology/2014/jul/30/lords-right-to-be-forgotten-ruling-unworkable.

³⁵⁰ *Ibid.*

competing interests between this non-absolute right to be forgotten and right to information make it very difficult to be enforced, at least in some jurisdictions (such as the US) the latter outweighed the former.351

For publishers, like newspapers, magazines and broadcasters, the ruling is something of a double edged sword. On the one hand, although their content should be unaffected by the ruling, it can effectively be wiped from the map of the internet – i.e. Google. On the other, however, some have suggested it will boost the value of paywalls, because media organisations can now claim the only really surefire way that you can get an uncensored search is to directly search their archives, which increasingly lie behind paywalls.

The impact on other internet companies is less clear. Will social network content be fair game for deletion, as it is searchable too? And whether or not the judgement is a game-changing ruling for online privacy and data protection rights remains to be seen over the coming years, as people test out the implications in real world situations and inevitable case law begins to mount. 352

However, with increased scrutiny of the issue worldwide, where law-makers are currently working on new rules for governing the area, and the influence of internet companies becoming stronger by the day, the question of the 'right to be forgotten' is unlikely to be forgotten over the coming years.



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While the right to be forgotten from the Internet may be understood in principle as a right to one's personality, one fully consistent with values of free expression, self-determination, and second chances, in practice, the right suffers major setbacks in implementation; its unabashedly subjective language clashes with such societal needs as free speech and free press. The tendency to copy and retain information, inherent to the Internet's nature, also diminishes the right's effectiveness. 353

Existing remedies should be pursued such as those offered by privacy and defamation laws, and remedies under the terms and conditions of intermediaries, instead of recognising the 'right to be forgotten'.

³⁵¹ Supra 23

³⁵² Will Goodbody, The pros and cons of "the right to be forgotten", RTE News (14 May 2014) available at https://analysis.rte.ie/business/2014/05/14/the-pros-and-cons-of-the-right-to-be-forgotten/.

³⁵³ Science, Technology, and Society 'Formulating and Implementing a Right to Be Forgotten in the United States: American Approaches to a International Origin'ST118 January 2015) available Law https://getinspired.mit.edu/sites/default/files/documents/ST118_Report.pdf.

The 'right to be forgotten' should be strictly limited, as certain minimum requirements must be met for such a right to be compatible with the right to freedom of expression, both in terms of substance and procedure. Specifically, the right should be limited to private individuals and should be actionable only against search engines (as data controllers), rather than against hosting services or content providers. Any protections should also make explicit reference to the right to freedom of expression as a fundamental right with which such protections must be balanced. Further, decisions on 'right to be forgotten' requests should only be issued by courts or independent adjudicatory bodies.³⁵⁴

Moreover, minimum procedural requirements should be observed, including only courts or independent adjudicatory bodies to decide whether 'right to be forgotten' requests should be upheld; data publishers to be notified of 'right to be forgotten' requests and be able to challenge these requests; de-listings to be limited in scope, including geographical limitations; relevant service providers, public authorities and the Courts should all publish transparency reports on 'right to be forgotten.' 355

Therefore, although the right to be forgotten should be implemented, it is clearly imperfect in its current form and should be modified to fit the legal, cultural, and practical needs of the States.³⁵⁶

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³⁵⁴ Supra 58

³⁵⁵*Ibid*.

³⁵⁶ Supra 64

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CAPITAL PUNISHMENT- ISSUES AND IMPRESSIONS

-Swetha Shiv³⁵⁷

"Every saint has a past and every sinner has a future."

- Oscar Wilde

ABSTRACT

Capital punishment or death penalty is a warranted measure by the State wherein the life of a capital offender is extinguished. Within the ambit of this article the author seeks to evaluate the legal impediments conjoined with pragmatic corroboration and practical utility of awarding death sentence. The article has represented the holdings of both abolitionists and retentionists in this context. Primacy has also been given to expand the humanitarian standpoint of this issue. The author also attempts to trace the continuing relevance of this Penal provision in the background of Indian society. The objective of this paper is to fix the concept of Death penalty in the evolution of human rights jurisprudence and enhance the growing awareness towards the same.

Keywords: Capital Punishment, Penal, Sentence, Society

INTRODUCTION:

The progressives of today are veered towards the optimism in democratisation. This is one which is continually attesting to the expanding horizons of human rights. In being so, an ethical struggle is quite inevitable upon the notion of capital punishment. The issue is the perception of many who cannot excuse themselves to ration against the indoctrination of 'right to life'. They hold that harm cannot be digested only because it is endorsed by the law. In other words, the supremacy of law would erode its sanctity if it perpetrates an act of State violence. The eyes of the abolitionists view the law of the land as a protective agent rather than a preventive agent. Thus, when an act as terminal as death penalty is sanctioned by the infallible law, it is loosely construed as a 'court mandated murder' 1558.

³⁵⁷V year, Student, School of Excellence in Law, Chennai

³⁵⁸Law Commission of India, 35th Report: Capital Punishment, GOVERNMENT OF INDIA, 1967.

It cannot be denied that what is as transitory as the circumstances of each individualised case is the raging and divided opinions of jurors. In India, the makings of the past pose some glaring examples- in the case of Bariyar, two-judge Bench admitted to error in the sentencing to death of seven convicts by the previous benches of the court. Similar error was immediately noticed in the sentencing to death of six more convicts, after the delivery of judgment in Bariyar, taking their total to 13. The error was the reliance by the court on a legal precedent, which Bariyar declared as per incuriam. Similarly, there have been instances of reliance on erroneous legal precedents in Sangeet& ANR vs. State of Haryana, following which five other cases which resulted in the wrongful sentencing to death of more convicts have come to light. They are Shivu, Jadeswamy, B.A. Umesh, RajendraPralhadraoWasnik, Mohd. Mannan, and SushilMurmu.³⁵⁹ As Justice Bhagwati opines, "unfettered and uncharted discretion conferred on any authority, even if it be the judiciary, throws the door open for arbitrariness, for after all the judge does not cease to be a human being subject to human limitations when he puts on the judicial robe and the nature of the judicial process being what it is, it cannot be entirely free from judicial subjectivism." This reflects the friction amongst the judicial machinery to awarding capital punishment. But if such humanising considerations are compelled to exist, yet again, it may vitiate the realm of judicial process, curbing and rigidifying the gravity that each case portrays. Thus, an equinox between the two is the where the disparity lies.

Here, the logical precedence in the criminal justice system asserts prevention of further commission of

Here, the logical precedence in the criminal justice system asserts prevention of further commission of crime as an inextricable twin side of protection. Thus, protection cannot be enforced in isolation without the psychological abetting of fear. But this ground largely remains disputed. To the society deterrence albeit morally questionable is deemed indispensable to instate reliability in the workings of judiciary and therefore the government. The conflict lies here, as by way of reasons these appeals are convenient when otherwise, it can be interpreted as an excuse. It is disturbing that one breathes a sigh of relief in learning that a potentially devastating threat to the society has been eliminated. This seemingly is in the interest of collective good. The paradox heavily traipses here, as in the delayed introspection of the credibility of the court's death sentence; this is also a prolonged injury on the interest of a singular subject, who is still part of the very collection, and

pre-judged as incapable of reformation. As one may argue, certainty of punishments may produce actual deterrence than severity of punishments.

³⁵⁹V.Venkatesan, For a Moratorium on Death Sentence, THE HINDU, Dec 10, 2012.

³⁶⁰Bachan Singh v State Of Punjab, AIR 1980 SC 898

But the alternate disparity it raises is a thought mimicking Justice Wadhwa. J who says 'emphasis must also be given to the fact that the rights of the victims of crime ought not to be forgotten in the reformation of criminals and thus a proportionate punishment fitting the crime must be considered'. 361

To further this, it would only be proper to shoulder a detailed perusal of the issues in capital punishment.

THE EFFECT OF PENOLOGICAL FACTOR

An obvious rhetoric that survived till recent times is that awarding death penalty shall brew terror in the minds of potential criminals who lurk unguardedly in the general populous. This was viewed as fulfilling a falsified and antiquated penological means of deterrence. Whether such a hypothesis was actually tenable was conveniently ignored for a long time. For, if this was proved in negation, their premises of reasoning would appear as a three legged chair. Indisputably, it has not been the case that an apathetic delinquent be affected by the remote consequences of his action. In other words, a person determined to execute an unthinkable offence, would not preoccupy himself with its repercussions until this desired act has been done. 'As an US police officer, Gregory Ruff, reports, "I have never heard a murderer say they thought about death penalty as consequence of their actions prior to committing their crimes." This then furthers the end query: has the deterrence effect of capital punishment which exists in theory, become defunct in practice.

In India, during the period of 1953-1963, an average of 128 death row convicts were executed as per the 35th report of law commission. But the increase in murder cases during the same period as per National Crimes Record Bureau was about 17%. Post *Bachan Singh*, when death penalty awarding was drastically brought down. The decadal decrease of murder cases from 1992-2002 was 12.43% although of increase in India population by 21.34%. Death penalty also does not act as a deterrent in non-homicidal offences.³⁶³ For instance, the execution of rape and murder convicts does not reduce incidence of rape.

In a global semblance, researches bearing the contrast of homicide trends in countries that allow execution as opposed to those that do not, chiefly find that this practice does not invite deterrence. The works of sociologist Thorsten Sellin in 1959, (who was the first to conduct a detailed comparative study of capital punishment: Crime data 1920-58) led him to the "inevitable conclusion...that executions have no discernable effect on homicide rates" (Sellin, 1959: 34)This conclusion has been reiterated a number of

³⁶¹State of Gujarat v Hon'ble High Court of Gujarat, AIR 1998 SC 3164.

³⁶² John W. Whitehead, The death Penalty Is a Miscarriage of Justice: It Should Be Abolished,

 $https://www.rutherford.org/publications_resources/john_whiteheads_commentary/the_death_penalty_is_a_miscarriage_of_justice_it_should_be_abolished$

³⁶³India: Death Penalty Has No Deterrence, ASIAN CENTRE FOR HUMAN RIGHTS, www.achrweb.org/reports/india/NoDeterrence.pdf

times where the newer investigations consistently backed the results of Sellin. (See Bower and Pierce 1980, Bailey and Peterson 1997, Archer and Gartner 1984 for reference)

Thus, by a clear majority, the merit of these social experiments unanimously declassifies the stubborn fancy that capital punishment has any deterrence effect and what has been left in its place is known as 'brutalization effect'.

THE LEGAL DILEMMA

The legal dilemma which emerges is that the jurors who hold contrary views are also persons of reason. They are able to instil a sense of empiricism behind the disputed question. Each of such divisions, providing indefeasible grounds is itself denotative of the uncompromising positioning of death penalty. The larger concern is that there is a school of queries that attempts to give legal validity and enforce the sceptical. This is done by way of titles like the crime test, the aggravating and mitigating factors, public abhorrence and such. Whether such tests have illumined the jurisprudential evolution is mostly unconvincing. What the judges do is foreordain if a criminal is capable of reformation or not. Their convictions enlightened by legal judos impression a sense of rightness to the public.

The judiciary banks on mere words to measure the culpability. Law is then an apparent egalitarian obsessing verbomania which sometimes aggrandizes. in grossly There is no doubt that death penalty is awarded depending on the merits of each case but a bare perusal of judgements shows that that certain judges have been more inclined to award death penalty than others.³⁶⁴ In such a situation, the contours of such tests become blurred, indeterminate and paves for chanciness. The test is only a dictum which singles out a very generic conduct but leaves the lacunae to be filled in by the judges generously. But, for any law to be enforced justifiably, the judicial process demands a proportionate divide of judicial discretion coupled with fixed rules that cannot be dispersed from at any cost. As Justice KT Thomas states "However this drastic curtailment of power to impose capital punishment remained only in paper. The Supreme Court itself began to dilute the rigors of the condition imposed in Bachan Singh case. Many judges employ semantics whenever and wherever they want to impose death penalty. All that the judges are required to do was use some superlative degree of words such as "brutal, atrocious etc." and then say that "I/we hold that this is one of the rarest of rare cases." ³⁶⁵

³⁶⁴Ibid, para 2

³⁶⁵ Thomas K T, Time to revisit Bachan Singh, www.livelaw.in/constitutionality-of-death-penalty/

The inherent disqualification to the effectiveness is that there is no statutory definition for the unknown reason of being indefinite or infinite in its scope of description. Also, it is simply not restricted to judge-centric reasonableness in condemnation of a person to death, but the judicial process employed- How far the emotional predilections of the public strengthen the *ratiodecidendi* behind a judicial pronouncement. The subject of worry for a student of law is that the 'jurisprudence' led interpretations have recently been steered towards a 'media tempered' interpretation. Thus, the cardinal principles appear to be dampened. And there appears to be scope for personal inclination rather than legal acumen. These two factors together make filling of the pie.

THE UNDECLARED PUNISHMENT

The impending facet of this issue is not to consider the legality of death sentence but to scrutinize the illegality of its practices. The most inconceivable savagery as was professed by the wings of democracy is the issue of 'inordinate delay' and deviation from 'procedure established by law'. The organs of government cannot seek refuge under the enamelled term 'inordinate delay' or the complexity of proceedings to advance comfortable politicisation of legal order (be it clemency or approval). The lingering interval from the time of sentencing to death to the time when this sentence is executed reduces life to a mere vegetative state. The knowledge of his own nearing doom coupled with excruciating waiting period is venom that scavenges its way into the psychological well-being of the convict. As given in Furman v Georgia (408 US 238) "Mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death." Under the Indian constitution, the charged offender has the right to speedy and fair trial under Article 21 and 22. Also the Constitution immunizes the accused from any kind of torture as widely derived from Article 21 and 22. Here to consider the mere verdict of death sentence as adhering to the grounds of 'due process' is improper, as it necessarily stretches till the actual execution of this pronouncement. Any delay is an explicit disobedience to the constitutional mandate. This legal position had been considered by the courts of law in the case of T.V. Vatheeswaran v. State of Tamil Nadu. 366 The bench consisting of Chinappa Reddy and R.B Misra JJ observed that "Making all reasonable allowance for the time necessary for appeal and consideration of reprieve, we think that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 of the Constitution and demand quashing of the sentence of death." But this was later disavowed by a three judge

³⁶⁶T.V.Vatheeswaran v. State of Tamil Nadu,1983 SCR (2) 348

bench in *Sher Singh v. State of Haryana*³⁶⁷ where the court held that the reasons for the inordinate delay must be wholesomely considered and not fixedly commuted to life imprisonment at all times. The law centres on the need of serving the victim with adequate justice, the quantum of which shall not exceed the severity of injustice done to victim by the accused and the liability of the state in its failure to protect the victim. However, there is another dimension to this. The extended social circle on either side i.e. the families of victim and the offender happen to be the secondary victims for which the state has no measurable approach of any to take care of. To dwell deeper, this is also going against the principles of double punishment under the eyes of the law.

HUMAN RIGHTS PERSPECTIVE

After an arduous course of social progression, our societies have managed itself to evolve as civilized in our dictionaries. This status of refinery has been widely acclaimed only in parlance with how the nation states have embedded the realm of human rights in their governance. Every civilized nation is desired to instil and develop a sense of social temperament. Such an ambition roots deep in the most rudimentary principles of human rights which are right to life and dignity. A departure from this article of faith constitutes a flagrant violation of the "unalienable rights". Thus capital punishment is viewed as an act of state violence which lowers the tone of civilization. A number of the international protocols have proselytized the riddance of death sentence such as, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) 1966, Article 5 of the Universal Declaration of Human Rights 1948, UN Economic and Social Council in resolution No.15 of 1996, article 3 of the European Convention on Human Rights. Article 3 of the UDHR also provides for right to life, liberty and security of human beings.³⁶⁸ The euphemism that the State uses is that capital punishment is given by way of necessity to assuage the threatened public. At such times the welfare government is seen to promote revenge than remedy. To repeat the sentiments of Justice Krishna Iyer, to kill a killer is not public justice but personal revenge. But at the same time, the state has a duty to mitigate the circumstances from a further perilous upscale. To be able to satiate the twin goals the State needs to identify alternatives to replace the traditionally habituated practice of killing. Of course, we already have life imprisonment in our system. As Supreme Court eloquently says, "life imprisonment is the rule, death sentence is an exception". 369 But the courts have been looking at the problem with squeezed eyes. The case is not an alternative punishment as opposed to specific cure. Such is a solution which allows the victim-offender mediation, setting up of mental health courts and institutions, a strategy for the re-entry of the reformed criminals in the society,

³⁶⁸I.G.Ahmed, Death Sentence In Human Rights Perspective

³⁶⁹Brajendra Singh v State of Madhya Pradesh, AIR 2012 SC 1552.

adequate compensation by the state upon its failure to protect the victim, counselling to the family of the victim, strict surveillance to identify potential issues which are capable of leading to dastardly acts etc. Thus there is a need to rationalize the conventional approach by blending in humanising provisions in the realm of administration of punitive justice.

CONCLUSION

From the primitive law of the jungle era which avowed 'Might is right', we have progressed to the humanitarian age of 'Right is might'. Human rights which is the development of a treated social system through the instrument of State preconditions the integration of human values which conditions life and death. This is spotted as the birth of civilization. Therefore, every time a death sentence is awarded, the social conscience is stirred upon. In a honed society, it can be gathered that none would relish in the concept of manslaughter. Only the organs of democracy have the power to heal such transgressions by playing a decisive role in balancing propriety and social justice of the community.

It is evident that the dispute of righteousness in awarding capital sentence is largely undecided. This is so because capital punishment is a delicate controversy reflecting on the question if justice should be administered at all costs. And if so, would such an administration constitute justice. Verdicts are neither rituals nor whims. There is no bible to guide the keepers of law. For all of this is benched in distinct calculus of turbulent justice. What is perennially questionable is that justice swings in extremes. A single case unfolds two opposite solutions both of which happen to be true and irrefutable too. The right to take out life under law is still a matter of debate among the enlightened consciences. As a way of judicial reasoning, an exposition is essentially taken to equate the quantum of crime, leaving the legal or jurisprudential object to meet the demands of individual cases. This is observable in trying to qualify justice in physical terms but the subject of death is not maintainable within the premise of logic. Therefore, the question for immediate contemplation is not the relative concepts of right or wrong but why one cannot judicially choose from the alternative instead of rendering an extreme asseveration.

What the law sometimes ceases to consider is that majority of the criminals were victims once. Maybe they were victims of dishonourable guidance; of social bigotry; of communal stigmas; of domestic violence; of extremist influence and therefore of poor principles. What would be lasting is when the Government is able to initiate measures to make sure that the deterrence is inbuilt in the form of moral fear instead of through external forces. Although the approach to this would be farfetched, there shall be a harmonious payoff only

when the State can entrust confidence in the delinquent that will he be driven for a better change. Indeed it is the gospel that the State, more than anything is a teacher.

The law of universe is operating on the principles of humanity. When the purpose of law is itself to establish and uphold the features of human progression one need not resort to retrograde steps to demean such a spirit. To encapsulate the whole issue in a nutshell in the exemplary words of Mahatma Gandhi, "Hate the sin. Love the sin.



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RETHINKING OF JUVENILLE JUSTICE SYSTEM IN INDIA

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INTRODUCTION

Juvenile Justice (Care and Protection of Children) Act, 2015 has been passed by Parliament of India. It aims to replace the existing Indian juvenile delinquency law, Juvenile Justice (Care and Protection of Children) Act, 2000, so that juveniles in conflict with Law in the age group of 16–18, involved in Heinous Offences, can be tried as adults. The Act came into force from 15 January 2016.

It was passed on 7 May 2015 by the Lok Sabha amid intense protest by several Members of Parliament. It was passed on 22 December 2015 by the RajyaSabha. After the 2012 Delhi gang rape, it was found that one of the accused was a few months away from being 18. So, he was tried in a juvenile court. On 31 July 2013, Subramanian Swami, a BJP politician filed a Public Interest Litigation in the Supreme Court of India seeking that the boy be tried as an adult in a court. The Court asked the juvenile court to delay its verdict.

After the Supreme Court allowed the juvenile court to give its verdict, the boy was sentenced to 3 years in a reform home on 31 August 2013. The victims's mothercriticised the verdict and said that by not punishing the juvenile the court was encouraging other teenagers to commit similar crimes.

In July 2014, Minister of Women and Child Development, Maneka Gandhi said that they were preparing a new law which will allow 16-year-olds to be tried as adult. She said that 50% of juvenile crimes were committed by teens who know that they get away with it. She added that changing the law, which will allow them to be tried for murder and rape as adults, will scare them. The bill was introduced in the Parliament by Maneka Gandhi on 12 August 2014.

DRAWBACKS

One of the biggest problems of a young offender being tried as an adult is the fact that they could possibly be sent to an adult correctional facility. This is a very dangerous situation, especially if they are very young. Many of these juveniles lack the maturity to handle situations such as adult prison.

Message of Lost Hope

By giving juveniles extremely hard sentences, it gives the impression that there is no hope for their future and no hope of them ever becoming anything but a criminal and a convict. This is damaging for all of society and especially for the young person and their family.

'the Cabinet cleared the final version after some changes... Judges Don't Have Much Variety for Punishment' Judges in juvenile courts have the power to impose curfews, house arrest, and counselling to offenders, rather than send them to jail. Judges in adult courts have much fewer options, and usually choose the prison one.

More Likely to Commit More Crimes

When you put a juvenile in a situation with seasoned criminals, such as adult prison, they are still impressionable and likely end up becoming involved in gang or other crime activities. This further hinders their ability to rehabilitate after they are released.

Criminal Records Follow

Crimes that are on your juvenile records hold much less weight in the world than those on your adult record. By putting a juvenile into adult court, you are also effecting their adult criminal record. This will follow them all through out life, especially when trying to get a decentB Juvenile Justice (Care and Protection) Act 2000:

The Act was not based on policy regarding children in conflict with the law or children in need of care and protection. The ad hoc nature of a possible policy can only be gleaned by examining the Act. On examination the following points emerge as articulating the approach of the Act towards children.

General points applicable to both child in conflict with the law and child in need of care and protection

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Age

The law provides that any juvenile or child who has not completed the age of eighteen would fall within the jurisdiction of the Act. In the previous enactment the definition of juvenile included boys who had not completed the age of 16 and girls who had not completed the age of 18. With the present change, the CRC standard, which defines a child as anyone under the age of 18, has been complied with.

Separation of child in conflict with the law from child in need of care and protection

The law provides for separate treatment for children in need of care and protection and juveniles in conflict with the law. Under the old Act the classification of delinquent juveniles and neglected juveniles was meant

to separate the two categories of children with the Juvenile Welfare Board and the Juvenile Home meant for the neglected juvenile and the Juvenile Court and Special Home meant for the delinquent juvenile. However, the separation was only a partial separation as pending inquiry both categories of children were kept in an Observation Home together. Thus the argument went that often children who had committed serious offences were kept in the same institution as children whose only crime was that they were neglected children as per the Act. Keeping this argument in mind, the state has now ensured a complete separation between the two categories as now juveniles in conflict with the law are kept in the observation home and children in need of care and protection are sent directly to the juvenile home. However, this shift itself seems a cursory attempt at really changing the deeply custodial nature of the entire juvenile justice system. If one was serious about decriminalizing at least the child in need of care and protection then, one needed to intervene at every level starting from the police. In fact, the police are still empowered to come in contact with both categories of children. The police have more power vis a vis the category of child in need of care and protection as under Sec 33 of the enactment they are now even empowered to inquire into the situation of the child. With regard to the role of the police what has happened is really a deeper level of decriminalization rather than decriminalization. What is also important to keep in mind is that the distinction between the two categories is illusory as the way the law treats both categories is by prescribing custodial care as one of the options.

POINTS SPECIFIC TO CHILD IN CONFLICT WITH THE LAW

Adjudicating Authority for child in conflict with the law

The law pertaining to what are now called children in conflict with the law has undergone a few changes. The adjudicating authority has been redesignated as the Juvenile Justice Board and the composition has changed from an adjudicating authority which was a Magistrate with a panel of two social workers to assist her as prescribed under the old law to a Bench which is composed of two social workers and one Magistrate. This change in composition of the adjudicating authority is one of the more significant changes in the new law, as now the space exists for bringing about a change in the very nature of the inquiry. The primary inquiry of whether the child did commit the offence as mandated by a magistrate's training could now be displaced by a social workers inquiry, which could focus in on why the child committed the offence, and how does one redress the same. The shift in composition of the Board can bring about a shift in the line of inquiry from intention to motive. Thus what could change has been referred to as the criminal law

mindset itself. This is in effect an important step towards decriminalizing the administration of juvenile justice, provided the rules operationalize the same.

LEGAL PROTECTIONS FOR CHILD IN CONFLICT WITH THE LAW

The protections under the Juvenile Justice Act, 1986, continue with the new enactment with their being no additional protection guaranteed to the child in conflict with the law. The protections can be enumerated as follows:

Whether the juvenile commits a bail able or non-bailable offence, the child shall be released on bail with or without surety. The only grounds on which the juvenile can be detained is if there is reasonable ground for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice. Further detention can only be in observation home and not in prison or police station. The bail provisions for young offenders are far more liberal than those applicable under the criminal procedure code. (Sec 12)

In terms of the orders which the Board may pass regarding the juvenile, there is a discretionary power to send the child home after admonition or advice, order the juvenile to perform community service, release the child on probation of good conduct etc. (Sec 15) The only controversial part of the power of the Board is the power to send the child to a special home for a minimum period of not less than two years for a child who is over seventeen and less than eighteen and in case of any other juvenile till he ceases to be a juvenile. There is a proviso under which the child could reduce the period of stay having regard to the nature of offence and circumstances of the case. However, this provision is in clear contravention of Art 37(b) of the Convention of the Rights of the Child, which notes that No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of the last resort and for the shortest appropriate period of time.

The Act also clearly prohibits sentencing a child to death or life imprisonment or committing to prison in default of payment of fine or furnishing of security (Sec16). For a juvenile sentenced under the Act, there is a clear mandate such juvenile shall not suffer any disqualification attaching to a conviction of an offence under the law. Further after a reasonable period of time the Board is enjoined to remove the records (sec19). The Act also stipulates that there shall be no joint trial of a juvenile with a person who is not a juvenile (Sec 18).

The Act also protects the privacy of the child by mandating that no report by newspaper etc shall disclose the name, address or school or other particulars calculated to lead to the identification of the juvenile nor shall any picture of such juvenile be published. (Sec 21)

POINTS SPECIFIC TO CHILD IN NEED OF CARE AND PROTECTION

EXPANSION OF CATEGORY OF CHILD IN NEED OF CARE AND PROTECTION

The category of children in need of care and protection has been expanded to include victims of armed conflict, natural calamity, civil commotion, child who is found vulnerable and likely to be inducted into drug abuse etc. The expansion of the category of children in need of care and protection has itself led to serious questions as the system still remains custodial in nature and what one in effect does is bring more children within a criminal justice framework.

CUSTODIAL FRAMEWORK FOR DEALING WITH CHILD IN NEED OF CARE AND PROTECTION

The framework of the law remains within the criminal justice system as the police still have power to contact a child and produce him before the Committee. In fact the powers of the police have been expanded as under the new Act the police have also been empowered to hold an inquiry regarding the child in the prescribed manner. Further if the child is sent to a Juvenile Home, then such home remains a place where the child is deprived of her liberty, thereby rein scribing the custodial nature of the institution.

RESTORATION AS OPTION FOR CHILD IN NEED OF CARE AND PROTECTION

The innovation the law makes with respect to children in need of care and protection is the conceptualization of restoration of the child as being the focal point, with restoration being conceptualized as restoration to parents, adopted parents or foster parents. (Sec39). This being the crux, the law then outlines four options for children in juvenile homes and special homes which include adoption, foster care, sponsorship and after care. While the aim of minimizing the stay of the child in the juvenile home and special home as conceptualized is laudable, there are serious concerns as to whether restoration can be the only solution. Especially in the case of sexual abuse the solution can be ill conceived. Further in the case of children in difficult circumstances such as children on the street, children in prostitution restoration might not be an immediate solution. The other concern is as to the fact that no safeguards have been built into the

procedures regulating adoption and foster care in the Act itself leaving it entirely to the discretion of states, which have the power to make rules under the Act.

In spite of these changes and continuing protections, one needs to be conscious of the fact that it still falls short of the international obligations undertaken by the Indian state both in the form of treaties as well as declarations.

THE JUVENILE JUSTICE (CARE AND PROTECTION) ACT 2000, CRIMINOLOGICAL CONSIDERATIONS

The discussion on the merits of the present enactment also has to be located in the context of the debates in criminology regarding crime and punishment. One needs to understand the philosophy motivating the JJ 2000 Act itself and locate the critique in a deeper conceptual basis. Any policy prescription necessarily needs to locate itself in a certain kind of criminological understanding. To do so this section will

OUTLINE THE VARIOUS KINDS OF CRIMINOLOGICAL THEORIES

Locate the Juvenile Justice Act within this framework and argue for an integration of other criminological understandings INTERNATIONAL OURNAL OF

The various criminological approaches AGEMENT STUDIES

Criminology is a rich discipline with multifarious approaches. While understanding that no approach stands on its own, and there is a degree of interpenetration between approaches it is still useful to classify approaches at least as ideal types. Cunnenclassifies the criminological approaches broadly within the framework outlined below:

Classical Theory

Positivist approaches

Strain theories

Social Control theories

Youth sub culture theories

Labelling theories

Marxist theories

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• Classical theory

Classical theory is premised on the notion of free will. If individuals commit crime, it is because they freely choose to do so and have to take responsibility for their action. Since individuals are responsible for their actions this theory advocates that punishment is a way of deterring rational individuals (all individuals are rational) from committing crime. Classical theory is based on a Benthamite calculus of pleasure and pain and believes that if pain is administered by way of imprisonment then wrong doing would be deterred.

Positivist approaches

Positivist approaches advocate that individuals commit crimes either because of biology, environmental factors or sociological factors. Individuals thus commit crimes for reasons often beyond their control and they should be 'cured' of their disposition to commit crimes. Positivist approaches thus recommend an individualized approach where offenders are classified and different kinds of treatments are prescribed. Thus a whole range of expert interventions is recommended to ensure that the individual does not commit crime again as suggested by sociologists, psychologists, doctors, social workers and other 'experts'.

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Strain theories

This approach decisively moves responsibility for crime away from the individual person on to the social structure. Crime is not the result of an individual predisposition for crime, but happens because of the way society has structured common goals and ways to achieve them. For example, in Merton's analysis, if all individuals share the common American dream of financial success, but the institutional means to achieve success are limited to a few, then one outcome would be crime, which is a non-institutional means to achieve the same. Thus crime is seen as an outcome of a social disease be it inequality of opportunity, inability to integrate those considered alien or a socially and culturally discriminatory attitude

• Social Control theory

Social Control theory is premised on the idea that it is an individual's bond to society, which makes the difference in terms of whether or not they abide by society's general rules and values. Hirchi theorized that the social bond is made up of four elements

Attachment: the ties of affection and respect to significant others in one's life, and more generally a sensitivity to the opinion of others

Commitment: the investment of time and energy in activities such as school and various conventional and unconventional means and goals

Involvement: the patterns of living which shape immediate and long term opportunities, for example, the idea that keeping busy doing conventional things will reduce the exposure of young people to illegal opportunities

Belief: the degree to which young people agree with the rightness of legal rules, which are seen to reflect a general moral consensus in society.

It is the combination of attachment, commitment, involvement and belief which shapes the life world of the young person and which essentially dictates whether they will take advantage of conventional means of social advancement or whether they will pursue illegal pathways toself gratification.

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• | Youth subcultures

Another important theory closely linked to social control theory is the idea of youth subcultures, wherein what society calls criminal behavior is learnt in a group setting. The sub culture sees itself as operating on different value systems, different notions of right and wrong and individuals act in conformity to the norms of the subculture to which they belong. Subcultures are also seen as a response to social and economic marginalization and are a creative mode of coping with or resisting deprivation.

Labelling theory

Labelling theories focus on the fact that deviancy is subjectively made and not objectively given. Deviance is seen to be a product of the juvenile's interaction with the criminal justice system. Once the juvenile commits the act prohibited by law, and he/she is apprehended then the very interface

with the criminal justice system produces the identity of the criminal. Society identifies the individual henceforward with only one identity, namely that of the criminal. This kind of societal reaction results in the individual taking on the identity as a response to societal stigma and learning the norms of behavior conferred by the label. The label thus serves to amplify deviance or criminality.

Marxist theories

Traditional Marxist theories locate the cause of crime in the unequal access to material resources, with crime itself being seen as a class response to inequality. Later applications of Marxist thinking to criminology have carried the analysis further and analyse how wrongdoing by the powerful and wrong doing by the powerless is defined. Wrong doing by the powerful, may sometimes not even be defined as a crime, (negligent conduct which causes the death of thousands i.e. Bhopal) if so defined then the powerful are able to defend themselves because of their greater resources. By contrast the wrong doing by the less powerful tends to be highly visible and be subjected to wide scale intervention by the police, courts, prisons welfare agencies etc. This approach raises fundamental questions as to the legitimacy of interventions in the lives of poor people while the harm done by the powerful is not taken note of.

The JJ Act 2000 in the context of criminological theory: an impoverished criminological understanding?

Law & Management Studies

The fundamental premise underlying the JJ Act is that children who commit offences and children who need care and protection would fall within the ambit of the juvenile justice system. While building in certain avenues for release of the child either to parents, guardians, fit persons or adoptive parents and to people who would provide foster care, the systems logic is to provide what the preamble calls 'proper care, protection and treatment by catering to their development needs' within an institutional setting. These institutions designated as observation homes, children's homes and special homes share one feature in common—they are all closed institutions, which completely deprive the child of his or her liberty. However, the deprivation of liberty is not conceptualized as punishment, but as a mode through which the juvenile is reintegrated into society. In its conceptualization, the Act along with the rules [16] is based not on punishment, but on how best one can reform the erring individual.

In this respect the moment the individual enters the institution he or she is classified by the Classification Committee which looks into age, physical and mental status, length of stay period, degree of delinquency and his character...(Rule21). After the child is classified then the child is subjected to the daily routine prescribed by the rules. Each institution shall have a well regulated daily routine for the inmates which should be displayed and should provide among other aspects, for regulated disciplined life, physical exercise, educational classes, vocational training, organized recreation and games, moral education, group activities, prayer and community singing. (Rule 14)

For Sunday and holiday the daily routine shall include

- a) Washing of clothes and bedding
- b) Reading
- c) Recreational programmes, games and sports
- d) Radio and television programmes and recorded music
- e) Properly planned excursions
- f) Scouting activities (Rule 14(2)) AMANAGEMENT STUDIES

What is to be noted is that this programme of 'reintegration' is to be carried out with respect to the child in conflict with the law for a period of not less than 2 years with respect to a child who is over 17 and below 18 and for other juveniles till he ceases to be a juvenile. For children in need of care and protection, the child would continue in the children's home if the other measures conceptualized under the Act, like foster care, adoption, sponsorship and after care are not suitable.

Thus the philosophy seems to be that by detaining children till they reach the age of 18 and by subjecting them to the daily routine described above, one would produce individuals who can then be reintegrated back into society.

If one places this mode of treating juveniles within the theoretical frames outlined above, the approach bears shades of positivist theory as well as classical theory. Through the process of classification and the space given for intervention by the Probation Officer and the Superintendent, as well as by referring to the objects of the Act it seems that some rudimentary form of specialized intervention is contemplated to 'cure' the child. However, the daily reality of life in the Home in terms of the monotonous daily routine and the

enforced separation from all forms of life outside is really an adherence to the classical model of punishment. The approach is normatively within positivist frameworks, but in terms of the existential reality of the child really the classical approach, i.e. an imposition of a heavy punishment for a wrongdoing, in the conviction that that will deter wrongdoing. This conclusion is buttressed by the fact that the Rules framed under the JJ Act bear a remarkable similarity to the Prison Rules.

What is shocking that in an age when our knowledge about wrongdoing has increased exponentially wherein the traditional criminological approaches of classical/positivist have long been contested by other explanatory frameworks, which locate the reason for wrongdoing in societal structures, the Act bears no trace of any new thinking. If for example the labelling theory were taken seriously, then the aim of the Act would really have been to minimize the contact of the child with the criminal justice system as being processed by the system contributed to the child becoming criminal. Diversion would have had to be a mandatory part of the juvenile justice system at all levels right from the police officer, to the prosecutor, to the judge. However, the Act reflects no such theoretical shift in thinking. If social control theories were even considered then, the juvenile justice would have focused more strongly on ensuring that one concentrated on building the social bonding between the juvenile and society, rather than subjecting the juvenile to a prison regime of limited contact with the outside world which in effect alienates him/her even further from society. Interventions based on the impoverished approaches of classical and positivist understandings simply fail to take into account the nuances of understanding from the point of the child as would be evident if one looked at youth subcultures and the loss that this understanding makes for interventions in the life of children. [20] Similarly the Act has not engaged with the deep structural questions thrown up by strain theories and Marxist theories, which defines crime, why are certain crimes the basis of policing as opposed to others? The answers to these questions might seriously destabilize the very ideas of juvenile justice itself[21].

D Juvenile (In) Justice ? Comparative perspectives

One would also imagine that when the law with regard to such a complex area as the interface of children and the criminal law, one would seriously take into account the experiences of other countries around the world. However the law, which has ultimately emerged, shows no such engagement.

One has only to contrast the experience of South Africa where law reform was premised on a close study of what has really happened in other jurisdictions and the law reform proposal was based on such an understanding drawing both from the experiences of other countries as well as the grassroots experience in South Africa. In this section it is proposed to look at experiences pertaining to juvenile justice in the United States, Uganda, South Africa and Scotland to understand how other jurisdictions are dealing with children in conflict with the law.

1) The United States response

The United States has recently celebrated a centenary of the existence of juvenile courts. It is in recent years that the issue of juvenile courts has come under increasing threat with some radical quarters pushing for an abolition of the Juvenile Justice system and others asking for a radical overhaul. [24] Whatever might be the final outcome of these calls for reform, what is apparent is that the trend is increasingly towards recriminalization and a wiping out of the admittedly minimal gains of the past.

The juvenile justice system as established in the US, basically had a more liberal sentencing jurisdiction as compared to the ordinary criminal courts with options such as release on probation and diversion. The aims of the juvenile court were focused on rehabilitation as opposed to punishment. Further the juvenile court did not have the jurisdiction to pass orders, which ran after the person ceases to be a juvenile.

The supposedly more liberal character of the juvenile justice system came under increasing threat in the 1990's with the politicization of juvenile crime. The US media portrayed juvenile crime as a result of the liberal juvenile justice system and the calls for getting tough on crime had its effect in three major shifts in the juvenile justice system.

(i)Expansion of waiver provisions

Most of the states enacted waiver provisions, allowing for juveniles who committed crimes to be transferred to adult courts. The three kinds of waiver, which have been used, are legislative, judicial and prosecutorial.

• Legislative Waiver – In legislative waiver the state excludes certain offences from the jurisdiction of the juvenile court. This is generally done in the case of serious offences like homicide, sexual assault, rape or kidnapping. If a juvenile does commit such offences, the juvenile will automatically be tried in an adult criminal court. The thinking behind legislative waiver seems to be that some offences are

so serious that no consideration can be shown to the child. What matters in legislative waiver is not the best interest of the child, but the fact that the child has committed a serious offence and a strong message needs to go out that such wrongdoing will not be tolerated.

- Judicial Waiver- In judicial waiver, a juvenile court judge can use his or her discretionary authority to waive jurisdiction over a specific juvenile and send him to the adult court system for adjudication. In most states, transfer of the juvenile is undertaken after what is known as a transfer hearing. During the hearing the judge is expected to consider factors such as age of the offender, juvenile's previous record, whether the offence was against a person or property, juvenile's mental or physical maturity etc.[25] In a racist society, there are well grounded fears for supposing that judicial waiver will most often be used against juveniles from
- Racial and ethnic minorities.[26]
- Prosecutorial waiver-The prosecutor has the discretion to file a charge against a minor in either the criminal court or juvenile court. The prosecutor's decision is generally not subject to judicial review and is not subject to any detailed criterion, which restrict discretion. This discretionary power vested in the prosecutor can once again be subject to critique based on the fact that discretion is vested in an authority who does not have the best interest of the child in mind, but rather whose 'primary duty is to secure convictions and who is traditionally more concerned with retribution than rehabilitation' [27]

(ii) Sentencing Authority

One of the problems faced by those advocating a policy based on zero tolerance for crime was that the juvenile court had a jurisdiction, which was limited by the age of majority. To circumvent this problem, many states have expanded sentencing options available to juvenile courts. 'Through extended jurisdiction mechanisms, legislatures enable the court to provide sanctions and services for a duration of time that is in the best interests of the juvenile even past the period of original jurisdiction. In some states that have recently changed the jurisdictional aspects of the juvenile court, 'blended sentencing' has been used to maintain control over juveniles who have aged out of the system. This empowers juvenile courts to impose adult sentences on juveniles that result in confinement beyond the maximum age jurisdiction of the juvenile court.'[28]

(iii)Confidentiality

One of the essential tenets of the Juvenile Justice system throughout the world [29] has been the notion that offences committed in childhood do not follow the child into adulthood. The child who

has been sentenced by the juvenile court has his record expunged, so that the child can start life out on a clean slate.[30] This fundamental premise of the juvenile justice system has been subject to increasing contestation. 'Recent state legislation in forty seven states resulted in changes in confidentiality provisions, including expungement, making records and proceedings more open.'[31]

THE US RESPONSE- JUVENILE IN(JUSTICE)?

The United States response points to a move towards an adult oriented criminal law jurisprudence, which is in violation of agreed international standards. The United States in one of the two countries in the world, which has not ratified the Convention on the Rights of the Child. The legal environment is thus unfavourable to compelling the United States to comply with the Convention. Thus major shifts vies a vis the human rights of children are occurring without any debate within a human rights framework. The very basic rights of children to have an inquiry which is separate from adults, the right to be detained only as a measure of the last resort and for the shortest possible period of time are being whittled away by the enactment of waiver provisions and the enactment of extended jurisdictional options. What is shocking is that this progressive whittling away of core protections is being done in an environment of legal silence. Debates in the United States on issues of juvenile justice do not even mention the existence of international standards vis a vis children, let alone make out a case for why the CRC is a persuasive authority which should be taken into account by US law makers.

The United States experience points to the dangers which juvenile justice reform can run into in an environment where crime is politicized. This points to the more happy position in India where crime by young people has not yet become a politicized issue. As such the policy climate is more attuned to the framework offered by the Convention on the Rights of the Child and reform could mean a greater compliance with the CRC.

2) The Ugandan response

Uganda enacted its legislation on the care of children in 1995 post Ratification of the Convention in 1990. The legislation reflects how a developing country with limited resources can move towards compliance with existing International Standards. The South African Law Commission observed that 'The Ugandan legislation consequently provides an example of the enactment of principles found in international instruments thus elevating the status of the principles to binding local

law. The child-centered approach reflected in the Ugandan legislation can be analyzed under three heads:

(i) The Human Rights Framework

The statute shows a clear commitment to human rights norms found in the three international instruments concerning children. Many of these fundamental principles are actually reflected in the statute. This commitment to translating international instruments into local law is reflected in Sec 4 read with the 1st schedule which balances the welfare of the child with the rights of the child and places them in the position of principles which guide the implementation of the statute itself. It is within this rights based context, that various other child friendly measures have been enacted.

(ii) Diversion

One of the important principles to which close attention has been paid by the Statute is the principle of diversion. Open the apprehension of the juvenile himself or herself, the police have been empowered to deliver a caution at the point of arrest and let the child go. The police may also dispose of the case themselves without recourse to formal proceedings. Thus the statute implements the principle of diversion at the point of first contact itself in line with the mandate of the Beijing Rules. If the police are convinced that the case is not a fit case for diversion and the child cannot be immediately taken before the court, there is even a provision for the release of the child on a personal bond or bond entered into by his or her parent or guardian. If the first tier of diversion does not work then the child goes through an adjudicatory process, which is an innovative attempt at limiting the power of the criminal court.

In the first instance the child in a limited number of criminal cases goes before a local village level authority which has limited criminal powers, namely the Village Resistance Committee Court. The VRCC's sentencing jurisdiction vis a vis juveniles is limited to reconciliation, compensation, restitution, apology or caution and these reliefs may be provided regardless of how the offence is treated by the criminal law. In the case of all other offences committed by children below the age of 18, apart from offences punishable by death and offences committed jointly by adults and children go before the Family and Children's Court as the court of first instance. The Family Court has the power to make the following orders, namely absolute discharge, caution, conditional discharge for not more than twelve months, binding the child over to be of good behavior for a maximum of twelve months and compensation, restitution or fine taking and detention as a measure of the last

resort and for the shortest possible period of time. It is only in cases in which both adults and children are charged and in cases in which the death is the penalty that go in the first instance before the Magistrate.

Thus the way the hierarchy of the courts is structured implements the principle of diversion to the greatest extent possible into community structures at the first instance and into a non-criminal jurisdiction in the second instance.

(iii) Deprivation of Liberty

The statute also incorporates the notion of detention in any facility as a serious measure, which is violative of the basic human rights of children. Thus since deprivation of liberty is seen as a serious punishment it can be inflicted only in limited circumstances. Thus the first level, the VRCC is not competent to deprive an individual of his liberty. It is only the Family and Children's Court and the courts of second instance, which have that particular power. Further the Family and Children's Court is authorized to order detention only 'as a matter of the last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants the order' Finally the maximum period of remand has been fixed as six months in the case of an offence punishable by death and three months in the case of any other offence.

The Ugandan experience: Pointers to India

What is most interesting about the Ugandan experience is that a developing country with limited resources has been able to develop a child friendly code to deal with children in conflict with the law. What the statute indicates is a close attention to international commitments and translation of them into binding local law

When one reflects that the Ugandan law was a post ratification enactment and so was the Indian law, it is clear the points, which Uganda has taken seriously, India has ignored. All three of the heads indicated above viz, a human right framework, diversion and deprivation of liberty have not been attended to in the Indian statute. The Ugandan experience is thus a pointer to how a child friendly jurisprudence as mandated by

international commitments could be incorporated taking into account the existing societal mechanisms and cultural context.

3) The South African Response

South Africa ratified the CRC in 1995 and has since then carried out an intense process of deliberations to arrive at a suitable policy and law on juvenile justice. Prior to this process of reform South Africa did not have any policy or law to deal with children in conflict with the law as they were dealt with by the ordinary criminal law. The South African draft bill is an attempt at taking the best out of experiences around the world and arriving a at a policy suited to the South African context. The South African juvenile justice reform efforts can be analysed under the following heads:

(i) The process of Law Reform

The process of law reform in South Africa has been particularly rich, as law reform has been conceptualized as a consultative process building on existing experiential knowledges and on experiences of comparative jurisdictions.

The two key points at which consultation in built into the law reform process is at the point of circulation of issue papers and discussion papers. In the process of law reform, the opinions of interested parties, such as judges, probation officers, NGO's and children is taken on Board and policy is formulated keeping in mind these concerns as well as the experiences of other countries. This shows the rigorous nature of a process, which is committed to democratizing law making. Law is thus only an end product of a process in which there is fundamental clarity on conceptual issues like minimal age of criminal responsibility, expungement of records etc.

(ii) The Vision of Child Justice

South Africa as mentioned earlier did not have any law to deal with children in conflict with the law. It is only through this process of law reform that a conceptual framework to deal with children in conflict with the law has evolved The core features of this system as outlined by the Commission is 'a comprehensive system for children in conflict with the law, striving at all times to prevent children from being drawn into criminal justice processes...Much emphasis is placed on a proposed new procedure called the preliminary inquiry, which aims to ensure that the case of each child is carefully considered and that each child is given maximum opportunity of being diverted out of the system. Those proceeding to trial will be better protected from the risk of pre-trial detention...The

envisaged system is balanced in such a way that the majority of children will be afforded the opportunity to be held accountable outside the criminal justice system. It is recognized however that when children are accused of serious violent crimes and are assessed to be a danger to others, provision must be made for their secure containment.'

What is clear is that the vision of child justice is clearly based on a commitment to existing international standards and the South African constitutional mandate as is suited to the local conditions. It is this sensitivity to local context, which has meant that the Commission in terms of its policy recommendations decided to opt for a harsher regime vis a vis juveniles who commit serious offences. Thus for juveniles who commit serious offences imprisonment is a sentencing option. Further those who commit serious offences also are not eligible to have their criminal record expunged. However for children who have committed 'non serious offences it undoubtedly is an advance as the vision of child justice emphasizes certain important principles such as diversion, preliminary inquiry, incorporation of international principles into domestic legislation and accountability of the youth offender.

INTERNATIONAL JOURNAL OF

The most important lesson for law reform processes in India would be the rigour and systematic nature of the law reform efforts in South Africa. The entire process right from circulation of the Issue Paper to the formulation of the policy document which was submitted to the Ministry of Justice spanned a period of almost three years, workshops and seminars regarding themes in the discussion paper, comments and feedback from interested parties and the production of voluminous research material of over 800 pages.

The contrast in India was disappointing in terms of the rigour of the work undertaken. There was no systematic collection of data, comparative experiences, experiential learnings that could inform the thinking on juvenile justice. The few research efforts were disappointing in terms of the ability to produce policy papers, which could stimulate debate and discussion. Most importantly, the Ministry of Social Justice and Empowerment did not seem to have taken the process of law reform seriously and was seemingly adamant on producing a new law in the shortest possible period of time without any vision of child justice.

While South African experience does in significant ways enact a more child friendly system, the very classification of children into those who commit violent crime and others seriously stigmatizes the latter category. These children are stigmatized and labeled by the criminal justice system and are the

ones who lose out in the attempt to humanize the system. Thus humanizing the system for some means producing a more inhuman system for others. It is this experience which India should avoid and instead produce a just system for all.

4) The Scottish response

The Scottish treatment of juveniles has evolved independently of the Convention on the Rights of the Child and has been seen a progressive way of treating children who offend and neglected children. In fact it can even be seen to go beyond the CRC in the far reaching nature of reforms suggested. The following can be seen as the key features of the system:

(i) Separation of trial from disposal

The key impetus for the Scottish reform was the Report by Lord Kilbrandon in 1964. Lord Kilbrandon recommended that the 'system should be completely abolished and replaced by a new system which would clearly separate two important functions: the establishment of guilt or innocence on one hand, and the decision on what measures would help each individual child on the other. At that time this was an enormously far reaching proposal, without precedent in either English or Scots law.'

What in effect this meant that after the Sheriff determined whether the child did commit the offence or was indeed neglected, the treatment to be given to the offending child was to be determined by a different body, consisting of lay people.

(ii) Non-separation of delinquent and neglected children.

The Kilbrandon Report made the unique contribution of treating all children as children in need of care and protection. The only judicial role was thus to establish whether the facts constituting the alleged offence were true. There was no further scope for the intervention of the criminal justice system as the treatment of all children was to be determined by a lay panel.

(iii) Operationalization of diversion at various levels

The Scottish system operationalizes diversion as a systematic part of juvenile justice policy at various levels. At the level of the police themselves, once the child admits the offence, he she is released using the principle of formal or informal caution. Diversion is also operationalized at the next level

of the Reporter. Before the child goes before the Hearing, the Reporter has to be satisfied that there are sufficient grounds for a hearing to be arranged. The Reporter has the discretion to decide that no action in necessary and to release the child.

(iv) Lessons for India

The Scottish system is in effect the most radical and it overthrows the basic principles of juvenile justice. It makes a departure from seeing children purely as persons who have committed crimes and goes beyond to ask why such crimes are committed. It then proposes solutions to the causes of why the child chooses to commit the crime rather than redress the issue at a superficial level.

Hopefully we will be able to draw on the strengths of this system in any future law reform we might propose

THE JJ ACT 2000 - A HUMAN RIGHTS APPROACH

While it may be reprehensible that the present enactment does not show any engagement with developments in criminological thinking, it definitely does not violate any obligation, as the state is not duty bound to engage in the same. However, the same does not apply to international obligations undertaken by the state, which are a legal obligation. The JJ Act 2000 in its preamble explicitly invokes three international obligations undertaken by the Indian State, namely the Convention on the Rights of the Child, 1989 The UN Rules for Juveniles Deprived of their Liberty, 1985 and the UN Standard Minimum Rules for the administration of juvenile justice, 1990. Each of these standards will now be examined to show how the Act is not in compliance with existing human rights standards, which have been evolved by states at the international level.

(1) The Convention on the Rights of the Child, 1992

The Convention on the Rights of the Child 1992 is the most heavily ratified human rights treaty in history. The Convention is itself structured to encompass within its framework, both civil and political and socio-economic rights. State parties undertake all appropriate legislative, administrative and other measure for the implementation of the rights recognized in the present Convention where as the social economic and cultural rights are subject to the principle of progressive realization.

This section will look at whether the JJ Act 2000 conforms to

- (i) The basic principles underlying the Convention
- (ii) Specific protections in the CRC to children coming in contact with the juvenile justice system
- (i) The basic principles underlying the Convention

The Committee on Rights of the Child has identified four general principles which are referred to as the 'soul of the treaty' These four articles are essential to understanding the spirit of the Convention as they set out the overarching principles that guide the interpretation of all other provisions. [60] These are in Art 2, (non discrimination) Art 3(best interest), Art 12 (right to participate) and Art 6 (right to life)

a) Best Interest Principle (Art 3)

This is seen by the Committee on the Rights of the Child and various other commentators as a key provision, which guides the interpretation of the other articles in the Convention itself.[61] Historically the best interest principle has always been at the heart of a protectionist approach. Decision makers right from judges to administrative authorities have traditionally determined the best interest of the child using their value frameworks and normative belief systems. How to determine what the best interest of the child has been a matter of sustained controversy, especially when it comes to practices, which enjoy cultural legitimacy such as inflicting corporal punishment on a child. The content of the best interest principle either depends on the belief systems of the society in which it is sought to be applied or can be understood in the light of what the child perceives to be in his or her best interest [62]

One interesting attempt has been to reconcile two principles, which seemingly conflict with each other, the right to participation, and the best interest principle. Can one read down the protectionism inherent in the best interest principle by reference to the right to participate? Can the child determine her own best interest as opposed to having an adult standard imposed on her? John Ekeelar essays an imaginative attempt at interpreting best interest through the lens of participation. Best interest is determined by the child using the principle of dynamic self-determination. This would mean that the best interest principle must be read along with Art 12 (right to participation) This is particularly important in the case of children who are institutionalized as the very fact of institutionalization is often justified by reference to the fact that institutionalization is in the child's best interest.

b) Art 12(right to participation)

The child under Art 12 has the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child This is one of the central provisions in the CRC which puts forward a new vision of what children's rights means. If one traces the history of child rights what is clear is that the original impulse of international child rights law is protectionism. Both the League of Nations Charter on Children's Rights and the 1959 Declaration on the Rights the Child saw the child as a subject to be protected. Hence the stress was on protection from abuse and neglect, protection from homelessness etc. It is only the Convention that first introduced the notion of the child as rights holder in her own right entitled to participate in decision that affect her.

This fundamental principle has completely been ignored in the JJ Act 2000. If an enactment were to implement Art 12, it would mean a radical overhaul of existing ways of interacting with children. At every stage in the interface between the child and the juvenile justice system space should be created for expression of the child's opinion. So right from the point of arrest, to adjudication before the competent authority to assessment by the authority to placement to everyday living within the institutions set up under the juvenile justice system, the child's opinion should not only be heard, but given due weight in accordance with the age and maturity of the child. In particular the protectionist understanding implicit in the philosophy of best interest underlying the juvenile justice administration should be subject to a radical shift in the light of this principle.

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c) Art 2 (nondiscrimination)

Art 2 mandates ,State parties shall respect and ensure the rights set forth in the present Convention.without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. This principle would strengthen the protection given under the constitution as it includes other categories of prohibited discrimination such as discrimination on the basis of disability ,property , birth ,language ,political or other opinion ,colour and the open ended category of other status. However a non-discrimination clause has not been enacted into the JJ Act 2000.

d) Art 6(Right to life)

Art 6 mandates that every child has the inherent right to life This principle has once again not been explicitly or implicitly invoked by the JJ Act 2000. The Constitution does guarantee the right to life under Art 21 to all persons and children would definitely be entitled to protection under the same.

2 Specific protections in the CRC with respect to children coming in contact with the juvenile justice system

Apart from the general principles, Art 37 and Art 40 are specifically aimed at protecting the rights of the child who comes in conflict with the law. The principle that capital punishment and imprisonment cannot be imposed for offences committed by children and the principle that every child deprived of liberty shall be separated from adults. have been incorporated within the JJ Act 2000

However, some of the other principles enunciated in the above-mentioned articles have simply not been incorporated.

Art 37 (a) notes that No child shall be subject to torture or cruel, inhuman or degrading treatment. This provision has not been incorporated. Given the reality, which some international human rights groups have pointed out to i.e. children being subject to torture, cruel, inhuman and degrading treatment, it remains a striking omission. Since human rights organizations have quite strongly indicted the state for these kinds of abuses it was imperative that this provision be incorporated into the legislation.

Art 37(b) notes that No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of the last resort and for the shortest appropriate period of time. This article points to the most serious and systematic abuse of children who come in conflict with the juvenile justice system. As noted earlier, the present Act prescribes a minimum period of detention for those between 17and 18 and detention till they reach the age of 18 for all others. Further even children in need of care and protection are deprived of their liberty without mandating a maximum period of detention. This serious abuse of the human right to liberty and freedom continues to be violated in the name of the need to provide 'proper care, protection and treatment by catering to their development needs' This provision also violates the explicit provision under Art 37(b) that detention shall be used only as a measure of the last resort and for the shortest appropriate period of time.

Art 37(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner, which takes into account the needs of a person of his or her age....

The two principles embodied above are extremely important in the light of the nature of the juvenile justice

system. The law in fact needs to not only incorporate the general principle but in its rules mandate how the child should be treated so as to safeguard his or her dignity and how his or her special needs should be catered to. The Act should have incorporated the general standard and the rules should have operationalized them.

Art 37(c) reads ... the child shall have the right to maintain contact with his or her family through correspondence and visits save in exceptional circumstances. This rule should have been mandatory in the light of the custodial nature of the institution. However, this rule has been left to the discretion of the States leaving scope for enormous violation. To take one example, the Karnataka Rules under Rule 23(1) 'the parents and near relatives of the inmates shall be allowed to visit an inmate once a month or in special cases more frequently at the discretion of the Superintendent. Rule 23(2) notes, the receipt of letter by the inmates of the institution shall not be restricted and they shall have freedom to write as many letters as they like at all reasonable times. However, the institution shall ensure that where parents, guardians or relatives are known at least one letter is written by the inmate every week for which postage shall be provided. Rule 23(3) notes, The Superintendent may peruse any letter written by or to any inmate, and may having regard to the inmate's health or wellbeing, if he considers it necessary to refuse to deliver or issue the letter, destroy the same after recording his reasons in a book maintained for the purpose. The Karnataka Rules restrict access of the family to meet the child to only once a month. The arbitrary nature of this rule violates the institutionalized child's right to maintain contact with his or her family. Further when it comes to correspondence and the power of the Superintendent to not only peruse, but also destroy correspondence it not only violates Art 37(c). Art 37(c) gives the power to restrict access only in exceptional circumstances, however the restricted access of once a month and power to peruse and destroy letters the superintendent finds objectionable makes exceptional circumstances the rule in Karnataka. Further these rules are also violative of the child's right to privacy as embodied in Art 16 of the Convention

Art 37(d) reads, Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action. This broad ranging nature of this provision and its application to all children deprived of their liberty be it children in conflict with the law or children in need of care and protection needs to be noted. The seriousness with which deprivation of liberty for whatever reason is treated and the safeguards built in also needs to be noted. Though the Act prescribes a maximum period of four months for the completion of inquiry this mandate is often violated in practice.

Art 40 obliges the state to incorporate basic safeguards of all those who come in contact with the criminal justice system None of these safeguards have been explicitly incorporated into the JJ Act 2000. It has been argued that these protections do apply to the child as they form both part of the Criminal Procedure Code and the Constitution of India. However it has to be noted that the JJ Act 2000 does not incorporate the procedure as envisaged in the Cr. P.C, instead leaving the procedure to be determined by rules made by State governments. There is scope for doing away with the protections guaranteed by the Cr. P.C by different states as they make rules under the present Act. In this context it is useful to note the South African experience as in their system the rights of children who come in conflict with the penal system form a part of both the Constitution as well as the proposed Juvenile Justice Bill. The fact that rights of children who come in conflict with the system have not been specifically incorporated is a serious omission.

Art 40(3) (a) mandates the establishment of a minimum age below which children shall be presumed not to have the capacity to violate the penal law. This provision exists in the notion of doliincapax under Sec 82 of the IPC. However it has not been incorporated under the JJAct2000.If Art 40(3) is read along with the principle of best interests of the child (Art3) and the principle enunciated in the Beijing Rules then not only should the minimum age have been fixed, but also it should have been fixed at a much higher level than 7 years.

Art 40 3 (b) notes, whenever appropriate and desirable measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. This provision operationalizes a limited understanding of diversion, applying the concept to judicial proceedings only. The constitution of a Juvenile Justice Board with two social workers having coequal powers though significant would still not comply with this provision as the Board would still inquire into the situation instead of diverting the child away from the system itself and completely avoiding the possibility of the child being stigmatized.

Art 40 (4) mandates a variety of dispositions such as care, guidance and supervision orders...and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their wellbeing and proportionate both to the circumstances and to the offence. Though Sec 15 of the JJAct2000 does provide a variety of dispositional options these options do not operate within the CRC framework wherein detention is regarded as a deprivation of liberty and such detention is mandated only as a measure of the last resort and for the shortest possible period of time. Instead the discretion lies with the authority to decide on any of the dispositional options.

What is clear from the above analysis is that the CRC has not been complied with, either in terms of general principles or in terms of specific protections given to children who come in conflict with the juvenile justice system. It is almost as if the JJ Act2000 was a pre CRC enactment in terms of its grasp of CRC principles.

THE BEIJING RULES (1985)

The JJ Act 1986 was supposedly enacted in pursuance of the Beijing Rules. The enactment utterly failed to reflect the spirit underlying the Beijing Rules. In 2000 the State had a chance to move its invocation of the Beijing Rules from rhetoric to reality, needless to say, the commitment remained rhetorical.

The Beijing Rules were enacted prior to the CRC coming into force. Therefore when the CRC came into force, some of the non-binding and recommendatory standard minimum rules were incorporated into the treaty. [79] However some fundamental concepts have not yet been incorporated into the CRC and would have served as useful guidelines for any government enacting legislation on Juvenile Justice.

The guidelines lay out general principles, and specific rules for Investigation and prosecution, adjudication and disposition, non-institutional treatment and institutional treatment. Without getting into a detailed analysis of how each of the rules stands violated in the JJ2000 Act, we will go into two crucial concepts which underpin the Beijing Rules and which have been ignored in the enactment.

1) The concept of diversion, hed by Agradoot Web Technologies LLP [188N-2455-277]

This is operationalized through Rule 11. [80]The fundamental premise behind diversion is that if children are processed through the criminal justice system, it results in the stigma of criminality and this in fact amplifies criminality of the child. Hence any intervention must aim at minimizing the contact with the criminal justice system.

This is conceptualized in Rule 11.2, which empowers police, prosecution and other authorities to divert the child away from the system.

2) The concept of detention as a serious punishment

The philosophy underlying the rules is that detention is a serious punishment, which is inflicted upon juveniles, and therefore it should be imposed only as a measure of the last resort and for the shortest possible period of time.[82] This philosophy, which is influenced by a human rights framework, does not find any place in the new Act, as there is no structuring of the discretion of the authorities so as to ensure

that deprivation of liberty is viewed as a serious infringement rather than as a necessary measure in the care of the child.

UN RULES FOR JUVENILES DEPRIVED OF THEIR LIBERTY (1990)

The JDL Rules are applicable to all persons under the age of 18 who have been deprived of their liberty. These Rules are non-binding and recommendatory in nature. It is important to note that this would include children who are deprived of their liberty even due to health or welfare reasons. Thus the Rules recognize that the philosophical notion of best interest cannot be interpreted to mean deprivation of liberty in most circumstances. It is also important to note that the Rules in effect provide detailed and elaborate human rights standards to be conformed to both on arrest and within the institution. These detailed human rights standards are to be made available to juvenile justice personnel in their national languages. The Rules also mandate the State to incorporate the rules into their legislation or amend it accordingly and provide effective remedies for their breach, including compensation when injuries are inflicted on juveniles.

The JDL Rules are seriously violated both under the present enactment and the Karnataka Rules. To take just a few key examples, NTERNATIONAL OURNAL OF

- When individuals enter the Juvenile home as per Rule 11(3) of the Karnataka Rules, On a juvenile being received in the institution the money, valuables and other articles found with him or on his person on search and inspection and taken possession shall be entered in the Register. By contrast the JDL clearly notes the possession of personal effects is a basic element of the right to privacy and essential to the psychological wellbeing of the juvenile. The right of every juvenile to possess personal effects and to have adequate storage facilities for them should be fully recognized and totally respected.
- In one of the most important areas of violation, namely the subjection of the juveniles to disciplinary proceedings, both the Act and the Karnataka Rules are curiously silent. The JDL Rules by contrast provided detailed guidelines. Rule 67 notes 'All disciplinary measures constituting cruel, inhuman and degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned. The reduction in diet and the restriction or denial of contact with the family members should also be prohibited for any purpose. Labour should always be viewed as an educational tool and a means of promoting the self-respect of the juvenile in preparing him or her for return to the community and should not be imposed as a

disciplinary sanction. No juvenile should be sanctioned more than once for the same disciplinary infraction. Collective sanctions should be prohibited. Rule 70 goes on to note 'No juvenile should be disciplinarily sanctioned except in strict accordance with the terms of the law and regulations in force. No juvenile shall be sanctioned unless he or she has been informed of the alleged infraction in a manner appropriate to the full understanding of the juvenile, and given a proper opportunity of presenting his or her defence including the right of appeal to a competent impartial authority.

The above two examples of non-conformity touch upon certain aspects of the JDL Rules. What is clear is that the If the State was serious about ensuring conformity to the JDL Rules, then they should have been incorporated directly into the JJ Act 2000.

CONCLUSION

The questions which are thrown up by the present critique of the Act are numerous and troubling. One can focus on two sets of questions for further research:

Firstly, there are a whole series of questions as to the impact of international law. At one level the normative assumption of the value of human rights language is present in the use of international instruments to critique the Act. The value of these instruments is seen in the enormous pressure being brought to bear upon even powerful countries such as the USA to ratify the CRC. It thus provides a language for advocacy groups. But on the other hand it is the very human rights instrument, i.e. the CRC and the pressure of the Reporting Procedure, which has brought about the present flawed and ill-conceived Act.

Secondly, the process of Law Reform needs to be subjected to serious interrogation. We must institutionalize a far more rigorous process wherein local learnings, comparative experiences and human rights standards are taken far more seriously before law reform is proposed. There should be no law, which should be framed without policy clarity. As Prof, UpendraBaxi noted, 'law reform is necessarily an ad hoc rather than a sustained or systematic affair: it is a good illustration of what Sir Karl Popper called 'piecemeal social engineering' (when it is a symbolic exercise it is not even such an engineering but a ritual)...The process of Law Reform is deprived of any comprehensive grasp of social reality. There is a lack of any philosophical ideological base.' The JJ Act, 2000 is emblematic of this process of ad hoc law reform. It is a clear example of a law, which in Baxi's words is not even piecemeal social engineering but merely a symbolic exercise undertaken without any grasp of social reality and without any philosophical or ideological base job.

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CYBER SECURITY AND SUSTAINABLE DEVELOPMENT-STRATEGIC POLICY ANALYSIS OF INDIA AND CANADA

ABSTRACT

Information technology has emerged as one of the most significant growth catalyst for the sustainable economic development. More specifically, cyber security has come to be considered as one of the key factor in ensuring sustainable development worldwide. It has been seen how cyber security and a safe and trusted cyber environment have been prioritised in the United Nations Sustainable development goals (UNSDG). Trust in cyber space or ICT is imperative for achieving the goals laid down in the United Nations Sustainable Development Goals. Absence of secured cyberspace would make it difficult to achieve the objectives of sustainable development. The paper highlights the role played by the state as well as the industry and other non-state actors in ensuring better cyber security norms as a catalyst towards sustainable development. Better policy making, better tools and techniques, better cyber architectural designing, collaborative efforts of private parties such as industry, media, civil societies and other national and international organisations can not only contribute towards improving the online safety and keep the world safe from cyber vulnerabilities and threats but also would act as a fundamental infrastructure in achieving the global sustainable development goals.

The Cyber security policy of India envisages a vision to build a secure and resilient cyberspace for citizens, businesses and government. The mission of the cyber security policy aims to protect information and information infrastructure in cyberspace, build capabilities to prevent and respond to cyber threats, reduce vulnerabilities and minimise damage from cyber incidents through a combination of institutional structures, people, processes, technology and cooperation. This is the main driving force behind sustainable development in the present world of technology. Drawing a comparison with Canadian information technology infrastructure, like India even in Canada the economy and the government rely heavily on the internet. Both the Indian as well as the Canadian Cyber Incident Response Centres (CERT) aims to strengthen the security related incident of the internet domain of both the nations. In the light of the initiatives taken by the Indian and the Canadian Governments, the paper aims to highlight the collaborative efforts of both the nations towards achieving sustainable growth and development through a secure cyber world.

Keywords

Cyber Security, Sustainable Development, Information and Communication Technology, Challenges

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INTRODUCTION

Information technology has emerged as one of the most significant growth catalyst for the sustainable social and economic development. More specifically, cyber security has come to be considered as one of the key factor in ensuring sustainable development worldwide. It has been highlighted that cyber security and a safe and trusted cyber environment have been prioritised in the United Nations Sustainable development goals (UNSDG). Trust in cyber space or ICT is imperative for achieving the goals laid down in the United Nations Sustainable Development Goals. Absence of secured cyberspace would make it difficult to achieve the objectives of sustainable development. The paper highlights the role played by the state as well as industry and other non-state actors in ensuring better cyber security norms as a catalyst towards sustainable development. Better policy making, better tools and techniques, better cyber architectural designing, collaborative efforts of private parties such as industry, media, civil societies and other national and international organisations will not only contribute towards improving the online safety and keep the world safe from cyber vulnerabilities and threats but also would act as a fundamental infrastructure in achieving the global sustainable development goals.

The Cyber security policy of India envisages a vision to build a secure and resilient cyberspace for citizens, businesses and government. The mission of the cyber security policy aims to protect information and information infrastructure in cyberspace, build capabilities to prevent and respond to cyber threats, reduce vulnerabilities and minimise damage from cyber incidents through a combination of institutional structures, people, processes, technology and cooperation. This is the main driving force behind sustainable development in the present world of technology. Drawing a comparison with Canadian information technology infrastructure, the paper aims to highlight the cybersecurity adopted by India and the strategies and approaches which India can adopt from Canada. The paper delves into the following aspects:

- 1. The need for sustainable development and the role of cyber security in achieving the same.
- 2. The relationship between cyber security and sustainable development.
- 3. The approaches state and non-state actors must adopt to support sustainable development through a secure cyber environment.
- 4. Challenges in achieving the sustainable cyber security.
- 5. Analysis of the Indian and Canadian International cyber security policy.

SUSTAINABLE DEVELOPMENT AND ICT

Without doubt, the future belongs to the net and netizens. People would be sharing net spaces with each other through a much more advanced cloud computing system. The way the technology is advancing and encroaching into the essential routines of human beings, it can be said that humans will become dependent on technology and more particularly on ICT for almost everything. The advantages of ICT are far reaching but at the same time the risks and the vulnerabilities associated with it are threatening and challenging to a secured sustainable development. The much increasing use of ICT and dependence on cyber world for day to day business, marketing, financial transactions, data storage has made it important to analyse the issue of sustainability as well as cyber security. The world has already started to transact in a paperless and cashless fashion, it indicates that entire data storage shall be done online, and the economies shall be digital. Considering that the significance of information or knowledge economy, sustainable development lies in the protection of data for the future generations. Online digital libraries which are a database of unimaginable quantity of data and information are being stretched to the space. Research regarding digital vellum being in focus, the associated challenges such as interpretation of bits, digital repositories, digital object identifiers, IPRs, generalised encoding, privacy issues and the capacity of big data would be direct challenge for the sustainability in the future. The present generation is researching about the expansion of the internet into the solar system which would become the sole foundation of existence and sustainability for the future generations³⁷². Digital vellum essentially requires a safe cyber environment for preservation and sustainability of data for future generation.

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Emergence of new concepts such has artificial intelligence and Internet of Things, although interesting and invented for the benefit of the humans, but has added more weight to the already existing debate that whether online privacy has totally evaporated? The Secretary General of the United Nations has quoted in the forward to the report on the Group of Governmental Experts on Developments in the field of Information and Telecommunications in the Context of International Security³⁷³,

"Few technologies have been as powerful as information and communications technologies (ICTs) in reshaping economies, societies and international relations. Cyberspace touches every aspect of our lives. The benefits are enormous, but these do not come without risk. Making cyberspace stable and secure can only be achieved through international cooperation, and the foundation of this cooperation must be international law and the principles of the UN Charter.....Our efforts in this realm must uphold the global commitment to foster an open, safe and peaceful Internet. In that spirit, I commend this Report to the General Assembly and to a wide global audience as a crucial contribution to the vital effort to secure the ICT environment."

³⁷²https://www.cmu.edu/silicon-valley/news-events/dls/2015/cerf-news.html

³⁷³https://www.un.org/disarmament/topics/informationsecurity/

All agree that a robust and strong cyber security mechanism needs to be designed for development across the globe. Considering the increasing dependence of people on ICT, it is important to build confidence and security in the use of ICT. Robust cybersecurity helps develop trust in the digital environment and promotes economic growth, social inclusion as well as innovation³⁷⁴. Interestingly, cyber security has become both technical as well as an economic issue as it fosters economic developmental goals. Sustainability is to thrive in the present along with the ability to thrive in the future. A global culture of cyber security needs to be encouraged if the countries have to achieve development and sustainability together. We need such policies which strengthen security and sustainability while also preserving openness, interoperability and a global market for ICT.³⁷⁵

UNITED NATIONS SUSTAINABLE DEVELOPMENT GOALS AND CYBER SECURITY

ICT has become a catalyst in the realization of sustainable development goals. It has emerged as a new medium of economic growth and social development, The General Assembly of the United Nations adopted the 2030 agenda for the sustainable development "376" which encompasses a plan of action for people, planet and prosperity. In the absence of appropriate cyber security practices and mechanism, it shall become difficult to achieve the sustainable development target and goals. These goals have been considered critical for humanity and the planet. The vision of the United Nations is to "envisages a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all. A world in which consumption and production patterns and use of all natural resources — from air to land, from rivers, lakes and aquifers to oceans and seas — are sustainable. One in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger. One in which development and the application of technology are climate-sensitive, respect biodiversity and are resilient. One in which humanity lives in harmony with nature and in which wildlife and other living species are protected."

Trust and confidence in the ICT becomes a mandatory requirement for achieving the goals of sustainable development. The following Sustainable Development Goals illustrate how these goals can be furthered by a safe and robust cyber secure world³⁷⁷:

³⁷⁴https://www.sbs.ox.ac.uk/cybersecurity-

capacity/system/files/WSIS%20Cybersecurity%20White%20Paper%201%20June%2016.pdf

³⁷⁵http://www.jeita.or.jp/japanese/topics/2013/1016/20131016_2.pdf

³⁷⁶http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E

³⁷⁷https://www.sbs.ox.ac.uk/cybersecurity-

capacity/system/files/WSIS%20Cybersecurity%20White%20Paper%201%20June%2016.pdf

- **Develop industry, innovation, and infrastructure (SDG 9)**: ICT can enable better management of infrastructure roll-out and maintenance, increase agricultural productivity, and provide additional business opportunities and market intelligence through online services.
- Achieve gender equality and empower all women and girls (SDG 5): ICT can enable access to information and services that empower women to participate and succeed in academia and business. Capacity building and user education on staying safe online can boost technology use to this end.
- Make cities inclusive, safe, resilient and sustainable (SDG 11): ICT can enable sensing and communication technologies to more efficiently use resources, detect and mitigate natural disasters.
- Revitalize the global partnership for sustainable development (SDG 17): ICT can connect people and institutions, enable sharing of information, and ultimately further the cross-pollination of ideas and innovation across industries.

ROLE OF STATE VIS-À-VIS NON-STATE ACTORS

Recognising well the fact that how a safe and secure cyber world and ICT can help foster and promote sustainable development goals, it becomes important to study and analyse the role of state as well as various non-state actors in ensuring cyber security to people. As we can witness, ICT has become essential to the standardised human life and the responsibility for its security lies both with the governments, its users as well as the business sector and civil societies. The length and breadth of cyber security threats is gigantic, given the unique features of internet such as its unregulated nature, it maintains anonymity and has the ability to transcend across borders.

Both the state as well as non-state actors along with the international institutional bodies have to come forward and perform their share of responsibilities to make cyber world a safe place. Confidence building measures are a mutual obligation of all the stakeholders involved in designing the cyber architecture. The following parties have an important role to play in providing cyber security in tune with achieving the sustainable development goals:

State- There is a need to identify voluntary, non-binding norms for responsible state behaviour and also to strengthen common understanding to increase stability and security in the global ICT environment.³⁷⁸ Such voluntary and non-binding forms of responsible state behaviour is expected to reduce the risks to security and stability. Norms have the potential to prevent

³⁷⁸https://www.opencanada.org/features/cyber-peace-possible/

conflict in the ICT environment as well as to enable the full realisation of ICT to increase global social and economic development.³⁷⁹ Similarly confidence building responsibility has to be jointly shared by state, business sector and international institutional bodies. Particularly, states should undertake further confidence building measures that could strengthen cooperation at regional, national and international levels. States can also facilitate cross border cooperation to address critical infrastructure vulnerabilities that transcend national borders. The Group of Governmental Experts has recommended the following voluntary confidence building mechanisms by the States:

- 1. Identification of appropriate points on contact at the policy and technical levels to address serious ICT incidents and the creation of a directory of such contacts.
- 2. Development of mechanisms and processes for bilateral, regional, sub-regional and multilateral consultations.
- 3. Encouraging transparency at various levels to increase confidence and inform future work. It includes voluntary sharing of national views and information on various national and transnational threats to and in the use of ICT.

Confidence building measures also include establishing a national computer emergency response team or cyber security incident response team and States should extend its full support and cooperation to such emergency response teams by providing adequate exchange of information about vulnerabilities, attack patterns and best practices for mitigating risks.³⁸⁰ The GGE report also envisages cooperation with respect to the investigation of cybercrimes, in a manner which is consistent with national and international law.

The past experience shows that we need a multi-stakeholder approach for moving towards a concrete cyber security structure. Governmental or non-governmental organisations or civil society groups, all must have their specific roles and contribution. Policy making and sharing of operational resources necessarily lies in the hands of the government, acting in accordance with the principles of international law. States also have the responsibility of creating a cyber army and draft exclusive defence policies to protect the cyber world and cyber transactions against the unanticipated

³⁷⁹https://www.un.org/disarmament/topics/informationsecurity/

³⁸⁰http://cis-india.org/internet-governance/files/ict-paper.pdf

cyberattacks. States also need to create policy shaping environment that define the role and responsibilities of other stakeholders.³⁸¹

ii) Industry- The business sector or the industry can also contribute immensely towards cyber security and sustainable development. Companies have a huge responsibility for protecting global cybersecurity. They can do it in two possible ways- one, by developing such a structure or system which ensures discretion in reporting on and sharing details about cyberattacks, as well as invest in awareness raising and capacity building programmes; and second, by disclosing all the associated risks, threats and challenges that are involved in the cyber security. The second component known as materiality is what a reasonable investor would want to know before making a decision, which is the standard for deciding what publicly-traded companies must disclose. The duty of business sectors lies in ensuring that companies should publicly report on risks and incidents related to cybersecurity such as, when the information system of a company is hacked and private information of clients is stolen 383. Materiality lies in the awareness of risks and capacity to prevent as well as react to the incidents, and this responsibility lies with the business sector. The business sector also need to be incentivised to report the incidents thus prioritising and motivating global security over short term risk to reputation. 384

It is important to note that in the world of internet of things and artificial intelligence, how materiality can be a major factor in establishing a strong connection between cyber security and sustainable development. Adam J. Sulkowski³⁸⁵argues that materiality that is risks and incidents related to cybersecurity must be disclosed otherwise sustainable development goals cannot be attained. He explains that it's both in our collective self-interest and the best interest of investors for companies to publicly report on risks and incidents related to cybersecurity such as data breaches and hacking. True and factual disclosure of inherent risks and hazards forms the fundamental matrix of cyber security is a sine qua non to sustainable development.

Public-Private Partnership- It has been seen that public-private cooperation can be a very successful model to support cybersecurity for sustainable development. Given the role of the government in policy making and implementation, even the industry should share the best

³⁸¹https://www.diplomacy.edu/sites/default/files/Cybersecurity_briefing_note_final.pdf

³⁸²https://adamsulkowski.com/2013/02/11/question-whats-cybersecurity-got-to-do-with-sustainability-answer-materiality/

³⁸³https://adamsulkowski.com/2013/02/11/question-whats-cybersecurity-got-to-do-with-sustainability-answer-materiality/

³⁸⁴https://www.diplomacy.edu/sites/default/files/Cybersecurity_briefing_note_final.pdf

³⁸⁵https://adamsulkowski.com/2013/02/11/question-whats-cybersecurity-got-to-do-with-sustainability-answer-materiality/

practices for securing the digital ecosystem. Private sector can also contribute immensely through capacity building mechanisms by providing training and raising awareness among people, as well as through operational collaboration with the government by committing to develop highly secure technology, sharing best practices and facilitating the prevention and identification of cyber threats.³⁸⁶ Joint projects like "Cyber security in OAS Member states" by the Organisation of American States (OAS) and the Government of Argentina, Chile and Estonia can be taken up by other countries also, which would help in building integrated approach to cyber threats and provide wide research on how to achieve sustainable development by securing a safe cyber world.

- iv) Individual- The main pillar of cyber security, yet the most vulnerable one is individual. Individual users of ICT must be more vigilant and cautious during their online presence towards the cyberattacks which may cause harm to their body, mind, property as well as reputation.
- v) Civil Societies- The civil societies play a very significant role in creating and raising general awareness among the users of ICT. They not only balance the security policies with the human right approach such as freedom of expression, access to information and openness of information but their active involvement with the policy shaping and policy implementation processes acts as a fundamental catalyst for promoting cyber security towards accomplishing sustainable development goals. This balanced approach towards the human rights while making policies for the ICT and cyber security is required to be maintained for sustainable development.
- vi) International Bodies- Interestingly, all the stakeholders including the institutional bodies have done their significant bit towards cyber security. The United Nations Group of Government Experts (UNGGE) has coordinated among the member states including India and Canada on norms for cyber security. Among other initiatives by such bodies, the Budapest Convention on cybercrime has made great efforts to create and enhance mutual trust and confidence among the signatories. The Internet Society along with the industry participation has immensely contributed to effectively deal with spams. The Global Forum on Cyber Expertise has taken initiatives on combatting cybercrime as well as e-governance. All these initiatives indicate the intention of the international institutions and the nation states to achieve sustainable development through a cyber safe environment.

³⁸⁶https://www.sbs.ox.ac.uk/cybersecurity-capacity/content/public-private-cooperation-support-cybersecurity-development ³⁸⁷https://www.sbs.ox.ac.uk/

PRESENT AND THE FUTURE CHALLENGES

A recent example whereMorgan Stanley Smith Barney had agreed to pay a \$1 million penalty to settle charges related to its failures to protect customer information³⁸⁸, some of which was hacked and offered for sale online, indicate that how even the big corporates may be either negligently or intentionally fail to adopt written policies and procedures reasonably designed to protect customer data. Such incidents pose a major threat and a question mark on the cyber security measures adopted by even developed nations. It shakes the customers' confidence and trust in the ICT and acts as a major hurdle in achieving the sustainable development goals.

Identify Theft, impersonation, data espionage and data breaches have become common these days. The future belongs to the Internet of Things, artificial intelligence, big data as well as cloud computing. The biggest challenge of achieving sustainability by ensuring cyber security is the challenge posed by thesenew innovative technology which pose a direct threat to the privacy, data as well as can be a channel of cyberattack against the states. According to IBM, everything around us is generating big data. It is being produced by every digital process and every social media exchange site. All the time it is being transmitted by systems, sensors and devices. Thus big data is being produced by multiple sources at an unimaginable velocity, volume and variety³⁸⁹. While big data can be used advantageously by the government or the business sector, it has its own inherent risks and challenges. Organisations and companies have to be proactive about the usage, privacy, governance and other technical aspects of big data otherwise it might lead to a disastrous situation like never before and can be a major hurdle to sustainable development.

Similarly, the privacy issues and risks associated with artificial intelligence, Internet of Things and cloud computing can lead to security breaches which, in the absence of a direct policy over these issues, may lead to shaking of the confidence and trust of the user of these advanced technological features. We appreciate how ICT can be beneficially used for better economic and social development keeping the interests of future generations in mind but at the same time, the risks associated with these advanced ICTs would be in direct conflict with the sustainable maintenance and development.

The challenges for providing a better and safe cyber space are many. The unique features which ICT offers such as anonymity and borderless has been misused by criminals for their own wrongful interests. This uniqueness of internet allows them to carry on their activities anonymously. This has led to increased

³⁸⁸https://www.sec.gov/news/pressrelease/2016-112.html

³⁸⁹https://www.ibm.com/big-data/us/en/

organised crime over the internet and through the internet which results into unimaginable drastic consequences. The incidents of cybercrimes such as espionage, data mining, ransomware and targeted attacks have increased at an alarming rate due to the lack of traceability. Both the state as well as non-state actors' involvement and contribution in to the menace of unsafe cyber environment has been a direct threat to the national security, economic growth, public safety as well as healthy competition.

DEVELOPMENTS IN ICT IN THE CONTEXT OF INTERNATIONAL SECURITY- INDIA

General appreciation of the issues of information security³⁹⁰ suggests that the although ICT promotes and fosters economic growth and attainment of social goals, threats in the form of cyberattacks, cyber terrorism, cybercrime, espionage and cyber money laundering certainly needs to be addressed. The misuse of ICT by state as well as non-state actors has necessitated at an introspection by these agencies about the manner in which they should perform their responsibilities. ICTs have been used by terrorists for fulfilling their malicious intentions such as recruitment, financing, training and incitement of offences. No sustainable development can be achieved unless the misuse of ICT is checked and the states fulfil their obligation of fearless cyberspace.

Efforts taken at the national level to strengthen information security and to promote international cooperation in this field³⁹¹-

The Indian government has initiated several steps to enhance cybersecurity in the country. The government has adopted an integrated approach with a series of policy, legal, technical and administrative steps for addressing cyber security concerns. The government has also launched the Digital India" initiative ensure that government services and social benefits are available to citizens electronically so as to enable improving governance, efficient delivery of services in education, health, medicine, transportation, energy, infrastructure and financial sector.

The National Cyber Security Policy (NCSP, 2013)has been drafted to build a secure and resilient cyberspace for citizens, businesses and Government. Another important legislative framework is the Information Technology Act, 2000, which provides the legal framework for facilitating e-commerce, e-governance and measures to deal with computer related offences including cybercrimes. The Act which was amended in the year 2008 provides for the provisions related to cyber security, cyber terrorism and new forms of

³⁹⁰https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2016/10/India.pdf

³⁹¹https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2016/10/India.pdf

cybercrimes like identify theft, video voyeurism, breach of confidentiality and leakage of data by intermediaries and e-commerce frauds.

India has also envisaged a multi layered approach to ensure defence-in-depth with a clear delineation of responsibilities amongst various Government Ministries/Departments relating to cyber security. Appointment of National Cyber Security Coordinator has been done to co-ordinate and oversee compliance of cyber security policies. The government has also laid emphasis on the capacity-building and skill development in this area. One of the most important and unique initiative is that the Public-Private Partnership (PPP) on Cyber Security has been institutionalized by establishing a Joint Working Group on cyber security. The Interestingly, India has also devised many strategic approaches in its XIIth plan to ensure a safer and sustainable cyber environment. The following strategic approaches have been adopted for a safer and sustainable cyber environment.

- Enhancing the understanding with respect to factors such as dynamically changing threat landscape, technical complexity of cyber space and availability of skilled resources in the area of cyber security.
- Focus on proactive and collaborative actions in Public-Private Partnership aimed at security incidents prevention, prediction, response and recovery actions and security assurance.
- Enhancing awareness and upgrading the skills, capabilities and infrastructure to protect the country's cyber space, to provide rapid response to cyberattacks, to minimize damage and recovery time and to reduce national vulnerabilities to cyberattacks.
- Improving interaction and engagement with various key stakeholders such as Govt. and critical sector organizations, sectoral CERTs, International CERTs, service providers including ISPs, product and security vendors, security and law enforcement agencies, academia, and media, NGOs and cyber user community.
- Carrying out periodic cyber security mock drills to assess the preparedness of critical sector organizations to resist cyberattacks and improve the security posture.
- Supporting and facilitating basic research, technology demonstration, proof of concept and test bed projects in thrust areas of cyber security through sponsored projects at recognized R&D institutions.

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³⁹²http://meity.gov.in/writereaddata/files/downloads/Plan_Report_on_Cyber_Security.pdf

<u>DEVELOPMENTS IN ICT IN THE CONTEXT OF INTERNATIONAL SECURITY-CANADA³⁹³</u>

There has been appreciable development in the field of international cyber security in Canada. Canada has endeavoured to provide a free, open and secure cyberspace and considered it to be critical to global security, economic prosperity and the promotion of human rights, democracy and inclusion.³⁹⁴ For attainment of sustainable development goals, protection of human rights and fundamental freedom of human being is imperative and Canada greatly believes to innovate such strategies which can not only tackle cyber threats but also respect fundamental freedom of humans. Canada's cyber security policy other than strategic issues greatly focusses on the human rights issues and internet freedom. The mandate of the Canadian government to focus on the strengthening of the cyber security system can be witnessed in its engagement with critical infrastructure partners in launching the public awareness campaigns such as "Get Cyber Safe" as well as throughreinforcing the capabilities of the Canadian Cyber Incident Response Centre (CCIRC). As a major step towards combatting cyber threats, Canada had passed its Anti-Spam legislation in July 2014. This Act is consumer centric and ensures that the companies take the consent of the consumers in order to send commercial electronic messages, thereby deterring the most damaging and deceptive forms of spam from occurring in Canada. Information sharing and mutual collaboration with the private sector at the operational and strategic level is a fundamental factor in strengthening cyber security. Canada's participation in discussions on the military aspects of cyber security at the annual Seoul Defence Dialogue to enhance the resiliency of our cyber infrastructure has been instrumental towards effective and trusted cyber infrastructure. Canada is a member of the Global Alliance against child sexual abuse online and has devised policy for combating online child sexual abuse The National Child Exploitation Coordination Centre (NCECC) is Canada's main portal for all matters related to the sexual exploitation of children on the Internet, including those destined for international agencies and those originating from foreign agencies and destined for Canada.

- Similarly, Canada has always been keen in investing a huge amount towards enhancing cyber security. To mention a few contributions and investments-
- Contribution of \$1.1 million to an INTERPOL-led initiative to enhance cyber security through forensic investigation tools and skills in Southeast Asia,

³⁹³https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2016/10/Canada.pdf

³⁹⁴https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2016/10/Canada.pdf

- Canada's support to a \$2.8 million project with INTERPOL to establish a more secure and robust cyber infrastructure environment,
- Contribution of \$500,000 to the UNODC's Global Program in Cybercrime Internet Crimes
 Against Children, to enhance the capacity of law-enforcement agencies in Central America to
 prevent and respond to Internet crimes against children by improving local law-enforcement
 capacity and making the investigation and prosecution of cybercrime against children a priority.

Many important and effective initiatives taken by the Canadian government include giving producers and small-scale entrepreneurs' access to market information, job opportunities, banking services and business and technical skills.

Canada's focus towards attaining sustainable development through a secured cyber environment is reflected through its closeness and accord with the international partners, including major multilateral organizations and private sector associations in order to strengthen the information security of the networks on which Canada's economic prosperity and security rely. The Canadian Cyber Threat Exchange (CCTX) which is a private sector led, not-for-profit organization focuses on sharing actionable information on cyber threats between businesses operating in Canada. It aims to complement existing information sharing hubs in specific sectors by providing a cross-sector venue to share threat information. CCTX is on track to be operational by 2017. Canada is also the founding partner of the Global Forum on Cyber Expertise (GFCE), a capacity building mechanism through which it focuses on cyber security, cybercrime, data protection and e-governance.

By ratifying the Budapest Convention on July 8, 2015, which aims to fight crimes committed against the integrity, availability and confidentiality of computer systems and telecommunications networks. Canada fully supports the Budapest Convention as the best tool to fight cybercrime at the international level.

SUGGESTIONS AND CONCLUSION

The present generation is all set to move towards cyber or virtual world and be able to sustain in future. The future generation is the cyber generation. Cyber has grown with the present generation, but for future generation, they would be dependent for everything on ICT. Thus, nations will have to ensure sustainability of not only resources but also sustainability of data, technology, ethics, law, peace, order and morality for the future generations in the cyber world. Collaborative efforts by state as well as non-state actors to deal with cybercrime should be seriously taken up and real-time cooperation between

government agencies should be developed to tackle this menace. There is also a need to develop suitable mechanism for sharing of information relating to cyber threat and cyber vulnerabilities. In addition, efforts must be made for developing concrete cyber norms relating to responsible state behaviour. Cyber norms as a part of responsible state behaviour have been voluntary and non-binding so far, they should be made mandatory by the States to promote a general culture of cyber mannerism and ethics. The netizens must know to respect the privacy of each other, and if infringed by them, should be ready to face punitive action for the same. Probably, cyber mannerism and ethics can be interpreted as a fundamental duty of the netizens and on the other hand, providing cyber security to them should be interpreted as a directive principle of the state policy.

Looking at the approaches taken by the developed countries like Canada and USA, India must adopt the initiatives taken up by Canada. India, must first think towards signing the Budapest Convention on Cybercrime and join the manifesto to combat cybercrime just like Canada. India should also seriously think about taking capacity and confidence building measures to reduce the risk of cyber threats and armed cyber conflict. Like USA and Canada, India necessarily needs to invest a much bigger amount on ensuring cyber security and take up the cause of no–tolerability towards certain heinous cybercrimes such as online child sexual abuse. The approach for securing a safe cyber environment towards sustainable development can be three pronged:

- i) **Legislative approach** Formulate specific legislative framework for identified cybercrimes such as anti- spam legislation, data protection legislation etc.
- ii) **Technical approach** Build a strong technical architecture for cyber world which can make it almost impossible for the infringers to intrude with the safety of the netizens.
- Social approach- Create a consensual social netiquette in the form of formalising cyber mannerism and cyber ethics among the masses.

Moreover, to defend the highly risky cyberattacks and instances of cyber warfare which is threatening to the present as well as the future generations, the governments need to invest on creating a parallel cyber army consisting of technical internet architecture that could protect the data as well as the people in this highly advanced technological world. This requires a massive contribution of non-human actors.

Thus, as discussed in the introduction, the basic parameters for improving cyber security towards achieving sustainable development for the future of the world require better policy making, nations need to be equipped with better tools and techniques, better architectural designing for effective

defenceagainst cyberattacks and active contribution by all the stakeholders. Thus, the world cannot achieve sustainable development without cyber security and the safe future of the world truly lies in a creating a safe cyber world.



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RIGHT TO LIFE VIS-À-VIS PATENT RIGHTS

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ABSTRACT

The idea of a better ordered world is one in which medical discoveries will be free of patents and there will be no profiteering from life and death. Article 21 as envisaged in the constitution of India provides to every person right to life and personal liberty. On analysis, it can be observed that life does not mean mere existence but includes living a healthy life with dignity and decency. However, is this basic right of health, available to all the citizens of India is a question that needs to answered. To answer this, we need to look at the major amendment in the Act. It was in 2005 i.e. after 35 years of the commencement of the Act that

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India introduced the concept of product patent to new drugs and pharmaceuticals, which lead to various Multinational companies filing patent for their drugs, which was earlier unavailable to them in India and lead to a sudden increase in price of the drugs due to excessive profiteering, loading of huge trade commission and promotional costs. Before the product patent regime India was considered the pharmacy of the developing world. India supplied generic version of the high priced patented drugs with same quality medicines at affordable prices which led to certain concerns among the third world country, an example to this was the letter of the HIV/AIDS Director of the WHO, which recommended the Indian government to take the necessary steps to continue to account for the needs of the poorest nations that urgently need access to antiretroviral. The authors have thus examined the need for having a legislation to curb the high prices of the patented drugs and in spite of having a legislation regarding the same, the use of the said provision has been minimal in order to meet the international trade relations with other countries. Thus, the need of the hour and genesis of compulsory licensing is the desire to balance the private rights of the patent holders with the public interest, thus creating an environment beneficial for all.

Keywords: Compulsory licenses, monopoly, patent

INTRODUCTION FRANCE (Necessity is the mother of invention)

Right to life or Right to Intellectual Property Rights ("IPR") is the main conflict that exists today underlying the innovation policy in India. Patent holders enjoy monopoly rights and benefit from the safeguards in the patent regime that guarantee exclusive rights of their innovation and protection from their misuse. With the safeguards, there are certain exceptions like the "Compulsory licensing" ("CL") under the TRIPS which allows a third party to use and exploit the invention of a patent holder without his/her consent under certain conditions laid down by the government. Thus, compulsory licensing acts as an ex-post limitation of valid patent rights for the purpose of achieving balance between patent rights of an owner to the rights of the people under Article 21 of the Constitution.

1.1. HISTORY AND MEANING OF COMPULSORY LICENSING

Patents are necessary for innovation however these turn into evils when they become a hindrance to life due to their high prices. The Doha declaration and TRIPS talk about the necessity of compulsory licensing and the rights of access to life-saving medicines. "Compulsory license is a license issued by a state authority to a

government agency, a company or other party to use a patent without the patent holder's consent³⁹⁷". A royalty however has to be paid by the government for compensation of the use of the patent without the consent of its holder.

1.1.1. <u>Pre WTO period</u>: In those times, priority was not given to patent laws and thus they had weak regimes. The first ever patent regime was in 1873, known as the "Congress of Vienna for Patent Reform", that permitted the abuse of monopoly right holders by the use of compulsory licensing to safeguard the interests of the public. Other provisions for CL were made under Article 5(A) (4) of the Paris Convention³⁹⁸, Article 11 of the Berne Convention³⁹⁹ and Article 15 of the Rome Convention⁴⁰⁰. Thus, though there were provisions, they lacked clarity and were ambiguous.

1.1.2. <u>Post WTO period:</u> After the WTO, the progress that was made in terms of protection of intellectual property rights was tremendous. The ambiguous provisions that existed now were backed up with well-drafted statutes.

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1.2. DEVELOPMENT OF THE CONCEPT BY THE INTERNATIONAL COVENANTS

The concept of compulsory licensing though existed from 1623, have undergone a great level of development by way of a number of international treaties and agreements.

1.2.1 TRIPS AGREEMENT: An important treaty, Trade-Related Aspects of Intellectual Property Rights ("TRIPS") came into effect in 1995 which required the WTO members to adopt important regulations related to IPR. Under Article 27(1) of the TRIPS Agreement⁴⁰¹, the signatory states are obliged to protect any

³⁹⁷ Paris Convention, 1883; the origin of the term "Compulsory licensing" can be associated with Statute of Monopolies in 1623. It later became popular in 1850 in Britain and finally it was recognized in the international society through the Paris Convention in 1883.

³⁹⁸ It provides that compulsory license must be refused if the patentee has legitimate reasons to justify his inaction. This right to avoid a charge of abuse was given to the patentee in 1925 when Article 5(A) of the Paris Convention was revised at The Hague (Reichmanm&Hasenzahl, 2003).

³⁹⁹ Article 11 of the Berne Convention provided for compulsory licensing in case of broadcasting and related rights.

⁴⁰⁰ Article 15 of the (Rome Convention) merely states that "Compulsory licenses may be provided only to the extent to which they are compatible with this Convention".

⁴⁰¹ Article 27(1) stipulates that: "...patents can be granted for any invention, whether products or processes, in all fields of technology...[and] patent rights enjoyable without discriminations to the place of invention, the field of technology and whether products are imported or locally produced"

innovations, whether products or processes, in all fields of technology. Prior to 1995, more than 50 countries excluded drugs from patentability which was prohibited by the TRIPS. For patent protection, three conditions have to be fulfilled, i.e. "It must be new, it involves an inventive step, and it is capable of industrial application". It is also to be noted that protection under Article 28 of the TRIPS empowers the holders to exclusively use their patents and restrict the third parties from using the same. However, it is to be understood that TRIPS provide an exception for this by providing for compulsory licensing in third world countries. Thus, TRIPS realized that patent protection in case of pharmaceuticals is only possible in the high income and developed countries who can afford expensive drugs. Article 30⁴⁰² provides for compulsory licensing although it is not specifically stated in the agreement and Article 31 deals with an exception and lays down conditions for providing non-voluntary licenses. Another conflict existed with regard to Article 31(f)⁴⁰³ for underprivileged states to obtain affordable generic medicines from the developing countries which have the capacity to manufacture cheaper generics.

1.2.2DOHA DECLARATION ON TRIPS AGREEMENT AND PUBLIC HEALTH: During a discussion that was initiated in the TRIPS Council, it was decided as to submit two drafts, one by the advanced countries and the other by the third world countries. The adoption of the draft of the third countries resulted in the adoption of the Declaration on TRIPS Agreement and Public Health, with some amendments, during the fourth Ministerial Conference in order to deal with the issues of public health, especially the issues resulting from epidemics like tuberculosis⁴⁰⁴. It declared that each member has not only the right to grant compulsory license but also to determine grounds for the grant of license and to determine what constitutes national emergency.

1.2.3 WTO GENERAL COUNCIL'S WAIVER DECISION: Even after the Doha declaration, there existed a state of conflict between the US who was against the system of compulsory licensing and the third world countries who were in need and favour of the same. To come to a consensus, a Decision was taken by the WTO General Council which came to be known as the "Perez Motta text⁴⁰⁵". It waived two

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⁴⁰² Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

⁴⁰³ According to another interpretation of Article 31(f), the purpose of this provision may not be to prohibit the grant of compulsory licenses for the purpose of exporting the products manufactured under compulsory license, but to put a limitation on such export; it may mean that compulsory licensed goods should not be allowed to be exported in competition with the owner of the patent.

⁴⁰⁴ Paragraph 1 of the Doha Declaration mentions HIV/AIDS, tuberculosis, and malaria. However, it is argued that Paragraph 1 of the Doha Declaration should be interpreted broadly and generously to cover other important diseases.

⁴⁰⁵ The General Council, which is composed of representatives of all WTO member countries, exercises the functions of the Ministerial Council when the latter is not in session, as well as other functions assigned to it under the WTO Agreement.

provisions of Article 31, which put 'domestic market' limitation on the generic drug exporting countries, and paragraph and regarding the adequate remuneration requirement. The waiver, however, was not absolute and was subject to certain conditions. This interim Waiver was adopted as a temporary solution until the amendment of TRIPS Agreement and tried to address the initial problem caused by Article 31(f).

1.2.4 ARTICLE 31B: AN AMENDMENT TO THE TRIPS AGREEMENT: The purpose of this amendment was to address the limitations and confusion surrounding Article 31(f) of the TRIPS Agreement. An examination of TRIPS provisions reveals that compulsory licensing is of two types; normal or basic compulsory license under Article 31 of TRIPS and special Doha style compulsory license under Article 31b of TRIPS where 'domestic market' condition is waived. If a country has adequate manufacturing capacity to make generic versions of needed patented drugs under compulsory license or the country is able to acquire the needed patented drug at a reasonable price directly from the patent holder or from any humanitarian organization, then it is not allowed to resort to special Doha style compulsory license 406. Special mechanism is therefore reserved for special circumstances where the state is facing public health emergency and lacks manufacturing capacity of its own.

Thus, even after having provisions regarding compulsory licensing it has hardly been used by the developing countries. This is because of fear of economic consequences in the form of loss of foreign direct investment, countervailing pressures by pharmaceutical industry and governments of powerful states; fear of trade sanctions, reactions and retaliations of developed countries, lack of technical expertise, high costs of patent litigation, bilateral and regional TRIPS Plus free trade agreements, and various other factors.

1.3. INDIA AND COMPULSORY LICENSING

International treaties like the Universal Declaration of Human Rights are not directly enforceable in India and thus have to be incorporated by way of enabling statutes like the *Patents Act* which has been amended thrice since WTO TRIPS agreement came into force. The current law is governed by the *Patents (Amendment) Act, 2002*. The Act now provides for compulsory license on the following grounds:

- (a) The **reasonable requirements** of the public with respect to the patented invention have not been satisfied;
- (b) The patented invention is not available to the public at a reasonably affordable price; and
- (c) The patented **invention** is **not worked** in the territory of India.

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⁴⁰⁶ Berne Convention for the Protection of Literary and Artistic Works, 1979.

The considerations are given in Section 83, some of which are directly relevant to the relationship between IPR and competition law. They include, inter alia that patents are not granted merely to enable a patentee to enjoy a monopoly for the importation of the patented article, patentee does not abuse his rights, and rights are granted only to benefit the public. Section 84 specifies the grounds for applying for a compulsory license, which include public interest, affordability and working in India. Section 89 explains the general purposes of granting compulsory license Section 90 of the Act also empowers the Controller to settle the terms and conditions for compulsory licenses. Sections 92 (1) and 92 (3) enable the Central Government and the Controller, respectively, to deal with circumstances of national emergency or circumstance of extreme urgency related to public health crises by granting relevant compulsory licenses. Section 92A provides for compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems. It is mandatory for a person before obtaining a compulsory license to obtain a license within 6 months on reasonable grounds from the patentee. However, there has not been much clarity on the terms of "reasonable requirement "and reasonably affordable price".

India is amongst few nations that supported the concept of compulsory licensing, however even in India it has been granted only once, in the area of pharmaceutical industry. In *Natco vs. Bayer*⁴⁰⁷, the issue was regarding issuance of compulsory license for the patent of the drug Sorafenibtosylate sold by Bayer under the name Nexavar for kidney and liver cancer. Bayer charged R.s. 2.8 lakhs for a therapy and there was no patented drug manufactured in India for the same. Thus, the government allowed Natco to manufacture and sell a generic version of Nexavar for Rs. 8,800 by granting a compulsory license.

In another case⁴⁰⁸, an application was filed by BDR Pharmaceuticals for anti-cancer drug Dasatinib patented by Bristol-Myers Squibb in India. However, the same was rejected by the Controller stating that the reasonable efforts required were not made to the patent holder.

Thus, the concept has attracted major criticisms from the developed nations like the United States (US). India is in the Priority Watch List of USA, and as per the report of the US⁴⁰⁹, the Indian government was asked to provide clarity on decision making process of compulsory licenses as it affected the U.S stakeholders. The report also stated that though India has issued only one CL under Section 84 and rejected

⁴⁰⁷ Bayer Corporation vs. UOI &Ors. Writ Petition No.1323 OF 2013

⁴⁰⁸ Bristol-Myers Squibb Company &ors v J.D. Joshi; CS(OS) 679 of 2013; In a similar case, Astrazeneca vs Lee Pharma IPAB No. 256 of 2016,the controller rejected the application for compulsory license on the ground that applicant failed to satisfy any of the grounds specifies in section 84 (1) of the Act. The case was relating manufacturing and selling the drug Saxagliptin used in the treatment of type-II diabetes mellitus.

⁴⁰⁹ As per the 2016 Special 301 report of the published by the United States

another petition under it, India has made it clear in other policies that it views compulsory license as an important tool⁴¹⁰.

1.3.1 <u>Article 21 and compulsory licensing</u>: Jurisprudential evidence has time and again proved that "Right to health" is a fundamental right. In *Consumer Education & Research V UOI*⁴¹¹ the Supreme Court has held that right to health and medical aid to protect the health is a fundamental right under Article 21.

Also, the Delhi High Court in a landmark judgment on the issue of Article 21, the right to health, intellectual property and access to medicine has laid down in *Mohd. Ahmed v. Union of India*⁴¹²:

"Everyperson has a fundamental right to quality health care- that is affordable, accessible and compassionate.... By virtue of Article 21 of the Constitution, the State is under a legal obligation to ensure access to life saving drugs to patients. A reasonable and equitable access to life saving medicines is critical to promoting and protecting the right to health". Thus, the court held that State has to fulfill its obligations to ensure access to medicines and in doing so, it can in no way cite financial crisis as an excuse. Also, it was held that providing access to essential medicines at affordable prices is one such core obligation of the government.

Also, the Directive Principles of the State Policy state that the state has a duty to improve the public health as is provided under Article 42 and 47 of the Constitution of India. Thus, as provided by the constitution and the supreme court it is the duty of the state to improve the public health of its citizen and to provide with required facilities enabling citizen to enjoy their Fundamental Right to life of which Right to Health is a part and parcel⁴¹³.

Therefore, the research clearly points out that in the recent Indian cases, the Courts have been of the view that access to medicine comes under Article 21 of the Constitution and it becomes mandatory for the State to fulfill it as its core obligation. Thus, though there are conflicts in the pharmaceutical industry relating to compulsory licensing of essential medicines due to them being in violation of the patent holder's rights, the Courts are of the view to abide by the Constitution and give preference to the grundnorm and consider it as the final authority in case of disputes.

⁴¹⁰ Special 301 Report, 2016.

⁴¹¹ Consumer Education & Research V UOI 1995 AIR 922; Similar observations were made in ParmanandKatara Vs Union of India 1989 AIR 2039.

⁴¹²Mohd Ahmed v. Union of India W.P.(C) 7279/2013

⁴¹³*Ibid* note 10

1.4 CONCLUSION AND SUGGESTIONS

CL is thus an exception to the patent regime and is both a boon and an evil. India is still in a state of conflict where it has to comply with the international standards and maintain international co-operation with the US and also provide for its citizens by guaranteeing access to medicines which is its obligation under Article 21 of the Constitution. Thus, after the analysis of various jurisprudential cases and evaluation of the history, we come to the conclusion that CL though has evolved to a great extent since its inception through international covenants, it still needs more substance. Even after having due protection under various domestic and international statutes, CL has only been granted once. Recently, the new IPR Policy was unveiled by the Finance Minister which was in compliance with TRIPS. Its main objective was to comply with compulsory licensing which was in consonance to promotion of availability of medicines at affordable prices. Thus, the effort of the generic manufacturer is thwarted by the government 's initiative of "Make in India". This has led to the belief that compulsory licensing is the last resort and should be used only when all other remedies are exhausted. Even today there are several patented drugs entering the market with high prices but there have been very few Compulsory license applications. Therefore, the need of the hour is to reduce the risks of abuse, developing countries should use compulsory licensing in the specific circumstances defined by already existing laws. The use of compulsory licensing as a strategy to create public policies should be linked to a framework which ensures reasonable remuneration for the patent-holder. The main problem involving the concession of compulsory licensing lies in the value of the remuneration to be paid to the patent-holder. The payment of royalties similar to those paid to the patent holder in the case of voluntary licensing would prevent, in practice, the fulfillment of the objectives of compulsory licensing. Thus, greater use of compulsory licensing in developing countries requires the existence of high levels of the protection of patents in developed countries. In this context it is absolutely necessary to maintain the flexibility established by the TRIPs Agreement for this to happen.

⁴¹⁴Salmond on Jurisprudence, ed.12, at 422

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