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ILS LAW COLLEGE
Law College Road, Pune
Tel.: 020-25656775; Fax: 020-25658665
Email: ilslaw@vsnl.com; Website: www.ilslaw.edu

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PRINCIPAL'S MESSAGE

We feel very proud to publish the 5th volume of *ABHIVYAKTI* Law Journal for the year 2012-13. This is a Students' Law Journal. It is a platform for them to express views on legal issues of their choice. It is commendable that students have chosen a wide range of legal issues for critical analysis. Topics like Specific Performance, Standard Form of Contracts, Euthanasia, Surrogacy, Uniform Civil Code, Public Interest Litigation, Intellectual Property Rights and many others are not only of academic interest but carry a lot of practical value. These will be appreciated by the entire legal fraternity.

I congratulate these students for their research and for walking a step ahead on the road to legal scholarship.

I thank all those faculty members who helped in bringing out this volume.

Smt. Vaijayanti Joshi

Principal, ILS Law College, Pune.

EDITORIAL

At ILS, we always believe in inculcating skills of research and clarity of exposition. *ABHIVYAKTI* Law Journal is our Institution's endeavour to encourage research and writing skills among students to achieve academic excellence. At the end of every academic year we are proud to showcase the efforts of our students in various subjects of law.

We have received enthusiastic participation from a large number of students, of both the three year and the five year law courses. This year's edition of *ABHIVYAKTI* has seen contribution covering a wide array of subjects like Corporate laws, Public law, Intellectual property rights laws, Competition law, Personal laws and Uniform Civil Code, Contract and Labour laws.

Members of the editorial board undertook the task of sorting many articles received. Faculty members provided invaluable assistance by reviewing submissions and reverting with suggestions for improvement. We thank them for their assistance. We also thank our administrative and library staff for providing logistic support. We thank Shri. Shekhar Joshi and his team at Shree J printers for technical support.

Members of the editorial board have endeavoured to capture the best work. We sincerely hope this initiative through the law journal benefits our students and all readers.

EDITORIAL BOARD

ABHIVYAKTI Law Journal

CONTENTS

LEGALISATION OF ACTIVE EUTHANASIA*

*Aayushi Mehta, Aaradhana Bokil, Tanya and Tinaz Kalyanvala***

"Death is our friend, the trust of friends. He delivers us from agony. I do not want to die of a creeping paralysis of my faculties—a defeated man,"

- Mahatma Gandhi

Introduction

In India, just as everywhere in the world, the issue of legalizing active euthanasia is much debated. As of today, active euthanasia is treated as a criminal offence under the Indian Penal Code. In this research paper, we shall present arguments to support the legalization of Active Euthanasia in India. These arguments deal with the legal as well as moral aspects of euthanasia. We have also included a study of the views of different religions regarding the practice of euthanasia. Why a person should have the right to end his or her life, what methods are involved and how far is the act of taking one's life legally and morally justified are the other aspects discussed in this paper. Further, a study of the global perspective regarding the practice of euthanasia has been included to support these arguments.

Context and Background[1]

Euthanasia in lay man's language is commonly referred to as 'mercy killing'. The word 'Euthanasia' originated in Greece, it comes from the two Greek words ***"Eu"***-meaning good and ***"thanatos"***-meaning death. When one reads or hears about Euthanasia, the first thing that comes to one's mind is the deliberate ending of one's life.

Euthanasia can be classified into three main categories, based on the consent given by the patient. These are Voluntary Euthanasia, Non-Voluntary Euthanasia and Involuntary Euthanasia. When the person who is killed has requested to be killed it is known as **'Voluntary euthanasia'**. **'Non-voluntary euthanasia'** refers to the euthanasia performed on a person who in incapable of giving an informed decision (for example, when the patient is a child),

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* This Article is an outcome of the exercise 'Writing a research article' under the Foundations of Law Programme offered to students of the first year of the five year law degree course.

** *I BSL*

[1] Euthanasia.com – euthanasia definitions; Wikipedia – classification of euthanasia, last accessed 11th March, 2013.

whereas, **'involuntary euthanasia'** refers to a form of euthanasia which is performed on a competent person, against his/her will.

On the basis of the methods used for performing Euthanasia, and the person performing it, Euthanasia can be classified into three main categories. They are Active euthanasia, Passive euthanasia and Physician Assisted Suicide (PAS). **Active euthanasia** in simple terms is performing certain steps to cause a patient's death. These measures may include a lethal injection or an over-dose committed by a physician. It is also known as positive or direct euthanasia. **Passive euthanasia** can be described as the deliberate withdrawal of treatment for the purpose of ending one's life. The measures involve withholding or withdrawal of those elements that are absolutely essential for human life including food, hydration (water) and oxygenation. It is also known as negative or indirect euthanasia. **Physician Assisted Suicide** refers to that type of euthanasia where a physician provides an individual with the information, guidance and means to take his or her own life with the intention that they will be used for this purpose.

Types of Euthanasia Differentiated

In most simple terms the basic difference between 'active euthanasia' and 'passive euthanasia' is that active euthanasia refers to an 'act of commission' as direct measures are taken which cause the death of the patient whereas passive euthanasia refers to an 'act of omission' as treatment is withdrawn and the patient is left to die a natural death. Although Active euthanasia and PAS are very similar in nature, the main difference between them arises due to person performing euthanasia. In PAS, the physician can only provide information and the means for committing suicide but cannot directly participate in the process. It is the patient who has to take the direct steps necessary to kill himself, whereas in active euthanasia, direct measures are taken by a person other than the patient.

In this paper we are mainly concentrating on the legalisation of active euthanasia.

History of Euthanasia[2]

The Hippocratic Oath given by the Father of Medicine the Greek physician Hippocrates in 400 B.C states that: - "I will give no deadly medicine to any one if asked, nor suggest any such counsel". This was probably the first instance wherein the idea of ending life by giving someone a lethal injection or medicine was introduced.

In 1920, the book "Permitting the Destruction of Life not Worthy of Life" was published. In this book, authors Alfred Hoche M.D., a professor of psychiatry at the University of Freiberg, and Karl Binding, a professor of law from the University of Leipzig, argued that patients who ask for "death assistance" should, under very carefully controlled conditions, be able to obtain it from a physician. This book helped support involuntary euthanasia by Nazi Germany.

In 1935, the Euthanasia Society of England was formed to promote euthanasia. In October of 1939, during the outbreak of war Hitler ordered widespread "mercy killing" of the sick and disabled. Code named "Action T 4," the Nazi euthanasia program to eliminate "life unworthy of life" at first focused on newborns and very young children. Midwives and doctors were required to register children up to age three who showed symptoms of mental retardation, physical deformity, or other symptoms included on a questionnaire from the Reich Health Ministry. The Nazi euthanasia program quickly expanded to include older disabled children and adults too.

In 1995, Australia's Northern Territory approved a euthanasia bill .It went into effect in 1996 and was overturned by the Australian Parliament in 1997. In 1998, U.S. State of Oregon legalizes assisted suicide. In 2000, the Netherlands legalized euthanasia. In 2002, Belgium legalized euthanasia. In 2008, U.S. state of Washington legalized assisted suicide.

Religious Views on Euthanasia

Different religions present different views on euthanasia.

Buddhism[3]: Buddhist Monastic's believed that there was

[2] Euthanasia.com – History of euthanasia, last accessed 11th March, 2013.

nothing above human life, no matter what be its quality. They also believed that there was no greater sin than that of inflicting pain on any other human being. It is thus very evident that they were against any form of euthanasia as it led to the destruction of human life which was the greatest possible sin.

Christianity[4] : Christians believe that God is love, and love and compassion are very important in life. According to them, keeping someone in pain and suffering is not loving them but it is an evil. Thus they feel that Euthanasia can be the most loving action, and the best way of putting love for human life into practice. If someone has no quality of life, then euthanasia could be good. They believe that God gave humans a free will. We should be allowed to use free will to decide when our lives end. Thomas More, a Roman Catholic saint, wrote a book about a perfect society ('Utopia'), which included euthanasia - people ***"choose to die since they cannot live but in great misery."***

Hinduism[5] :They are of mixed opinion as far as euthanasia is concerned. Where on one hand they believe that keeping a person artificially alive or on a life support system is not an ideal way of life ,on the other hand they also believe that even though one's life maybe full of suffering disturbing the timing of the cycle of life and death is not something that one can take in his hands, it is to be decided by God who they believe is the only one who has the absolute authority to do so.

Islam[6] : They forbid all possible means of ending one's life. Infact even finding out the time of one's own death by any means is strictly forbidden.

Jainism[7] : The prime objective of Jain's is obtaining Liberation or 'Moksha' which is the freedom of one's soul from one's body and also the final liberation from the cycles of death and rebirth. If any person wishes to obtain Moksha he is to detach himself from all

[3] The Lancet, Volume 366, Issue 9500, at 1848, 26 November 2005.

[4] http.//www.rsrevisin.com/GCSE/christian_life/euthanasia/.for.htm accessed 11th March 2013.

[5] Wikipedia-Religious views on Euthanasia, last accessed 11th March 2013.

[6] Translation of Sahih Bukhari, book 71, Translation of Sahih Muslim, book 35.

[7] PROF. DR. PADMANABH SHRIVARMA JAINI, THE COLLECTED PAPERS ON JAINA STUDIES (Motilal Banarsidass Publications 2000).

worldly pleasures and engage oneself into deep meditation. Thus it can be inferred that through their principle of Moksha they are true supporters of Euthanasia.

Shinto[8] : In Japan, where the dominant religion is Shinto, the prolongation of life using artificial means is considered as a disgraceful act against life. Views on active euthanasia are however mixed, with 25% Shinto and Buddhist organizations in Japan supporting voluntary active euthanasia.

Right to Life and the Right to Religion

In *P.Rathinam v. Union Of India*,[9] the Supreme Court considered whether suicide was a non-religious act. It observed:

> "Every individual enjoys freedom of religion under our Constitution, as per Article 25. In a paper which Shri G.P. Tripathi had presented at the World Congress on Law and Medicine held at New Delhi under the caption "Right to die", he stated that every man lives to accomplish four objectives of life: (1) Dharma (religion and moral virtues); (2) Artha (wealth); (3) Kama (love or desire); and (4) Moksha (spiritual enjoyment). All these objectives were said to be earthly, whereas others are to be accomplished beyond life. When the earthly objectives are complete, religion would require a person to let go of his body. Shri Tripathi stated that a man has moral right to terminate his life, because death is simply changing the old body into a new one by the process known as Kayakalp, a therapy for rejuvenation."[10]

The Court also took note of mythological history, and observed that Lord Rama and his brothers took Jalasamadhi in a river Saryu near Ayodhya; ancient history says Buddha and Mahavira too achieved death by seeking it; modem history of Independence talks about the various fasts unto death undertaken by various people one of them being Vinoba Bhave a spiritual disciple of Mahatma Gandhi who met his end by going on fast.

[8] www.eubios.info – 9.3 Implications of Japanese religious views toward life and death in medicine

[9] AIR 1994 SC 1844, 1994 SCC (3) 394.

[10] *P. Rathinam v. Union of India*, AIR 1994 SC 1844 at 1861, 1994 SCC (3) 394.

These religious and spiritual leaders were praised and worshipped. Even the allegation against them that they indulged in a non- religious act, would be taken as an offence. So how is the act of death by euthanasia non-religious when the outcome "Death" is the same no matter what the means!

When an individual has the right to live in dignity shouldn't he also have the right to end his life when no condition suitable to his existence prevails?

Arguments in Favour of Active Euthanasia

In order to consider the legalization of active euthanasia, it is necessary to look up on the legality of passive euthanasia in India.

The Supreme Court of India endorsed passive euthanasia legal in the case of *Aruna Ramchandra Shanbaug v. Union of India*.[11] The court observed that passive euthanasia is legal throughout the world "provided certain conditions and safeguards are maintained."[12] Earlier, a larger bench of the Supreme Court in the case of *Gian Kaur v. State of Punjab*[13] had mentioned the Airedale case[14] which stated that euthanasia can be made lawful only "by legislation which expresses the democratic will that so fundamental a change should be made in our law."[15]

It has been held that by the bench in the *Gian Kaur* case that right to life with dignity also includes right to die with dignity where "process of natural death has commenced."[16] Thus the court holds that when a patient is in a persistent vegetative state or under terminal illness, he can put an end to his life and this would not be a crime because his death is imminent in the near future and he has just hastened the process.

Also, the court in *Aruna Shanbaug's* case observed that "right

[11] AIR 2011 SC 1290 at 1311, 2011 SCC (4) 454.

[12] *Aruna Ramchandra Shanbaug v. Union of India*, AIR 2011 SC 1290, 2011 SCC (4) 454.

[13] *Gian Kaur v. State of Punjab*, AIR 1996 SC 1257 at 1266, 1996 SCC (2) 648.

[14] *Airedale N H A Trust v. Bland*, [1993] 2 WLR 316 (HL).

[15] AIR 1996 SC 1257 at 1266.

[16] *Gian Kaur v. State of Punjab*, AIR 1996 SC 1257 at 1263, 1996 SCC (2) 648.

to life includes the right to life with dignity".[17] Thus, a terminally ill patient may be allowed to "terminate his life by premature extinction"[18] in certain circumstances.

The Legal Provisions Supporting Active Euthanasia

Article 21 of The Constitution of India states "no person shall be deprived of his life or personal liberty except according to procedure established by law." If the state decides that euthanasia will not be legalised, it will infringe upon the individual's right to personal liberty.[19] Every individual has a right to decide his course of treatment as well as a right to stop it. The state cannot infringe upon this right completely and make any form of euthanasia illegal. The state must allow the people to practice these rights under certain conditions so that people may enjoy this right but not misuse it.

We are not contesting whether right to die can be included in Article 21 because if we do, it would mean legalising suicide which is neither our topic nor the scope of this paper. We would only like to state that euthanasia should come under the ambit of Article 21 and people must be given this right, provided certain conditions are met.

Many argue that this right will be misused by family members to kill their relatives for property, money, etc. Euthanasia is practised secretly at many places. Thus it is necessary to have a legal framework to control this abuse.[20]

We agree that it is the government's job to have measures to safeguard interests of the weaker sections of society but in a similar manner it is their duty to treat everyone equally and grant them the rights they deserve. It is injustice to the patients lying in hospital beds with no future of a meaningful life, waiting for death to arrive,

[17] *Aruna Ramchandra Shanbaug v. Union of India*, AIR 2011 SC 1290 at 1308, 2011 SCC (4) 454.

[18] *Aruna Ramchandra Shanbaug v. Union of India*, AIR 2011 SC 1290 at 1307, 2011 SCC (4) 454.

[19] Stephen Orlando, *An Argument for the Legalization of Active Euthanasia*, 4-1-2010, at 4.

[20] Tania Sebastian, *Legalization of Euthanasia in India with Specific Reference to the Terminally Ill: Problems and Perspectives*, Journal of Indian Law Society, at 365.

or for those waiting to be treated by doctors and nurses who are caring for those terminally ill patients who have no future. We are not saying it is all right for doctors to let their patients die but in certain cases when the patient is in tremendous agony and demands that somebody put an end to his pain and let him die, we must respect his choice.

Some would argue that euthanasia and suicide are the same and if euthanasia is legalised consequently suicide would be legalised too. We would like to point out that there is a difference between suicide and euthanasia. A person commits suicide when he is depressed with life and has no reason to live. Euthanasia on the other hand means putting an end to an individual's life to stop the physical and mental pain he is going through on account of certain life threatening medical conditions.

We shall support our argument by the decision given by the Supreme Court of Nevada (one of the States of United States of America) in *Mckay v. Bergstedt*[21] wherein the court held that "the desire of the patient for withdrawal of his respirator did not tantamount to suicide." This was because the patient was exercising his right to choose whether he wanted to continue his medical treatment or not. This clearly shows us the difference between suicide and euthanasia.

Thus euthanasia cannot be considered a crime.

Furthermore, we would like to mention "The Euthanasia (Permission and Regulation) Bill, 2007"[22] regarding euthanasia that was introduced in the Parliament of India. The purpose of this bill is *'to provide for compassionate, humane and painless termination of life of individuals who have become completely and permanently invalid and/or bed-ridden due to suffering from incurable disease or any other reason and for matters connected therewith'.*

The purpose clearly states that it was introduced to provide a

[21] 801 P.2d 617 (1990), referred in *P Rathinam v Union of India*, AIR 1994 SC 1844 at 1849, 1994 SCC (3) 394 .

[22] The Euthanasia (Permission and Regulation) Bill, 2007 available at: <http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/17.pdf> last accessed 11th March 2013.

painless death.

The Moral and Ethical Support to the Practice of Active Euthanasia.

One of the most prominent arguments in support of the practice of active euthanasia is that it provides a quicker and possibly a much less painful alternative to passive euthanasia. According to James Rachels, "If one simply withholds treatment, it may take the patient longer to die, and so he may suffer more than he would if more direct action were taken and a lethal injection given. This fact provides strong reason for thinking that, once the initial decision not to prolong his agony has been made active euthanasia is actually preferable to passive euthanasia, rather than the reverse."[23] Once a patient has decided to request euthanasia, it would be inhumane to put him through more pain and suffering.

Another important argument is that of the right of every individual to self-determination or informed consent. It requires that respect must be given to the wishes of the patient.[24] Each individual has the right to choose what is best for him and therefore has the right to choose whether he wants to live a painful life or die a quick and painless death. If the patient chooses not to live and wishes to opt for a painless death, this principle gives him the right to do so.

An important aspect to be considered is compassion towards the ill. As stated by Kate O'Leary, *"Allowing someone to die peacefully surrounded by loved ones on their own terms this is true compassion, true love."*[25] It is also important to note that the patients must be allowed to die with dignity, as this will provide them with strength in the face of grave illness.

India, being a developing country, has limited resources. In such a case, the resources spent on a patient who is terminally ill with no hope getting better and who does not wish to live can be

[23] James Rachels, *Active and Passive Euthanasia*, 292 The New England Journal of Medicine 78 (1975), at 78-80.

[24] *Aruna Ramchandra Shanbaug v Union of India*, AIR 2011 SC 1290 at 1319, 2011 SCC (4) 454.

[25] Kate O'Leary, *Is euthanasia ethical or unethical?* (October 03, 2009), available at: <http://www.helium.com/debates/90329-is-euthanasia-ethical-or-unethical/side_by_side> last accessed March 11, 2013.

better utilised if they are directed towards patients who are not terminally ill.

Considering these arguments, it is clear that the legalisation of active euthanasia will be beneficial to the terminally ill patients. Since the end result of active and passive euthanasia is the same, why should the patient go through the agony for a longer time when he can have a fast, easy, painless death. Thus, we believe that active euthanasia is more preferable as compared to passive euthanasia.

The International Perspective on Active Euthanasia

Australia became the first country in the world to legalise voluntary active euthanasia when the Northern Territory of Australia passed the *Rights of the Terminally Ill Act 1995*.[26] The Act allowed terminally ill patients over the age of 18 years to request his or her own death. Under this act, four terminally ill patients were granted the right to die with dignity. However, the provisions of this act were overturned by the *Euthanasia Laws Act, 1997*[27] passed by the Australian Federal Parliament. Today, Voluntary Euthanasia and Assisted Suicide are illegal in all states and territories of Australia.

Netherlands is the first country in the European Union to legalise both euthanasia and assisted suicide. It passed the *Termination of Life on Request and Assisted Suicide (Review Procedures) Act* in 2002.[28] A regional review committee was set up for review of notification of termination of life on request and assistance in suicide. Euthanasia of children below 12 years is illegal in Netherlands unless the Groningen protocol[29] is followed. A report[30]

[26] *Rights of the Terminally Ill Act, 1995*, available at: <http://www.nt.gov.au/lant/parliamentary-business/committees/rotti/rotti95.pdf> last accessed March 11, 2013.

[27] *Euthanasia Laws Act, 1997*, available at: <http://www.austlii.edu.au/au/legis/cth/num_act/ela1997161/> last accessed March 11, 2013.

[28] *Termination of Life on Request and Assisted Suicide (Review Procedures) Act*, 2002 available at: <http://www.nvve.nl/assets/nvve/english/EuthanasiaLaw.pdf>.

[29] Eduard Verhagen & Pieter J. J. Sauer, *The Groningen Protocol - Euthanasia in Severely Ill Newborns*, The New England Journal of Medicine (2005).

stated that in 2005 out of all the deaths in Netherlands, 1.7% were due to euthanasia and 0.1% were due to physician assisted suicide. These percentages were lower as compared to those in 2001 when 2.6 % were due to euthanasia and 0.2 % from assisted suicide. There are many misapprehensions about euthanasia in Netherlands. People feel that it is really easy to plea for euthanasia in Netherlands.[31] However, the physicians have to follow a specific procedure and fulfill certain conditions to grant patients their wishes. Those who do wish to receive continuous treatment in face of life threatening diseases can say so in their will. Nobody is given a mercy death unless they want to have it.

Belgium became the second country in Europe (after Netherlands) to legalise the practice of Active Euthanasia. The principles of this are governed by *The Belgian Act on Euthanasia of May 28th, 2002.* [32] According to Section 3 (1) of this act, a physician can perform Euthanasia if a patient under 'constant and unbearable physical or mental suffering that cannot be alleviated' has attained the age of majority (18 years of age) and has repeated the request voluntarily.

Luxembourg became the third European country to legalise active euthanasia. It adopted the Euthanasia Law in 2009.[33] Euthanasia is regulated by a living will or advance directive and is allowed for the terminally ill and those with incurable diseases or conditions, only when they ask to die repeatedly and with the consent of two doctors and a panel of experts.

Japan: There are no official laws regarding euthanasia and the Supreme Court of Japan has never ruled on the matter. However, Japan's euthanasia policy has been decided by local court cases. The judgments in these cases established a legal framework

[30] Chelsea Pietsch, Research Officer SCBI, *Development of Euthanasia and Physician-Assisted Suicide in the Netherlands*, at 7.

[31] <http://www.rnw.nl/english/article/nine-myths-about-euthanasia-netherlands>.

[32] *The Belgian Act on Euthanasia of May 28th, 2002.* Available at: <http://www.kuleuven.be/cbmer/viewpic.php?LAN=E&TABLE=DOCS&ID=23>.

[33] Thaddeus M. Baklinski, *Luxembourg Legalizes Euthanasia, LifeSiteNews.com* (Luxembourg, March 18, 2009) available at: <http://www.lifesitenews.com/news/archive//ldn/2009/mar/09031803>.

and a set of conditions within which both passive and active euthanasia could be legal.[34] In 1962, a high court in Nagoya, declared euthanasia legal under special circumstances and specified that it should be performed by a medical doctor.

After going through the legislations of various countries [35], we propose to suggest certain pre-conditions for granting permission for active euthanasia so as to avoid the misuse and abuse of this provision. They are:

1. The patient has attained the age of 18 years.
2. The patient is suffering from unbearable pain.
3. The patient is suffering from an illness that will result in death if extraordinary measures are not applied.
4. The doctor has informed the patient of his illness, his likely condition in future, his medical treatment regarding the illness including palliative care and counseling to keep him alive.
5. Another doctor must support this doctor's view.
6. Only after knowing all the details of his illness and the treatments offered, the patient can make his decision to continue the treatment or put an end to it.
7. If a patient requests to be euthanized the doctor must inform the medical officer who may refer the matter to the district judge. Before accepting the patient's request the judge must make sure that his request was made voluntarily without any pressure.
8. In case of a patient who has a living will present, the judge must test the authenticity of it.

Conclusion

Through this research paper we have learnt about the different dimensions of Euthanasia; its scope, religious views, the

[34] Katsunori Kai, *Euthanasia and Death with Dignity in Japanese Law*, Waseda Bulletin of Comparative Law vol. 27.

[35] The Euthanasia (Permission and Regulation)Bill, 2007 (India); The Belgian Act on Euthanasia of May 28th 2002 (Belgium); Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002 (Netherlands); Guidelines laid down by Supreme court in case of *Aruna Ramchandra Shanbaug v Union of India* , AIR 2011 SC 1290, 2011 SCC (4) 454.

views of different countries, and also legal and moral arguments for it.

We propose to suggest that under the pretext of certain conditions stated above, there should be a legal provision for active euthanasia in our country. The arguments against active Euthanasia although strong and valid have failed to prove how it serves any purpose when a person has no further scope of a normal survival.

Life is a precious gift, and very often when we see it starting to leave us we are reluctant to allow the inevitable to occur. But for the thousands who have to endure the unbearable physical pain before death comes to them, there is only suffering that gets worse each day. The value of life does not only stand in preserving it for the longest possible duration, if that was the sole principle there would be greater efforts to prevent wars, death penalties would not exist, etc. The value of life, in fact, lies in leading a dignified and content life and also one that is definitely free from eternal suffering.

Active euthanasia is often only looked upon from a sentimental point of view, which involves the faith of the patient's family for a drastic change of prevailing circumstances or probably some kind of miracle. Miracles, yes they do happen sometimes but there is no room for them as far as medical sciences and their verdicts are concerned. Also, what sometimes families fail to realize is that it is not they who have to endure the daily physical pain of a terminal disease or the inability to address your own bodily functions.

Also what about the mental and physical state of the patient's family? Is it not a burden for them to look after and attend to the needs of such patients while leading their own lives?

The financial aspect must also not be ignored. While some families are in a comfortable position to bear medical expenses of such patients, some under privileged people cannot afford to look after their relatives who are in such a state. Is it not unjust to impose a financial burden on these poor people, for the care of a patient who will probably never lead a normal life again?

It is also true that the legalization of active euthanasia can be abused by a lot of people. But there is a risk involved in giving

people the right to assemble, the freedom of speech, the right to religion, etc. but our constitution has provided these along with certain conditions .Then why can't we have a legal provision for active euthanasia, with certain justified conditions? When our constitution has granted us the right to live with dignity, shouldn't they also make a provision for an individual to die with dignity?

"Death is not the greatest of ills: worse is to want to die and not be able to."[36] With his opinion, we wish to conclude our research and propose that just like passive euthanasia there must be a legal sanction for active euthanasia, as the ultimate outcome of both is the same that is, death on humanitarian grounds.

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[36] Attributed to Sophocles.

PERFORMERS' RIGHTS: BEFORE AND AFTER THE COPYRIGHT AMENDMENT OF 2012

Jasmine Latkar *

INTRODUCTION

The latest amendment to the Copyright Act, 1957 in India ("The Act") made in June 2012 aimed at bringing the Indian copyright laws in consensus with the World Intellectual Property Organization's Copyright Treaty ("WCT") and Performances and Phonograms Treaty ("WPPT") and to widen the rights of the performers.[1] Eminent artistes, ranging from Pandit Ravishankar to A.R. Rahman, had pleaded for the changes in the Copyright Act.[2]

This article mainly analyses the Rights of Performers' under the Indian Copyright Law prior to and after the 2012 Amendment. It shows how performers' rights became recognized in Indian law. It also refers to laws of United Kingdom and the USA.

HISTORY OF PERFORMERS' RIGHTS IN EUROPE, INDIA AND USA

Rights of performers were not recognized in Europe in the medieval period. In the English law, no copyright or similar right was conferred upon the performers under the Copyright Act, 1911. However, in the Dramatic and Musical Performers' Protection Act 1925 some consideration was given to the performers.[3] In the *Blackmail Case*[4] it was held that no civil remedy was available in case of infringement of performers' rights. This view later prevailed in the recommendations of the Gregory Report[5] and under The Dramatic and Musical Performers' Protection Act, 1958.

The Whitford Committee[6] in its compromise recommendation laid down that performers should not have a copyright to their performances but should have civil remedies for the unauthorized exploitation of their performances. Accordingly,

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* *IV LL.B.*

[1] Statement of Objects and Reasons of The Copyright Amendment Bill, 2010.

[2] http://www.thehindu.com/news/national/article3447052.ece.

[3] Rights such as right to control fixation and subsequent use of their performances were given to performers and criminal action was introduced for infringement

[4] *Musical Performances' Protection Association Ltd. v British International Pictures Ltd.*, (1930) 467 L.R. 485.

[5] Report of the Gregory Committee established to make changes to the copyright laws in 1951.

[6] Committee appointed to review the Copyright laws in 1972.

infringement of performers' rights was recognized and made actionable as breach of statutory duty.

The Rome Convention was signed by the United Kingdom in 1963 after which the Performers' Protection Act, 1963 came into force. Yet no provision for civil action was made. In *Apple Corps Ltd. V Lingasong*[7], once again injunction was refused. A phenomenal change took place in the ex parte *Island Records Ltd*[8] *case*. It was held that that the rights of the performers were rights in the nature of property rights, damage to which by criminal acts gave rise to civil remedies. Therefore, if performers could show that they were losing royalties from lost sales as a result of these criminal offences, a private right of action could be accorded to them. It was only in *Rickless v United Artists Corporation*[9] that civil remedy was finally made available. Ultimately in 1988, the Copyright, Patents and Designs Act was enacted that recognized civil liability for infringement of performers' rights. Later, the Copyright and Related Rights Regulations, 1996 conferred right to equitable remuneration to a person who has transferred his rights concerning a sound recording or other author to a film producer.

In the Indian law, the Copyright Act, 1957 did not grant any rights to the performers. In *Fortune Films International v Dev Anand*[10] , it was held that an actor had no claim over his performance in a film as this performance did not fall within the five categories of artistic work contained in the Copyright Act. It was only after the Amendment of 1994 that the rights of the performers were recognized. This Amendment brought the Copyright Act in India in harmony with the Rome Convention, 1961. A performer was defined to include an actor, singer, musician, dancer, acrobat juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance[11] and performance was in relation to performer's right, meant any visual or accoustic presentation made live by one or more performers[12] Certain rights

[7] [1977] FSR 345.
[8] [1978] Ch 122.
[9] [1986] FSR 502; [1988] QB 40.
[10] AIR 1979 Bom 17.
[11] Section 2 (q) of the Act.
[12] Section 2 (qq) of the Act.

were guaranteed to the performers. These are given further in the Article.

In the USA, performers' rights have found recognition in two ways, by way of right of publicity which is a tort and by way of economic rights providing copyright protection. A news channel televised an entire 15-second performance of a famous human cannon-ball on its news show who claimed that the viewership of his show would fall since his whole show was screened on the news. In this case[13], the Supreme ordered the news company to pay compensation for violating his right of privacy. Where distinctive traits of voice and singing of performers were duplicated in order to advertise and increase sales, it was held that there was infringement of right of publicity. [14]

The Copyright Act (Title 17 of the United States Code) also envisages certain rights of performers. Performers have the right to a fixed royalty. [15] Further, there is an obligation to make royalty payments[16] and there is a procedure for its distribution.[17] Anyone who, without the consent of the performer or performers involved makes a copy of the sounds or images of a live performance or otherwise transmits or communicates or offers, distributes, sells etc such sounds or images regardless of whether the fixations occurred in the United States, is subject to the same remedies as that of an infringer of copyright.[18]

POSITION PRIOR TO 2012 AMENDMENT:

The 1994 Amendment provided definitions for the terms performer and performances. In 1995, the Delhi High Court observed[19] that the copyright in derivative works viz. cinematograph film and sound recordings are limited rights when compared to the rights in primary works viz. literary, dramatic or

[13] *Zacchini v. Scripps Howard Broadcasting*, 433 U.S. 562 (1977).
[14] *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1989).
[15] Section 1006 of the Copyright Act.
[16] Section 1003 of the Copyright Act.
[17] Section 1007 of the Copyright Act.
[18] Section 1101 of the Copyright Act.
[19] *The Gramophone Company of India Ltd. v. Super Cassette Industries Ltd.*, 1995 (1) ARBLR 555 Delhi.

musical works. When the music industry came up in 2000, there was a demand that broadcasters pay 20% royalty[20] to the producers.

Sections 38 and 39 dealt with the rights of the performers. Where any performer appeared or engaged in any performance, he was given a special right known as the "performer's right" in relation to such performance.[21]

As per Section 38 of the Act, during the continuance of performer's right in relation to any performance, making of a sound or visual recording or reproducing it without the consent of the performer or for a purpose different than the one for which consent is given or for purposes different from those referred to in Section 39 from a sound recording or visual recording which was made in accordance with Section 39 by any person amounts to infringement of performers' rights. Further, broadcasting the performance except where the broadcast is made from a sound recording or visual recording other than one made in accordance with Section 39, or a rebroadcast by the same broadcasting organisation of an earlier broadcast which did not infringe the performer's right, or communicating the performance to the public otherwise than by broadcast, except where such communication to the public is made from a sound recording or visual recording or a broadcast, shall subject to the provisions of Section 39, amount to infringement. An exception to these rights was a performer who has agreed to include his work in a cinematograph film.[22]. Once the performer agreed to include his work in the cinematograph film, he automatically lost the performer's right and the right to royalty, unless a contract to the contrary was concluded. The producers reaped benefits of their work each time their work was broadcasted, for example, when the song of a musician was played on a radio, the producer received the monetary gratification from the radio channel and not the musician.

Section 38 only envisaged what would lead to infringement of a performer's right. However, no positive right of any entitlement was conferred upon the performer, for instance, "A performer has

[20] http://timesofindia.indiatimes.com/business/india-business/Copyright-Amendments-Rendering-justice-after-decades-of-denial/articleshow/13366015.cms.
[21] Section 38(1) of the Act.
[22] Section 38 (4) of the Act.

the right to make a sound recording or visual recording of the performance".

In an important decision in 2003[23], it was held that re-recording of a song without the permission of the original performer constituted infringement of the performer's rights. Interestingly, in another case[24] before the Delhi High Court, it was held that even though the Copyright Act provides protection to only live performances, every performance is live in its first instance, be it on a stage or in a studio. Recording such a performance without the consent of the performer constitutes infringement of the performer's rights.

However, sound or visual recording for the purpose of research or bona fide teaching or for private use by a person or for the purpose of reporting do not amount to infringement.[25] Also reproduction for the use of judicial proceeding[26], reproduction for the members of legislature[27], the use in a certified copy in accordance with any law in force[28] and the use of sound recording or visual recording in the course of activities of an educational institution if the audience are limited to the students, parents etc. Further, there can be assignment of performers' rights similar to assignment of copyright[29] and licenses may be granted.

The rights conferred upon the performer subsist for a period of fifty years from the beginning of the calendar year next following the year in which the performance is made. [30] Prior to 1999, the period for which the rights of performers subsisted was twenty-five years.

[23] *Super Cassettes Industries v Bathla Cassettes Industries.*, 107 (2003) DLT 91.
[24] *Neha Bhasin v. Anand Raj Anand*, 2006(32)PTC 779(Del).
[25] Section 39 of the Act.
[26] Section 52(1)(c) of the Act.
[27] Section 52(1)(d) of the Act.
[28] Section 52(1)(e) of the Act.
[29] Sections 18 and 19 of the Act.
[30] Section 38 (2) of the Act.

CHANGES INTRODUCED BY THE 2012 AMENDMENT:

In the *Eastern India Motion Pictures Judgment*[31] Justice Krishna Iyer observed that: "Disentitlement of the musician or group of musical artists to copyright is un-Indian, because the major attraction which lends monetary value to a performance is not the music maker, so much as the musician. Perhaps both deserved to be recognized by the copyright law... So viewed, apart from the music composer, the singer must be conferred a right". In 2009, Asha Bhosale, Lata Mangeshkar and others came together and demanded payment of royalty to performers.

Consequent to the provisions of the 2012 Amendment, the rights of the performers have been broadened. Sections 38 and 39 are amended for that purpose. The 2012 Act has appended a Proviso to the definition of performer to disable those performers not mentioned in a film's credits (including film 'extras') from being able to claim all but one of the rights granted to performers by the Act. [32]

The Act gives the performers the right to exploit their own work. Section 38A (1) provides that without prejudice to the rights conferred on authors, the performer's right which is an exclusive right subject to the provisions of this Act to do or authorise for doing any of the following acts in respect of the performance or any substantial part thereof, namely making a sound recording or visual recording of the performances and restoring it in any material form including the storing in any medium by electronic devices, issuing copies to the public provided that they are not copies already in circulation and communicating, selling, renting them or offering for sale or commercial rental as also broadcasting or communicating the performance to the public except where the performance is already broadcast. Prior to the 2012 Amendment, performers' could only restrain other persons from infringing their work but now they have the positive rights to make sound recordings etc.

[31] *IPRS v. Eastern Indian Motion Pictures Association and Ors.*, 1977 AIR 1443.

[32] Proviso: 'Provided that in a cinematograph film a person whose performance is casual or incidental in nature and, in the normal course of practice of the industry, is not acknowledged anywhere including in the credits of the film, shall not be treated as a performer except for the purpose of clause (b) of section 38B.

The Amendment provides a clarification on Section 38(4) of the Act.[33] This provision firstly contemplates that the consent to incorporate his performance in a cinematograph film shall be given by the performer in writing. Once such consent is obtained, the performer cannot object to the enjoyment by the producer of his performer's right in the same film. However, a contract to the contrary can be entered into by the parties. Most importantly, in spite of this provision, the performer is entitled to royalties if and when the producer makes commercial use of his performance.

Consequently, subsection (3) & (4) of Section 38 have been repealed.

In a recent decision[34], the Delhi High Court held that cricket players and umpires can be categorized as performers of a cricket match on account of the language used to define performer. However, this Single Bench Judgment was set aside by the Division Bench of Delhi High Court. It was further observed that once a combination of the lyrics, music and the performers' works together is performed and a sound recording created, that sound recording which is the first sound recording, is recorded on a plate. After the first sound recording is made, then, if and after permissions are taken from the authors of the musical work and the lyrics writer which formed the basis of the first sound recording, another band of orchestra with the singer (i.e. another set of performers) can by their performances on the basis of the existing musical work and the lyrics, cause to come into being a new sound recording. This second/subsequent sound recording is called a version recording/cover version. This new/second sound recording itself is a subject matter of a copyright by virtue of Section 13(1)(c) of the Act and there exist the entitlements on the basis of such sound recording to exercise rights as provided in Section 14(e) of the Act. To further clarify, on utilization of original musical work and the lyrics from which the first sound recording is made, various independent/subsequent sound recordings can be made, and each of which subsequent sound recording would be original sound

[33] Section 38A(2)

[34] This judgment clubbed three cases - *Star India Pvt. Ltd. v Piyush Agarwal and Others, Start India Pvt. Ltd. v. Idea Cellular Ltd. and Another*, and *Star India Pvt. Ltd. v. OnMobile Global Limited and Another* decided on November 8, 2012 (CS(OS) No.2722/2012 & connected matters).

recording for being the subject matter of the copyright under Section 13(1)(c) of the Act. Thus it may be concluded that performers enjoy the performers' rights only with respect to a particular performance or work and with respect to visual or sound recording as mentioned in Section 38 and nothing beyond that.

The Amendment[35] has introduced the concept of moral rights for performers'. The performers have the right to claim authorship of the work and the right to restrain or claim damages in respect of any distortion, mutilation or modification of the work or any other action in relation to it which may prove to be prejudicial to his honor. The mere removal of any portion of a performance for the purpose of editing, or to fit the recording within a limited duration, or any other modification required for purely technical reasons shall not be deemed to be prejudicial to the performer's reputation and thus abuse and misuse of the moral rights has been prohibited.

IMPACT OF THE AMENDMENT:

Singers and musicians who were deprived of royalties will now be entitled to it. Noting that poor artistes had been left in the lurch as producers cornered all royalties HRD Minister Kapil Sibal said the new law will help them to live a good life even in old age as they would continue to get their dues for their work during their heyday. [36] Making of cover versions is now difficult and prohibited up to five years from the making of the recording[37]. In case they are made, royalty is again payable.

Only by a written contract can now consent for incorporating performance in a cinematograph film may be given by a performer. Irrespective of the existence or non existence of such a contract, the

[35] Section 38B: The performer of a performance shall, independently of his right after Moral rights of assignment, either wholly or partially of his right, have the right of the performer-.
(a) to claim to be identified as the performer of his performance except where omission is dictated by the manner of the performance; and
(b) to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.

[36] http://articles.economictimes.indiatimes.com/2012-05-22/news/31814400_1_artistes-copyright-act-royalty.

[37] Section 31C of the Act.

performer is entitled to royalties in case of commercial use of the performance.

Further, on account of the statutory licensing introduced, the monopoly of the owners is checked and broadcasters can play their music albeit on payment of royalties. Consequent to the amendment, royalty is payable to the IPRS. IPRS demanded that they too be given Rs 1,000 per needle hour or 10% of revenues, whichever is higher.[38]

CONCLUSION:

The article shows the evolution that has taken place in the arena of performers' rights in India. Performers' rights have widened, they have a right of income in future dealings with works incorporating their performances, and they now have moral rights over their performances.

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[38] http://timesofindia.indiatimes.com/business/india-business/Copyright-Amendments-Rendering-justice-after-decades-of-denial/articleshow/13366015.cms.

SPECIFIC PERFORMANCE – A ROUTINE REMEDY?

*Madhupreetha Elango**

Introduction

"In case of a breach of contract, buyer's concern is for performance of seller's obligation and seller's concern is payment of price"[1].

The general purpose of the law of remedies is to place the party in the position he would have been had the contract not been breached. There are two different approaches to achieve this end, monetary compensation by way of damages and specific performance. The principal remedy for a breach in common law is by way of damages. India essentially follows the common law system and considers specific performance as an exceptional remedy. On the contrary, the civil law system provides for specific performance as the primary remedy. This system believes that there is no better way to restore the aggrieved party to the position he was had the breach not occurred; than to enforce performance of the contract. This paper aims at examining the remedies provided under the United Nations Convention for Contracts of International Sale of Goods [CISG], and analyzes the provisions of specific performance as the routine remedy, the nature, scope, limitations and viability of specific performance under this convention.

Specific Performance – A routine remedy under the CISG

The CISG grants individual remedies to the buyers and sellers. The remedies can be broadly classified into three heads – specific performance[2], monetary compensation or damages[3] which are substitutory in nature and the right to avoid the contract[4]. However, the convention's primary remedy is the right to claim performance of the contract.

* V LL.B.

[1] Secretariat Commentary, *'Guide to CISG Article 46'*, (Pace Law School Institute of International Commercial Law, 2006); Secretariat Commentary, *'Guide to CISG Article 62'*, (Pace Law School Institute of International Commercial Law, 2006).

[2] United Nations Convention on Contracts for the International Sale of Goods, Arts. 46, 62.

[3] United Nations Convention on Contracts for the International Sale of Goods, Art. 72.

[4] United Nations Convention on Contracts for the International Sale of Goods, Art. 80.

Article 46 empowers the buyer to *'require performance of seller's obligations'* while Article 62 states that the seller may *'require the buyer to pay the price, take delivery or perform his other obligations'*.

The CISG gives the injured party a right to demand performance of the unperformed parts of the contract, a concept drawn from the civil law system as opposed to common law practice where specific performance is viewed as an extraordinary remedy.[5]

Legislative History

The provisions of the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) formed the basis for drafting the CISG.[6] Specific performance under ULIS was restricted to cases where the buyer was unable to procure alternative replacement or the goods were unique in nature.[7] It was proposed to incorporate the language of Article 25 of the ULIS in the CISG as well. The proposal was rejected on the ground that it would "unjustifiably restrict" the buyer's right to require contract performance.[8] The pre - convention negotiations witnessed a 'common-civil debate'. While the representatives from common law countries advocated for a the remedy of specific performance to be scarce and made available only in cases where there is no availability of substitute goods, the followers of civil law system voted for placing specific performance as the primary remedy. Finally, the committee decided to adopt the civil law approach. To some, this may mean that the civil law principles were preferred over the common law. On the contrary, a compromise was reached by virtue of Article 28.[9] According to Article 28, a court is not bound

[5] LARRY A DIMATTEO, LUCIEN DHOOGE, STEPHANIE GREENE & VIRGINIA MAURER, INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE (Cambridge University 2005).

[6] Steven Walt, *For Specific Performance under the United Nations Sales Convention*, 26 Tex. Int'l L. J. 211-251 (1991).

[7] *Report of the Committee of the Whole I Relating to the Draft Convention on the International Sale of Goods*, in *Report of the United Nations Commission on International Trade Law on the Work of Its Tenth Session*, 32 U.N. GAOR Supp. (No. 16) Annex 1, para. 239, U.N. Doc. A/32/16 (1977).

[8] *Id.*

[9] Nayiri Boghossian, *Comparative Study of Specific Performance Provisions in the United Nations Convention on Contracts for the International Sale of Goods*, in PACE

to grant specific performance unless it would do so under its own law in respect of similar contracts not governed by the CISG. The limitation of 'forum choice' is beyond the scope of this paper's discussion.

Nature of Specific Performance under CISG

1. Burden of Proof

Common law considers specific performance supplementary to the remedy of damages. Therefore, it has been traditional practice to grant specific performance only in cases where damages provide an inadequate relief.[10] Judicial practice reflects that the claim of specific performance will be disposed off in cases where damages provide full compensation.[11] Consequently, in common law it is imperative for the plaintiff to prove that damages will not suffice as an adequate remedy. Damages are considered to be inadequate when the subject matter of the contract is a rarity, or a unique item[12] or it is difficult to find substitutes for the same[13]. Thus, the onus of showing such compelling circumstances is on the plaintiff claiming specific performance. Further common law requires mutuality of performance. The plaintiff is under an obligation to demonstrate that he is ready and willing to perform his part of the contract.

Similarly, under the Uniform Commercial Code, specific performance may be decreed where the goods are unique or in other proper circumstances. [14] The usage of the term 'may' indicates that it is the court's discretion to grant specific performance.[15] Consequently, this provision does not confer upon the injured party

REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 6 (Kluwer 1999-2000).

[10] BEATSON J., ANSON'S LAW OF CONTRACT 596 (28th ed., Oxofrd University Press 2002).

[11] *Harnett v. Yielding*, [1805] 2 Sch. and Lef. 549 at 553; *Cud v. Rutter* (1620) 1 P Wms 570.

[12] *Falcke v. Gray*, 62 Eng. Rep. 250 (1859), *Pusey v. Pusey*, 23 Eng. Rep. 465 (1684).

[13] *Behnke v. Bhede Shipping Co.* (1927) 1 KB 649.

[14] Uniform Commercial Code, Sec. 2-716.

[15] Nayiri Boghossian, *Comparative Study of Specific Performance Provisions in the United Nations Convention on Contracts for the International Sale of Goods*, in PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 6 (Kluwer 1999-2000).

a right to claim specific performance.[16] The success of his claim will depend upon his ability to demonstrate that the goods are unique or prove the existence of other such circumstances. Therefore, under common law there is a two-fold burden upon the plaintiff; to prove the presence of exceptional circumstances and to satisfy the test of mutuality.

In India, the remedy of specific performance is exceptional in nature. The buyer is required to prove that the damages will be inadequate or there exists no standard for ascertaining damages[17] and that the plaintiff is ready and willing to perform his part of the contract[18]. In case of failure to discharge this burden, the plaintiff will not be entitled to the remedy.

However, the primary remedy provided by the CISG is specific performance. The traditional assumption is that damages will make for a sufficient remedy, especially in cases of contracts for sale of goods. This assumption is built on the premise that given the market conditions, it is easy for a buyer to procure substitute goods and sellers to locate alternate purchasers. The CISG however challenges this assumption. The relevant market under the convention spans over the world at large. Given the international expanse, sometimes substitute goods may have to be procured from different countries, thereby making it difficult for the buyer to enter into a cover transaction.[19] Therefore, the injured party is given an option to choose between claiming damages or specific performance or other remedies. Since specific performance can be claimed as of a right, there is no onus incumbent on the aggrieved party to prove the inadequacy of damages.[20] Nor are injured parties required to

[16] JUSSI KOSKINEN, CISG, SPECIFIC PERFORMANCE AND FINNISH LAW, B: 47 (Faculty of Law of the University of Turku 1999)

[17] Section 10, Specific Relief Act, 1963.

[18] Section 16(c), Specific Relief Act, 1963.

[19] Secretariat Commentary, *'Guide to CISG Article 46'*, (Pace Law School Institute of International Commercial Law, 2006).

[20] Admire Takawira, *Departing from mere compromise: Reformulating the remedy of specific performance under the Convention on the International Sale of Goods (CISG) in line with the Convention's underlying goals*, (2007), available at: <http://www.cisg.law.pace.edu/cisg/biblio/takawira.html>.

demonstrate their inability to reasonably purchase or resell the goods under contract.[20]

For instance the claim of an advertiser is to order a magazine to print a particular advertisement on the cover page and secondly to forbid publication of any other material. If the case falls within the jurisdiction of common law, the onus is upon the advertiser to prove that the magazine has some unique features due to its readership or that there are no substitutes available. However, if the case falls within the civil law jurisdiction, the advertiser is not required to aver and prove any factor, but must only prove the breach. [21] He is directly entitled to the remedy of performance. Moreover, the defendant is bound to perform his obligation and cannot escape liability on the grounds that there are adequate substitutes.

Further, under the CISG identification of the goods to the contract is not a prerequisite to a claim for specific performance.[22] In Indian law buyer is eligible to claim specific performance only in cases where the goods are specific or identified. Specific goods means good identified and agreed upon at the time a contract of sale is made.[23] Therefore, on cases of enforcement of contracts to sell goods, it is an additional burden in the Indian law upon the buyer to demonstrate that the goods are specific or identified.

2. Specific Performance as a matter of right and not discretion

Under common law, specific performance is not a right of the person seeking the relief but is at the court's discretion.[24] Therefore, even if the plaintiff demonstrates that damages are an insufficient and satisfies the condition of mutuality, he will not automatically be entitled to an order of specific performance. Being an equitable remedy, the court will grant an order of specific performance only in

[20] Steven Walt, *For Specific Performance under the United Nations Sales Convention*, 26 Tex. Int'l L. J. 211-251 (1991).
[21] Yves Marie Laither, *The French Law of Remedies for Breach of Contract*, in COMPARATIVE REMEDIES FOR BREACH OF CONTRACT (Nili Cohen & Ewan Mac Kendrick eds., Hart publishing 2005).
[22] Steven Walt, *For Specific Performance under the United Nations Sales Convention*, 26 Tex. Int'l L. J. 211-251 (1991).
[23] Section 2(14) Sale of Goods Act, 1930.
[24] *Lamare v. Dixon*, (1873) LR 6 HL 414 at 423.

cases where it deems just. [26] The court has the power to reject an order of performance if in its opinion it is inequitable to deliver such order. The scheme of remedy at common law places the plaintiff at the mercy of the court. The Indian law is modelled along the lines of common law and hence the courts has a discretion while decreeing specific performance.[27] The statute expressly provides certain situations when the relief may be refused; in cases of hardship to the defendant or if in the court's judgment it is inequitable to do so.

However, the injured party under the Convention "can choose between damages and specific performance, without any discretion left to the court."[28] The CISG is inspired by the principles of civil law in granting this remedy. A civil law court does not have the discretionary power to grant specific performance.[29] Therefore it follows that there can be no discretion of the court in granting the remedy.[30] Further, the convention provides damages as only a secondary remedy. An injured buyer is entitled to choose between claiming damages or other remedies provided by the convention.[31] Article 45(2) clearly states that the buyer does not lose his right of claiming damages despite choosing other remedies. Therefore, the right of the buyer to adopt a remedy of his choice is supreme under this convention. Thus, the aspects of choice of remedy coupled with a court's duty to grant specific performance makes it a right under the CISG. While exercising this right, the buyer is not required to show inadequacy of damages, lack of substitute goods.

The aggrieved party is in no case compelled to claim specific performance but is given a right to choose among the various remedies.[32] Thus, if the aggrieved party wishes that the contract to

[26] *Stickney v. Keeble*, [1915] AC 386 at 419.
[27] Section 20, Specific Relief Act, 1963.
[28] Nayiri Boghossian, *Comparative Study of Specific Performance Provisions in the United Nations Convention on Contracts for the International Sale of Goods*, in PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 6 (Kluwer 1999-2000).
[29] CHENGWEI LIU , SPECIFIC PERFORMANCE: PERSPECTIVES FROM THE CISG, UNIDROIT PRINCIPLES, PECL AND CASE LAW (2d ed., 2005).
[30] *Id.*
[31] United Nations Convention on Contracts for the International Sale of Goods, Arts. 45(1).
[32] Judgment by Arbitration Court of the Chamber of Commerce and Industry of Budapest, Hungary 5 December 1995; Case No. Vb 94131. Translation by *Marko*

be enforced, he can make a claim for specific performance without having to prove any factors. However, if he chooses not to, then his right to damages or price reduction are not compromised.

Scope of the Right

The scope of specific performance under the convention is considerably wider as compared to the civil and common law systems. A whole range of obligations can be enforced by both the seller and the buyer. Article 46 is an expression of the general maxim *pacta sunt servanda* which requires the performance of the contract by the seller after he has failed to perform in any manner.[33] The scheme of Article 46 can be analyzed in three parts.

The first part is a general provision conferring upon the buyer a right to require performance of any obligation of the seller. This includes all the obligations imposed by the convention on the seller – duty to produce, to procure, to deliver the goods, to deliver documents of title to goods. For instance, Buyer B contracts with Seller S for the supply of 10 processing units, but S fails to deliver. B has a right to require S to supply all the 10 processing units.

This general remedy is supplemented by two more specific provisions. It covers cases where the breach is not related to delivery of goods but delivery of non – conforming or defective goods. In case of non conforming goods the buyer is entitled to claim delivery of conforming goods. For instance, in the aforementioned illustration, if there was a contract for type X processing units but type Y was delivered, buyer B can require replacement of type Y with type X. In cases of defective delivery the buyer is entitled to get the defects cured. For instance, if 2 processing units out of the 10 are supplied without the installation of a certain feature, the buyer can require the curing of such defect. However, these rights are not unbridled and are subject to express limitation as stipulated by the convention which will be discussed in the next part of the paper. The remedy of replacement and right to cure are not found in the Sale of Goods Act under the Indian law. The injured is only provided with a right to reject the goods in cases of non conformity.

Maljevac, translation edited by *Dr. Loukas Mistelis*; available at: <http://www.cisg.law.pace.edu/cases/951205h1.html>.

[33] *Supra* note 29.

Article 62 recognizes that the seller's primary concern is payment of price at the time it is due.[34] Bearing in mind the difficulty of the buyer to dispose off the goods, Article 62 provides the seller a right to payment and obliges the buyer to take delivery of the goods. Since the obligations of the buyer are fairly simpler, there is only one general remedy of specific performance of the buyer in these cases. Thus, from this it could be seen that specific performance is given by way of a routine remedy under CISG.[35]

Limitations

Under all jurisdictions, the right to claim specific performance is not sacrosanct.[36] It is only the extent of such limitation which various across several jurisdictions. While in the common law system, the nature of the remedy is extremely limited, the CISG envisages the following express and implied limitation to the remedy. Regarding the general right of the buyer and seller to compel performance vide Articles 46(1) and 62, the injured party's right is restricted if he has resorted to a remedy inconsistent with specific performance. A buyer is entitled to demand substitute delivery of conforming goods only if the breach amounts to a fundamental one. Similarly in cases where it is unreasonable, the court may refuse to provide the remedy to cure the defect sustained by the buyer.

1. Inconsistent Remedies

The buyer or seller can claim specific performance so long as he has not resorted to a remedy inconsistent with it.[37] For the purposes of CISG, an inconsistent remedy is avoidance of the

[34] Secretariat Commentary, '*Guide to CISG Article 62*', (Pace Law School Institute of International Commercial Law, 2006).

[35] *Magellan International v. Salzgitter Handel* [No. 99 C 5153], available at: <http://www.cisg.law.pace.edu/cases/991207u1.html> last accessed on 3 March 2013.

[36] Steven Walt, *For Specific Performance Under the United Nations Sales Convention*, 26 *Tex. Int'l L. J.* 211 (1991), at 213.

[37] Peter Schlechtriem, *The Seller's Obligations under the United Nations Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 293 (Galston & Smit ed., Mathew Bender 1984).

contract or the reduction of the purchase price.[38] Avoidance of a contract is patently inconsistent with claiming performance under Article 81 because both the parties are relieved of their obligations in case of avoidance. The only remedy will be claiming the difference between the contract price and market price of the cover transaction.[39] These two remedies are mutually exclusive and may not be exercised simultaneously. Similarly, price reduction and specific performance are also incompatible. As *Koskinen* states, "it is obvious that if the delivered goods are defective and the buyer demands a price reduction or refund for repair costs as compensation, he may not at the same time require repair or delivery of substitute goods. In such a case the right to require performance and claim for a price reduction are inconsistent remedies, *because they aim to compensate the same interest.*"[40] The Convention provides that the right to damages is not lost by claiming specific performance but the converse is moot.[41] In cases where the injured has claimed specific performance, he may also be entitled to damages. To answer the question of whether damages is inconsistent with specific performance; jurists have distinguished two situations. In cases of delayed delivery, claiming of damages for the delayed period can coexist with claiming performance of the contract. However, in cases of non delivery the two remedies are inconsistent for damages can be claimed only if the contract is avoided.[42]

Under Indian law, the concept of avoidance may be compared to termination of a contract. Further, it can be sufficiently deduced that damages and specific performance are inconsistent remedies under Indian law.[43] However, there are cases where the two remedies will not be inconsistent. These are situations which fall

[38] Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 Washington Law Review 607-619 (1988).

[39] Mirghasem Jafarzadeh, *Buyer's Right to Specific Performance: A Comparative Study Under English Law, the Convention on Contracts for the International Sale of Goods 1980*, Iranian and Shi'ah Law, (Pace Law School Institute of International Commercial Law 2001).

[40] *Supra* note 16.

[41] *Supra* note 29.

[42] *Id.*

[43] *Ardeshir H. Mama v. Flora Sassoon*, (1928) 30 Bom L.R. 1242.

under section 21 of the Specific Relief Act, which provides the court discretion to award monetary compensation along with specific performance.

2. Fundamental Breach

Article 46(2) covers situations where there is delivery of non conforming goods. The claim of specific performance will be granted only in cases where such non conformity amounts to a fundamental breach. Further, if the buyer requires delivery of substitute goods, then he is obliged to return the non conforming goods accepted by him.[44] Otherwise it would amount to double enrichment. Fundamental breach is one which results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract.[45] The concept of fundamental breach under CISG is very vast. In the Indian context it can be reasonably compared to the 'breach of condition' in a contract for sale of goods.[46] A condition is a stipulation which is essential to the main purpose of the contract.[47] The breach of such condition gives rise to a right of repudiating the contract. The buyer has a right to reject the goods. Under the CISG, this right of repudiation is termed as avoidance. However, the convention provides the right to the buyer to claim the difference between contract price and market price of cover transactions along with the right to avoid the contract. In the Indian law there is no mention of cover transaction except the illustrations to Section 73 of the Indian Contract Act. For instance,

(a) A contracts to sell and deliver 50 maunds of saltpetre to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

[44] United Nations Convention on Contracts for the International Sale of Goods, Art. 82.

[45] United Nations Convention on Contracts for the International Sale of Goods, Art. 25.

[46] Indraneel Basu Majumdar & Srishti Jha, *The Law Relating to Damages under International Sales: A Comparative Overview between the CISG and Indian Contract Law*, 5 Vindobona Journal of International Commercial Law & Arbitration 185-211 (2001).

[47] Sale of goods Act, 1930, Section 12.

(b) A contracts to buy B' s ship for 60, 000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

These illustrations clarify that repudiation under Sale of Goods Act and damages under the Indian Contract Act will be available simultaneously. The quantum of damages will be governed in accordance with principles laid down under Section 73 of the Indian Contract Act, i.e., the difference between the contract price and the market price.

3. Reasonableness

Specific performance also includes within its ambit, a claim to cure a defective performance. This facet of the right is the most lenient for the breach does not have to be fundamental.[48] Even minor errors attract the provisions of Article 46(3). However, this right is subject to the test of reasonableness. If the court finds it to be unfeasible, uneconomical and inequitable the remedy can be refused.[49] If the expense involved in repairing is uneconomical when compared to the deterioration by way of defect or such repair is technically impossible, then the court can reject the same.[50] For instance, the cost of procuring technician from another country to repair the defect is more expensive when the goods are priced low and damages as a result of non conformity is minimal. In such cases, the court will reject the remedy of cure. Reasonableness of the request to repair does not depend on the nature of breach, but, on the character of the goods delivered, technical difficulties and all the other circumstances.[51]

[48] *Supra* note 16.

[49] JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (3d ed., Kluwer Law International 1999).

[50] Mirghasem Jafarzadeh, *Buyer's Right to Specific Performance:A Comparative Study Under English Law, the Convention on Contracts for the International Sale of Goods 1980*, Iranian and Shi'ah Law, (Pace Law School Institute of International Commercial Law 2001).

[51] *Id.*

4. Other Limitations

Third party rights are not governed by this convention. Therefore, in cases where the municipal law does not give the buyer a preferential right over the third party to whom the goods have been transferred, then there can be no specific performance.[52]

Civil Law Perspective

In civil law countries, the remedy is primarily by way of granting specific performance. In Germany, the claim of specific performance is considered to be an inherent and normal right flowing from the contract.[53] Therefore, the right to claim performance is considered as a right of the party than a remedy for the breach of contract.[54] The German law permits the claim for specific performance in all the cases except when the breach is by way of impossibility. The scope is vast and includes restitution in kind. For instance, when there has been a wrongful collusion with a third party and a transfer of title in goods, the third party can be compelled to perform return the goods for the payment of original contract price.[55] However, this right is subject to certain restrictions including but not limited to the ground of impossibility. The following are some instances where specific performance has been refused, cases where reparation in kind does not compensate the plaintiff adequately, where declaration of specific performance entails unreasonable expense, or which culminates in an unjust enrichment to the injured.[56]

An important ground of restricting this remedy is contracts involving personal capacity dependent upon the competence of the defendant. German law distinguishes contract involving personal performance into two – personal and non personal contracts. Personal contracts are those where performance is dependent on the promisor's talent or prowess and cannot be performed vicariously, for eg., enforcement of a promise made by Leonardo da Vinci to

[52] Harry M. Fletchner, *Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C*, 8 Journal of Law and Commerce 53-108 (1988).

[53] Charles Szladits, *The Concept of Specific Performance in Civil Law*, 4(2) The American Journal of Comparative Law 208–234 (Spring).

[54] *Supra* note 16.

[55] *Supra* note 53.

[56] *Supra* note 16.

draw a portrait. On the other hand, non personal contracts are those which are not dependent on the defendant's competence. The court has devised the test of vicarious performance. It can be said that non personal contracts may be vicariously performed as it is not dependent on any special skill. Therefore, these contracts can be specifically enforced and do not involve any undue restriction on personal liberty.[57]

Under the French law, obligations are of two kinds, 'obligations to give' and 'obligations to do or abstain from doing'.[58] Obligations of the former kind can be specifically enforced. Obligations of the latter kind are generally seen as not possible to be enforced.[59] The French law has not classified 'obligations to do' on the basis of vicarious performance as opposed to the German law.[60] French law confers a certain amount of discretion with the judges to deny specific performance. The court has refused performance if it is oppressive to the personal rights of the debtor, performance is impossible, the cost of enforcement outweighs the damages incurred or when the rights of third parties are likely to be infringed.[61] However, this discretion is to be exercised sparingly and not at the cost of the plaintiff's primary right. If the scope of specific performance is greater in French law, it is only because the court does not rule out this remedy on the ground that damages form an adequate relief.

Conclusion

Lord Hoffman observes that *'in practice, there is less difference between common law and civilian systems than one may suppose. The principles upon which English judges exercise the discretion to grant specific performance are reasonably well settled and depend upon a number of considerations, mostly of a practical nature, which are of very general application. I have made no investigation of civilian systems, but a priori I would expect that judges take much the same matters into account in*

[57] *Supra* note 53.
[58] *Id.*
[59] French Civil Code, Art. 1142.
[60] *Supra* note 16.
[61] *Supra* note 53.

deciding whether specific performance would be inappropriate in a particular case'.[62]

It has been opined that the nature, scope and the extent of restrictions on specific performance is the same under both common and civil law systems. The relief is subject to discretion of the judges and practical problems of enforcement, administrative costs even in the civil law countries. Therefore, in reality, specific performance as a routine remedy leads to the same effect as in cases where it is provided as an exceptional remedy.

However, despite the practical restrictions rendering specific performance nugatory, the alternative model is more viable for the following reasons. Firstly, there is a pronounced shift in the burden of proof. The injured party is no longer required to shoulder a negative burden, i.e., proof of 'no reasonable substitutes' in the market. Instead the breaching party bears a positive burden to establish the availability of such reasonable substitutes. The twin effects of this shift are; the tedious burden is now upon the defendant, the party breaching the contract as opposed to the victim of such breach. Moreover, it is comparatively simple to discharge a positive burden. Secondly, this model provides an option to the injured to claim a remedy of his choice. This exercise of choice is sacrosanct; because it is the injured party who can best decide the remedy that may be most satisfactory.[63] Further, it is implicit that the injured party bears the risks of enforcement and administrative costs upon electing the remedy of specific performance. The effect of the shift in burden and provision of choice to the injured will make every party in default think twice before breaching the contract. This will impress upon the parties the importance of their contractual obligations[64] and make enforcement of contracts more certain.

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[62] *Co- operative Insurance Society Ltd. v. Argyll Stores (Holdings Ltd)*, [1997] 3 All ER 297.
[63] Alan Schwartz, *The Case for Specific Performance*, 89 Yale LJ 271 (1979).
[64] Admire Takawira, *Departing from mere compromise: Reformulating the remedy of specific performance under the Convention on the International Sale of Goods (CISG) in line with the Convention's underlying goals*, (2007), available at: <http://www.cisg.law.pace.edu/cisg/biblio/takawira.html> last accessed 4 March 2013.

THE UNSEEN FOLLY OF PUBLIC INTEREST LITIGATION

*Meera Pathak**

Judicial discourse in India has garnered myriad set of reviews from all over the world. It is often regarded as the most powerful judiciary in the world. Political, social and economic questions, not usually presented to judges in other countries, are decided as matter of course by the Supreme Court.[1] This nature is a departure from the philosophy of founding fathers. Though judicial review is an integral part of the constitution, constituent assembly debates make the intention of judicial restraint quiet clear. Sir B.N Rao and others, under the influence of Justice Felix Frankfurter, agreed upon the non-insertion of 'due process' in the chapter of fundamental rights. Many interpreters of the Constitution including justices of the Supreme Court have admired Frankfurter not just for the felicity of his style; they have held his self-restraint with unabashed admiration and converted his work into a kind of judicial role model of reticence apt for the Indian appellate judiciary.[2] In its early years, the Court was not active in nature yet it portrayed potency. It denied procedural fairness to a detenu detained under a preventive detention law, presumed constitutionality of statues unless proved otherwise but, at the same time, it regularly found several land law reforms to be unconstitutional and invalidated curbs on speech.[3] However, the sheer damage caused during the emergency years instigated the judiciary to indulge in a pursuit of a particular ideology – it plunged upon itself the task of interpreting Constitution liberally. The Court's experiment with Public Interest Litigation in particular, has fascinated many. The groundwork for the growth of PIL was laid down in a series of cases. Whether or not this path delivered required results, is what the article seeks to address. The argument of the article is developed over two sections. The section after this will look into the origins of PIL in India conceptually, and examine the compulsions underlying this initiative. The next section will discuss the subsequent effects on the judicial discourse in India and traditional concepts of judicial activism along with a few case developments, which will be followed by a brief concluding section.

* *II LL.B.*

[1] Gadbois Jr., George H., *'The Supreme Court of India as a Political Institution'* in V.R Krishna Iyer, Rajeev Dhavan, R Sudarshan and Salman Khurshid (eds.), 250, 257.

[2] Upendra Baxi, *Who bothers about Supreme Court? The Problem of Impact of Judicial Decisions*, 24(4) Journal of the Indian Law Institute 848-862.

[3] Lavanya Rajamani & Argyhya Sengupta, *The Supreme Court*, in THE OXFORD COMPANION TO POLITICS, 80-81 (Pratap Bhanu Mehta & Nirja Gopal Jayal eds.). (hereinafter The Supreme Court)

The mixed origins of PIL in India

The evolution of Public Interest Litigation in India can be significantly attributed to three persons – Justice Bhagwati, Justice Iyer and Upendra Baxi. Late 70's saw a surge in social consciousness and a need for reinvigorating the status-quo of disadvantaged section of society. In a much acknowledged article, Upendra Baxi argued that Public Interest Litigation in India differed from public interest movement that occurred in US. His assumption was driven by the fact that, people in the United States never had to undergo social and economic deprivation of the kind suffered by people in India. Indian phenomenon was directed against "state repression or governmental lawlessness" and was focused "pre-eminently on the rural poor", whereas the US movement was focused on "civic participation in governmental decision making" and was directed towards securing "greater felicity to the parlous notions of legal liberalism and interest group pluralism in an advanced industrial capitalistic society."[4] By drawing this distinction, many scholars tried to distance the Indian movement from the American one, not realizing that though it unfolded in different manners, the subject-matter and basic objective of PIL remained the same.[5] Indian judges extensively referred trans-national judgments, particularly of US Supreme Courts to strengthen their quest of expanding public interest litigation in India. This required relaxing the traditional rules of *locus standi*, liberalizing the procedure to file writ petitions, overcoming evidentiary problems, which was majorly achieved by instituting fact-finding and expert commissions and evolving innovative remedies. To render remedies effective, the Supreme Court, till today passes series of orders in the nature of 'continuing mandamus' – that is, it keeps an issue under the judicial gaze and passes orders tailored to the demands of a continually evolving situation.[6] The challenge of *locus standi* rule came across in *Bar*

[4] Upendra Baxi, *Taking suffering seriously: Social Action Litigation in the Supreme Court*, Third World Legal Studies 107 (1985), at 109.

[5] Surya Deva, *Public Interest Litigation in India : A Critical Review*, Civil Justice Quarterly, Issue 1, 2009, at 7 (hereinafter PIL critique).

[6] The Court, according to rule 9 'may, if it thinks fit, grant such an interim relief to the petitioner, as the justice of the case may require, upon such terms, if any as it may consider just and proper.' The Supreme Court Rules, 1966.

Council of Maharashtra v. M.V.Dabholkar (1975)[7], in which Justice Iyer addressed the idea of interpreting *locus standi* more liberally. The case was about the capacity of Bar Council to appeal against a disciplinary order issued against errant lawyers. Justice Iyer in his judgment underlined the need of changing rules of interpretation, which are in consonance with the needs of developing country. He explicitly mentioned U.S examples in his judgment in the following way:

> *"Traditionally used to the adversary system, we search for individual persons aggrieved. But a new class of litigation, public interest litigation – where a section or whole community is involved (such as consumers' organizations or NAACP-National Association for advancement of coloured people – in America), emerges. In a developing country like ours, this pattern of public oriented litigation better fulfils the rule of law if it is to run close to the rule of life."*

Though this case falls in the pre-PIL era, it nonetheless is important because it portrays the guiding line of thought of a Supreme Court justice, who later pioneered this initiative. Also Justice Bhagwati, while addressing various problems in the criminal justice system of India, in *Hussainara Khatoon v. Home Secretary, Bihar*[8], stated various US Supreme Court judgments. Again, the reference to foreign decisions was not merely for broad guidelines, but also for emulating specific decisional strategies invoked in those foreign decisions.[9] It is nonetheless clear that PIL evolution and growth in India was significantly influenced by public interest movements in United States. Along with this, a general sense of betrayal had penetrated in the society. The tumultuous years of Indira Gandhi regime distorted the fabric of Indian Constitution in unprecedented ways. Public had started questioning the political cloak which judges were carrying. This was particularly in reference to maintaining a *habeas corpus* petition,[10] which was numerically

[7] AIR 1975 SC 2092.

[8] AIR 1979 SC 1369.

[9] Arun K Thiruvengadam, *In pursuit of "the common illumination of our house": Trans-judicial influence and the origins of PIL jurisprudence in South Asia*, Indian Journal of Constitutional Law, 67, 92.

[10] *ADM Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521.

rejected by a Supreme Court bench. Soon the Supreme Court was engulfed in a crisis of legitimacy. It was imperative for the Court to restore its credibility, which manifested in institutional changes, primarily PIL.

Haphazard effects of PIL on the judicial discourse in India

Justice Jackson once readily acknowledged the inherent perils in the overreaching of judicial organs, he stated, "The doctrine of judicial activism which justifies easy and constant readiness to set aside decisions of other branches of Government is wholly incompatible with a faith in democracy and in so far it encourages a belief that judges should be left to correct the result of public indifference it is a vicious teaching." Elaborating this point, PIL in India and the excessive judicial interference in public interest has led the country in a judicial chaos. Public Interest Litigation in India, in the new phase is characterized by some as 'judicial over-activism'[11] It is true that an impetus to PIL was vitally provided by the precarious situation in our country – unstable executive, emergency years and successive inefficient coalition governments. However, to undertake functions of other branches of the government under the tag of 'vacuum governance' is impalpable. The blame of deficient governance can be leveled against judiciary as well. Large amount of backlog cases, coupled with a compromise on the dispensation of justice for people who are seeking vindication of their rights by conventional litigation methods is a sad reality.[12] It is not that judicial restraint was never observed by the Supreme Court of India, in *Asif Hameed v. State of J&K,* [13] it stated, "Though separation of powers has not been recognized under the Constitution in its absolute rigidity, the Constitution makers have meticulously defined the functions of various organs of the state. The legislature, executive and the judiciary have to function within their own spheres demarcated in the Constitution. No organ can usurp the function of another. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own

[11] S P Sathe, *Judicial Activism: The Indian Experience*, Washington University Journal of Law and Policy, 29,40, argued 'judicial activism is excessive when a court undertakes responsibilities normally discharged by other co-ordinate organs of the government.'

[12] PIL critique, at 18.

[13] AIR 1989 SC 1899, para 17-19.

exercise of power is the self imposed discipline of judicial restraint. Some scholars argue that Supreme Court is a 'paradoxical institution' as it has immense power at its disposal but is accompanied by no accountability.[14] Since there is no real constitutional check against the judiciary, self restraint becomes all the more important.[15]

So, the question is, can the Court act as a policy reform stage? If Supreme Court is to be the ultimate policy maker, how is it to escape corruption, given the meager accountability? Moreover, can the Court satisfy the expectations it has aroused, especially when it is so ill-equipped, in terms of resources and at times, expertise? It is often argued that Court engages in over activism because of the helplessness reflected in our society. However, reaction to a stagnant society leads to emergence of 'jurisprudence of exasperation'[16], which hardly leaves any credible legacy of debate. Policy must emerge from socio political process and must be considered in a legislative forum, not a judicial one. Ronald Dworkin argued[17] policy decisions must be made through the operation of some political process designed to produce an accurate expression of the different interests that should be taken into account. In the recent years, judiciary reached limits and often found itself in policy entanglements. Distribution of food grains to the persons below poverty line was monitored, which even made the Prime Minister remind the Court that it was interfering with the complex food distribution policies of the Government. The Supreme Court also directed complex engineering of interlinking rivers in India, passed orders banning the pasting of black film on automobile windows. The Court also monitored the conduct of investigating and prosecution agencies that are perceived to have failed or neglected to investigate and prosecute ministers and officials of government. It is important to consider that a political system of representative democracy may work only indifferently in this respect, but it works better than a system that allows non-elected judges, who have no mailbag or lobbyists or pressure groups, to compromise competing interests in the chambers.

[14] Pratap Bhanu Mehta, *India's Judiciary: The promise of uncertainty*, 2007, at 158. (Hereinafter Promise of uncertainty).
[15] *Cabinet Nod to New Panel for probing Judges*, The Times of India, October 9, 2008.
[16] Promise of Uncertainty.
[17] Ronald Dworkin, *Taking Rights Seriously*, 1977, at 85.

[18]Moreover, the plethora of environmental cases and their judgments have added to the mediocre intellectualism in our jurisprudence. Although the Indian judiciary is universally acclaimed for its proactive stance on environmental protection, its judgments, taken together do not articulate a coherent philosophy of environmental law.[19] A right to environmental protection, without accompanying explanation of what precisely that entails, namely, the substance of the right, what is at the core of the entitlement, what trumps it, what does not, and in what circumstances is equally important.[20] Considering the role played by PIL cases in India, one should not over-estimate what courts could deliver through PIL in a democracy.[21] It is not the domain of judiciary to guide the country through unrealistic path. The amount of issues raised in PIL, over the years has expanded immensely partly because of the relaxed procedure. As discussed above, there is a departure from conventional litigation cases because of PIL workload. The fact that courts need years to settle cases might also suggest that probably courts were not the most appropriate forum to deal with the issues in hand as PIL.[22] Also the issues undertaken as PIL are too complex and interlinked to render an easy solution. Being a polycentric[23] dispute always, intervention by court may have wide and unforeseen repercussions. It is advisable to observe the salutary checks and balances in our system.

Conclusion

The growth of PIL in India is indeed the single most distinguished achievement of the Indian judiciary. In spite of the occasional unpleasant labeling against it, it has emerged as a more powerful and stable institution. Through PIL, the court addressed hitherto unnoticed issues in our society by providing access to all societal constituents. The Indian judiciary materialized the aspirations of our founding fathers who intended to bring social revolution in our country. However, the imprecision with which it

[18] *Id.*
[19] The Supreme Court, at 90.
[20] *Id.*
[21] Taking Suffering Seriously, at 107, 109.
[22] PIL critique, at 19.
[23] L. L. Fuller, *The forms and limits of Adjudication*, 92 Harvard Law Review 353, 395, 397.

has lead issues is a matter of concern because creation of rights which cannot be enforced devalues the very notion of rights. It has lead to new problems, such as unanticipated increase in the workload of superior courts, lack of judicial infrastructure to determine factual matters, gap between the promise and reality, abuse of process, friction and confrontation with fellow organs of the government and dangers inherent in judicial populism.[24] Judicial restraint for the Supreme Court becomes more important because, an error on the part of lower courts is subject to scrutiny by higher courts; however there is none above the Supreme Court. It is, therefore submitted that in a democracy solutions for the inefficiencies of legislature and executive must come from the people. They should experience political and moral education that comes from fighting the problems in the ordinary way, by correcting their own errors.

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[24] Desai & Murlidhar, in Kirplal et al., *Supreme but not infallible*, 176-183.

COMMERCIAL SURROGACY IN INDIA - NEED OF A COMPREHENSIVE LAW*

*Mukta Sathe***

Introduction

'The word 'surrogate' has its origin in Latin '*surrogatus*', past participle of '*surrogare*', meaning a substitute, that is, a person appointed to act in the place of another. Thus a surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg or from the implantation in her womb of a fertilized egg from other woman. According to the Black's Law Dictionary, surrogacy means the process of carrying and delivering a child for another person. The New Encyclopaedia Britannica defines 'surrogate motherhood' as the practice in which a woman bears a child for a couple unable to produce children in the usual way. The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984)[1] defines surrogacy as the practice whereby one woman carries a child for another with the intention hat the child should be handed over after birth.'[2]

In simple language Surrogacy is an agreement in which a woman carries and delivers a child for another couple or person. The surrogate mother carries the child in her womb during the nine-month gestation period and then hands over the baby to the intended parents on birth of the baby. The surrogate relinquishes all parental rights over the child born out of surrogacy and the commissioning individual/couple is the child's legal parent(s).Surrogacy is the method of reproduction used if an individual / couple is unable to have a child due to medical reasons. The surrogate child is biologically related to at least the biological father in case a couple is party to such an agreement.

When a surrogate receives no financial reward or material benefit for her pregnancy and for relinquishment of all rights over the child, it is altruistic surrogacy. The medical and other expenses related to the pregnancy are taken care of by the commissioning

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[1] Leading to the Human Fertilisation and Embryology Act 1990 in the UK.

[2] Law Commission of India Report, *Need For Legislation To Regulate Assisted Reproductive Technologies Clinics as well as Rights And Obligations of Parties to a Surrogacy* (August 5, 2009).

couple or individual but no monetary compensation is given for carrying the child.

In commercial surrogacy, the surrogate mother is paid to carry a child to maturity in her womb. In addition to medical and other expenses related to carrying the child, the surrogate mother is also given a monetary reward for carrying the child.

Surrogacy may be traditional surrogacy, where the surrogate mother is also the genetic mother of the child. She is impregnated with the sperm of the intended father using IVF [in vitro fertilisation]. Thus the intended legal father is also the biological father of the child. 'Traditional surrogacy' may be called 'partial or genetically'[3] contracted motherhood because the surrogate mother is impregnated with the sperm of the intended father making her both the genetic and the gestational mother; the child shares make-up of the commissioning father and the surrogate mother. On the other hand, in case of gestational surrogacy, the surrogate mother is impregnated with the egg of another woman (who may or may not be the intended mother), which has been fertilised by the sperm of the intended father prior to implantation. Thus the child is not genetically linked to the surrogate mother. The child is the biological offspring of the intended father of the child. If the egg belongs to the intended mother then she is the biological mother of the child. In case the mother is unable to provide an egg, the egg may come from a third party (egg donor).' 'Gestational surrogacy' is total in the sense that an embryo created by the process of IVF is implanted into the surrogate mother.

The world's second and India's first IVF (in vitro fertilization) baby, Kanupriya alias Durga was born in Kolkata on October 3, 1978 about two months after the world's first IVF boy, Louise Joy Brown born in Great Britain on July 25, 1978. Since then the field of assisted reproductive technology (ART) has developed rapidly.'[4]

India is one of the countries in which commercial surrogacy is legally permitted. It is legally permitted because there is no

[3] Law Commission of India Report, *Need For Legislation To Regulate Assisted Reproductive Technologies Clinics as well as Rights And Obligations of Parties to a Surrogacy* (August 5 2009).

[4] *Id.*

particular law banning it. There is no comprehensive law dealing with commercial surrogacy or the rights and duties of both parties involved. The Law Commission of India submitted a report stressing on the need of a law regarding surrogacy and suggested some provisions regarding the same. This report was submitted to the union law minister on August 5, 2009. The Assisted Reproductive Technology [Regulation] Bill 2010 (hereafter ART Bill) was thereafter introduced to deal with all medical methods of reproduction including surrogacy and lays down detailed guidelines regarding the same. However this bill has not yet been passed. Currently there is no legislation regarding the same. Only guidelines given by the Indian Council of Medical Research (hereafter ICMR) exist.

The object of this project is to examine the need for a comprehensive law regarding commercial surrogacy. An increase has been seen in the number of cases of surrogacy in India; however accurate statistics is not available about the number of cases. This may be because of the lack of a law requiring maintenance of records regarding the same. This article tries to establish the reasons why a stringent law to administer surrogacy is the need of the day and tries to analyse the provisions of The ART Bill and provide recommendations regarding the same.

A. Guidelines of Indian Council of Medical Research-

The ICMR has given guidelines related to surrogacy.[5] The provisions that are relevant here are[6]

- A child born out of surrogacy must be adopted by the commissioning couple unless it is proved that the surrogate child is theirs.
- All expenses have to be compensated by the commissioning couple.
- A surrogate mother must not be more than 45 years of age.

[5] National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, available at: <http://icmr.nic.in/art/art_clinics.htm> last accessed 13 March 2013.

[6] *Id.*, Chapter 3.

- A woman should not act as a surrogate mother more than three times in her life.
- A prospective surrogate mother has to be tested for HIV and it must be proved that she does not have HIV. She must also provide a written certificate stating that she has not had any drug administered to her through a shared syringe, she has not undergone any blood transfusion and that she and her husband (to the best of her knowledge has had no extramarital relationship in the six months before the use of ART.

The guidelines suggest that certain health precautions be taken during surrogacy. The ART [assisted reproductive technologies] clinic is expected to take steps to protect the health of the surrogate mother.

The guidelines given by ICMR are however not legally binding. No legal action can be taken against the offenders. They function only in an advisory capacity .The norms prescribed might not be followed. Many small clinics assisting in surrogacy have started and who might not maintain the safety standard prescribed in the above mentioned guidelines. Proper records regarding the number of such hospitals / clinics might not be available, and these will stay beyond regulation.

The guidelines fail to make any distinction between commercial and altruistic surrogacy. The compensation given to women remains governed by the contract made between the parties. In a country like India where there is large amount of poverty women may accept or be forced to become surrogates at a very meager price. When surrogacy is seen to be a desperate measure to get out of poverty, bad effects on health of women becoming surrogates are easily ignored.

Many couples from foreign countries come to India seeking surrogates. The amount of compensation that has to be paid in India to surrogates is drastically less as compared to most nations of the developed world. India has become an international center for surrogacy. Anand a place in western Gujarat is considered as one of the International centers of commercial surrogacy. There has been a huge increase in the cases of commercial surrogacy in India.

When foreign couples come to India to become parents through surrogacy, questions arise regarding the nationality of the child. In some countries commercial surrogacy is not permitted. This may further lead to problems regarding nationality, as a child born out of surrogacy may not be accepted as legitimate child. Further if the couple separates before the child is born and if one parent refuses to take responsibility of the child like in the case of *Baby Manji Yamada v Union of India*[7] further legal problems can arise.

The guidelines state that a woman above the age of 45 should not act as a surrogate mother, but does not fix any minimum age for acting as a surrogate. Thus very young girls may be drawn into becoming surrogates. There is a social a stigma is unmarried girls having a baby, but in many cases in India girls are married at very young age and despite having attained puberty are not completely mature and have not completed their growth to the extent required for being able to become a healthy mother. This can also have ill effects on the health of the unborn child. Further an age limit of 45 can be perceived to be very high as it covers almost the entire child-bearing age of a woman.

In the light of the above mentioned facts it becomes imperative to have a comprehensive law regarding commercial surrogacy in India. The rights of both the parties and also the child born out of such a contract need to be protected. Apart from preventing exploitation, the future of the child also needs to be secured. Proper monitoring of such surrogacy agreements needs to be done.

Now in order to elaborate on why there is a need of a law regarding commercial surrogacy, I would like to take into consideration the provisions regarding surrogacy in the Assisted Reproductive Technologies Bill 2010.

B. The Assisted Reproductive Technologies Bill 2010 –

[7] *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84.

This bill deals with Assisted Reproductive Technologies. Surrogacy is included under Assisted Reproductive Technologies. The gist of the relevant provisions is as follows:[8]

- The ART Bill makes the agreement signed by the commissioning couple and the surrogate couple legally enforceable.
- The surrogate is to relinquish all parental rights over the child.
- The birth certificate of the child will have the name of the individual(s) who commissioned the surrogacy.
- All medical expenses including those incurred for the use of ART, the medical insurance of the surrogate mother, all expenses during pregnancy, all expenses related to the delivery of the child and other miscellaneous medical expense incurred till the child can be handed over to the biological parents is to be borne by the commissioning couple .
- The ART Bill permits commercial surrogacy i.e. it states that 'the surrogate mother may also receive monetary compensation from the couple or individual, as the case may be, for agreeing to act as such surrogate.'
- The Bill also lays down an age limit prohibiting women below the age of 21 and above the age of 35 to act as surrogate mothers. Also no woman is allowed to act as a surrogate for more than five successful live births including her own children.
- Further irrespective of the existence of any physical abnormality the couple is legally bound to accept the custody of the child.
- If a foreign individual or couple not resident in India or a Non -resident Indian couple seeks to have a surrogate child in India, they must appoint a local guardian who would be legally responsible to take care of the surrogate till the child is received by the commissioning couple or individual.
- The commissioning foreign / non resident Indian couple (individual) must further submit a letter to the ART clinic from the embassy of the country concerned in India or from the foreign ministry of that country stating clearly that that country permits surrogacy and that the surrogate child shall be considered as the biological child of the commissioning couple / individual.
- If the foreign party is unable to take the child, the local guardian has to take responsibility of the child who can then be handed over to an adoption agency. The child will then get Indian citizenship.
- The personal information of the surrogate mother is to be kept confidential.
- Surrogate mother will be medically tested for diseases like sexually transmitted diseases and communicable diseases which may adversely affect the health of the child and she must give a written statement unambiguously stating that she has not received a blood transfusion or a blood product in six months prior to the testing.
- Surrogate mother must not engage in activities that would harm the foetus or the baby after birth.

[8]<http://www.icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf > last accessed 13 March 2013.

The ART Bill addresses many of the problems and irregularities observed in commercial surrogacy. It tries to protect the health of the surrogate by prescribing the minimum and maximum age for surrogacy [21 and 35 respectively] and also and prevents damage to health of women by putting the restriction that woman shall act as a surrogate for no more than five successful live births in her life, including her own children. It also insures that the all medical expenses of the surrogate are taken care of. The identity of the surrogate is also protected. The future of the child born out of surrogacy is also protected. Especially in cases where the commissioning couple is not residing in India, special care must be taken to protect the rights of the child. The provision of compulsory submitting a letter from the embassy or foreign ministry and the appointment of the local guardian are will help in achieving this objective. The rights of the commissioning couple will also be protected as it makes it mandatory and legally binding on the surrogate to take good care of the child during pregnancy and to give the baby to the couple after its birth.

C. Comparision Between the Guidelines of ICMR and the ART Bill-

Enforceability: The ART Bill being a law would be legally enforceable unlike ICMR Guidelines which are not legally binding. The danger of unregistered small clinics assisting individuals in commercial surrogacy will reduce. The possibility of the health precautions mentioned in the act being adhered to increases and if the health precautions are not taken then legal action can be taken.

Age of surrogate mother: The maximum age prescribed for a surrogate mother in the ART Bill is 35 which less than the maximum age prescribed by the ICMR Guidelines in which 45. The bill also proposes the minimum age of 25.This is an attempt to insure that girls who are very young do not become surrogate mothers. This reduces the health complications and health hazards that can result due to very low age of the surrogate mother. It is therefore in the interest of both the surrogate mother and the child.

Number of surrogate births: The ICMR Guidelines limit the number of times a woman can act as a surrogate mother to three. However it does not take into consideration the children naturally born to woman. Thus a woman who already has many children of her own may become a surrogate mother which can potentially endanger her health. The ART Bill seeks to avoid this problem by allowing a woman to act as a surrogate only before having five successful births in her life including her own children. It would be better if unsuccessful births are also taken into consideration because miscarriages can have a bad impact on the health of a woman making it potentially dangerous for her to be pregnant again. The health repercussions of course depend and vary in every case. But it should be made legally binding on the ART clinic to confirm that the surrogate has not suffered any such medical complications.

Legal rights over the child: The ART Bill makes the commissioning couple / individual the legal parents and there is no need of proving that the commissioning couple / individual is the biological parent or of adopting the child. The birth certificate of the child has the names of the commissioning couple / individual. It is

mandatory for the surrogate mother the give up all claims on the child born out of surrogacy.

Child's future: The ART Bill also makes provisions for the future of the child in case the commissioning couple / individual is a foreigner or non-resident Indian. This point has been mentioned before while discussing both the ICMR Guidelines and The ART Bill. However this point is of vital importance needs to be emphasised. The future of the baby needs to be made secure. The baby is not a party to the contract made between the surrogate mother and the intended parents. The interests of the baby therefore must be protected by the law. It is a grave injustice to the baby if his / her future is adversely impacted due to an agreement made before his / her birth by individuals other than him / her and to which he / she is not a signatory. If due to such an agreement the child is denied citizenship of both countries the child would become 'stateless' which will be unjust. Provisions of the ART Bill try to prevent this by laying down provisions insuring that the child is given the citizenship of the country to which the commissioning couple / individual belongs. In case the commissioning couple / individual is unable to receive the child then the child will be given Indian citizenship.

Healthy surrogate mother: Another provision that needs to be considered is regarding the health of the child is related to the medically tests which haven to be given by the surrogate mother. Both The ICMR Guidelines and The ART Bill make provisions related to the protection of the health of the child. The surrogate mother has to undergo tests to verify that she does not have sexually transmitted diseases including AIDS and other communicable diseases which may have an adverse impact over the child. The ART Bill further makes it legally binding on the surrogate mother to take good care of the foetus. In cases of surrogacy it is possible that the surrogate mother may not pay proper attention to the nutrition to the child because she is aware of the fact that she has to give up the child after its birth and that the commissioning couple has to take the child irrespective of any physical deformities. This can adversely affect the development of the child. The pre-natal environment plays a vital role in the mental and physical development of the child. Further if the surrogate mother is suffering from the diseases mentioned in the ICMR guidelines and the ART bill there is a very

high possibility that the child in the womb of the surrogate will be affected by the disease. Thus adequate care must be taken to protect the health of the child.

Confidentiality: The ART Bill seeks to insure that the personal information of the surrogate is kept confidential. Thus information regarding the caste, class, religion of the surrogate is concealed. There is a threat that the commissioning couple / individual may insist that the surrogate must belong to the same caste or religion as the couple / individual. The personal information of the surrogate mother needs to be kept secret in order to prevent harassment by the commissioning couple / individual and other members of the society. This provision is not present in ICMR Guidelines.

Adequate compensation to surrogate mother: The ART Bill like the ICMR Guidelines does not acknowledge the difference between commercial and altruistic surrogacy. The ART Bill legalises commercial surrogacy by stating that the surrogate mother 'may receive monetary compensation from the couple or individual, as the case may be, for agreeing to act as such surrogate'. However the compensation paid to the surrogate mother is determined by the contract .Therefore the threat of poor women being paid meager amount of money for acting as a surrogate persists. This would amount to exploitation of women belonging to the lower classes. It must be taken into consideration that in India mass poverty exists whereby women may accept to become surrogates just in order to earn enough money for survival or for taking care of her family. Due to the abundant 'supply' of surrogates who are willing to enter a surrogacy agreements India is becoming an International center for commercial surrogacy and is reaching industrial proportions. Due to availability of excellent medical facilities many foreigners come to India.[9] The bill should have provision to insure that the surrogate mothers are adequately paid for carrying the child.

Taking into consideration the benefits of this bill and the effects it will have if passed clearly indicates why this bill is so desperately needed. In the absence of a law the rights that it seeks to protect can be easily violated.

[9] Pratika Ghura, *Womb for Rent at 2 Lakhs*, The Times of India (3 Sept 2006); AFP, *Wombs for Rent : Commercial Surrogacy Big Business in India*, The Express Tribune (25 Feb 2013).

I would now like to make a summary of the problems arising out of unregulated commercial surrogacy

D. Problems Arising out of Unregulated Commercial Surrogacy-

a) Inadequate compensation: This point has been has already discussed. The Law commission in its report has stated that[10]- 'In commercial surrogacy agreements, the surrogate mother enters into an agreement with the commissioning couple or a single parent to bear the burden of pregnancy. In return of her agreeing to carry the term of the pregnancy, she is paid by the commissioning agent. The usual fee is around $25,000 to $30,000 in India which is around 1 / 3rd of that in developed countries like the USA. This has made India a favourable destination for foreign couples who look for a cost-effective treatment for infertility and a whole branch of medical tourism has flourished on the surrogate practice. ART industry is now a 25,000 crore rupee pot of gold. Anand, a small town in Gujarat, has acquired a distinct reputation as a place for outsourcing commercial surrogacy.' This clearly illustrates that commercial surrogacy is a budding business in India, but the compensation paid to surrogates is drastically less as compared to their counterparts in the developed world.

b) Future of the child- The ART Bill seeks to secure the future of the child. However in the absence of a law, the future of the child is in danger. In the case of *Baby Manji Yamada v Union of India*,[11] Manji Yamada was a surrogate child born to an Indian surrogate mother while the commissioning couple was Japanese. There were marital discords between the couple following which the commissioning father wanted to take custody of the children. The Japanese embassy in India refused to grant a passport or visa to the child. Further the child could not be adopted as the Guardians and Wards Act 1890 does not allow a single man to adopt a baby. The Court relegated the case to the National Commission for Protection of Child Rights constituted under the Commissions for Protection of Child Rights Act 2005.The Regional passport office, Rajasthan later issued a

[10] *Id.*

[11] *Id.*

certificate of identity as part of a transit document and the child was taken to Japan.

In the case of *Jan Balaz v Anand Municipality*,[12] the petitioner was a German national and the biological father of the twin surrogate children. The German law does not recognise surrogacy and therefore the child would not get German citizenship. Passports were initially granted to twin children but later withdrawn temporally till final decision was reached in Gujarat High Court. The petitioner appealed to the Gujarat High Court to direct the passport authorities to release the withdrawn passports and to grant the twins citizenship of India. The Gujarat High Court allowed the application and held that according to the existing legal framework babies born in India are Indian citizens. The court further observed that

> 'A comprehensive legislation dealing all these issues is very imminent to meet the present situation created by reproductive science and technology which have no clear answers in the existing legal system in this country...Legislature has to answer a lot of issues like rights of the children born out of a surrogate mother, legal, moral, ethical. Rights, duties and obligations of the donor, gestational surrogate and a host of other issues. Further under the Indian Evidence Act, no presumption can be drawn that child of the commissioning parents has to have a legal right to parental support, inheritance and other privileges of a child born to a couple through their sexual intercourse. The only remedy is a proper legislation drawing such a presumption including adoption. Further the question as to whether the babies born out of a surrogate mother have any right of residence in or citizenship by birth or by mere State orphanage and whether they acquire only the nationality of the biological father has to be addressed by the legislature'

Thus it is evident that in order to protect the rights of the child legislation is essential.

c) Health of surrogate mother and child- As discussed the health of the surrogate can be compromised in the absence of a

[12] *Jan Balaz v. Anand Municipality*, AIR 2010 Guj 27.

comprehensive law. The ART Bill if passed will be instrumental in the protection of the health of the surrogate mother. The ICMR Guidelines are not very effective in the protection of health of the surrogate mother as they do not take into consideration the children of the surrogate herself. Further they are not legally enforceable. The ART Bill will also protect the health of the child (relevant provisions are already discussed) by making it mandatory for the surrogate to take proper care of the child. However as the bill is still pending in Parliament, and hence the health of the unborn child might get compromised.

E. Commercial Surrogacy in Other Countries -

South Africa- the South Africa Children's Act of 2005[13] allows surrogacy. However only altruistic surrogacy is permitted. Payments in respect to surrogacy are prohibited. No rewards are to be received in cash or kind by the surrogate mother other than medical expenses and compensation for any monetary loss caused due to becoming a surrogate mother. Further there are certain conditions -1] The agreement has to be entered into in South Africa 2] At least one of the commissioning parents or the commissioning parent if it is a single person has to be domiciled in South Africa at the time of entering the agreement. 3] The surrogate mother and her husband / partner if any have to be domiciled in South Africa at the time of entering the agreement. 4] The agreement must be confirmed by the High Court within whose area the parents reside. Thus the problems arising out of foreigners being commissioning parent does not arise.

Germany- Surrogacy both altruistic and commercial is prohibited in Germany. According to the Protection of Embryos Act 1990- 'Anyone will be punishable with up to three years of imprisonment who... attempts to carry out an artificial fertilisation of a woman who is prepared to give up her child permanently after birth (surrogate mother) or transfer a human embryo into her. Thus arranging surrogate mothers and carrying out surgery for surrogacy is a punishable offence in Germany. The baby born out of the surrogacy agreement is considered as the child of the surrogate mother and not the commissioning mother. Even if foreign birth

[13] <http://www.justice.gov> last accessed 14 March 2013.

certificate states that commissioning mother is the legal mother she cannot be recognised as such by according to the German law.[14]

France- Surrogate motherhood has been prohibited in France since 1991; by a judgement given by Cour de cassation (highest court in France).The Bioethics law 1994 confirmed this prohibition. This prohibition has been codified in article 16-7 of the French Civil code making it a public order.[15] A surrogacy agreement is void. Criminal and civil sanctions can be issued against violators.[16]

Russia- gestational surrogacy is completely legal in Russia. Children born through surrogacy are regulated by the Family Code of Russia (art. 51-52) and the Law on Acts on Civil Status (art. 16) .The surrogate mother may get monetary compensation in addition to medical expenses. Thus commercial surrogacy is legal in Russia. The surrogate mother must be between 20-30 years old. A written contract between the parties is not necessary. If a contract is made it can determine the monetary compensation to be paid. However if the surrogate mother wants to keep the child then the agreement becomes void in that respect.[17]

United Kingdom- Commercial surrogacy is prohibited in the United Kingdom. The Surrogacy Agreements Act 1985 prohibits negotiating, facilitating and entering into a surrogacy agreement on a financial basis. Surrogacy agreements in the United Kingdom are not enforceable.[18]

Australia -In almost all states commercial surrogacy is illegal. In New South Wales, The Surrogacy Act 2010 prohibits commercial surrogacy.[19] In Queensland, The Surrogacy Act 2010 states that it is unlawful to enter surrogacy agreement.[20] In Australian Capital

[14] <http://www.auswartiges.amt.de> last accessed 13 March 2013

[15] a public order has rules created unilaterally by state to protect the fundamental values of the society

[16] see also Laura Bertillotti, *The Prohibition on Surrogate Motherhood in France*, [2012] NYU- Journal of International Law and Politics <http://www.nyujilp.org/the-prohibition-on surrogate motherhood in france-2> last accessed 13 March 2013.

[17] European Society of Human Reproduction and Embryology<www.eshre.ew> last accessed 13 March 2013.

[18] www.legislation.govt.uk last accessed 13 March 2013.

[19] www.legislation.nsw.gov last accessed 13 March 2013.

[20] www.legislation.qld.gov last accessed 13 March 2013.

Territory commercial substitute agreements are prohibited by the Parentage act of 2004.[21] In Western Australia surrogacy agreement that is for reward constitutes offence by Surrogacy Act 2008.[22] In South Australia surrogacy contracts are illegal. Only altruistic surrogacy is permitted according to Family Relationships Act 1975.[23] In Victoria only altruistic surrogacy is permitted by the Assisted Reproductive Technologies act 2008.[24]

United States: In The United States laws related to surrogacy differ from state to state.[25] Surrogacy is prohibited in Arizona, District of Columbia, Michigan, New York, Indiana, Kentucky, Louisiana and Nebraska. In Washington, Arkansas, Florida, Illinois, Nevada, New Hampshire, Texas, Utah and Virginia altruistic surrogacy is permitted but not commercial.

It can therefore be clearly seen that in most countries commercial surrogacy is not permitted by law. In countries in which it is permitted like Russia there are elaborate laws regulating the same.

Now I would like to deal with some problems inherently linked to commercial surrogacy. The question of whether commercial surrogacy has some bad effects irrespective of the existence of a law needs to be considered.

F. Arguments Against Commercial Surrogacy-

a) Outsourcing babies- Commercial surrogacy has many moral implications. It is argued that it can lead to the commoditisation of the child.[26] The baby born out of a surrogacy agreement gets the status of an object and the surrogate mother that of a baby producing machines. The word 'womb for rent' has been coined by critics while referring to commercial surrogacy. Further it is said that surrogate mothers have entered into the surrogacy agreement

[21] www.legislation.act.gov last accessed 13 March 2013.

[22] www.austii.edu last accessed 13 March 2013.

[23] www.legislation.sa.gov last accessed 13 March 2013.

[24] www.vatra.org last accessed 13 March 2013.

[25] www.americanprogress.org/Issues/Women's Rights last accessed 13 March 2013.

[26] lawcommissionofindia.nic.in / reports / report228.pdf last accessed 13 March 2013.

by choice. However it can be questioned if the consent is really genuine or is the woman being forced to enter into the agreement. In a country like India with is poverty and patriarchal society in which women often have no control over their lives the husband or relatives of the woman may force her to become a surrogate mother in order to earn money. Therefore it cannot be determined if the 'free consent' is really 'free'.[27]

b)] Psychological considerations- A surrogate mother may develop emotional ties with the baby. She carries the baby in her womb for nine months. According to commercial surrogacy contracts the surrogate mother must relinquish all rights over the child after its birth. In some cases the surrogate mother may not want give up the child however she does not have the option to withdraw consent. This may lead to intense trauma for the surrogate mother which can affect her physical or mental health. Giving the surrogate mother the opportunity to withdraw consent after the agreement is made may help in some cases. However in majority of the cases the surrogate mothers are poor and thus will be unable to repay the money spent on her by the commissioning couple and if a law is made stating that the commissioning couple is not to be repaid it would be a violation of the rights of the couple. The law commission in its report on commercial surrogacy advised that 'The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones.'

G. Arguments in Favor of Commercial Surrogacy-

a) Boon for couple / individual who cannot have biological children- Commercial surrogacy helps couples and individuals who due to medical problems not able to have children in having a biological child. In the case of *B K Parthasarthi v. Government of Andhra Pradesh,*[28] the Andhra Pradesh High Court upheld "the right of reproductive autonomy" of an individual as a facet of his "right to privacy". Every individual should have the right to start a family and be able to enjoy a happy family life. Commercial surrogacy helps many individuals and couples in achieving this dream.

[27] see also *Surrogate motherhood in India-understanding and evaluating the effects of gestational surrogacy on a woman's health and Rights,* [2008] Stanford university<www.stanford.edu> last accessed 13 March 2013.

[28] Para 14.

Altruistic surrogacy can also help in releasing this objective. However the problem that arises is that not many women are ready to enter into altruistic surrogacy agreements as they do not get any benefit by doing so. Thus permitting commercial surrogacy becomes advisable.

b) Is not outsourcing babies in a real sense- Commercial surrogacy cannot be called as outsourcing surrogacy because it is a type of gestational surrogacy. Thus the surrogate is not expected to 'produce' a baby. She provides the service of carrying the baby in her womb till he / she is matured enough to be born. The surrogate mother is thus paid only for the service she provides and is not considered as a 'baby producing machine'. Thus the baby is not treated as an object and commoditisation of the child does not take place.

While assessing whether commercial surrogacy is ethical we must take into consideration the benefits it provides to a vast number of childless individual and couples who would never be able to have a biological child in the absence of commercial. A broad view must therefore be taken on commercial surrogacy. I do not believe that commercial surrogacy is objectionable on the grounds that it leads to commoditisation of the child. The counter argument to this claim has already been mentioned. Further when it comes to the psychological effects that surrogacy can have, I believe that intensive counselling from the beginning can solve that problem.

F. Conclusion -

In a case where there is being such a rapid increase in this 'industry' and as India is emerging as a leading 'market' in 'surrogacy related fertility tourism' the need of a comprehensive law is more acutely felt. In the light of the problems listed and the irregularities observed it can be concluded that there is an urgent need for a comprehensive law regarding commercial surrogacy.

CONSTITUTIONALITY OF NARCO ANALYSIS TEST IN INDIA*

Based on the Supreme Court of India judgment on Smt. Selvi & Ors. v. State of Karnataka & Anr.

*Rudraneel Chattopadhyay***

INTRODUCTION

India, in the past decade, has witnessed numerous vital questions being raised on the use of the Narco Analysis Test by investigative and security agencies to 'extract truth' from the mental processes of an accused. Narco analysis test has been explicitly banned in most parts of the world and India is one of the very few countries where this test is still in practice. Exponents of this test have stated that this technique can serve several ends, like; the drug-induced revelations could help investigators to detect 'malingering' or faking of amnesia; to uncover vital evidence or to corroborate existing testimonies thus narrowing down investigation efforts and thereby saving public resources. They also suggest that this technique could be requested by defendants who want to prove their innocence, thus impacting the efficiency of investigations as well as fairness of criminal trials.[1]

However, in the process of attaching significance to the above contentions, the limitations of narco analysis test, the risks involved, its inaccuracy, unconstitutionality and human rights violations are often overlooked. In the 'Smt. Selvi & Ors v. State of Karnataka & Anr'[2] judgment delivered on 5th May 2010 by the Supreme Court of India, in what is considered to be a landmark ruling in the history of Indian legal scenario, the Supreme Court has held *'forcible'* or *'compulsory'* administration of the narco analysis test as unconstitutional and violative of a person's two non-derogable fundamental rights, viz. *'right against self-incrimination'* and *'right of*

*This article is the result of a study conducted, by the members of the Centre for Public Law of I.L.S. Law College, on the Constitutionality of the Narco Analysis Test in India based on the judgment of *Smt. Selvi & Ors. v. State of Karnataka and Anr* (of May 2010). The findings of this study had been presented as part of the Weekly Presentations of the Centre for Public Law, I.L.S. Law College in the year 2011 and in Constitutional Law class of 2013.

** *III BSL. LL.B.*

[1] *Smt. Selvi & Ors v. State of Karnataka & Anr,* Judgment, at Para. 46 [Supreme Court of India, 2004, Criminal Appeal No.: 1267]

[2] *Smt. Selvi & Ors v. State of Karnataka & Anr,* [2004] Criminal Appeal No.: 1267, Supreme Court of India

life and personal liberty'.[3] Conversely, by this ruling, the Supreme Court has left room for the *'voluntary'* administration of the test in the context of criminal justice.[4]

AIM:

The fundamental rights related to 'Protection in respect of conviction for offences'arelaid down in Article 20 of the Constitution of India. Clause 3 of Article 20 enshrines the 'right against self-incrimination'. It reads,

"No person accused of any offence shall be compelled to be a witness against himself."

Narco analysis test is violative of this very fundamental right enshrined in the Indian Constitution. There's a probability that a subject of the test might give inculpatory statements against himself, leading to self-incrimination. Thus, the option of completely eliminating this test from the Indian legal set-up should be ventured, leaving no room for 'voluntariness' to be the vitiating factor. With this objective, the paper intends to explain the hazards and imprecision of this test, the lacunas and logical inconsistencies in the judgment and the violation of rights and conventions if this test is allowed to be administered.

NARCO ANALYSIS

WHAT IS NARCO ANALYSIS TEST?

Narco[5]-analysis[6], popularly known as "Truth Serum Test", is a psychiatric therapy conducted while the patient is in sleep like state induced by intravenous administration of barbiturates or any other drug, especially as a means of releasing repressed feelings,

[3] *Supra* note 1, at para. 221, 223

[4] *Id.*, at para. 223

[5] Etymology: The word 'narco' has its origin in Greek from '*narkç*', meaning numb or torpor as in stupor. *narco- (n.d.). Definitions.net., http://www.definitions.net/definition/narco-*[Retrieved on January 20, 2011]

[6] The term 'narco-analysis' was coined by J. Stephens Horsley in 1943 in his book "*Narco Analysis: a New Technique in Shortcut Psychotherapy*" (Publisher: Henry Milford). Source: Psychoanalytic Electronic Publishing *http://www.pep-web.org/document.php?id=ijp.026.0083a*[Retrieved on January 20, 2011]

thoughts, or memories.[7]Commonly, the drug used for narco analysis is Sodium Pentothal.

METHOD OF ADMINISTRATION:

The Narco Analysis Test is conducted by administering 3gm of Sodium Pentothal dissolved in 3000 ml of distilled water depending upon the person's sex, age, health and physical condition and this mixture is administered intravenously along with 10% of dextrose over a period of 3 hours with the help of an anaesthetist. The rate of administration is controlled to drive the accused slowly into a hypnotic trance. The drug's effectdepresses the central nervous system, lowers blood pressure and slows the heart rate, putting the subject into a hypnotic trance resulting in a lack of inhibition. The subject is then interrogated by the investigating agency in thepresence of the doctors. The report prepared by the experts is what is used in the process of collecting evidence.[8]

RISKS INVOLVED IN THE TEST:

When the Sodium Pentothal is administered intravenously, the subject ordinarily descends into anaesthesia in four stages[9][10]:

- **Stage I**: Awake Stage. The subject is awake.
- **Stage II**: Hypnotic Stage. A relatively lighter dose of sodium pentothal is injected to induce the `hypnotic stage' and the questioning is conducted during the same. The hypnotic stage is maintained for the required period by controlling the rate.
- **Stage III**: Sedative Stage. The subject loses consciousness.
- **Stage IV**: Anaesthetic Stage. Also called 'surgical anaesthesia'. The Subject's pupillary gaze is central and the pupils are constricted.

[7] Amol Shrivastava, *Narcoanalysis: Reliability v/s Human Rights*, JurisOnline.in, available at: <http://jurisonline.in/2010/08/narcoanalaysis-r-h/> last accessed on January 16, 2011.
[8] Justice K. Kannan, Judge (High Court of Punjab and Haryana): *Human Rights & Medical Personnel*, 5.
[9] *Supra* note 1, at para. 43, 44.
[10] "Anaesthesia", Surgery Encyclopaedia, available at: <http://www.surgeryencyclopedia.com/A-Ce/Anesthesia-General.html> last accessed on January 20, 2011.

It is believed that the next stage in this process is the result of overdose of Sodium Pentothal, and is marked by hypotension or circulatory failure. Death may result if the patient cannot be revived quickly.[11] The possible life-threatening side effects of Pentothal include harmful effects on blood circulation and breathing, apnoea (stopping of airflow during sleep) and anaphylaxis (a rapid life-threatening allergic reaction of the immune system). Its effects on the central nervous system may lead to retrograde amnesia, emergence delirium, besides many other side effects.[12]

RELIABILITY OF THE TEST:

Empirical studies suggest that the drug-induced revelations need not necessarily be true and its reliability has been repeatedly questioned.[13] It does not have an absolute success rate and there is always a possibility that the subject will not reveal any relevant information.[14] Child and Adult Psychiatrist, Dr.AshishDeshpande states, "Narco tests cannot be considered as complete evidence. The person can also mislead and provide wrong information. Therefore, this cannot be considered as accurate proof. The test is a developing science, and has not yet developed. Although, it is called the truth serum, it doesn't guarantee the truth.[15] Doctors have also opined there arecircumstances where a person mayhold a certain deep belief. By repeatedly thinking about an issue in a particular way, he begins to believe that what he is thinking is right. But it need not necessarily be the truth.[16]The subject reiterates this same false belief while undergoing the test; and these kinds of revelations often mislead the investigators.

[11] *Id.*
[12] Peoples Union for Democratic Rights, *Narco Analysis, Torture and Democratic Rights*, for 22nd Dr Ramanadhan Memorial Meeting, Peoples Union for Democratic Rights Journal 2008, at 5.
[13] *Supra* note 1, at para. 5
[14] *Id.*, at 47.
[15] As told to 'The Mid Day', available at: <http://www.mid-day.com/news/2008/aug/080808narco-tests-arun-ferreira-abdul-karim-telgi-ravindra-kantrolu-city4.htm> last accessed on January 16, 2011.
[16] Advocate P.R. Vakil, as told to *rediff.com*, available at: <http://www.rediff.com/news/2007/jan/09spec.htm> last accessed on January 16, 2011.

THE PRESENT CASE

SYNOPSIS OF THE JUDGMENT:

a. *Narco-analysis test includes substantial reliance on verbal statements by the test subject and hence its involuntary administration offends the 'right against self-incrimination'*[17]

b. Rights guaranteed in Articles 20and 21[18]of the Constitution of India have been given a non-derogable status and they are available to all persons.[19]

c. The fact of physical confinementand involuntary administration of the test indicates is a breach of personal liberty & privacy and attracts Article 20(3) and Article 21.[20]

d. Compulsory administration of narco-analysis technique amounts to 'testimonial compulsion' and thereby triggers the protection of Article 20(3).

e. Protection afforded by Art. 20(3) not restricted to court room trial; to apply to every stage of investigation.[21]

f. Article 21 can be invoked to protect the 'bodily integrity and dignity' of persons who are in custodial environments.[22]

g. During hypnotic stage, individuals are prone to suggestibility and there's a good chance that false results could lead to finding of a guilt or innocence.[23]

h. The questionable scientific reliability of this test comes into conflict with the standard of proof 'beyond reasonable doubt' which is an essential feature of criminal trials.[24]

i. *Article 20(3) is not applicable when a person gives his/her informed consent to undergo the impugned test.*[25]

DEGREE OF ADMISSIBILITY:

[17] *Supra* note 1, at para. 130.
[18] Article 21 reads, "No person shall be deprived of his life or personal liberty except according to procedure established by law." The Constitution of India, 1950.
[19] *Supra* note 1, at Para. 216
[20] *Id.*, at para. 195.
[21] *Id.*, at para. 221.
[22] *Id.*, at para. 195.
[23] *Id.*, at para. 210.
[24] *Id.*, at para. 210.
[25] *Id.*, at para. 166.

Though the statements derived from the accused during the test cannot be themselves admitted as evidence, the Court has however declared that the findings of the test can be used as a step to find further evidence against the accused.[26] The Court has also referred to Section 27 of the Indian Evidence Act, 1872 and stated that the statements made are admissible to the extent that they can be proved by the subsequent discovery of facts.[27]However, if the fact of compulsion is proved then the resulting statements will be rendered inadmissible as evidence.[28]

CONSTRUCTION OF ARTICLE 20(3):

"NO PERSON ACCUSED OF ANY OFFENCE SHALL BE COMPELLED TO BE A WITNESS AGAINST HIMSELF"

- **PERSON**: Article 367 read with s.3(42) and s.3(47) of the General Clauses Act, 1897 gives that a 'person' is an individual, including companies and unincorporated bodies.[29]

- **ACCUSED**: A person stands in the character of an accused when a FIR is lodged against him in respect of an offence before an officer competent to investigate it or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial of the offence.[30]

- **OFFENCE**:An act or omission being made punishable by a law in force in the country.[31]

- **COMPELLED**: Essence of self incrimination;implies a necessary external stimulus to be given in order to extract evidence from an accused.

- **TO BE A WITNESS**: `To be a witness' is not merely in respect of testimonial compulsion in the court room but may

[26] *Id.*, at para. 117.
[27] *Id.*, at para. 119.
[28] *Id.*, at para. 106.
[29] *Maharashtra v. Nagpur Electric Light and Power Co. Ltd.*, 63 Bom.L.R.559.
[30] *Nandini Satpathy v. P.L. Dani*, AIR 1978 SC 1025.
[31] *Maqbool Hussain v. Bombay*, [1953] SCR 730.

well extend to compelled testimony previously obtained from him.[32]

CRITICAL ANALYSIS:

I. LOGICAL INCONSISTENCY: It has been expressly proved that the narco analysis is a highly inaccurate and unreliable test. Still, the Court has held that results of this test can be used for subsequent discovery of facts or evidence against the accused. If the foundation of the investigation is itself based on a shaky assumption, then this will lead to a null, unsure or undesirable outcome.

II. CONFLICTING PRINCIPLES: It is the fundamental rule of criminal law that the *burden of proving the guilt of an accused is on the Prosecution and it has to be proven 'beyond reasonable doubt'*. Thus, in cases where the accused gives consent to the test, the 'burden of proof' is indirectly transferred to the accused.

It is also to be noted that, even after recognising the unreliability of the test and 'dubious' nature of its outcome, the Court has allowed its administration on the ground of consent from the accused and has also approved subsequent discovery of evidence based on the test results. This is in clear conflict with the standard of evidence to be 'beyond reasonable doubt'.

III UNCONSTITUTIONAL NATURE: Even if we keep the question of consent aside, the narco analysis test is inherently unconstitutional. The essence of the test lies in diminishing the mental faculties of the accused in order to extract information. This by itself robs a person of the right to choose between what to say and what not to. The nature of the test is such that it COMPELS a person to divulge facts that may incriminate him. Interference with the person's mental processes is not provided for under any statute and it mostly comes into conflict with the 'right against self incrimination'. Right to dignified life and personal liberty and right to privacy are most certainly breached by this test.

[32] *M.P. Sharma v. Satish Chandra*, [1954] SCR 1077.

On the contrary, even if an accused gives his consent for undergoing the test, yet he will not know the nature of his statements, whether they will be exculpatory or inculpatory.[33]He might be innocent, yet under the influence of the drug may say things that might lead to framing of evidence against him.

III. CONSENT VITIATING FACTOR- 'DOCTRINE OF WAIVER': The real question in this case seems to be whether or not '*consent*' is the factor that determines the constitutionality of the narco analysis test.The Doctrine of Waiver, (by which a person can waive his rights)was explicitly mentioned to be inapplicable in India through the case of BashesharNath v. Commissioner of Income-tax, Delhi and Rajasthan and Anr. Even the jurists dissenting on the question of this doctrine have maintained that rights for public good cannot be waived. Borrowing from the judgment, Article 20 and 21 have been given non-derogable status and therefore, are undoubtedly for public good. Thus, the Doctrine of Waiver in no circumstances could apply to these rights.

Keeping in mind the inherent unconstitutionality of the Narco Analysis test, the presence of consent can do nothing to render it otherwise. Hence, the opinion, that consent is important, is erroneous.

IV. SAME SOURCES, DIFFERENT CONCLUSIONS: In the verdict, K.G. Balakrishnan, C.J., has borrowed heavily from the United States of America judgments. Majority of the judgments have held narco test results as inadmissible and many have even banned narco analysis explicitly. Some of the cases cited are: *State of Missouri vs. Hudson; State vs. Lindemuth; U.S. Court of Appeal (9thCircuit) in Lindsey vs. United States; Lawrence M. Dugan vs. Commonwealth of Kentucky; U.S Supreme Court –Townsend vs. Sain; Horvath v. R.* Interestingly, the U.S.A. itself has abolished the practice of 'truth serum tests' in its entirety. Hence, it is of considerable pondering on how the honourable Court has pronounced such a distinctly

[33] *Supra* note 1, at para. 122.

dissimilar conclusion,drawing analogy from the same sources that banned it completely.

INTERNATIONAL CONVENTIONS VIOLATED:

- The Universal Declaration of Human Rights, 1948, under Article 5, enumerates a person's right against torture or cruel, inhuman, degrading treatment or punishment. Further explaining this Article, the UN website states *"cruel, inhuman or degrading treatment include such practices as...pain-causing devices, interrogation under duress, biomedical experiments on prisoners, the use of drugs on prisoners and solitary confinement."*[34]
- Article 7 of the 'International Covenant on Civil and Political Rights, 1976' safeguards a person's right against torture or cruel, inhuman or degrading treatment or punishment.[35]
- The 'Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984' in its definition for 'torture' clearly marks that torture includes *physical as well as mental suffering*intentionally inflicted on a person for such purposes as obtaining from him, information or a confession, etc.[36] Article 16 of the same Convention against Torture instructs the State Parties to prevent in any territory under their jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1.[37]

Borrowing from the judgment; the Court has stated that administration of any of these techniques could involve the infliction of `mental pain or suffering' and the contents of their

[34] 'Notes' on Article 5, Universal Declaration of Human Rights, UN Cyber School Bus, available at: <http://www.un.org/cyberschoolbus/humanrights/declaration/5.asp> last accessed on January 21, 2011.

[35] Part III, International Covenant on Civil and Political Rights, 1976 <http://www2.ohchr.org/english/law/ccpr.htm> last accessed on January 21, 2011.

[36] Article 1, Part I, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, available at: <http://www2.ohchr.org/english/law/cat.htm> last accessed on January 21, 2011.

[37] Part I, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, available at: <http://www2.ohchr.org/english/law/cat.htm> last accessed on January 21, 2011.

results could expose the subject to physical abuse.[38] This makes the test qualify as 'torture'.

The Court has also found it plausible that a person could make an incriminating statement on being threatened with the prospective of administration of any of these techniques. It has also acknowledged the possibility of investigating officials obtaining 'consent' from the accused by means of coercion, duress or other intimidating ways. These possibilities, plus, the test itself amount to 'cruel, inhuman or degrading treatment'.

Thus, the existence of this test with or without consent violates the above international conventions and declarations.

CONCLUSION

By now, it has been explicitly established that the impugned test violates the fundamental human rights of accused persons. 'Consent' makes no good to the degree and impact of implications. The Court has failed to address these serious ambiguities. Interestingly, the Court has taken note of these aspects throughout the case judgment; but has somehow managed to evolve into a decision which is widely divergent.

The judgment indirectly implies that, a test that is unconstitutional, undependable, unpredictable, which conflicts core ideologies and violates every convention set to safeguard human rights, which is proscribed in almost all parts of the world, loses all its blemishes when voluntarily agreed up on by the accused.

As a consequence, narco analysis test is here to stay in India, safely camouflaged under the 'consent' factor.

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[38] *Supra* note 1, at para. 201.

ACQUISITION THROUGH OPEN OFFERS UNDER SEBI TAKEOVER CODE 2011

*Suryah S.G.**

INTRODUCTION

Takeover regulations were first introduced in 1994. They underwent an overhaul in 1997, based on the recommendations of the Justice Bhagwati Committee. The regulations were then periodically re-looked and amended several times, keeping pace with global events and developments in the capital market.

Being one of the fastest developing economies in the world after China, India has seen a tremendous increase in the extent of mergers and acquisitions (M&As). The Securities and Exchange Board of India (SEBI), vide an order dated September 4, 2009, constituted the Takeover Regulation Advisory Committee (TRAC) under the chairmanship of C Achuthan (former presiding officer of the Securities Appellate Tribunal) with a mandate to suggest suitable amendments to bridge the gap between the decade-long regulations and a rapidly evolving M&A market in the country.

Clearly, while drafting any legislation, concerns and interests of various stakeholders are involved and these are very often in conflict with each other. As TRAC has stated, its approach has been one of balancing and calibrating conflicting objectives; however, the goal of protection of interests of public shareholders seems to have been paramount for TRAC members. Also, given the increase in M&A activity and the likelihood of its further acceleration, an attempt has been made to provide clarity on several vexed issues which have emerged over the last few years.

OPEN OFFER

An Open Offer can take place if any of the promoters of a company wants to increase their stake or if non-promoters increase their stake to 15% or the company is going to delist from the stock exchange. An open offer is nothing but the exit route, which is given to the existing shareholders by the acquirer of shares through a public announcement.

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*II LL.B

When the acquiring company increases its stake to 5% or 10% or 14%, it needs to disclose its holdings at every stage to the target company and also to respective stock exchanges. But once the total holding reaches 15%, the acquirer has to come out with an open offer for existing shareholders. According to the current rule, an acquirer is required to make an open offer for at least 20% additional shares once its holding reaches 15%. The price for open offer should not be below the average price for the last 26 weeks.

REQUIREMENTS FOR MAKING AN OPEN OFFER

For making an open offer, an acquirer is required to make a public announcement, which should include offer price, number of shares to be acquired from the public, purpose of acquisition, identity of the acquirer, future plans, details about Target Company, procedure of accepting the shares and the time period for this. The acquirer is supposed to pay the consideration to shareholders within 15 days from the date of closing of the offer. For any delay, the acquirer is required to pay interest on the amount.

DIFFERENCE BETWEEN OPEN OFFER AND RIGHTS ISSUE

Rights issue is made to raise funds, while in an open offer there is a cash outflow. Generally, the rights issue price is lower than prevailing price in the secondary market. In an open offer, price is fixed based on the average price for the last six months and usually the price is higher than the prevailing market price, which is a motivation to current shareholders to sell their shares. Unlike the rights issue, shares bought in an open offer are not traded in the secondary market. Open offer decreases the holding of general shareholders while rights issue increases their holdings in terms of number of shares.

OPEN OFFERS IN NEWS

After the request received from the board of Satyam Computer Services, the Securities & Exchange Board of India has decided to amend the regulation on pricing of an open offer. Larsen & Toubro has bought more than 12% stake in Satyam. According to

current regulation, if it increases its stake to 15% it will have to come out with an open offer to buy another 20% of shares from existing shareholders in the secondary market. According to existing pricing rules the offer price will be much higher than the current market price of the fraud-hit company.

HIGHLIGHTS OF NEW TAKEOVER REGULATIONS ARE AS UNDER

1. Increase in Initial Threshold Limit from 15% to 25%.

The initial threshold limit provided for Open Offer obligations is increased from 15% to 25% of the voting rights of the Target Company. Since SEBI (SAST) Regulations, 2011 will be applicable from October 22, 2011, thus it's a last opportunity for all the Promoters holding less than 25% but more than 20% to come within bracket of Creeping Acquisition. Otherwise even the existing Promoters of these Companies have to give offer to consolidate their holding.

2. Creeping Acquisition Limit raised from 15%-55% to 25%-75%:

Now there will a single and clear creeping acquisition bracket. This will be available to all persons holding 25% or more but up to 75% i.e maximum permissible non-public holding shall be eligible for creeping acquisition of 5% each financial year.

3. Open Offer Trigger Point based on Individual Holding:

Now the Individual Acquirer Shareholding shall also be considered for determining the Open Offer Trigger Points apart from consolidated promoter shareholding. (Regulation 3(3) of SEBI (SAST) Regulations, 2011)

Increase in Offer Size from 20% to 26%.

The Offer Size is increased only upto 26% instead of TRAC Recommendation of 100%. It's a good move from the

point of view of domestic acquirers on account of lack of proper bank funding options available in India

New Provisions in case of increase in shareholding beyond the maximum permissible non-public shareholding due to Open Offer

- Obligation on the acquirer to bring down the non-public shareholding to the level specified and within the time permitted under Securities Contract (Regulation) Rules, 1957;
- Ineligibility to make a voluntary delisting offer under SEBI (Delisting of Equity Shares) Regulations, 2009, unless a period of twelve months has elapsed from the date of the completion of the offer period.

4. Abolition of Non-compete fees.

SEBI has accepted the TRAC Recommendation of scrapping the non-compete fee or control premium. Any amount paid to the Promoters/Sellers whether as consideration, non-compete fee or control premium or otherwise, shall be added in Offer Price and hence public shareholders shall be given offer at the highest of such prices.

5. Definition of "Control" modified:

A new definition of Control has been introduced in the new Regulation which is similar to recommendation of TRAC Report with an exception that the word **"Ability"** has been removed. The definition is as under:

"Control" includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner:

Provided that a director or officer of a target company shall not be considered to be in control over such target company, merely by virtue of holding such position

6. Change in Control

Any change in control of the listed company shall be only after Open Offer. The exemption from Open Offer available in case of change in control without acquisition of substantial shares, through a special resolution by postal ballot process, has been withdrawn and now the only route available for change in management and control is through the Open Offer to the shareholders of the Target Company. This is in contrast with the Regulation 12 of the SEBI (SAST) Regulations, 1997 which provides for the change in control through the special resolution passed by way of postal ballot.

7. No Exemption in case of acquisition from other competing acquirer

One of the important recommendations of the TRAC was, providing for exemption from Open Offer Obligations in respect of acquisition by the successful bidder from other competitive bidder has not been made part of the SEBI (SAST) Regulations, 2011.

8. Frequently Traded Shares

For determining the frequency of trading in shares, the trading turnover during the 12 months proceeding the month in which the Public Announcement is made will be considered. Further, the volume of trading for frequently traded company increase from 5% to 10% to have a more realistic picture.

8. New Definitions Introduced

- **"Enterprise Value"** means the value calculated as market capitalization of a company plus debt, minority interest and preferred shares, minus total cash and cash equivalents.

- **"Volume weighted average market price"** means the product of the number of equity shares traded on a stock exchange and the price of each equity share divided by the total number of equity shares traded on the stock exchange.

- **"Volume weighted average price"** means the product of the number of equity shares bought and price of each such equity share divided by the total number of equity shares bought.

- "Weighted average number of total shares" means the number of shares at the beginning of a period, adjusted for shares cancelled, bought back or issued during the aforesaid period, multiplied by a time-weighing factor

Open offer trigger limit:

Under the existing Takeover regulations an open offer is triggered when an acquirer acquires 15% or more shares or voting rights[1]. This regulation was introduced in 1998 by an amendment and is still in force without any change. However under the new takeover regulations, 2011 the trigger limit has been increased from 15% - 25%[2]. The committee came up with this change based on three important aspects, they are:

- Estimation of average promoter shareholding in prevailing listed companies as 25%-30%.
- To meet up with international practices.
- Shareholding more than 25% is sufficient to block special resolutions regarding critical decisions.

Creeping limit in a financial year:

Under the new takeover regulations, 2011 it has been proposed by the committee that an acquirer holding 25% or more

[1] Regulation 10 of the Takeover Regulations, 1997.
[2] Regulation 3(1) of the Takeover Regulations 2011.

voting rights but less than maximum permissible non public shareholding in a target company is entitled to acquire additional voting rights up to 5% within a financial year[3]. This is commendable change made to the existing regulation. Under the existing regulation it is provided that an acquirer is entitled to acquire an additional 5% of voting rights within a financial year if he has 15% or more but less than 55% of shares or voting rights in a company[4].

Minimum open offer:

The existing takeover regulations provides a mandatory provision that an acquirer once he reaches the threshold limit of 15% is required to make an open offer for acquisition of minimum 20% of the voting capital from the public shareholders of the target company[5]. However, the new takeover regulations, 2011 provide that an acquirer has to give an open offer to the 100%. of the remaining shareholders once the threshold limit is attained[6] i.e. 25%. The ultimate objective behind this recommendation is to provide for an easy exit option for the minority shareholders in case of the substantial acquisition of the target company. This recommendation has been heavily criticized on the grounds that this will lead to funding problems for the domestic players in India. This will also lead to the dominance of large players in acquisitions as there will be rise in the acquisition costs.

One reference date for calculating open offer price

Under the current law both the parent and the target company public announcement dates have to be used as reference dates for the purpose of calculating the offer price However to avoid any confusions the TRAC has proposed that there should be only one reference date for the purpose of calculating the open offer price. The date on which the acquisition of the parent company is announced or the date on which the parent company enters into any

[3] Regulation 3(2) of the Takeover Regulations 2011.
[4] Regulation 11(1) of the Takeover Regulations, 1997.
[5] Regulation 10 of the Takeover Regulations 1997.
[6] Regulation 7(1) of the Takeover Regulations 2011.

agreement, whichever is earlier, would be regarded as the reference date for calculating open offer price.[7]

For example in the Disa India case, a Netherlands based company Disa Holdings was acquired for which no official public announcement was made, as the company was unlisted in the Netherlands. Therefore Disa India, the listed Indian subsidiary of Disa Holding' claimed that as there was no reference date linked to the parent transaction at all no date had to be used for open offer price calculation. Clarification in this regard has now been provided by the TRAC wherein it is stated that the reference date is any date on which the parent acquisition comes into the public domain, and not just an official public announcement date.

The TRAC further said that a 10% per annum has to be added to the open offer price in cases where the time period between the announcement of the parent deal and the public announcement for the target company exceeds 5 days.[8]

Short form public announcement

The new takeover regulations, 2011 have introduced a new concept called the 'immediate short form public announcement which applies to both direct and indirect acquisitions. In case of direct acquisition an immediate short form public announcement is to be issued on the date on which an agreement for acquisition of shares or voting rights or control is entered into and within 5 business days from such public announcement a detailed public notice is required to be issued by disclosing all material facts. In case of indirect acquisition an immediate short form of public announcement has to be published within four business days and a detailed public notice to be issued within 5 business days of completions of such acquisition.[9]

Removal of Whitewash provisions

[7] Regulation 13(2) (f) of the Takeover Regulations 2011.
[8] Regulation 8(9) of the Takeover Regulations 2011.
[9] Regulation 13 of the Takeover Regulations 2011.

An exception has been provided under the existing Takeover Regulation wherein an open offer is not required if the shareholders of the target company pass a special resolution by way of a postal ballot to that effect for approving the change in control.[10] However under the new takeover regulations, 2011 the aforementioned provision has been omitted, to protect the interest of minority shareholders.

Another proposed change which is to be highlighted is that under the current Takeover Code Regulations an acquirer is allowed to nominate a director on the board of a target company if he has deposited the full offer amount in an escrow account and after the period of 21 days from the date of public has expired.[11] The TRAC in takeover regulations, 2011. has stated that there should not be any change in the constitution of the board of the target Company during the period of acquisition.

Recommendations on open offer:

The existing regulations provide that the Board of Directors of the target company can send their recommendations on the open offer to their shareholders. On the other hand the takeover regulations, 2011 impose obligation on the target company to constitute a committee of independent directors who are required to make a reasoned recommendation on the open offer which shall be published by the target company. Such committee shall also be entitled to seek external professional advice at the expense of the target company.[12]

Withdrawal of Open offer

Under the existing regulations an open offer can be withdrawn under specified circumstances like death of sole acquirer, or any other circumstances as may be deemed fit by the SEBI, after acquiring required statutory approval.[13] The takeover

[10] Regulation 12 of the Takeover Regulations, 1997
[11] Regulation 22(7) of the Takeover Regulations, 1997
[12] Regulation 26(6) of the Takeover Regulations 2011.
[13] Regulation 27 of the Takeover Regulations, 1997

regulations, 2011 not only include the aforementioned circumstances but also include another provision for withdrawal which states that withdrawal of open offer is allowed if any condition stipulated in the acquisition agreements is not met by the acquirer for reasons beyond his reasonable control.[14]

Voluntary Open Offer

In the Takeover Regulations, 2011 an acquirer or the person acting in concert holding collectively 25% or more voting rights in the target company can make a voluntary open offer for a minimum of 10% of voting capital shares of the target company and such an offer should be in compliance with minimum public shareholding norms. An exception to the aforementioned provision states that, a voluntary open offer can be raised to a fully fledged offer for 100% of the remaining shareholders within fifteen business days of such filing of competitive bid in case a competitive bid is filed.[15]

However no voluntary open offer can be made in case the acquirer has acquired shares in the preceding fifty two weeks. Also no such voluntary open offer can be made by the acquirer for a period of six months after an open offer.[16]

Overhaul of Exemptions from open offer:

The TRAC has laid down clear provisions for the exemptions from making an open offer made under regulation 3 and 4.[17] The TRAC has provided theses exemptions with such efficacy that all the loopholes in the existing Takeover Code have been taken care of. For example it has introduced anti-abuse conditions in the exemption regulation. It further classified the regulation providing exemptions into 2 parts namely, transactions which trigger a statutory open offer due to substantial acquisition of shares or voting rights or change in control and the transactions which trigger a statutory open offer due

[14] Regulation 23 of the the Takeover Regulations 2011.
[15] Regulation 7(2) of the the Takeover Regulations 2011.
[16] Regulation 6 of the Takeover Regulations 2011.
[17] Regulation 10 &11 of the Takeover Regulations 2011

to acquisition of shares or voting rights exceeding prescribed thresholds limit but where there is no change in control.

Under the existing takeover code a complete exemption from making an open offer has been given in case an acquisition in accordance with a scheme of arrangement, where such restructuring is undertaken either by the target company or its parent. However under the takeover regulations, 2011 the TRAC has made it difficult to obtain an exemption when an acquisition is pursuant to a scheme. It has been provided that the exemption is available only in cases where the cash equivalent component of the consideration is less than 25% of total consideration paid under the scheme and the persons who were previously holding voting rights of the target company's parent are required to continue to hold 33% voting rights either directly or indirectly in the restructured company.[18]

Another exemption which is worth a mention in the TRAC report is to make buybacks automatically exempted from an open offer but in case of such buybacks if the shareholding goes beyond the control threshold then the acquirer is required to make an open offer.[19] However this provision will not apply if the acquirer has obtained an exemption from the Board. In order to get this exemption he should not vote on the buyback in the board meeting or shareholders meeting and an increase in his voting rights will not cross the control threshold.

Non compete fee:

The existing takeover regulations provide for a non-compete fees up to 25% of the offer price which is permitted to be paid to the promoters of the target company in addition to the offer price[20]. However in the Takeover Regulations, 2011, the provision of non-compete fee has been omitted and it further states that the promoters are to be paid the same price as the public shareholders[21].

[18] Regulation 10(1)(d) of theTakeover Regulations 2011.
[19] Regulation 10(3) of the Takeover Regulations 2011.
[20] Regulation 20(8) of the Takeover Regulations, 1997
[21] Regulation 8(5) of the Takeover Regulations 2011.

Timeline for open offer process:

Timelines for various activities in the open offer process under the proposed takeover regulations has been reduced from 95 days to 57 business days from the date of public announcement.

Under the existing regulations the public announcement should be made within 4 working days from the date on which an agreement, for acquisition, has been entered into. But under the takeover regulations, 2011, a new concept called the "short form public announcement" should be made on the same day on which agreement has been entered into to acquire shares or voting rights or control over the target company and a detailed public statement should be made within 5 business days from making of the short form public announcement.

CONCLUSION

The Takeover Regulation, 2011 will impact different individuals in different ways. If notified, then due to the increase of initial trigger threshold limit from 15% to 25%the hostile takeovers of listed companies having lower promoter shareholding will be made easy. It will also take away the benefit given to promoters under the existing regulations, as promoters will not be allowed to get non-compete fee and will only be eligible for the price paid to other public shareholders of the target company. Moreover if notified creeping acquisition upto 5% per annum will be allowed till the threshold of 75% is reached. This will allow any person who will hold more than 25% of the shareholding in the target company to increase it up to 75% without any open offer. Thus it will affect the interest of the promoters of every company.

The Takeover Regulation, 2011 will also impact the public shareholders in different ways. The increase of offer size from 20% to 100% will provide for an exit opportunity to the public shareholders. Moreover prohibition of non-compete fee will provide an equal treatment and bring uniformity in the offer price. Furthermore reducing the timeline for an open offer will decrease the market risk of the public shareholders and finally the

recommendations made by the independent directors of the target company to their shareholders will assist them in deciding whether or not to exercise their option.

The Takeover Regulation, 2011 will also impact the acquirers. For instance the cost of acquiring a listed company will increase because of the increase in the open offer size. The domestic acquires will face a hurdle for getting fund as the domestic banks have limitation of financing. Furthermore it will give an option to the acquirers to directly go for delisting of the target company if the shareholding crosses the delisting threshold.

To sum up, The Takeover Regulation, 2011 mark a watershed in India's M&A landscape and will materially alter the rules of the M&A game in a variety of ways. On an overall basis, the next few years should be interesting as far as M&A activity for listed companies is concerned.

TRADEMARK EXHAUSTION RULE AND THE TRADEMARKS ACT, 1999 : AN INDIAN PERSPECTIVE

Shashank Mangal*

Once you release it, you can't claim it back.....

1. Introduction

Exhaustion of rights doctrine is the principle that once the owner of an intellectual property has placed a product covered by that right into the marketplace, the right to control how the product is resold within that internal market is lost.[1] The principle of exhaustion manifests itself in three forms; National, Regional and Global or International.

National exhaustion: if goods bearing a trademark which is registered in the land of Strombolia are put on sale in Strombolia by the trademark owner or with his consent, the trademark owner cannot use his trademark rights in order to prevent subsequent sale of those particular goods in Strombolia. But if goods are put on sale in the neighbouring state of Vesuvia, the trademark owner can sue anyone who imports them into Strombolia and subsequently sells them for trademark infringement.[2]

Regional exhaustion: if goods bearing a trademark are put on sale in any country within a specific region (for example, European Economic Area or EEA) [3] by the trademark owner or with his consent, the trademark owner cannot stop the sales of that product within his own country or in any other country in that region. But if the goods are put on sale in a country outside that region, the trademark owner can sue anyone who imports them into that region and subsequently sells them for trademark infringement.

Global exhaustion: if goods bearing a trademark are put on sale in a specific country by the trademark owner or with his consent, the trademark owner cannot stop subsequent sales of that product in that country or in any other country. The policy of global exhaustion

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* *III BSL*

1 Black's Law Dictionary 636 (8th ed., Bryan A. Garner (ed.), 2004).

2 JEREMY PHILIPS, THE TRADE MARK LAW- A PRACTICAL ANATOMY 274, para 9.11 (2003).

3 *Id.*, at 9.12.

operates with some limitations[4] in the United States, in Canada and Switzerland.[5]

2. Evolution of the Rule

This concept earlier operated under 'doctrine of implied contractual consent', a British doctrine. Its application gave rise to a presumption that when a wholesaler or any other person buys goods in bulk quantities from a proprietor of a registered trade mark, or from any other person who has been assigned that trademark, or who produces such goods with the consent of the proprietor under that trade mark, it is implicit in their contract that the buyer will further deal in those goods.[6]

But there were many limitations to this rule. The first being that even if it is assumed that there was an implied contract between the trade mark owner and the wholesaler, no such contract could be implied between the wholesaler and the retailer due to the operation of doctrine of privity of contract. Secondly, it is settled law that a term is implied into a contract only if it is indispensable to its performance. And lastly that - "In practice the implication of such a contract would probably be regarded as false and contrived."[7]

In contrast the exhaustion rule stands independent of contractual rights and obligations and thereby is free from these impediments.

3. Parallel Imports and Trademark Exhaustion

Parallel imports mean that apart from the proprietor of the registered trademark under which the goods are sold in a market, there are other people who are importing the same goods in that country or market, from other global markets where such proprietor or his assignee sells such goods. In other words, parallel imports present a scenario which is legal if global exhaustion principle is in existence in the country where goods are imported by such a person

[4] Xiodang Yuan, *Research on Trade Mark Parallel Imports in China*, 2003 [EIPR] 224.

[5] JEREMY PHILIPS, THE TRADE MARK LAW- A PRACTICAL ANATOMY 274, para 9.12 (2003).

[6] *Betts v. Wilmott*, (1871) LR 6 Ch App 239.

[7] JEREMY PHILIPS, THE TRADE MARK LAW- A PRACTICAL ANATOMY 274, para 9.06 (2003).

and illegal where national exhaustion principle is recognized, or the exhaustion principle is not recognized at all in that jurisdiction.

A question arises why would anyone engage in parallel imports, what are its implication for the proprietor of the registered trademark whose goods he is selling and for the consumer who purchases that good. We assume Multinational Corporations maximize their profits by selling the same product in different countries at different prices depending upon the Purchasing Power Parity (PPP) of that country. So, if an HP laptop costs $ 1000 in USA, it might cost Rs. 35,000 in India, which provides an opportunity to a trader looking to make some quick profit to make bulk purchases of the laptop in India, export it to US and then sell it in US market for $ 900-950. In such a situation, it is good for the consumers while not so much for HP, because its market share would reduce because of competitive pricing.[8]

4. Applicability of the Rule in India

The Trade Mark Act, 1999 (hereinafter referred to as 'the Act') embodies the concept of trademark exhaustion in India. The relevant section for this purpose is section 30 of this Act.

> ***30. Limits on effect of registered trade mark-***
>
> *(1)....*
>
> *(3) Where the goods bearing a registered trade mark are lawfully acquired by a person, the sale of the goods in the market or otherwise dealing in those goods by that person or by a person claiming under or through him is not infringement of a trade by reason only of----*
>
> *(a) the registered trade mark having been assigned by the registered proprietor to some other person, after the acquisition of those goods: or*

[8] Xiodang Yuan, *Research on Trade Mark Parallel Imports in China*, 2003 [EIPR] 224, at p.275, para 9.15.

(b) the goods having been put on the market under the registered trade mark by the proprietor or with his consent.

The plain reading of this section would mean that once the proprietor of a trademark releases his goods in the market directly or consents to such release, he cannot restrain any person from further dealing in those goods provided that such person has lawfully acquired those goods from the market. The same limitation also applies to any person who has been assigned the registered trademark by the registered proprietor after these goods have been put on the market.[9]

A question arose before the Delhi High Court in *Samsung Electronics Company Ltd. v. Mr. G. Choudhary,*[10] where the court granted an interlocutory injunction to the plaintiff restraining the defendant from parallel imports of plaintiff's goods from China. The Court noted that under the Trade Marks Act a proprietor may bring an action for trademark infringement against an importer where genuine goods have been *materially altered* without the proprietor's consent after being placed on the market[11] *(emphasis added).* Though Vikramjit Sen, J discussed the law of parallel imports in India, with reference to the Act, he didn't conclude anything regarding its recognition by Section 30 of the Act. But as per the author's interpretation of the order, he upheld the legality of parallel imports subject to the limitation imposed by Section 30(4) and yet gave an order to the contrary because the facts of the case show that it squarely fell within the purview of Section 30(4), the exception to the rule laid down by Section 30(3).

Having said this, the only question which remained unanswered after this order was the kind of exhaustion regime envisaged by Trade Marks Act, 1999. This could be solved only by interpreting the word 'market' as used in the section. The question

[9] Sonia Baldia, *Exhaustion And Parallel Imports In India*, in PARALLEL IMPORTS IN ASIA 163 (C. Heath ed., 2004).

[10] *Samsung Electronics Company Ltd. v. G. Choudhary*, 2006 (33) PTC 425 (Del).

[11] Pravin Anand , *Anti-counterfeiting 2008 – A Global Guide*, World Trade Mark Review, 71, available at: <http://www.worldtrademarkreview.com/issues/article.ashx?g=9c997e58-fedb-471f-8935-b9c813b1db28>

came up for consideration in *Samsung Electronics Company Limited v. Kapil Wadhwa ,*[12], where Manmohan Singh, J awarded interim injunction to the plaintiff on the basis that the Trade Marks Act, 1999 provides for National Exhaustion and since the defendant acquired goods from Gulf countries, i.e., from outside India, his act constituted infringement of the Plaintiff's trademark under Section 29(6)(c) of the Act. The Court said that term 'market' in the Act refers to the national market.

But in *Kapil Wadhwa v. Samsung Electronics Co. Ltd. ,*[13] the position was once again changed by the decision of the Division Bench of the Delhi High Court. The Court placed its reliance upon the notes on clauses of the Trade Marks Bill, 1999 for reaching the conclusion that the Act envisages International Exhaustion of Trade Mark.

5. Exception to the Rule

30. Limits on effect of registered trade mark-

(4) Sub-section (3) shall not apply where there exists ***legitimate reasons*** *for the proprietor to oppose further dealings in the goods in particular, where the condition of the goods has been changed or impaired after they have been put on the market.*

The exception states that further dealings in the goods may be opposed by the proprietor of the registered trademark under which the goods are sold, or his assignee if: there exists legitimate reasons to do so.

The drafting of the section is such that any change or impairment in the goods has to be considered a legitimate reason for opposing the further dealing in the goods.

With respect to physical condition being changed or impaired, even in the absence of a statutory provision, the registered proprietor of a trade mark would have the right to oppose further

[12] *Samsung Electronics Company Limited v. Kapil Wadhwa*, 2012 (49) PTC 571 (Del).

[13] *Kapil Wadhwa v. Samsung Electronics Co. Ltd.*, FAO(OS) 93/2012, decided on 03.10.2012, para 71.

dealing in those goods inasmuch as they would be the same goods improperly so called, or to put it differently, if a physical condition of goods is changed, it would no longer be the same goods.[14]

5.1 'Legitimate Reasons'

Sub-section 4 of Section 30 is not restricted to only when the conditions of the goods has been changed or impaired after they have been put on the market. The section embraces all legitimate reasons to oppose further dealings in the goods. Thus, changing condition or impairment is only a specie of the genus legitimate reasons, which genus embraces other species as well.[15]

'Legitimate Reasons' is a term which also finds a mention in the UK Trade Marks Act, 1994.[16] It is a term of wide import. It is not necessarily limited to reasons provided for by law. It is clear that the words 'legitimate reason' can be interpreted as going beyond a 'reason specifically provided for by law', in that colloquial meaning of the word 'legitimate' embraces such notions as 'reasonable, sensible, or valid'.[17]

A few instances or acts which have been held to give a legitimate reason to the proprietor of the registered trademark to oppose the further dealings in the goods have been mentioned below[18];

(1) Differences in language of the literature provided with the product[19]

(2) Difference in services and warranties[20]

(3) Difference in advertising and promotional efforts[21]

[14] *Id.*, para 68.
[15] *Id.*
[16] UK Trade Marks Act, 1994, Section 12(2).
[17] JEREMY PHILIPS, THE TRADE MARK LAW- A PRACTICAL ANATOMY para 9.55 (2003).
[18] *Samsung Electronics Company Limited v. Kapil Wadhwa*, 2012 (49) PTC 571 (Del) para 68.
[19] *SKF USA v. International Trade Commission & Ors.*, 423 F.3d 1037 (2005); *PepsiCo Inc v. Reyes*, 70 F.Supp 2d 1057; *Original Appalachian Artworks Inc. v. Granada Electronics Inc.*, 816 F.2d 68, 76 (2nd Cir. 1987).
[20] *Fender Musical Instruments Corp. v. Unlimited Music Center Inc.*, 35 USPQ2d 1053 (1995); *Osawa & Co. v. B&H Photo.*, 589 F. Supp. 1163 (1984).

(4) Differences in quality control, pricing and presentation[22]

(5) Differences in packaging[23]

6. Conclusive Evidence of the Practice of International Exhaustion Regime In India

The Delhi High Court, while interpreting the Act in *Kapil Wadhwa*, has put together scattered sources reflecting intention of the legislature, all unequivocally pointing in the direction of global exhaustion regime.

6.1 Notes on Clauses

While introducing the Trade Mark Bill 1999, clause-30, which ultimately found itself as Section 30, was explained in the Statement of Objects and Reasons, inter-alia in the following words:-

> *"Sub-clauses (3) and (4) recognize the principle of 'exhaustion of rights' by preventing the trade mark owner from prohibiting on ground of trade mark rights, the marketing of goods in any geographical area, once the goods under the registered trade mark are lawfully acquired by a person. However, when the conditions of goods are changed or impaired after they have been put on market, the provision will not apply."*[24]

Though it has been held in *Aswini Kumar*[25] that the Statement of Objects and Reasons is not conclusive for the purpose of interpretation of the Statute, for the Bill may undergo a change when debated upon in the Parliament, it doesn't mean that it cannot be resorted to in any circumstances. Firstly, the application of the principle propounded in *Aswini Kumar* can be limited owing to its heavy dependence on the factual matrix of that case. There the Act which was sought to be interpreted underwent changes during the Parliamentary Debates on same and consequently came to differ

[21] *Osawa & Co. v. B&H Photo.*, 589 F. Supp. 1163 (1984).
[22] *Societe Des Produits Nestle v. Casa Helvetia*, 982 F.2d 633 (1992).
[23] *Ferrero USA v. Ozak Trading*, 753 F. Supp. 1240 (1991).
[24] *Samsung Electronics Company Limited v. Kapil Wadhwa*, 2012 (49) PTC 571 (Del) para 57-60.
[25] *Aswini Kumar Ghose v. Arabinda Bose*, AIR 1952 SC 369.

from the Bill. In context of Section 30 of the Trade Marks act, 1999, it can be clearly observed that the Clause 30 in the Trademarks Bill, 1999 came to be enacted in the same form. Taking it to its logical conclusion, it can be said that when the bill gets enacted without any change, then there is no reason to disregard the Notes on Clauses for the purpose of interpretation.

Moreover, similar provisions in the Trade Marks legislations of other nations are of no significance for ascertaining the ambit of the term 'market' in context of the Indian legislation because there they clearly refer to the market which is contemplated by their respective acts.[26]

6.2 Other Leads

6.2.1 Report of Standing Committee on the Copyright Amendment Bill 2010, Rajya Sabha

The Court also based its conclusion on a report presented by the Rajya Sabha Standing Committee on the Copyright Amendment Bill 2010 –

> *"7.12 .....On a specific query in this regard the Department informed that the concept of International Exhaustion provided in Section 107A of the Patent Act, 1971 and in Section 30(3) of the Trade Marks Act, 1999 and in Section 2(m) of the copyright law were similar. This provision was in tune with the national policy on exhaustion of rights."*[27]

[26] *Samsung Electronics Company Limited v. Kapil Wadhwa*, 2012 (49) PTC 571 (Del) para 48.

[27] *Samsung Electronics Company Limited v. Kapil Wadhwa*, 2012 (49) PTC 571 (Del) para 62.; Department - Related Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report on The Copyright (Amendment) Bill, 2010, para 7.12, http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20HRD/227.pdf.

6.2.3 Language of Section 30(4)

Where goods have to be imported from a country of manufacture or a country where they are put on the market thereof, and then imported into India, only then would there be a difference in the language of the literature provided with the product; difference in services and warranties in the country from where the goods are imported by the seller and the country of import i.e. the manufacturer's warranties not being available in the country of import; difference in quality control, pricing and presentation as also differences in advertising and promotional efforts. This is also an indication of India adopting the Principle of International Exhaustion of Rights in the field of the Trade Mark Law.[28]

6.2.4 TRIPs

As far as TRIPs is concerned, it lays down in Article 6 that it is up to the members to decide if they want to follow the principle of exhaustion of intellectual property rights. But it must be kept in mind that the Indian stance at the Uruguay Discussions was to allow parallel imports which carries within it the implicit will to follow the principle of international exhaustion. The observations of Delhi High Court are relevant in this context;

> *" Undisputedly, preceding the TRIPs Agreement, when the international community debated, and what we colloquially speak of as the Uruguay Discussions, the Indian position was to permit parallel imports. Communications from India at the Uruguay Round of the General Agreement on Tariffs and Trade dated July 10, 1989 on 'Standards and Principles Concerning the Availability, Scope & Use of Trade Related Intellectual Property Rights' clearly brings out that India favoured the Doctrine of Exhaustion of Rights linked to parallel imports."*[29]

[28] *Samsung Electronics Company Limited v. Kapil Wadhwa*, 2012 (49) PTC 571 (Del) para 70

[29] *Id.*, para 61.

6.2.5 Stand Taken by Customs Department

On May 8, 2012, the Central Board of Customs & Excise issued a circular clarifying that parallel import is allowed under Trade Marks Act, 1999.[30]

6.2.6 The Rule Doesn't Contradict S.29(6)(C), S.140

The interpretation of S.30 in favour of international exhaustion can't be struck down because of any fears that such an interpretation would render S.29(6)(c) r/w S.29(2), 29(4) and S.140 redundant. The rationale behind this assertion is that these provisions can co-exist with Section 30.

Section 29 remains relevant for cases where the imported goods bear a registered trademark but goods have been manufactured by the importer only, making it a fit case of passing off or when in a similar situation the importer uses a deceptively similar mark which causes confusion in the mind of public, making it a fit case for trademark infringement. In a similar case, *CISACO Technologies v. Shrikanth*,[31] , where the plaintiff was the owner of CISCO and 'Bridge Device' trade marks and supplied critical components like routers and switches under the mark, the Delhi High Court in an ex-parte interim injunction gave a direction to Collector of Customs to notify all ports that no consignment bearing the offending trade mark other than that imported by plaintiff be permitted to be imported. The main reason for this order was because that the plaintiff was not importing the same goods but was copying the goods and was using identical trademark.[32]

Secondly, construing the marginal note of Section 30 that reads as –" *Limits on effect of registered trade mark* ", it is clear that it is in nature of an exception to Section 29 of the Act. [33]

[30] See F. No. 528/21039/08-Cus/ICD issued by Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs on 8th May, 2012; http://www.cbec.gov.in/customs/cs-circulars/cs-circ12/circ13-2012-cs.htm.

[31] *CISACO Technologies v. Shrikanth*, 2005 (31) PTC 538 (Del.).

[32] *Id.*

[33] *Samsung Electronics Company Limited v. Kapil Wadhwa*, 2012 (49) PTC 571 (Del) para 23.

6.2.7 Consonant with Intellectual Property Rights (Imported Goods) Enforcement Rules 2007

In a recent development the Central Government passed the Intellectual Property Rights (Imported Goods) Enforcement Rules 2007, which define "goods infringing intellectual property rights" under Clause 2(a) to mean:

"any goods which are made, reproduced, put into circulation or otherwise used in ***breach of the intellectual property laws in India*** *or outside India and without the consent of the right holder or a person duly authorised to do so by the right holder."*

The rules enable the customs authorities, at the request of the rights holder, to prohibit and/or suspend the trading and disposal of allegedly infringing goods in India.

But even this rule can't be said to be contrary to the International exhaustion regime in India because the language of the clause clearly places the provisions of the legislation, that is the Trade Marks Act, 1999 in context of the present discussion, in the deciding position, which we have already seen to be in support of the International Trade Mark Exhaustion regime.

7. Feasibility of Global Exhaustion Regime in India

The purpose of trademark was never and is not to give the owner of the mark a sales monopoly over his own branded goods, but to identify and distinguish his goods in the market. Once this positive role is over, trademark's monopolistic character should be kept under control, allowing advanced objectives of economic policy to prevail.[34]

The players in developed countries don't favour application of the doctrine of international exhaustion of rights. The application of international exhaustion of rights would incapacitate these powerful MNCs from allocating markets, fix arbitrary prices by

[34] Vito Mangini, *Competition and Monopoly in Trademark Law:An EEC Perspective*, 11 IIC 591, 598 (1964).

creating non-price competition and defeat the profit maximization goals.[35]

While presence of an global exhaustion regime would discourage Multinational Corporations from investing in India (as it means that it is lawful for others to sell its products at lower prices), it is a pro-consumer move as it leads to reduction of prices of the commodities.

8. Conclusion:

If parallel imports are to be allowed, it is imperative that effective measures should be taken in order to protect the consumers including an obligation on the parallel importers to provide:[36]

(1) clear and prominent information on, or in connection with, the imported goods, notifying consumers as to the country of origin of the goods and, where applicable, of the product's differences vis-à-vis the local or popular product under that trade mark.

(2) the same guarantees with respect to after-sales services, supply of spare parts, etc., as are extended by the local owner of the mark or clear notice of the absence of the corresponding guarantees.[37]

The language of the Trade Marks Act is capable of being interpreted to support national exhaustion also. The Delhi High Court overruled its earlier judgment relying mainly upon the Statement of Object and Reasons, which were earlier held inconclusive for the purpose of interpretation by the Supreme Court. Hence this issue must be clarified by the legislation.

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[35] ASHWINI KUMAR BANSAL, LAW OF TRADE MARKS IN INDIA WITH INTRODUCTION TO INTELLECTUAL PROPERTY 440 (2d ed. 2006).

[36] *Id.*, at 442.

[37] *Samsung Electronics Company Limited v. Kapil Wadhwa*, 2012 (49) PTC 571 (Del) para 75.

CAESAR OR GOD: WHO DICTATES SOCIAL RELATIONS? A HISTORICAL AND COMPARATIVE ANALYSIS OF THE UNIFORM CIVIL CODE

*Sneha Deka & Jhinook Roy**

This essay picks up a 62 year old debate in the history of our nation, the solution to which has not been arrived at till date. Uniform Civil Code, a "dead letter" in our constitution remains untouched and unfulfilled. In this essay, we attempt to delve into the issue of religion based personal laws and the intent of the constitution makers and the debates leading to its inception. We shall look at the personal laws in other countries and try and situate the Indian model in it. A discourse on UCC is never complete without mentioning the opposition from the religion based minorities, particularly the Muslims. However, we have tried and illustrated, both by excerpts from the constituent assembly debates and paradigms of law reforms in Islamic countries, like Pakistan, that the raison d'être for the absence of UCC in India, is not only one minority community, but there are other actors too. The essay is divided in four parts. Firstly, the intent of the constituent framers is being comprehended by taking a look at the various dissenting voices at the constituent assembly debates. We also assess how far the judiciary has acted upon the goals aspired by the framers, and how has it interpreted it from time to time. We then come across how the legislature and executive failed to materialize the directions given the court in formulating a UCC. Finally, an attempt has been undertaken to compare the Indian system of religious based personal laws with laws in other countries, namely Pakistan, Turkey and the U.S.A. this section also tries and draws an analogy between the succession laws and other property laws. We conclude with an optimistic note that someday, India shall have a UCC. Though the implementation of an abrupt code and doing away with the personal laws altogether is not desirable, as that will result in anarchy and chaos, but we are hopeful that the government will discard the political interests underlying the UCC and address the issue soon enough and take some progressive steps in that direction.

**V BSL*

Caesar or God: Who dictates social relations?

A Historical and Comparative analysis of the Uniform Civil Code

Render unto Caesar what is Caesar's and unto God what is God's.[1] But when some of what was Caesar's has been rendered to God, can it be returned to Caesar ever again?

How far can the government interfere in matters provisioned under the personal laws? The 60 year old debate of a Uniform Civil Code[2] has circumvented around this very issue and still fails to find a solution. This paper attempts to deal with this long-standing issue and individually evaluates how different players have been responsible for the static state of affairs. The paper delves deeper into the issue of religion based personal laws and seeks to answer the question as to how the Government actions are defeating the Constitution and the intent of the founding fathers. It infers exactly where the country stands today in respect of the 'conducive' environment which the Constituent Assembly had envisaged would one day arrive for a UCC. The paper also makes an analysis of the paradigms of law reforms in Islamic countries, like Pakistan and Turkey, and how the *raison d'être* for the absence of UCC in India is not only one community but others too. It seeks to take inspiration from countries which have successfully implemented a UCC and situate the unique Indian model. Further, the paper also explains how pragmatic a UCC would be, owing to the myriad political forces at play.

To be *au fait* with the contemporary constitutional trends on UCC, to ponder over their value and meaning, and to appreciate the incorporation of Article 44, what we can do best is look into the Constitutional history and go back to the views of the members of the Constituent Assembly.

[1] Render unto Caesar..." is the beginning of a phrase attributed to Jesus in the synoptic gospels, which reads in full, "Render unto Caesar the things which are Caesar's, and unto God the things that are God's"

[2] Hereinafter referred to as UCC.

The Inception after British departure

Social reform had never been a priority or even an option for the British colonial masters in India. Maintaining law and order for the furtherance of their economic goals was the underlying intention of the British policy makers. Their policy was to lend support to a measure only if the evil it sought to rectify was specific, manifest and grave or was not controversial. Integrating the people also, was not a part of their agenda.

On both counts, things ought to be the opposite today; social reform is as important an objective of state policy as any other; and removing all laws etc, which gives currency to the notion that we are separate, is an even more important task. That independence having been won, the country's objective – and therefore the tasks of governments – were the exact opposite of those the British had pursued and was the leitmotif of discussions in the constituent assembly. [3] That the system of separate personal laws was an anachronistic concept and 'one nation one civil code' was the best way to further the goal of 'welfare' state in order to justify 'unity in diversity' was quite clear.

As the issue of UCC shares its birth with the *suprema lex* of the country, comprehensive rounds of debates were conducted by the Constituent Assembly members. Alladi Krishnaswami Aiyyar, one of the supporters of UCC believed that different systems of laws cannot live in isolation. However in the face of diversity, having different personal laws will keep the nation back from advancing on the road to unified nationhood.[4] In the opinion of the authors, a nation with one law for matters governing disposal of property, crimes, divorce etc. creates solidarity. Segregated laws based on

[3] Arun Shourie, A secular agenda, (Harper Collins Publishers India, 1999) pg. 123

[4] *See* Constituent Assembly Debates, Vol VII, p. 549, "The idea is that differential systems of inheritance and other matters are some of the factors, which contribute to the differences among the different people of India" Alladi Krishnaswami Aiyyar explained. "Each system of laws would of course influence the other, that was already happening", he said, "no system of laws can remain self-contained. There is no use clinging always to the past. We have to decide and weld ourselves to one nation. By asking the continuance of separate personal laws, are we helping those factors which help the welding together of a single nation, or is this country always to be kept us always as a series of competing communities? That is the question at issue"

religion for non-religious matters create boundaries and restricts a nationalist outlook. It impedes the thought of 'one nation' and keeps the people from moving in the direction of 'a common code for all'.

K.M. Munshi words were even straighter and wanted that the Muslim law must not be static but open to changes. He emphasized that a UCC is a necessity if the secular motive is to be realized.[5]

Undoubtedly, they were met with opposition. Some of the Muslim members of the Constituent Assembly sought to immunize the Muslim Law from State regulation and criticized the idea of UCC. Mohammed Ismail said[6] that a secular state should not interfere with the personal law of people, which was part of their faith, their culture and their way of life. He claimed that the European countries, including Yugoslavia, protected "the Mussalmans in the matter in the matter of family law and personal status". Naziruddin Ahmad pleaded[7] that abrogation of personal law should not be treated as regulation of secular affairs surrounding religion or as a measure of social reform. He pointed out that even the British, who enacted uniform civil and criminal codes, never tried to scrap personal laws. Pocker Saheb disclosed[8] that he received representations from various organizations; including Hindu organizations, which characterized the provisions related to Uniform Civil Law as tyrannous. Hussain Imam wondered[9] whether there could be " uniformity of civil law in a diverse country like ours..... how is it possible to have uniformity when here are 11 or 12 legislative bodies [entitled to] legislate on a subject like marriage, divorce, succession according to the requirements of their own people and their own circumstances.[10]

[5] *Ibid*, p. 548, "There is one important consideration which we have to bear in mind – and I want my Muslim friends to realize this," he said, "that the sooner we forget this isolationist outlook on life, it will be better for the country. Religion must be restricted to spheres which appertain to religion, and the rest of the life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation."

[6] Id, p. 540-41

[7] Id, p. 541- 43

[8] Id p. 544- 46

[9] Id p. 546

[10] *See* Mohammad Ghouse, Secularism, Society and Law in India, (New Delhi, Vikas Publishing House, 1973) p. 223

But Munshi acknowledged Pocker Saheb's statement and said: "I know that there are many Hindus who do not like a UCC".[11] Munshi also asserted that UCC should be taken to mean tyranny by majority and pleaded for divorcing "religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession". He asserted that the enactment of the UCC would come under Article 25(2), which empowers the state to regulate secular affairs surrounding religion and to enact measures of social welfare and reform, it would not violate religious freedom guaranteed in Article 25. Alladi[12] drew the attention of the Muslims on abrogation by the British of various branches of the Hindu and the Muslim law and to the enactment of common codes on matters of personal status in European countries. Ambedkar[13] emphasized that in a secular state religion should not be allowed to govern all human activities and that personal laws should be divorced from religion.

However, certain Muslim members of the Constituent Assembly proposed that provisos be added to the draft Article. Mohammad Ismail Sahib, Naziruddin Ahmed, Mahboob Ali Beg Sahib Bahadur, B. Pocker Sahib Bahadur were some who belonged to the clique that believed in inserting a proviso setting out a declaration that even if a UCC is imposed on the citizens, any group, section or community shall not be obliged to give up its own personal law in case it has such a law. The ultimate motive was to render the Article meaningless and the prolonged deliberation over the issue of a UCC a total waste. Alladi drew the attention of the drafters to the point that countries of Continental Europe have coordinated and unified laws for all.[14] Ambedkar intervened to soothe the situation and gave out an assurance that not much should be heeded to Article 44 as it is entirely possible that whenever the Parliament enacts a UCC, an optional clause, as the Shariat Act 1937, may be inserted which will afford a person an option to be governed by the new code only if he files a declaration to that effect.

Whether it was a mere statement to pacify the situation or more of a serious note, the question here is: Does it remotely make

[11] Id p.547-48

[12] Id p.549-50

[13] Id p.550-52

[14] Id p.549-50

sense that a person be given a choice as to what Code is to govern him in civil matters of transfer of property, divorce, guardianship etc.? A code is to be meaningfully and equitably 'imposed' on people and cannot be regarded as a matter of selection amongst various codes.

But ultimately the Constituent Assembly opted in favour of incorporating a UCC in the Constitution in the form of a directive principle; more importantly it was adopted unconditionally and absolutely. This is proof of the fact that the founding fathers had a clear intention to have a UCC for India but the communal situation post independence was not conducive to secure to the people the code just then. They had probably believed that the reformist forces of the communities will gain momentum in a few years and the people would begin to see the merit of a common code. When the majority of the Sub-committee on Fundamental Rights posited a UCC as a social objective to be attained ultimately, M.R. Masani, Hansa Mehta and Rajkumari Amrita Kaur believed that it would not suffice the purpose if UCC is included as a directive principle. They desired that it be incorporated as a fundamental right and appended a note of dissent. "One of the factors that have kept India back from advancing nationhood," they wrote, "have been personal laws based on religion which keep the nation divided into watertight compartments in many aspects of life. We are of the view that a UCC should be guaranteed to the Indian people within a period of 5 to 10 years in the same manner as the right to free and compulsory primary education has been guaranteed by clause 23 within 10 years....."[15]

The Right to Education Act, 2010 was recently enforced. Going by the math, we should have been witnessing all Indians alike being subjected to a common code by now. For ensuring free and compulsory primary education, the State Governments as well as the legislators had begun the ground work way back. The 60s gave a launch pad, 80s gave a thrust to the motion and the advent of the millennium saw some serious effort towards codification. But when it comes to a UCC, the legislature has adopted the 'silence is golden' rule very conveniently and dodged the question remarkably.

[15] B. Shiva Rao, c.f., The Framing of India's Constitution, Vol II, p. 177

How far has the baton been carried?

Not much has so far been done towards achieving the ideal of a UCC which still remains a distant dream. The only tangible step in this direction has been the codification of Hindu law. The codification of Muslim Law still remains a sensitive matter. With the enactment of UCC, the rights of people, especially of women, can be better secured. Women's rights are still compromised in certain communities, as they are being governed by customary laws. Nevertheless, the courts have definitely taken a progressive step in that direction.

As early as in 1952, Justice Chagla and Gajendragadkar, in *State of Bombay* v. *Narussupa Mali*[16], held that Article 44 by necessary implication recognizes the existence of different codes applicable to Hindus and Muslims, in matters of Personal Law and permits their continuance unless the State succeeds in the endeavour to secure for all citizens a UCC.

In the historic judgment of *Sarla Mudgal* v. *Union of India*[17], the Supreme Court has directed the Prime Minister to take a fresh look at Art. 44 of the Constitution which enjoins the State to secure a UCC which, accordingly to the court is imperative both for the protection of the oppressed and promotion of national unity and integrity. The court directed the Union Government through the Secretary to Ministry of Law and Justice to file an affidavit by August 1995 indicating the steps taken and efforts made, by the Government, towards securing a UCC. The judgment aroused hope that some progressive steps in this direction would be undertaken by the government. But unfortunately, the court, in an appeal filed in the above case, clarified that its direction was only an *obiter dicta* and not legally binding on the government. Even before the clarification of the Court, the Prime Minister had told the Muslim Ulemas of Rampur, U.P that the Government would not implement the constitutional mandate under Art. 44.[18]

[16] AIR 1952 Bom 85
[17] (1995) 3 SCC 635
[18] J.N. Pandey, T*he Constitutional Law of India*, (Allahabad, Central Law Agency, 2009), pg. 396

The need for a UCC was reiterated by the Court in the much celebrated *Shah Bano* case[19]; a case pertaining to a Muslim husband's liability to maintain his wife beyond the period of *Iddat*. It had a far reaching impact on the discourse on UCC. The Supreme Court, through CJ Y.V. Chandrachud, held:

> *"It is also a matter of regret that Art. 44 of our Constitution has remained a dead letter..... There is no evidence of any official activity for framing a UCC for the country."*

The judgment itself became an area of conflict, with Hindu fundamentalist leaders hailing it as a positive step and Muslim leaders opposing it. Shah Bano, unable to bear the pressures exerted on her from the community, in an open letter to Muslims declared her discontentment of the judgment and expressly stated that she didn't accept it.[20]

The Rajiv Gandhi government gave in to the pressures exerted by the orthodox factions in the community and passed the Muslim Women (Protection of Rights upon Divorce) Act, 1986. The Act removed divorced Muslim women from the ambit of Section 125 CrPC[21], choosing to focus on a one time relief to divorced women.

[19] *Mohd Ahmed Khan* v. *Shah Bano Begum & Ors.* AIR 1985 SC 945: 1985 SCR (3) 844

[20] The letter by Shah Bano, was an open letter to Muslims, poignantly in its helplessness, stated: Maulana Mohammed Habih Yar Khan, Haji Abdul Gaffar Sahib and other respectable gentleman of Indore came to me and explained the commands concerning nikah, dower and maintenance in the light of the Quran and the Hadith.... Now, the Supreme Court of India has given the judgment on 23rd april 1985 concerning maintance of the divorced woman, which apparently is favourable to me. But since the judiciary is is contrary to the Quran and the Hadith and is an open interference in Muslim Personal Law, I, Shah Bano, being a Muslim, reject it and disassociate myself from every judgment that is contrary to shariat. *(November 13, 1985, Inquilab, translated from Urdu)*

[21] Code of Criminal Procedure, 1973 s125 reads:
(1) If any person leaving sufficient means neglects or refuses to maintain-
(a) his wife, unable to maintain herself, or.....A Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate[1][***] as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct.....
Explanation. For the purposes of this Chapter:
(a) minor means a person who, under the provisions of the Indian Majority Act, 1975 (9 of 1875) is deemed not to have attained his majority;
b) "Wife" includes a woman who has been divorced by, or has obtained a divorce from, ıer husband and has not remarried.

In another landmark judgment in *Danial Latifi* v. *Union of India*[22], a five Judge Constitution bench of the apex court upheld the constitutional validity of the Act and held that a Muslim divorced woman has the right to be maintained even after the *iddat* period under the 1986 Act. The petitioner also argued that the Family Courts Act 1984 excluded Muslim women and aggravated this situation of apartheid whereby the weakest section, namely the women of the minority community, would per se be prejudiced.

The need for UCC has been felt by the judiciary also in cases related to inter-religious marriages, especially which are not registered. Shortly after Shah Bano, there was the case of *Jorden Diengdeh* v. *S.S. Chopra*[23] . The Supreme Court said that:

> *"..... the present case is yet another which focuses.... on the immediate and compulsive need for a UCC."*

The judiciary has also attempted to bring in some reforms in the personal laws through certain progressive judgments. This is usually visible in cases relating to protection and promotion of women's rights, as under the personal laws, it is undoubtedly, women who are always on the receiving end of injustice and discrimination. A demand for the enactment of a UCC has also been expressed in the form of writ petitions. This is illustrative of the fact, that the people too, feel the need for a secular and common civil law. However, the courts did little, but expressed their helplessness in codifying a uniform law for all denominations. The Supreme Court in *Maharshi Avadesh* v. *Union of India*[24] dismissed the petition seeking a writ of *mandamus* against the Government of India to introduce a UCC. The Court took the view that this was a matter which fell within the domain of the Legislature and that the Court cannot legislate in this matter.

The abovementioned cases amply demonstrate how the hands of the Judiciary have been tied. The Judiciary, being the first hand assessor of the social problems is aware of the needs of the society. In spite of repeated attempts to direct the Government to

[22] AIR 2001 SC 3262

[23] AIR 1985 SC 935

[24] 1994 SCC, Supl. (1) 713

take positive steps towards a UCC, politics has always had the final say.

The Constitution envisaged a single legal system in India to free the society from the age of shackles of redundant religious dogmas, which, on certain occasions deny basic human rights to an individual. However, soon after independence, the political leaders and parties began to scramble for government authority and power in the state. In such an environment, the constitutional goal of a classless, casteless, non-sectarian and secular democracy has been reduced to an ephemeral reality, by the politicians, who claim to be secular, but at the time for political ends arraign one religious community against the other religious community or group.[25]

The fact that the various political parties or the coalition government which have come in power since the first general elections in 1951, have failed to make positive changes in this direction, illustrates this fact. Even a socialist Nehru once bemoaned, "How do I pass a new civil law for Muslims with the vote of Hindu MPs?"[26] In the later years, communalism seeped into Indian politics, never to leave it again. In 1993, the Congress fought elections on religious lines giving assurance to the people of Mizoram that there the State would be treated as a Christian State.[27] Our political history is filled with such instances. These elements consequently opposed the politics of divisive secularism and equally communalized Hindu psyche of another new threat from Islamic fundamentalism. The most disastrous outcome of such politics was the 1984 Ram Janam Bhoomi Andolan for the "liberation" of Lord Rama's birth place from Muslim desecration. The Allahabad High Court, after years of communal carnage and politics, in September 2010, finally passed a decree in this regard. However, in public opinion, the matter stands disputed.

Do Women Activists support UCC?

Since a number of years, the women's movement has been protesting against discriminatory personal laws based on religion.

[25] S.N Dhyani, Secularism: Socio-Legal Issues, (Jaipur, Rawat Publications, 1996) pg. 117-118

[26] *Ibid*, pg 119

[27] Failure of Indian Secularism by H.A. Gani, p. 31 at 33, *The Radical Humanist*, April 1993

Women's secondary status in society is, to a great extent determined by the hold of religion on family. Patriarchy operates through the institutions of religion and family, defining the woman as subservient, meant only to bear and rear children, contribute her labour to the household and maintain the family at all costs. Any deviation from this norm, whether by force, choice or accident makes a woman more vulnerable, and at the mercy of discriminatory personal laws, in areas of divorce, maintenance, succession, guardianship and adoption.

The unique and common feature of all personal laws is the secondary status they accord to women, across all communities. Property rights protect male interests and perpetuate the patriarchal family. Women are denied a fare share in inheritance, and have no access to matrimonial property. Getting a paltry amount as maintenance if fortunate, a separated woman is often left entirely on her own to put her life together. Years of tedious housework, and the bringing up of children, merit no recognition in society or in the eyes of law

But at the same time, we find certain dissenting voices as well. Many fear the imposition of the culture of the majority on the minorities, thus leading to an identity crisis. Thus, a simple approach which considers all women as belonging to one homogenous community has to be avoided. Rather,in the opinion of the authors, what needs to be taken into consideration, is the fact that difference amongst women themselves exist on a cultural, regional and religious level.

The National Commission for women founded in 1990, started reviewing the various laws on women with a view to give them equality and justice on equal footing. For this it had proposed two important bills for all women in the country in order to improve their status and position in Indian society. They were: (1) the Marriage Bill, 1994: and (2) the Domestic Violence to Women (Prevention) Bill, 1994.[28]

Though the Domestic Act came to force in 2006, no progress has been made in making the former proposed bill a reality.

[28] Indian Express, December 4, 1994

How the other nations score on the chart?

Know thy neighbour

Those wishing to reform the Muslim Personal Laws have often cited Muslim countries as examples that such reform is possible. Where Indian Muslims are allowed to legally marry four wives, Pakistan which is a predominant Muslim State tried to bring reforms in this obsolete practice by enacting the Muslim Family Law Ordinance of Pakistan 1961 which makes it obligatory for a man who desires to take a second wife to obtain a written permission from a government appointed Arbitration Council.[29] The interesting point regarding Pakistan stemmed out of India and therefore Muslims of both nations were once governed under the Shariat Act of 1937. But legal reforms in Pakistan are quite contradictory to the traditional normative understanding of the Muslim laws. The judges who have been educated in the modern western culture have interpreted the law from the modern legal perspective.[30] If Pakistan could take initiatives on the reformist lines, so can India.

The Turkish Paradigm

Turkey is one of the classic examples of a state undertaking legal importation as a means for a transition to a secular structure and to do away with religiously sanctioned provisions of law. Though the modernization of Turkey had begun during the Ottoman rule, the Republic of Turkey became secular after the empire collapsed in 1922. The secularization process in Turkey reached its peak in 1926 with the adoption of the Swiss civil code[31] and the total disregarding of the Muslim laws. The new Turkish Code introduced some fundamental changes in the existent structure which is now uniformly applied to all and can be considered one of the daring examples of an attempt to modernize the country by adopting the secular path in the true sense.[32] A new civil code was adopted by Turkey very recently in 2001.[33] It is worth mentioning here that, Turkey is one of the few Muslim majority

[29] Section 6(1) of the Muslim Family Laws Ordinance 1961 (VIII of 1961), Pakistan.
[30] *See* Ihsan Yilmaz, Muslim laws, politics and society in modern nation states: Dynamic legal pluralisms in England, Turkey, and Pakistan, (Ashgate Publishing, Ltd., 2005), p.130
[31] On 27th 2001 November, The Turkish Parliament enacted the New Civil Code
[32] Ibid p.97-98
[33] Ibid p.84

nations which undertook one of the radical positive steps by abolishing polygamy.[34]

The Ubiquitous sets an example: American Model

It is a matter of common knowledge that the heterogonous American society has successfully implemented a uniform code. The Indian diaspora in the USA have readily accepted the UCC. But when in India they refuse the same treatment? It is not the people who are to blame, but the indifference and inaction of the state to effectively enlighten people of the advantages of a UCC in India.

If Muslim countries can reform Personal Laws, and if western democracies have fully secular systems, then why are Indian Muslims are governed by ancient customs? The State has time and again turned a blind eye towards this and the matter extends *ad infinitum*.

How far can Caesar have his say?

What is religious and what is not? There cannot be an answer to this. Or can there be? Well, from the law point of view there has to be one. All religions preach the same thing in different forms; all religions preach how man should live a virtuous life. In this sense, when 'life' is involved, everything related to life is religious. Then every activity is religious and should be covered by personal law based on religion. A line has to drawn somewhere to demarcate what can be included under the banner of religion and what not.

Religion as per the Oxford Dictionary means:

- the belief in and worship of a God or gods
- a particular system of faith and worship[35]

[34] Turkey is the only nation located in the Middle East that has abolished polygamy, which was officially criminalized in 1926, becoming the first nation in the area to do so. Turkey has long been known for its promotion of secularism, and has continued to introduce measures that have placed even stricter bars on polygamy. The most recent prohibition act, passed in March 2009, effectively banned polygamists from entering or living in the country.

Not all things can be related to one's belief in God. Inheritance and succession are governed under personal laws, but a second thought in this direction pops the question, how can 'one's belief in some higher power' decide the manner in which his/her property is to be divided? Property is acquired by all non-religious functions, then why is the same property, when divided among the heirs, to be decided according to which god one believes in or which faith one adheres to? Muslim law recognizes the concept of oral gift but the other religions are governed by the Transfer of Property Act which doesn't recognize oral gift. This implies that huge pieces of lands can be transferred without any stamp duty or documentation under the Muslim personal law. Classifications are allowed under Article 14 based on "intelligible differentia" having "nexus" with the object sought to be achieved. Making the supposition that the state is making at least some miniscule effort towards a UCC, does the subjection one particular faith to one law and others to a different law form an intelligible differentia? If we go a step ahead, then it requires no genius to see that the differentiation not only is illogical but is also 180 degrees opposite to the object sought. Article 14 goes down the drain yet again.

Let us take a more crude way of coming up with an answer to this question. All religions prohibit and discourage crimes like homicide, rape or offences against property. Different religions prescribe different punishments pertaining to various crimes. Many do not commit crime out of the fear of religion or a fear of heaven and hell. This line of thought leads us to one conclusion: crimes and their regulation can also be brought under the religious domain. Why is it that the citizens of this country are governed by one single uniform law when it comes to crime but differentiated when it comes to civil matters?

Marriage is regarded as a social institution. It is a sacrament but also a contract. As far as the sanctity is concerned, it is by all means religious but the contractual nature cannot and should not be brought in the religious sphere. Then why is it that Parsi law makes no provision for any relief if consent to marriage has been obtained by fraud? Why is it that the Indian Divorce Act 1869 does not make

[35] The Compact Oxford Reference Dictionary, (New York, Oxford University Press, 2001) p. 705

pre-marriage pregnancy a ground for divorce? Why is it that Muslim law still permits men to have 4 wives when polygamy has been abolished in the predominant Muslim states of Turkey and Tunisia? And why is it that the 'so modern and progressive' Hindu law always makes exemptions for customs and usages even though most them are outmoded, harsh and archaic? The relations arising out of social status of man are to be same for all. They affect all men alike irrespective of their religion. Different laws for social relations imply that the declaration in the Preamble of 'unity and integrity of the Nation' is a letter of law devoid of any meaning. There is only unity of the subject but no unity of thought and much less of practice.

Take an assertive stand but don't stand still

The issue of a UCC has given rise to heated debates and controversies. It touches the sensitivities of certain groups. But this should not be taken to concede that existing laws should remain untouched. An endeavour should be made to incorporate good points of one system into another and strike down provisions which are harsh, antiquated and discriminatory.

The indifference of the political parties has to come to an end, because the UCC waits to see the light of the day. There has been a lot of human rights violations throughout the length and breadth of the country. Further, a law reflects the political awareness and the changing mindset of a society. India, with its bulk of population under the age of 30, should have an equally dynamic set of political laws, rather than being stagnated in age old religious doctrines, which negates every revolution, every renaissance the annals of history contains. However, progress need not spell out as a blind aping of the western model of secularism and erecting a "wall of separation"[36] between religion and politics. A room for reformation should always be there, but a line has to be drawn between religious freedom and denial of rights to the population, particularly women and the poor, in the name of religion.

India has a history of assimilation and inclusion from various laws, the prime example being the Indian Constitution itself.

[36] Enshrined in the 1st amendment of the American Constitution, See *Everson v board of education, 330 US. 1 (1947)*

Legislating over a sound UCC is an uphill task for the lawmakers and the positives of the existing personal laws in India and the successful models of the UCC around the world can be incorporated into one. The political forces have to stop influencing the turn of events for once, so that "unity in diversity" of the Indian culture can be given life and meaning. The situation does not call for a sudden and abrupt imposition of a UCC but a gradual transition towards a more favourable atmosphere for a secular civil law to thrive. The founding fathers of the Constitution aspired a UCC not because it should lie latent as mere letters of law but for the purpose it intended to serve, i.e. unison of the country in actuality and a better, dignified life of its citizens.

DISTRIBUTOR LOSSES AND PROMOTIONAL EXPENSES IN TRANSFER PRICING ASSESSMENTS :

"Who has to bear it and to what extent?"

*Tanvi Kishore**

In recent times, an important question to be answered in transfer pricing assessments has been that of advertising, marketing and promotion (AMP) expenses incurred by a local subsidiary in relation to an intangible or brand owned by a foreign Associated Enterprise ('AE') and the apportionment of such AMP expenses between the foreign Associated Enterprise ('AE') and the local subsidiary.

In such assessments, Transfer Pricing adjustments have been made on account of Arm's Length Price of the AMP expenses and an arguable issue has come to light of who is to bear the expenses and to what extent. The Tax Authorities have adopted an aggressive approach in this regard where it is alleged that the AMP expenditure incurred by the Indian AE results in an enhancement of the value of the brand / trademark belonging to the foreign AE and therefore an appropriate compensation is required to be made to the Indian AE. Accordingly, the Indian AE ought to get an arm's length compensation.

In an attempt to answer these questions various criteria have been listed over time, based on which one can decide the allocation of such costs.

Criteria for allocation of AMP expenses:

1) *Benefit Test for promotional expenses*[1]

It is the foremost criterion taken into consideration under US regulations while deciding the question of transfer pricing adjustment in relation to promotional expenses. The entity bearing the cost for promotional and advertising activities should derive direct benefit from such activities.[2]

Generally, such activities are carried out by the distributor in his course of business. When such expenses are not incurred at the direction or instance of the foreign entity, the distributor bears

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* *II LL.B.*

[1] Marc M. Levey, C. Wrappe Steven, Chung Kerwin, Transfer Pricing Rules and Compliance Handbook.

[2] Neeraj K. Jain, *Benchmarking of Brand Promotion Expenses-An Indian Perspective.*

such expenses as he directly benefits from such activities in the form of higher sales and consequently higher profits, and any benefit to the foreign entity are purely incidental.

However, if promotional activities are on the direction of the foreign entity as a part of efforts to benefit the global brand name, these expenses might be apportioned accordingly between the foreign and local entities. In case there is a specific mutual agreement or arrangement in regard to allocation of promotional expensesor reimbursement of expenses by the foreign entity to the local distributor to compensate it for its marketing efforts, the same can be followed by the parties. In the absence of such arrangements, there cannot be said to be any "international transaction" involved in relation to such promotional expenses that falls within the scope of Transfer Pricing regulations.

The Indian courts have given high regard to this criterion, as can be seen in the Delhi High Court's decision in the Maruti Suzuki India Limited Case[3], wherein on the issue of marketing expenses, the Court held that *under normal circumstances, even when a brand belonging to a foreign related entity is used by a domestic company in promoting and advertising its products in the local market are essentially for the benefit of the domestic entity. Any benefit accruing to the foreign brand owner is purely incidental and hence, no payment by the foreign brand owner to the Indian brand owner is necessary in such cases.*

This view has also been adopted in the case of DCIT v. M/s Sony India (P) Ltd. wherein the Income-Tax Appellate Tribunal held that the benefit of advertisement expenses was within India.

2) *'Bright line' Test*[4]

In cases relating to Transfer Pricing adjustments of promotional expenses, the concept of 'Bright line' has been used to determine quantum of excessive expenditure. 'Bright line' is thus a watermark for the permissible marketing expenditure that would ordinarily be undertaken by any entity in a given industry.

[3] *Maruti Suzuki v. ACIT*, 328 ITR 210 (Del).
[4] Amicus Tax Team, *Tax Times Newsletter*, Vol. 1, Issue 2, Sept 2011.

It distinguishes between the 'routine' and 'non-routine' expenditure that is incurred on marketing and promotional activities.

While distributors are expected to expected to spend a certain amount of cost to exploit the items of intangible property to which it is provided, it is when the investment crosses the 'bright line' of routine expenditure into the non-routine that, economic ownership likely in the form of a marketing intangible is created.

If the 'bright line' is crossed by the domestic entity/ distributor, i.e. the marketing intangibles are being developed at a more global level, it may be entitled to compensation for its efforts.

Determination of 'bright line' is an important question and it depends on various factors including nature of industry, stage in business lifecycle, etc. Firstly, comparable products need to be identified and their average expenditure on marketing and advertising needs to be determined. Secondly, the quantum of expenditure of concerned assessee in the same regard is assesses and the expenditure in excess of the average is disallowed as this expenditure is attributed to benefits accruing to the parent company.

The concept of 'bright line' was used for the first time by the US Court of Appeals in 2002 in the DHL Case[5]. It was reiterated in the Maruti Suzuki India Limited Case by the Delhi High Court.

3) *Economic Characterization*[6]

In Transfer Pricing economic characterization of the entity is necessary as it helps to determine method of Transfer Pricing, type of comparables that can be used in Transfer Pricing study, type and nature of the entity. In addition to determining the

[5] *DHL Corporation and Subsidiaries v. Commissioner*, TC Memo. 1998-461, December 30, 1998.
[6] Narayan Mehta, *An Integrated Approach to Formulating a Transfer Pricing Strategy Concerning Marketing and Distribution Affiliates*, 124 (IBFD 2006).

economic character of the entity, a functional analysis relating to the functions performed, assets owned and risks assumed needs to be carried out. For the purpose of our study, an entity can be classified under four broad categories-

- Full – fledged distributor:
  It is an entity which performs normal trading functions of purchasing and selling goods, bearing all the risks involved in the process. It buys and sells goods in its own name and undertakes all related risks like product obsolescence, bad debts, etc. Such an entity would most likely bear the entire quantum of marketing and promotional expenditure.
- Limited Distributor:
  It is an entity that performs all the normal trading functions of buying and selling products but does not undertake any major risks. Such risks are passed onto the principal. He has little or no strategic marketing responsibilities, but may undertake market-specific marketing tasks.
- Agent:
  It is an entity which is more involved in the sales process, and he facilitates the meeting of the buyer and seller. He does not himself perform the function of purchasing and selling goods, but is a mere intermediary between the buyer and seller. They are generally remunerated on the basis of a commission on sales. They do not take title to the goods, have no accounts receivable or inventory risk. However, the costs incurred in achieving the sales target are borne by them out of the commission receipts.
- Service provider:
  This is also a type of an agent that provides marketing and support activities without undertaking any risks of achieving sales target. Its remuneration is in the form of reimbursement of expenses plus an appropriate mark up on these expenses. Here, as in the previous case, the marketing expenses are ultimately borne by the principal.

4) Risks Assumed

It is an important aspect to be considered while determining which entity has to bear promotional and marketing expenses. It forms a part of the functional analysis but for the purposes of this study is discussed as a separate criterion. The various risks that a distributor could face are inventory management and acquisition, inventory holding, after-sales services, undertaking credit risks and risk of commercial success or failure of business. It is seen that generally a full fledged distributor undertakes all aspects of the general risk-bearing pattern. As such, all the benefits arising from such undertaking accrue directly to him. And as established above, the person directly receiving benefits shall be liable to pay the related expenses. Similarly, when marketing risks are borne by the domestic entity locally, then all benefits arising from marketing activities accrue directly to him, and as such, the promotion and marketing expenses shall be borne by him. However, if marketing risks are assumed by the parent company then it shall be liable to pay such expenses.

5) Party Undertaking Market Penetration[7]

In case of new products, losses may be incurred in initial years. These losses have to be borne by the party undertaking the market penetration strategy which can be either the foreign parent company or the local distributor.

The distributor may undertake market penetration through enhanced marketing or price reductions to end customers. Similarly, the parent company may accomplish market penetration through a reduction of prices at which products are supplied to the local distributor.

On principle, the tax authorities expect the party suffering losses from a market penetration strategy to receive the related benefit.

Above have been discussed the various factors which are to be considered while allocation of AMP expenses between the foreign AE and local subsidiary. However in studying a particular case in relation

[7] *Id.*, at 134.

to these criteria various other important concepts need to be discussed such as that of routine and non-routine expenses while conducting a 'bright line' test, the comparables to be selected, etc.

Routine and Non-routine expenses

The AMP expenses need to be analysed in order to determine whether these are routine in nature, i.e. whether a third party distributor would have incurred these expenses. Similarly, it is important to identify the company's non-routine expenditure and which anticipated benefits they hope to receive from these expenses.

The question of routine or non-routine expenses is a company-specific one. Each company has its own AMP policy. There is no specific industry norm in this regard and often there are inconsistencies in how these expenses are accounted for. In such a case, the expenses ought to be analysed from the perspective of whether these are routine expenses that a third party would have incurred for selling the product.

Advertisements in the media that provide details of the product should be considered as routine expenses. However, expenses incurred for a promotional activity (being in the nature of a brand building activity) that focuses on the brand rather than the product may be regarded as brand building expenses and accordingly, potentially non-routine in nature.

Example:

A promotion party commemorating an anniversary of the brand or the success of the Group in India may be regarded as a non-routine expenditure.

Comparables

The arm's length principle is generally applied in practice by establishing comparability between the conditions in the controlled and uncontrolled transactions. Similarly, in determining of routine and non-routine expenses in relation to the 'bright line' test, it is necessary to conduct a comparability analyses. However, the selection of comparables in this process is a difficult task as there are few comparables that would provide

an accurate answer. There are many attributes of the transaction that determine the degree of comparability. These attributes as listed under Transfer Pricing guidelines, laid down by the OECD[8] are-

- Characteristics of property/services

  Differences in specific characteristics lead to differences in value in the open market, to some extent. Such relevant characteristics could include form of transaction, type of property, anticipated benefits, etc.

- Functional Analysis

  Also known as FAR Analysis as it mainly involves identification of 'Functions' performed, 'Assets' employed, and 'Risks' assumed. These factors directly influence the returns earned by the entity involved in a transaction.

- Contractual Terms

  Conduct of parties is directly influenced by the terms of contract between them. In addition to written contract, the correspondence and communication between parties also helps in determining terms of transaction.

- Economic Circumstances

  The economic circumstances surrounding an entity may vary from company to company. These may have a direct bearing on the company's pricing of its products, expenditure incurred, and various other activities.

  Thus, it is important to choose a comparable keeping in mind the economic circumstances surrounding each entity such as geographic location, size of market, extent of competition, availability of substitute goods, level of supply-demand, nature & extent of

[8] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, para. 13.8-1.63.

government regulation, cost of production, level of market penetration, business cycle, etc.

- Business Strategies

  In applying the 'bright line' test while determining quantum of AMP expenses to be allowed, the AMP expenses of the comparable is a direct result of its individual business strategy. It may vary to a great extent from that of the tested company. As such, it is necessary to have a thorough analysis of the business strategies of both the entities. Such business strategies could include innovation & new product development, degree of diversification, risk aversion, duration of agreements, market penetration schemes, etc.

Incidental Benefit

When a branded product is sold in India, it is advertised in India and consequently so is the brand. Advertising for a product, to a certain extent, is likely to benefit the brand in the long run. However, such benefit is purely incidental to the AMP expenditure incurred by the local subsidiary.

It cannot be considered that all AMP expenses benefit the brand and ought to be reimbursed to the Indian AE under a cost plus arrangement, as it shows a lack of analysis of the nature and reason behind such expenses. Similarly, it would be incorrect to say that all AMP expenses are incurred purely for advertising of the product and none of the AMP expenses are for promotion of brand. It forms a part of the brand building or brand promotion exercise of the company. These can be regarded as non-routine expenses which a third party is unlikely to incur.

Another issue related to marketing intangibles is that of right to use the brand. Generally, the Indian AE is licensed to use the brand in order to sell the product in local market. Such license could be with or without a charge (e.g. where the Indian AE is unable to undertake selling function without use of the brand).

In determination of transfer pricing treatment of marketing intangibles, it is difficult to adopt a standard approach. The above

mentioned incidental benefit shows the 'rub-off' effect of AMP expenditure. In this regard, a reasonable conclusion cannot be obtained without a thorough analysis of the nature of expenses (e.g. whether the expenses were necessary for the sale of the product) and the economic scenario under which the expenses were incurred.

International Scenario- US regulations[9]

The US regulations have tried to separate the provision of marketing services and the development of intangible property. An important theory suggested in IRS regulations relates to the *'Developer-Assister'* rule and is applicable where there is no legal ownership of intangible property and one of the controlled taxpayers is considered the developer and another is regarded as the assister.The entity considered as the developer is generally the one who bears the largest portion of costs for developing the intangible. This rule focuses on the economic relationship of relevant parties for the purpose of evaluating the development of intangibles and assign profits based on the economic contributions of the parties.

The Department of the Treasury amended the regulations in 1994 to consider 'legal ownership' as the basis for determining the developer/owner of the intangible property. It further draws distinction between 'routine' and 'non-routine' expenditure. In the famous DHL case[10], the US courts held that *no royalty would be due to DHL US from its AE DHL International, standing for the proposition that for items of intangible property, the party which bore the economic burden of the investment should bear the economic rewards. The trial judge adopted the 'bright-line' test which notes that, while every licensee or distributor is expected to expend a certain amount of cost to exploit the items of intangible property, it is when the investment crosses the bright line of routine expenditure into the realm of non-routine that economic ownership, in the form of marketing intangible, is created.*

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[9] Neeraj K. Jain, *Benchmarking of Brand Promotion Expenses-An Indian Perspective.*

[10] *DHL Corporation and Subsidiaries v. Commissioner*, TC Memo. 1998-461, December 30, 1998.

OECD Views

Paragraph 6.38 of the OECD Guidelines[11] provides that in arm's length dealings the ability of a party who is not the legal owner of marketing intangible to obtain future benefit of marketing activities that increases value of that intangible will depend principally on the substance of the rights of party. The OECD Guidelines further clarifies that a distributor may have ability to obtain benefit from its investment in developing the value of trade mark from its turnover and market share where it is a long term contract of sale distribution right or the trade mark product. It is provided in such case a distributor may bear extraordinary marketing expenditure beyond what an independent distributor in such a case might incur to obtain an additional return from owner of a trade mark, e.g., through a decrease in the purchase price of the product and reduction in royalty rate.

The Transfer Pricing regulations in India are largely based on OECD Transfer Pricing guidelines, the said guidelines are usually referred to in explaining and interpreting the Transfer Pricing provisions under the Act to the extent that they are in linewith the OECD guidelines.

Recently, on June 6, 2012 the OECD released a Discussion Draft[12] on intangibles ('discussion draft') providing policy direction on several aspects pertaining to Transfer Pricing of intangibles. Published well ahead of schedule, the discussion draft provides valuable guidance on definition, identification and allocation aspects of intangible related returns.

From an Indian perspective, the draft has been published at a very convenient time. Under Finance Act, 2012 India has recently adopted (retrospectively from AY 2002) an expanded definition of 'intangible property' which covers ten different kinds of intangibles - marketing, technology, artistic, engineering, customer, location, human capital and a few others - and in addition, a residual clause covering *'any other item deriving its*

)ECD Transfer Pricing Guidelines for Multinational Enterprises and Tax ninistrations.

)r more details visit http://www.oecd.org/ctp/transferpricing/50526258.pdf.

value from intellectual content' is also provided. Further, 'marketing intangibles' has attracted significant attention leading to high value adjustments for multinational taxpayers.

Conclusion

Determination of ultimate liability of promotional expenses and distributor losses with regard to transfer pricing regulations depends on merits of individual cases. Income earned from intangible property has been one of the most challenging issues in Transfer Pricing in the recent times. AMP expenses are held by Revenue as creating "marketing intangibles" by contributing to brand promotion of "foreign owned" brand. Indian distributor, even if not the "legal owner", is held to be the "local developer" of the trademark. Although several guidelines are laid down regarding the allocation and tax treatment of such intangibles, it remains to be seen how the proposed changes in the OECD Discussion Draft are adopted by the tax authorities in India.

UNFAIR TERMS IN STANDARD FORM CONTRACTS

*Tanya Pahwa**

Contract d' adhesion: An Introduction

One of the most serious challenges that the modern law of contract has had to face is the type of a contract called an adhesion contract i.e. Standard form contract. Standard form contracts also referred to as 'Contracts of adhesion'[1] have been widely used in economic transactions since the middle of the twentieth century. Standard form contracts are typically contracts whose terms and conditions are predetermined by one party who has all the bargaining power and are presented to the other party on a *take it or leave it* basis.

Today a myriad of complex commercial transactions take place in almost every industry and the role of such standardized contracts thus, is indispensable. Since the terms and conditions of such contracts are stipulated in advance, it gives little or no opportunity to the other party for any negotiation thereby undermining the interest of that party.

Freedom of Contract is the fundamental principle on which Contract Law is based. For a valid contract, proper offer and acceptance is essential. There has to be *consensus ad idem*. Two or more persons are said to consent when they agree upon the same thing in the same sense.[2] However, freedom of contract is of little value when one party has no alternative between accepting a set of terms proposed by the other or doing without the goods and services offered. Since in such standardized contracts, full acceptance and free consent cannot be assumed, the legality of such terms and conditions stipulated in these contracts assumes importance.

Standard Form Contracts and Economic Theory

It is widely accepted that the standardization of contractual relations between parties reduce transaction costs and facilitate greater exchanges. These standard form contracts can generate positive effects in terms of economic welfare, particularly in the economies of scale, characterized by increasing return rates at higher levels of production. Stiglitz[3] points out that government

* V LL.B.

1 Saleilles, De la déclaration de volonté (1901).

2 Section 13 of Indian Contract Act, 1872

3 Stiglitz, Analysis on "Free Markets" (2000).

intervention in such transactions could create economic distortions. Economists believe that in competitive markets, contracts tend to be efficient, meaning they tend to reflect economic options of the parties who should be enforced to ensure market efficiency. However, the consumer biases that arise out of these standard form contracts provide a wide opportunity for firm exploitation of consumer tendencies.[4]

Legal Framework

The Indian legal framework does not provide for a specific legislation on the subject. For a contract or a term to be void, it must be covered under some provision of the Indian Contract Act, 1872. Section 16 of the Indian Contract Act, 1872 deals with 'undue influence' and it provides that where one of the parties to a contract is in a position to dominate the will of the other and the contract is apparently unconscionable, that is, unfair, the law presumes that consent must have been obtained by undue influence and hence such a contract is voidable. However, not all standardized contracts fall within the scope of 'undue influence' as contemplated under the Indian Contract Act. It is pertinent to note that since the Indian Courts have recognized the fact that these standard form contracts affect a large number of people and if they are unconscionable, unfair or unreasonable, thus injurious to public interest cannot be held as *voidable*[5] and the remedy under Section 31(1) of the Specific Relief Act, 1963 cannot be given to public in such cases as it will give rise to only multiplicity of litigation.

In these circumstances, the only recourse under Contract Law is that of Section 23 which lays down that "the consideration or object of an agreement is lawful unless...the Court regards it as immoral or opposed to public policy..." Section 23 of the Indian Contract Act, 1872 incorporates the expression 'public policy' which has not been defined anywhere in the Contract Act. 'Public Policy' as interpreted by the Courts connotes *public good* or *public interest* in general.

4 Antonio Jose Maristrello Porto & Lucas Thevenard Gomes, *Consumer Biases and "Fairness" in Standard Form Adhesion Contracts*, available at : <http://cors.edubit.com.br/files/25.pdf> last accessed on 21 March 2013.

5 Section 19A Indian Contract Act, 1872

Standard Form Contracts: Unconscionability

The more standardized the agreement and the less a party may bargain meaningfully, the more susceptible the contract or a term will be to a claim of unconscionability. [6]The Apex Court in *Central Inland Water Transport Corp. Ltd v. Brojo Nath Ganguly*[7] laid down that the Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. In this case, the Supreme Court regarded the clause which empowered the employer (a Govt. Undertaking) to remove the employee by 3 months notice or pay in lieu to be unconstitutional and contractually void.

However, the question often comes up before the Court as to which bargain is 'unconscionable' and whether it falls under the head of Section 16 or Section 23 of the Contract Act.

An unconscionable bargain would be one which is irreconcilable with what is right or reasonable. It is in *Central Inland Water Transport Corp. Ltd v. Brojo Nath*, that the Court deduced that all these cases rest on a single thread of 'inequality of bargaining power'. It was marked out that this principle can only apply in cases when the inequality is a result of circumstances, whether of the creation of the parties or not; when the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them; where a man has no choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or forms or rules may be.

In view of the unequal bargaining power of the two parties, the courts have evolved certain rules to protect the interest of the weaker party. The rules are as follows:

[6] Reporter's Note, Section 208 "Reinstatement of the Law – Second", adopted and promulgated by the American Law Institute, Vol II.
[7] AIR 1986 SC 1571, 1986 SCR (2) 278, 1986 SCC (3) 156.

- There should be a contractual document: The parties are bound by the terms only of there is a contract document. [8]
- There should be no misrepresentation.
- There should be a reasonable notice of the contractual terms
- Notice should be contemporaneous with the contract
- The terms of the contract should be reasonable.

A string of English cases have been constantly referred to by the Indian Courts in deciding such matters. The concept of "inequality in bargaining power" has been remarkably illustrated in *Lloyds Bank v. Bundy*[9] where Lord Denning MR pointed out that, "English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair, or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires or by his own ignorance or infirmity, coupled with undue influence or pressure brought to bear on him by or for the benefit of the other." In this case, the bank exploited the vulnerability of the father and charged his house for a short moratorium, which was a highly inadequate consideration for the mortgage. In another case, *Universe Tankships Inc. v. International Transport Workers' Federation*[10], when the workers did not permit the ship to leave without signature, it amounted in economic duress upon the ship-owners. This case was referred to by the Bombay High Court in *Dai-ichi Karkaria P. Ltd v. Oil and Natural Gas Commission*[11] and followed in *B & S Contracts and Designs Ltd. V. Victor Green Publications Ltd.*[12].

Lord Diplock in *Pao On v. Lao Yiu Long*[13] elucidated that economic duress results when the apparent consent of the aggrieved

[8] *Chapelton v. Barry Urban District Council* 8 - it was held that if the document is a mere receipt and does not create a contract, the terms contained in such a document are not binding.
[9] (1975) 1 QB 326.
[10] (1982) 2 WLR 803 HL; (1983) AC 366.
[11] AIR 1992 Bom 330.
[12] (1989) ICR 419.
[13] 1980 AC 614 PC, (1979) 3 All ER 65 PC. Also see *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.*, (1979) 1 QB 705.

party has been obtained by illegitimate pressure exercised upon him by the other party. But the concept of economic duress has been distinguished from commercial pressure by Lord Diplock. There are two essential elements to constitute duress, i.e., (1) pressure amounting to compulsion of the will of the victim, and (2) the illegitimacy of the pressure exerted[14].

In another case, *Atlas Express Ltd. v. Kafco (Importers and Distributors) Ltd.* [15] when one party was made to re-negotiate the terms to a contract to his disadvantage and accept new terms, it amounted to economic duress. Lord Denning in *D&C Builders v. Rees.*[16], pointed out that "no one can insist on a settlement procured by intimidation". This was upheld in *Superintending Engineer, Irrigation Deptt v. Progressive Engineering Co.*[17]In *Schroeder Music Publishing Co v Macaulay*[18] and a similar case *Clifford David Management Ltd. v. W.E.A Records Ltd.*[19], whereby the contract was on company's standard terms thus a dictation of company's terms on the other party, the House of Lords declared such contracts as void.

There are different factors such as age, poverty, illiteracy and emotional state in determining the respective bargaining positions of the parties[20]. However, when contract had conferred reasonably equal benefit on both parties, it is not held to be void.[21]

Boilerplate Clauses

Normally, certain standard clauses known as 'Boilerplate clauses' are incorporated in these contracts. These clauses generally cover terms such as - *retention of title, price escalation, interest, force majeure, choice of law, arbitration, and jurisdiction etc.*

GRIFF AND JONES, THE LAW OF RESTITUTION.
(1989) 1 All ER 641.
(1965)3 All ER 837, 841.
(1997) 4 Audh LD 489 DB, AP.
[1974] 1 WLR 1308.
(1975) 1 All ER 227, See *Takri Devi v. Rama Dogna*, AIR 1989 HP 11.
Nicholas Rafferty, Recent Developments in the Law of Contract, 24 McGill LJ (1978), at 271.
National Westminster Bank v. Morgan, (1985) 1 All ER 821: (1985) 2 WLR 588

However, one of the most controversial boilerplate clauses is an exclusion or limitation clause. Generally, the parties to a contract seek to control risks and avoid consequential losses hence such 'exclusion or limitation clauses' are incorporated in standardized agreements so as to exclude liability or restrict it.

Exemption Clause

The Law Commission of India in its 103rd report (May, 1984), on Unfair Terms in Contract, had recommended the insertion of a new chapter IV- A consisting of section 67-A of Indian Contract Act, which was of no avail. A contract according to this provision was considered to be unconscionable if it exempts any party there to from either the liability for wilful breach of contract, or consequence of negligence. This was an attempt on the part of Indian legislature to replicate tailored provisions regarding such contracts which exist in United Kingdom[22].

In the UK, Section 13 of the Unfair Contract Terms Act, 1977 lays down different varieties of exemption clauses and includes clauses excluding or restricting any kind of liability; making the liability or its enforcement subject to restrictive or onerous conditions; excluding or restricting any kind of right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of pursuing any such right or remedy; excluding or restricting rules of evidence or procedure.

Amongst the many exclusion clauses generally included in such contracts are clauses restricting liability to a certain sum of money, imposing a short time limit during which claims for breach may be made, imposing onerous conditions on obtaining the remedy, limiting liability for implied terms of quality. In some cases, clauses which modify performance obligations are inserted.

As regards Exemption Clauses in these Standard Form Contracts, Courts in the U.K. have resorted to the *contra proferentem*

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[22] The UK has separate legislations to deal with unfair terms in contracts such as Unfair Contract Terms Act 1977 and the Unfair Contract Terms in Consumer Contract Regulations, 1999

rule[23], the 'four corners' rule, the *gibaud* rule and the doctrine of fundamental breach. In the Gibaud case, the plaintiff left his bicycle at the defendant's station and received a ticket containing a clause exempting the defendants' station and received a ticket containing a clause exempting the defendants from liability. The bicycle was not kept in the cloak room, but was left in the booking hall from where it was stolen. It was held that the defendants were protected. If the contract had been to keep the bicycle necessarily in the cloak room, the defendants would be outside the 'four corners' of the contract and the exemption clause thus would not extend to them. Lord Denning in *Levison v. Patent Steam Carpet Co.*[24] observed that a term which exempts the stronger party from his ordinary common law liability should not be given effect except when it is reasonable.

However, it is at this juncture that we must appreciate the dictum in *Central Inland Water Transport Corp. Ltd. vs. Brojo Nath Ganguly*[25] whereby the Court has clearly mentioned that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Our Indian Courts are guided by the principles underlying the Preamble, Fundamental Rights and the Directive Principles enshrined in our Constitution. It is only proper that the Court must adjudge each case on its own facts and circumstances as the instances of unreasonable bargains in a standard form contract can neither be enumerated nor fully illustrated. Also, in light of the economic theory is in not feasible to have a set formula to render such terms or contracts void.

Time and again, the Court have tried to strike a balance in this approach. It is pertinent to look at the a few judicial precedents set out for a correct appraisal of the legality of a particular exemption clause in such contracts. In *Indian Airlines v. Madhuri Chowdhuri*[26], where all the passengers and crew including one Sunil Baran Chowdhari were killed in an air crash, the exemption clause printed on a passenger ticket excluding liability of the airlines in case of death, injury or delay to the passenger was held to be good

A person who, relying on an exclusion clause, seeks to avoid a liability, can do only by reference to the words which clearly and unequivocally apply to the cumstances of the case.
(1978) 1 QB 69.
AIR 1986 SC 1571, 1986 SCR (2) 278, 1986 SCC (3) 156.
AIR 1965 Cal 252.

in law as this exemption clause was brought to notice of the defendant which the defendant chose not to examine and therefore, no relief was given to the family of the defendant. In the case of *Central Bank of India Ltd. v. Hartford Fire Insurance Co. Ltd.*[27] , a particular clause of an Insurance Policy which conferred the power to the Insurance Co. to terminate the contract at will was held to be valid as the language of the clause was clear and as that particular clause sanctioned no repudiation of liability only incurred, but only terminated a contract as to the future, it was not unreasonable or opposed to public policy. In another case *Lily White v. R. Munuswami*[28], it was it was held that a term which is opposed to public policy will not be enforced in the Court of law, even if printed on the reverse of the bill and there is tacit acceptance of the term when the bill was received by the customer. In *M Siddalingappa v. Nataraj*[29], the exemption clause stated that the petitioners, dry cleaners would not be liable in the event of any damage/delay/loss occurred, which exceeds 8 times the cleaning charges. It was held that the petitioner was a bailee under section 151 of the Indian Contract Act, 1872 and could not possibly contract himself out of it since law imposes a minimum duty of care upon all bailees. Another case in this respect is that of *RS Deboo v MV Hindlekar*[30].

Conclusion

In the decision of the House of Lords in the *Suisse Atlantique* [31]*case*, it was pointed out that the remedy is to be sought in legislation, rather than judicial law- making, to curb the scope of exemption and other clauses which are inconsistent with the

[27] AIR 1965 SC 1288, (1965) 1 SCJ 498.
[28] AIR 1966 Mad 13, (1965) 1 MLJ 7.
[29] AIR 1970 Mys 154.
[30] Air 1995 Bom 68, the basic question in this case was the legality of a printed condition on the reverse of 'laundry receipts' issued by the proprietor of the laundry, purporting to restrict his liability for the quantum of loss, to 20 times the laundering charges or half of the value of the unreturned articles, whichever was less, whatever be the cause for the non-return of the article entrusted by the customer to the laundry for the purpose of laundering. It was held that such a stipulation was opposed to public policy and was in contravention of other provisions of the Indian Contracts Act, 1872. Such a stipulation was held to be void under section 23 of the Indian Contract Act, 1872.
[31] *Suisse Atlantique Societe d'Armament SA v. NV Rotterdamsche Kolen Centrale*, [1967] 1 AC 361.

fundamental obligations in those contracts. However, such a view cannot be adhered to. A tailor-made provision to render all such clauses or contracts void would not only give rise to more ambiguities and multiplicity of proceedings but also distort the economic balance of such transactions. These contracts were introduced in order to facilitate easier, cheaper trade. The terms of such contracts have been settled over years of negotiation. The primary advantage of such contracts is a reduction of transaction costs; because the parties need not negotiate a new contract for each transaction. Standard contracts provide greater certainty regarding the meaning of contractual terms and a reduction in agency costs. Standard form contracts are a necessary evil, especially in the contemporary world of complex financial transactions.

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Vaijayanti Joshi
Principal
ILS Law College, Pune