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Articles
Presentations
Legislations : Highlights
Judicial Pronouncements : Highlights

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Principal's Page

I am indeed very glad to present the annual volume of Abhivyakti Law Journal.

I congratulate the students for selecting relevant topics for their contribution to the journal which go beyond curriculum boundries. It is encouraging to note that they are entering into areas like economic analysis of Law. They have also taken note of legislations that have affected our lives for e. g. Adhar, Benami Transations, Real Estate etc. The variety of subjects has made this collection rich. This volume will make interesting reading to students of Law, lawyers and non-lawyers as well.

I congratulate all student contributors and Editorial team of Abhivyakti for their efforts in introducing this journal.

Vaijayanti Joshi
Principal

Editorial

We present ILS Abhivyakti Law Journal 2017 before you with immense pleasure.

Freedom of thought in a student promotes a creative instinct resulting in honing the intellectual research, enquiry, analysis, logic, interpretations and explorations in the academic domain. This commended journal is an effort taken by ILS Law College to provide a suitable platform for its students to emote and share their thoughts and opinions pertaining to a variety of legal issues.

Carrying forward the precedents, the journal aims to be a reflective experiment with the students' understanding and critical analysis of the recent legislations and the emerging jurisprudence underlying the myriad of laws.

We hope that this endeavor is appreciated and that it comes across as an engaging and involving one to everybody.

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I, Principal Vaijayanti Joshi, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Vaijayanti Joshi

Principal

ILS Law College, Pune

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ARTICLES

Rarest of the rare doctrine- a phenomenon of unguided judicial discretion.

-Mukta Sathe, V B.S.L. LL.B.

Introduction

Imposition of capital punishment is a topic which attracts great amount of interest. In India the doctrine of 'rarest of the rare'is relied upon in determining its application. This article seeks to study the doctrine as laid down in the case of *Bachan Singh*[1] and its development ever since.

The term 'rarest of the rare' is not defined in the said judgement or in any statute. However the judgement did mention that reliance should be placed on legislative policy and judicial precedent for ascertaining the rules applicable for determining if a particular case falls within the ambit of the rarest of the rare category. However in the many years since then the judicial precedent that has been laid down with regard to this doctrine can at best be classified as inconsistent and at worst as contradictory. In the case of *Santosh Bariyar*[2] the Supreme Court has acknowledged that "there is inconsistency in how *Bachan Singh* has been implemented, as *Bachan Singh* mandated principled sentencing and not judge centric sentencing." and further that "the balance sheet of aggravating and mitigating circumstances approach invoked on a case-by case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system."

The existence of differences in judicial interpretation becomes an acutely important matter when the life of persons is at stake. Much of the objection to the doctrine is therefore centred on this consideration. This article seeks

[1] *Bachan Singh v. State of Punjab,* (1980) 2 SCC 684
[2] *Santosh Bariyar v. State of Maharashtra,* (2009) 6 SCC 498

to analyse if this objection has been sufficiently addressed by rules of precedent and indeed if it is capable of being so addressed or is it inherently subjective and judge centric in which case its continuation would seem to establish a cause of injustice

Scope of the Doctrine

The doctrine of rarest of the rare was laid down in *Bachan Singh*[3]. The Court however refrained from setting down standard guidelines for application of this principle. Whether a particular case falls within the category of rarest of rare is to be determined based on the peculiar facts and circumstances of the case. The majority opinion of the Supreme Court was that due to the "infinite, unpredictable and unforeseeable variations"[4] and the "countless permutations and combinations"[5] it was neither possible nor advisable to lay down a straight-jacket formula to determine whether a particular case can be considered rarest of rare. This position seems to have been altered in *Macchi Singh v State of Punjab*[6]. This article will first discuss the *Bachan Singh* case and then analyse the *Macchi Singh* case.

Bachan Singh

The Supreme Court laid down the rule that death sentence would be awarded only in "rarest of rare cases when the alternative option is unquestionably foreclosed."[7] The Court also stated that aggravating and mitigating circumstances are to be considered while determining the sentence. The Court stated that "...the Court should not confine its consideration principally or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal."[8] The Court thus prescribed a process of principled sentencing, and held that the determination of aggravating and mitigating factors would be based on a determinate set of standards created through

[3]*Supra note 1*
[4] *ibid*
[5] *ibid*
[6]*Macchi Singh And Others v. State of Punjab* (1983) 3 SCC 470
[7]*Supra note 1*
[8] *ibid*

the evolutionary process of judicial precedents."[9]

The term 'rarest of rare' can have multiple meanings inevitably leading to ambiguity. It can be interpreted to mean a crime which is so gruesome in nature that it would shock the conscience of any right thinking person and showcasing such depravity that the collective conscience of the society is shocked. Such a view was taken in the case of *Macchi Singh*. However frequency of a particular type of crime may also be held to be the test to determine if the doctrine is applicable. There may be cases in which there is extreme depravity and gruesomeness of crime. However if crimes of similar nature are widely prevalent in the society then the doctrine will not apply to secure the death penalty. In the case of *Ravindra Trimbak Chouthmal v. State of Maharashtra*[10] the Supreme Court held that the murder of a pregnant married woman by her husband in order to remarry and secure dowry did not amount to rarest of rare due to increasing incidences of dowry death in the society.

Another aspect which requires to be considered is the standard set by the court while determining if there is scope for reform. *Bachan Singh* mandates judges to impose capital punishment only in cases where 'alternative option is unquestionably foreclosed'. The standards while accessing capacity for reform are inconsistent. Further the importance attributed to various factors is varied. In *Dhananjoy Chatterjee v. State of West Bengal*[11] the Supreme Court imposed the death penalty for raping and murdering an eighteen year girl without considering the fact that the accused was only twenty seven years old. Young age was not considered to be a mitigating factor. However in the case of *Rameshbhai Chandubhai Rathod v. State of Gujarat*[12] the Supreme Court considered age as a mitigating circumstance notwithstanding the facts being almost identical and the accused was sentenced to life imprisonment. Such inconsistency

[9] Law Commission of India Report No.262 available atlaw commissionofindia.nic.in/reports/report262.pdf last accessed on 2 march 2017
[10] (1996)4 SCC 148
[11]*Dhananjoy Chatterjee v. State of West Bengal,* (1994) 2 SCC 220.
[12]*Rameshbhai Chandubhai Rathod (2) v. State of Gujarat,* (2011) 2 SCC 764.

in the importance given to mitigating factors has led to contradictory judgements being delivered by the Court.

S. 235(2) of the Cr.P.C. as interpreted by the Supreme Court in *Bachan Singh* case also deals with pre-sentencing hearing for the purpose of accessing mitigating circumstances and determining if the case can be considered as rarest of the rare. In *Santosh Bariyar v. State of Maharashtra*[13] it was held that "the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme." However the Law Commission in its 262nd report has concluded after an analysis of cases that this precedent is not adequately followed.

In the light of the ambiguities caused due to the absence of a standardised formula it must be now considered whether laying down such a formula would cure the apparent injustice caused by the same. In the case of *Macchi Singh*[14] the Supreme Court laid down certain tests for determining whether the death penalty should be imposed.

Macchi Singh and the 'collective conscience of society' rule

In *Macchi Singh v State of Punjab*[15] the Supreme Court stated that death penalty may be inflicted when "collective conscience "of the society "is so shocked that it will expect the holders of the judicial power center to inflict death penalty...". The judgement further lays down five factors which must be considered in order to determine if it is appropriate to inflict the highest punishment. The factors are -

"1. Manner of Commission of Murder
2. Motive for Commission of murder
3. Anti-Social or Socially abhorrent nature of the crime
4. Magnitude of Crime
5. Personality of Victim of murder[16]

[13] *Supra note 2*
[14] *Supra note 6*
[15] *ibid*
[16] *ibid*

A closer analysis of the categories enumerated brings to light that the circumstances of the criminal are not considered at all. This is clearly contrary to the ratio laid down in *Bachan Singh* where the Court clearly stated that the peculiar circumstances of the accused can serve as mitigating factors.

The Supreme Court has observed in *Swamy Shraddananda (2) v. State of Karnataka*[17] that "the standardisation and classification of cases that the two earlier Constitution Benches had resolutely refrained from doing finally came to be done in *Machhi Singh*." The court further observed that "*Macchi Singh*... considerably enlarged the scope for imposing death penalty."[18] An exclusive focus of the nature of the crime was also demonstrated in *Ravji alias Ram Chandra v. State of Rajasthan*[19]. The Supreme Court has in *Bariyar*[20] reached to the conclusion that the judgement delivered in *Ravji* as well as six other cases which followed its ratio is per incuriam *Bachan Singh*. The interpretation of *Macchi Singh* in *Ravji* and subsequent cases which justifies imposition of death penalty for certain class of heinous crimes irrespective of the existence of mitigating circumstances is essentially flawed.

The concept of collective conscience of the society was introduced to the discourse relating to the death penalty due to the *Macchi Singh* judgment. This concept requires detailed analysis at two levels. Firstly, it is necessary to deliberate as to whether it is advisable to determine public opinion based on the subjective analysis by a particular judge about the same. Secondly, the desirability of fixing public opinion as the touchstone of justice calls for reflection.

The Supreme Court had expressly warned against determination of public opinion by the court. The Court had stated with respect to the judges that "...they might write their own peculiar view or personal predilection into

[17] *Swamy Shraddananda (2) v. State of Karnataka,* (2008) 13 SCC 767.
[18] *ibid*
[19] *Ravji alias Ram Chandra v. State of Rajasthan,* (1996) 2 SCC 175
[20] *Supra note 2*

the law, sincerely mistaking that for what they perceive to be the Community ethic."[21] Further the Court went on to state that "...perception of 'community' standards or ethics may vary from Judge to Judge."[22] Relying on the analysis by a judge of public opinion is one of the factors which contribute to making the determination of whether the case warrants the sentence of death judge-centric.

Further the role that public opinion ought to play in depriving a person of her life can be questioned. Public opinion can be misinformed. The belief that all the members of the society are united in holding one common opinion is fallacious. Public opinion is influenced by the private beliefs and prejudices of the holder. The possibility of media trials cannot be ruled out. Courts owe their very existence to the belief that the public opinion should have very limited role to play in the dispensation of justice. Public opinion is never ignored in a democracy as it is the basis of penal law. But in situations where public opinion is contrary to constitutional policy it is not only the prerogative but rather the responsibility of the Court to oppose such opinion. Public opinion as expressed by their representatives in the Parliament is not authorized to abrogate the constitutional safeguards guaranteed to protect individual rights. Thus should the same public opinion as subjectively interpreted and understood by the court be allowed to take away from an individual her constitutional rights is a question which demands sincere inquiry.

One more aspect that requires to be discussed is the fact that there may be crimes which show extreme depravity and thus fall within the five categories laid down in *Macchi Singh*, but nevertheless do not shock the collective conscience of the society because of their frequency. Therefore it can be seen that the ambiguity caused due to the contradictory interpretations of the *Bachan Singh* judgementis not essentially dispensed off by the categorisation made in *Macchi Singh*. The application of the doctrine remains subjective and judge-centric.

[21] *Supra note 1*
[22] *ibid*

Judge-centric nature of the rarest of the rare doctrine

The judge-centric nature of the rarest of the rare doctrine can be best demonstrated by considering one case. In the case of *Harbans Singh v. State of U.P.*[23] three persons namely Harbans Singh, Jeeta Singh and Kashmira Singh were jointly accused for murdering a family. The Allahabad High Court sentenced all the three to death. They appealed to the Supreme Court by way of separate special leave petitions. Jeeta Singh's petition came up before one bench of the Supreme Court and was dismissed. He was executed. Kashmira Singh's petition was heard by a different bench and the sentence awarded to him was commuted to life imprisonment. Harbans Singh's petition was heard by yet another beach and the death sentence was confirmed. His review petition was also dismissed. Then he filed a writ petition in the Supreme Court and received a stay on his execution. Therefore it can be seen that different punishments were meted out to co-accused involved in the same crime. It thus becomes apparent that the imposition of the death penalty depends on the opinions of the bench before which the case appears. This is a clear violation of the fundamental rights guaranteed under Art. 14 of the Indian Constitution which bestows equal protection and equal application of the law.

Erroneous application of the doctrine

In Shankar *Kisanrao Khade v. State of Maharashtra*[24] the Supreme Court observed that "The number of death sentences awarded ... is rather high, making it unclear whether death penalty is really being awarded only in the rarest of rare cases." The Law Commission in its 262nd report[25] has mentioned that between 2000 and 2012, 1677 death sentences were imposed by the Indian courts. The Law Commission report further comes to the conclusion that the death sentence awarded by the trial court was

[23] *Harbans Singh v. State of U.P.*, (1982) 2 SCC 101
[24] *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546.
[25] LAW COMMISSION OF INDIA Report No.262 available at lawcommissionofindia.nic.in/reports/report262.pdf last accessed on 2 March 2017

confirmed only in 4.3% of the cases. Thus the trial courts erroneously impose the death penalty in 95.7% cases. This incorrect imposition of the death penalty is a matter of concern on two counts. Firstly, though it is said that the erroneous application of the death penalty is ruled out due to the system of appeals and any incorrect application of the rarest of the rare doctrine is corrected by the higher courts, it is an unfortunate reality, in India, that due to socio-economic factors the adequate representation of all the individuals before the apex court is not guaranteed. The Law Commission in its 262nd report has come to the conclusion that "...data indicates that of the persons who are given the death sentence at the trial court level, those who cannot afford to hire their own legal representation are more likely to have their death sentences confirmed by the high court, and/or the Supreme Court."[26]

Secondly, even if the error is corrected by the higher courts the accused has to suffer the agony of being held on death row for years. By the time the case reaches the Supreme Court the accused may have spent years as a person condemned to death. The Supreme Court has in many cases held that non execution of the death penalty for a long time due to non-disposal of mercy petitions is contrary to the basic human rights of the convict. The long time required for appeals to be disposed off can also be judged by the same criteria. This coupled with the fact that the trial courts have been seen to erroneously apply the doctrine most of the times and violates the rights of the accused convicted by the lower court as a matter of serious concern.

The erroneous application of the doctrine is not limited to the lower courts. The acknowledgement by the Supreme Court of erroneous interpretation of the doctrine in previous cases must be viewed seriously. As previously mentioned the Supreme Court in *Bariyar*[27] noted the erroneous application of the doctrine in Ravji and six other cases. In the case of *Shankar Khade*[28]

[26] *ibid*

[27] *Supra note 2*

[28] *Supra note 24*

the court admitted the erroneous application of the doctrine in three cases. In *Sangeet v. State of Haryana*[29] the court further admitted the erroneous application of the doctrine in five cases.

Conclusion :

The acknowledgement by the Supreme Court of the erroneous application of the doctrine in various past cases raises a serious concern, more so because the life of the person is at stake. The death sentence is a peculiar one, in that it cannot be undone or revoked once executed. It deprives a person of her basic right to life. The obstacles faced in applying the doctrine and the peculiar nature of the doctrine in itself raises questions about whether it should be retained. The criminal justice system works on the basis of the principle that it is better if ten guilty persons go free but not even one innocent person should be incarcerated. In case of deprivation of life the standards set should be even higher and the willingness to impose the punishment must be even lesser. This article does not seek to question the morality of the death sentence. Nor does it question the presumption that there may be some persons and some crimes for which death penalty is the only just punishment. However it does seek to question whether it is possible for us to identify such persons and such crimes. Or are we for the sake of punishing a minuscule number of persons who deserve death penalty willing to sacrifice the lives of a large number of people who do not deserve to be so punished. All the matters discussed in the article bring to light that the application of the doctrine in a just manner is not possible. This establishes a strong case for the revocation of the death penalty as a whole. It is a question of life and death.

[29] *Sangeet v. State of Haryana,* (2013) 2 SCC 452

Decoding The Official Secrets Act, 1923

Anchita Nair & Sushreya Nepal, IV B.S.L. LL.B.

Abstract

The following paper aims to critically analyse the said Act and highlight the various shortcomings it sustains. It will subsequently show the view of the authors with respect to the scrutiny the said Act necessitates for it to no longer be inconsistent with the RTI Act, 2005. The paper draws various recommendations and suggestions to improve the statute with the purpose of bringing out a balanced stance between transparency and secrecy and to find a solution to retain the OSA, 1923 without compromising the essence of democracy and freedom of the people.

Introduction

The Constitution of India strives to guarantee every individual their inherent right to know, that is, the right to freedom of speech. In reality, though, official information is severely protected by the Official Secrets Act, 1923 ("OSA") - a padlock which is as resilient as it is ancient. The OSA provides a framework for matters related to sedition, espionage and any other assaults on integrity and unity of the country.

The OSA in India is a convenient smokescreen to deny the public any access to information. Traditionally, public information has always been masked by secrecy. OSA took inspiration from the British Official Secrets Act, 1911 and 1920 and in 1923, the British colonial masters brought this law to India to cement the rising demand for transparency in the wake of Gandhi's 1921 movement.

The world has since unyieldingly advocated for transparency, but India has fallen behind. Only when the Indian government is pressurized by either the Parliament or courts does it offer any information. Else, all information remains a secret. This hints at a possible mistrust between the State and her subjects. However, it is expedient to have more openness in a democracy where people govern themselves.

Genesis & Evolution of Official Secrets Act, 1923

The Official Secrets Act, 1923 was formulated when India was a colony under the obstinate British regime, and the Act to this day carries its legacy in more facets than one. Tracing the origin of the current statute, the first record of a parameter dealing with official secrets is a Notification issued by the Foreign Department of the Government of India on 30/08/1843 that prohibited officials from making official documents public.

Furthermore, in 1887, following a similar law that was enacted in France a year earlier, the British Colony of Gibraltar issued an Ordinance which forbade making sketches, drawing or photograph of any fortification in the garrison.

On 1 June 1888, Indian Fortifications Act was drafted which prevented unauthorized entry and making of sketches of Military and Naval stations. In September 1889, British Parliament passed the Official Secrets Act. The Indian Official Secrets Act (Act XIV) of 1889 was passed by Viceroy's Executive Council on 17 October 1889. On 4th March 1904, Official Secrets (Amendment) Act, 1904 was passed after receiving the assent of the Governor General. Another statute that was enacted during World War I was the Defense of India (Criminal Law Amendment) Act of 1915 despite being strongly opposed. The Act was to remain in force until six months after the end of the War, after which it would automatically lapse.

In 1923, a new Official Secrets Act was enacted in Britain, repealing the British Act of 1889. The Act was made applicable to India also. However, the maximum punishment in the British Act was reduced to 7 years, whereas in the Indian Act it remained transportation for life.

The proposal to consolidate laws relating to official secrets was initiated again. Soon afterwards, a new Official Secrets Act was enacted in England in 1920; the new Act had more stringent provisions, but did not apply to India. Following the proposal of amendment of 'Official Secrecy' law in India for the fourth time since 1921, Select Committee submitted its report on 30 January 1923. The assembly met in 1923 to discuss the report

submitted to it by the Committee and debate on the provisions. The Bill was accepted and passed by the Legislative Assembly on 21 March 1923.

OSA, 1923: Deciphered

The normal rule in India is secrecy, and openness is an exception.[1] The OSA consolidates and reiterates the law relating to official secrets.[2] The enactments' context belies the imposing title. The word "secret" or the term "official secrets" *per se* have not been defined anywhere in the Act. The law predominantly attends to espionage cases by using wide definitions of the potentially sensitive information that is involved. Therefore, in the absence of any definition in the Act, it is for the government to decide what it should treat secret and what not, which gives the concerned authority unparalleled power to do what it pleases and opens a window to misappropriation of this power.

Though the government does not seem to be the sole judge of the matter as the courts can review the decision of the government.[3] Nevertheless, the judiciary also has not been successful in giving a precise definition with regards to how the term 'secret' or 'official secret' shall be defined. Neither have the courts given a scientific cataloging as to what documents or information is to be regarded as an 'official secret' and what would not.

In *Sama Alana Abdulla v. State of Gujarat,*[4] the Supreme Court has held that the word 'secret' in S.3(1) (c) qualified official code or password and not any sketch, plan, model, article or note or other document or information and if no plausible explanation has beengiven for its possession, it has to be presumed as required by S.3(2) of the Act that the same was

1Rodney D. Ryder, *Right to Information: Law, Policy, Practice* (1st edn, Wadhwa Nagpur 2 006) 434.
2Official Secrets Act, 1923, Statement of Objects and Reasons [Hereinafter as 'OSA'].
3State of Kerala v. K. Bala krishna, AIR 1961 Ker 29; *Nand Lal More v. The State,* [1965] 1 Cr. Lj 392 (Pb).
4 [1996] 1 SCC 427.

obtained or collected by appellant for purpose prejudicial to the safety or interests of State.Therefore, such devices need not necessarily be secret in order to be covered by the Act, provided it is classified as an 'Official Secret'. Similarly, even information which does not have a bearing on national security cannot be disclosed if the public servant obtained or has access to it by virtue of holding office. Definitions like these are a poor attempt by the judges to come up with a suitable interpretation of the Act.

The Manual Of Departmental Security Instruction (MODSI) issued in 1994 is the basis for all classification and declassification of vulnerable information held by various government departments and not the OSA that classified such sensitive official documents and records 'top secret', 'secret' and 'confidential'.[5] MODSI, which asserts the procedures for classifying and declassifying sensitive information is itself not available in the public domain because Ministry of Home Affairs has classified it as a confidential document.[6] However, under the modern criminal justice system where '*ignorantia jure non-excusat*' prevails, all laws, rules, regulations and procedures that invite penalty for defiance, must be in the public domain. No rational democracy keeps rules and regulations itself a secret, without even publishing it in the official gazette.

In the absence of an official division, researchers, through other unidentified sources have categorized government papers and documents into two categories, namely, "non-classified" and "classified".[7] Greater secrecy is to be observed in case of the latter. Classified documents are divided into four categories, namely, "top secret", "secret", "confidential", and "personal"- not for publication." "Top secret" grading is given to information of a vital nature affecting national security such as military secrets, matters of high international policy, intelligence reports, etc. The "secret" marking is given to papers of information which is likely to endanger

5Venkatesh Nayak v. Ministry of Home Affairs, Appeal No.
CIC / SS / C / 2009 / 000758 (Aug. 14, 2008) (Central Information Commission).
6 Ibid.
7 Rodney D. Ryder, *supra note 1, at 435.*

security or cause injury to the interests or prestige of the nation or would cause serious embarrassment to the government. The word "confidential" pertains to inform whose disclosure would be prejudicial to the interest of the nation or given advantage to a foreign nation or even cause administrative embarrassment.

Nonetheless, in the eyes of good governance, it would be in the best interest of the government that it makes MODSI accessible in the public domain. Even so, government can at least release procedures as to classification of certain information and documents as 'official secrets', if it were to cultivate confidence of its citizens on itself.

The OSA provides provisions for spying[8]. It allows a conviction simply on the basis of conduct or known character of accused and allows the court to dispense with a need to specifically prove that the person had prejudicial purpose. Not only does this go against the basic tenets of treating character evidence, but in a unique manner disregards both *actus reus* and *mens rea* requirements.

As per OSA, any kind of secret information will attract prosecution, even though it may be well justified in public interest, persons concerned will be liable to an action[9]. OSA uses blanket language by making punishable "willful communication of any official secret to any person, other than a person to whom he is authorized to communicate it. There are no exceptions like communication in public interest, etc. everything is punishable whether national security or any other interest worth protecting is endangered or not. The section offers carte blanche to the executive to prosecute anyone disclosing official information or any person voluntarily receiving such information knowing or having reasonable ground to believe that such information is being given to him in contravention of the Act. Provisions of the statute are harsh, nevertheless, its redeeming feature is that it takes *mens rea* into consideration; thus a mere leak unless it was intentional or willful will not be covered by the Act.

8 OSA, *supra* note 2, S. 3.
9 *Ibid.*, S. 5.

It can be seen that provisions of S. 5 are so general, wide and obscure that everything connected with the government could be brought within its fold. This omnibus and 'catch-all' provision is neither fair nor purposeful. Literally read, it is "disclosure" which is punishable and not the purpose of disclosure or prejudicial effect on certain interest deserving of protection in national interest. Both the person communicating and the person receiving official information are guilty of an offence under the Act.

If strictly applied, there will be daily innumerable prosecutions of the fourth estate, completely hampering its work. Such illiberal and draconian provisions clearly breed a culture of secrecy. Though RTI Act now overrides these provisions in relation to exempted by the Act itself from disclosure, but the fact remains that OSA in its current form in the statute books is an anachronism.

View of Committees on OSA

In 1971, Law Commission summarized the difficulties encountered with the OSA, in the absence of a clear and concise definition of 'official secret' by stating that the wide language of Sec.5 (1) may lead to some controversy. It penalizes not only communication of information useful to the enemy or any information which is vital to national security, but also includes the act of communicating in any unauthorized manner any kind of secret information which a Government servant has obtained by virtue of his office. Thus, every noting in the Secretariat file to which an officer of the Secretariat has access is intended to be kept secret. Every such information will not necessarily be useful to the enemy or prejudicial to national security.[10] The Commission also stated that the language of S. 5(1) was cumbersome and lacks clarity. Hence without any change in substance it recommended the adoption of a drafting device separately defining "official secret".[11]

10 Law Commission of India, 'Forty-third Report on Offences against the National Security' (1971) 7.61.
11 *Ibid.* at 6.63.

The Report on the Working Group constituted under the Chairmanship of Shri H. D. Shourie on "Right to Information and Transparency, 1997" provided valuable inputs on the OSA. It stated that OSA has been regarded in many quarters as being primarily responsible for the excessive secrecy in government.

Its "Catch-all" nature has invited criticism and demand for its amendment. S.5 of the Act omits to define 'secrets'. The Committee also recommended comprehensive amendment of S. 5 (1) of OSA to make the penal provisions of OSA applicable only to violations affecting national security.

However Ministry of Home Affairs, on consultation, expressed the view that here is no need to amend OSA as RTI Act has overriding effect. While recognizing the importance of keeping certain information secret in national interest, the Commission is of the view that disclosure of information has to be the norm and keeping it secret should be the exception. The OSA, in its present form is an obstacle for creation of a regime of freedom of information, and to that extent the provisions of OSA need to be amended.[12]

Second Administrative Reforms Commission (SARC) went a further step ahead and recommended to repeal the OSA[13] as it had become a barricade against the implementation of the RTI Act. However, SARC also recommended the lawmakers to classify the information covered by the exemptions in the RTI Act afresh with labels such as 'top secret', 'secret' and 'confidential'; and also consolidate the espionage related provisions and punishments in the OSA to the National Security Act, 1980 (NSA).[14] However, the government rejected both recommendations on the ground of impracticality and unreasonableness.

12 Second Administrative Reforms Commission, Government of India, 'First Report on Right to Information Master Key to Good Governance' (June 2006), 10.
13 *Ibid.* at 11.
14 *Ibid.* at 9.

OSA, 1923 vis-à-vis RTI, 2005

Right to information has been seen as the key to strengthening participatory democracy and ushering in people centered governance. In recognition of the need for transparency in public affairs, the Indian Parliament enacted the Right to Information Act ("RTI Act") in 2005 empowering people and promoting transparency. While right to information is implicitly guaranteed by the Constitution, the Act sets out the practical regime for citizens to secure access to information on all matters of governance.

The most contentious issue in the implementation of the RTI Act relates to official secrets. In a democracy, people are sovereign and the elected government and its functionaries are public servants. Therefore, transparency should be the norm in all matters of governance. People should have the unhindered right to know the decisions of the Cabinet and the reasons for these, but not what transpires within the confines of the 'Cabinet room'. The Act recognizes these confidentiality requirements in matters of State and S. 8 of the Act exempts all such matters from disclosure.

The OSA has created a culture of secrecy. Confidentiality became the norm and disclosure the exception. While S. 5 of OSA was obviously intended to deal with potential breaches of national security, the wording of the law and the colonial times inwhich it was implemented made it into a catch-all legal provision converting practicallyevery issue of governance into a confidential matter. Even the instructions issued for classification of documents for security purposes and the official procedures displayed this tendency of holding back information.

Right to Information Act has a non-obstante clause which provides that notwithstanding anything in the OSA, 1923, public may be allowed access to information, if public interest in disclosure outweighs the harm to the protected interests[15]. The right to know, receive and impart information

15 Right to Information Act, 2005, s 8 [hereinafter as 'RTI Act'].

has been recognized within the right to freedom of speech and expression.[16] It is admitted that whenever disclosure of a document is clearly contrary to the public interest, such document is immune from disclosure. But the decision on such immunity will rest with the court and not with the head of government or department.[17]

The provisions of the Act allow disclosure of information even where there is a clash with the exemption provisions of Sec.8(1) and enjoy a general immunity from other Acts and instruments particularly the OSA, 1923[18]. But OSA, along with other rules and instructions may impinge on the regime of freedom of information as they historically nurtured a culture of secrecy and non-disclosure, which is against the spirit of the Right to Information Act.

One important class of disclosures not covered under the Act is public interest disclosure. Interestingly, it is recognized in many democracies that an honest and conscientious public servant who is privy to information relating to gross corruption, abuse of authority or grave injustice should be encouraged to disclose it in public interest without fear of retribution. There is need to bring uniformity in the information recording systems, introduce standard forms and a better system of classification of cases. The spirit of democracy as well as the letter of law demands that the work of legislative committees, save on matters exempted from public gaze under the RTI for reasons of state or privacy, should be thrown open to public.

The Right to Information Act of 2005 signals a radical shift in our governance culture and permanently impacts all agencies of state. The effective implementation of this law depends on the fundamental shift from the prevailing culture of secrecy to a new culture of openness. The Official Secrets Act, 1923 in the current form is antiquated and unsuitable to

16 *S. P Gupta v. Union of India*, AIR 1982 SC 149.
17 Rajesh Tandan J, *Right to Information – Law and Practise* (1st edn., Lexis Nexis 2016), I. 263.
18 RTI Act, *supra* note 15, s 22.

emerging needs. The struggle for transparency is over due to the RTI Act but the tedious process of system-building has to take over. The privacy exception, the confidentiality exception, the national security exception etc. must be articulated in the socio-political context of our country for the implementation process to succeed according to the intention of the Parliament.

Maharashtra Protection of Internal Security Act (Bill), 2016

The Maharashtra Protection of Internal Security Act (Bill), 2016 ("MPISA") was proposed by the Maharashtra government to provide special provisions for protection of internal security in the State of Maharashtra, to deal with the challenges of terrorism, insurgency, communalism, caste violence, etc.[19] The draft of MPISA has since been removed from the public domain due to extreme criticism from all around.

The MPISA has vaguely tried to introduce the definition of 'subversive acts'[20] and has also introduced a notion of Special Security Zones (SSZ)[21] which will give the government unparalleled power to control the entry and movement of money or any device of any kind. This Bill will inevitably turn the Maharashtra into a 'Police State' where every person's freedom of free speech and expression will be regulated. This is a major disadvantage to the people who will be at the mercy of the government.

Another baffling provision under MPISA is that it forbids any subversive act done by a person with the intent to injuriously affect, whether by impairing the efficiency or impeding the working of anything or in any manner whatsoever[22]. The pure reading of this provision shows that impeding the working of "anything" has been declared as a criminal offence. Even if the defects in the language of the MPISA are put aside, the grave violations of fundamental rights in the Bill cannot be ignored.

19 Maharashtra Protection of Internal Security Act (Bill), 2016, Statement of Objects and Reasons.
20 *Ibid.*, s 2 (xiii).
21 *Ibid.*, s 7.
22 *Ibid.*, s 14.

Conclusion

India is among the only commonwealth country to have not revised her secrecy law in the wake of the freedom of information movement. Such stringent laws restrain one's freedom of expression and are fundamentally against the very spirit of the Indian democracy. It is seemingly unintelligent to have retained a British law that Britain itself has comprehensively repealed. Thence, it is suggested that the existing Act is duly amended and reviewed in the interest of good-governance by adding a definite and structured definition to the expressions like "secret information", "document" and "official secrets". Moreover, it has been observed that, the Act in its current form is not ideal and has abundant scope for improvement. The statute has omnibus and catch-all provisions that covers all kinds of secret official information whatever be the effect of disclosure. If plainly read, it is the "disclosure" which is punishable and not the purpose of disclosure or prejudicial effect on certain interests deserving of protection in the national interest. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined.

In addition, enforcement of the MPISA (Bill) still remains relatively inexplicable, as a Central Act in a fundamental form is already in existence.

Secrecy laws is the vanishing point of vagueness, a point where one does not know what is legal and illegal. Therefore, it seems necessary that the OSA must be revised with citing a proper procedure as to classification and declassification of any information as 'secret'. It is also necessary to review the prosecutions resulting in the discharge or the acquittal of persons accused of offences under the Official Secrets Act, 1923.

Nature, Reasons, and Economic Analysis of Repeal of Laws

Amogh Diwan, I LL. M.

Introduction and meaning of repeal

Repeal means ceasing to hold ground. The word 'repeal' is formed from French words 're' (prefix expressing reversal) and 'apeler' (to call, appeal). When a statute is repealed, either fully or partly, the said provision ceases to have the effect of law. Bennion, under S. 85 of the Code[1] has defined 'repeal' as follows:

"To 'repeal' an Act is to cause it to cease to be part of the corpus juris or body of law. To 'repeal' an enactment is to cause it to cease to be in law a part of the Act containing it."

Supreme Court has provided functional definition while ruling that *"the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed."*[2] Viewed in another way, repeal can be defined as an action, by a competent body, of removal of sanction accorded at the time of enactment of law.

Repeal and amendment

Under sub-section (3) of S. 85 of the Code[3], Bennion clearly equates repeal with an amendment. However, it should be noted that the definition of 'Amendment' given by Bennion is very wide. In S. 77[4], Bennion says that to 'amend' an act is to alter its legal meaning.

Not all amendments could be repeals and not all repeals could be amendments. This connection is evidenced from the fact that amendments

[1] Francis Bennion, *Bennion on Statutory Interpretation* (5th edn, Lexis Nexis 2008) 300
[2] Kolhapur Canesugar Works Ltd v Union of India (2000) 2 SCC 536 [38]
[3] Francis Bennion, *Bennion on Statutory Interpretation* (5th edn, Lexis Nexis 2008) 300
[4] Francis Bennion, *Bennion on Statutory Interpretation* (5th edn, Lexis Nexis 2008) 287

may perform a multitude of functions like addition of a new section on a subject matter not covered hitherto. Similarly, implied repeal/ quasi repeal by desuetude will fall out of the traditional ambit of amendments.

Repeal of delegated legislation

Delegated legislation has become a reality for any modern legal system. Delegated legislation under the legal authority given under the statute is very dynamic and is typically aimed at solving the problems of details and responding swiftly to the changed scenarios. Repeal of the delegated legislation is under the auspices of the enacting authority. Hence, the rules are amended very frequently without delay by the various authorities.[5] Generally, all provisions applicable to repeal of laws would be equally applicable to repeal of delegated legislation. However, the Supreme Court has iterated that section 6 of the General Clauses Act, 1897 cannot have application in cases of repeal of rules. Omission was held to be different than repeal.[6]

1. Types of repeal

Repeal can be classified into various types depending upon manner and authority of repeal.[7]

1.1. Express repeal

Express repeal means repeal by a manifest will of the legislature. The scenario could be further divided into 3 sub-categories:

1.1.1. Direct express repeal

When the Acts to be repealed are identified by the legislature, the repeal would be classified as express repeal.

[5]The forms and rules under the Companies Act, 2013 are changed quite frequently by the Ministry of Corporate Affairs. Many such alterations amount to repeal.
[6]*Kolhapur Canesugar Works Ltd v. Union of India* (2000) 2 SCC 536 affirming *Rayala Corporation (P) Ltd. v. Director of Enforcement, New Delhi* (1969) 2 SCC 412
[7] Repeal is different than expiry of a temporary statute.

1.1.2. Indirect express repeal

When the legislature simply indicates that all laws upon the same subject made prior to this law are being repealed, it is an indirect yet express repeal.

1.1.3. Double repeal

When the Act is repealed both through the provisions in the Act and also identified in the repeal Schedule as well, it is called a 'Double repeal'. While this practice was observed in England earlier, it is not observed in India.

1.2. Implied repeal

The enactment of a later statute dealing with same subject matter, which may be running contrary to the earlier statute, may amount to repeal of the former. This declaration is done by Courts although it may date back to the enactment of the later statute.

1.3. Quasi-repeal by desuetude

A statute may become a dead letter of law when a contrary practice and lack of enforcement is observed for a long time. This Scottish Law principle was adopted by the Indian Supreme Court[8] though reservations about it remain.

2. Procedure of express repeal in India

The powers of repeal vest with the legislature which has enacted the law or has the powers to enact law on the said subject matter. The procedure can be broadly classified into two modes: enacting special statutes for repeal and repeal through later legislation dealing with the similar subject matter.[9]

[8]*Municipal Corporation of City of Pune v. Bharat Forge Co. Ltd. & Ors* 1995 SCC (3) 434
[9]As an example of the second mode, the section 465 of Companies Act, 2013 proposes to repeal the Companies Act, 1956.

The procedure for repeal of laws completed through 2014-16 was setting up of a two members' committee[10], taking into account law commission reports[11] and enactment of legislations in various tranches[12] by the Parliament. It should be noted this magnitude was an exception to the trend seen till date. Successive governments had repealed 1,301 such outdated laws in 64 years. But the present government has managed to weed out as many as 1,159 obsolete laws in less than two years. While the previous Governments repealed a total of 1301 Acts in 64 years, the present Government repealed as many as 1159 statutes in two years.[13]

3. Reasons for repeal of laws

The 159th Report of the Law Commission very succinctly summarised the reasons for repeal of laws in the following words: *"Citizens are concerned with living law. They should not be made to wade through a forest where obsolete or anachronistic statutes cloud the scenario."*[14]

The said report further quoted 4 reasons of Lord Westbury[15] for the exercise of review and repeal:

a. Renovation (weeding away obsolete statutes)
b. Order and symmetry (arrangement and classification)

[10]Ramanujam Committee, which has submitted a report titled 'Report of the committee to identify the Central Acts which are not relevant or no longer needed or require repeal / re-enactment in the present socio-economic context' to the PMO on 05 November 2014.

[11]Law Commission of India, *Obsolete Laws : Warranting Immediate Repeal* (Law Com No. 248, 249, 250 and 251, 2014)

[12]The Repealing and Amending Act, 2015, The Repealing and Amending (Second) Act, 2015, the Appropriation Acts (Repeal) Act, 2016 and the Repealing and Amending Act, 2016.

[13]Times of India, '1159 obsolete laws scrapped by Modi Govt; 1301 junked in previous 64 years' (Times of India, 19 May 2016) < http://timesofindia.indiatimes.com/india/1159-obsolete-laws-scrapped-by-Modi-govt-1301-junked-in-previous-64-years/articleshow/52333875.cms > accessed 04.03.2017. This achievement seems much less grandiose after considering that about 750 laws were laws of appropriation and majority of the rest were amendment Acts.

[14]Law Commission of India, *Repeal and Amendment of Laws : Part 1* (No 159, 1998) para 1.3.

[15]Law Commission of India, *Repeal and Amendment of Laws : Part 1* (No 159, 1998) para 1.4.

c. Easy access to legislation (consolidation)
d. Harmony (eliminating discordant and jarring provisions)

This author seeks to expand the above base of reasons as follows, in view of the complexity of the modern legal systems:

a. Obsolescence with subsequent legislation (S)
b. Obsolescence for having outlived its utility/ costing more than the benefits (U)
c. Statute being anomalous or archaic in changed conditions[16] (A)
d. Disharmony with legal system (H)
e. Changed political system/ political convictions and policies[17] (P)
f. Amalgamation/ consolidation of laws (C)
g. Statues in conflict/ non-conformity with the Apex Court's judgments[18] (J)
h. Statues not in conformity with the international treaties (I)

4. Economic view of the process of repeal

Laws are like investments. Any investment needs to be realized at some point in time to book either gains or losses. Following analysis strives to assess the questions of 'Why? When? What thence?' in context of repeal of a statute.

4.1. Reasons for repeal

The reasons for repeal mentioned above could be easily expressed in the following equation:

$$\text{Repeal of law} = \mathbf{f\,(S, U, A, H, P, C, J, I)}$$ [19]

[16] Statutes covering subject matter which no longer needs to be regulated.

[17] 148th Report of the Law Commission looked at all pre-freedom laws while 159th report dealt with post-liberalisation policies.

[18] However, this is a case of treading with caution. The Legislatures will be loath to make

[19] Error term not included as no factors outside these are expected to be present in an informed decision of repeal.

However, such a simple equation will not suffice the practical needs. Hence, this inquiry needs to be expanded. The first consideration to take into account is the nature of law[20]. A standard will change itself to suit the test of time and hence would require lower need for repeal than rules. For the primary assessment on specificity and nature of law, the Parisi and Fon's work[21] is proposed to be relied upon:

For maximizing the net total value of law for the given degree of specificity's':

$$\max N.V(s,w) - F(s,\ddot{e},\hat{e}) - N.C(s,\acute{o},\hat{e})$$

where,

N= Frequency of application

V= Average value of law

s= Degree of specificity

w= Rate of obsolescence

F= Fixed promulgation cost

ë= Co-ordination cost

$\hat{e}$= Complexity of regulated environment

C=Unit adjudication cost

ó= Degree of specialization of courts

Assuming ë, ó and $\hat{e}$ to be constant and upon differentiating the above equation, the same is rearranged for an optimum specificity of s^* as follows:

$$dN(V_s.C_s) + dw(N.V_{sw}) = ds^*.|(N.V_{ss} - F_{ss} - N.C_{ss})|$$

[20] Based on nature, laws can be classified as either as a standard or a rule. Standards being generalized / qualitative statements (like 'reasonable care to be taken while driving on roads') while rules are highly specific laws ('driving speed of a car shall not exceed 50 kmph on the highway').

[21] Francesco Parisi, Vinci Fon, *The Economics of Lawmaking* (Oxford University Press 2009). This work primarily deals with the level of specificity in enactment of statutes. However, the same is proposed to apply to repeal as well.

In this equation, the following relationships emerge:

Sr.No.	Relationship	Implications for repeal
1.	$\frac{ds^*}{dN} > 0$	When the legal obsolescence is nil/ low, do not repeal a specific rule which is applied frequently.[22]
2.	$\frac{ds^*}{dw} < 0$	When the number of applications of law is unchanging, rules may require repeal before standards.[23]
3.	Both *dw* and *dN*change	The direction and magnitude of changes will decide the response. E.g. in case of low obsolescence and high application, the current rules may be continued/ in case of high obsolescence and low application, standards should be continued[24]
4.	$\frac{ds^*}{d\ddot{e}} < 0$	When the cost of accommodating a law is higher, do not repeal a standard.[25]
5.	$\frac{ds^*}{d\acute{o}} < 0$	When specialised courts are interpreting a law, a rule may becontinued.[26]

Other factor not considered above is availability of information. When information is incomplete, it is better to enact standards and wait for more information. They shall be repealed and replaced by rules upon better availability of information.

[22] The Limited Liability Partnership Act, 2008 is an example of a rule facing lower level of obsolescence and frequent application.

[23] The *'100 Laws Worthy of Repeal: A report by Centre for Civil Society, Macro / Finance Group at NIPFP and Vidhi Legal Centre, September 2014 '* (<http://ccs.in/100laws> accessed on 04 March 2017) suggests repeal of Semiconductor Integrated Circuits Layout Design Act, 2000 for the reason that a more complete protection will be granted under the Patents Act.

[24] Best examples are found in fiscal federalism of the Constitution of India. While the borrowing powers under Article 293 are continuing without any modification, the taxation powers continue to see many Amendments.

[25] At such places, indirect express repeal may also be resorted to. The best examples are the Codes in Civil Law system. Current text of Article 21 of the Constitution of India can also be equated to a standard which incorporates many rights but impliedly.

[26] With the establishment of National Company Law Tribunal, the provisions regarding mergers and amalgamations are made more specific.

The conclusions above may also be applied to decision of making a direct or indirect express repeal.

4.2. Timing of repeal

While the law can be repealed immediately in the same session in which it is passed, the timing of repeal, especially in case of an express repeal becomes very crucial.

To avoid massive build-up of statutes, the statutes like Appropriation Bills may be equipped with sunset clauses, after expiry of which they will self-destruct.[27] To consider the facets of repeal, recourse to Parisi and Fon needs to be taken again.

The cost of waiting (alternatively, short term benefits of law forgone by waiting), which is crucial at the time of enactment of statute becomes even more dynamic where an existing statute is already holding ground.[28]

The optimal payoff at every time'tʼ would be

$$P_t(V_t) = \max \left\{ V_t - I, \frac{1}{1+á+ä} E\ [P_{t+1}(V_{t+1})] \right\}$$

where,

V = Average value of law

I = Direct investment cost of adoption of law

ä = cost of waiting/ short-run return

á = long-run benefit

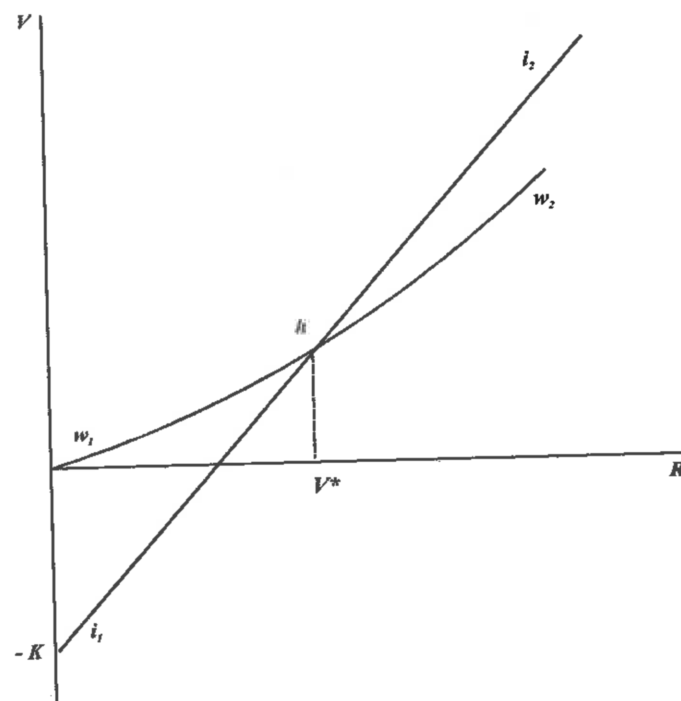
[27] Such practice already exists in form of temporary statutes.

[28] Such situation would be like an investment problem which involves a decision between making new investment or modification of existing asset to suit the changed needs.

After making this equation into continuous form and smooth-pasting it, the optimum threshold V^* would be given by:

$$V^* = \frac{â}{â - 1} I$$

The emerging equation can be represented as follows[29]:



The repealing enactment needs to conform to the condition of benefits (depicted by $i_1 i_2$) exceeding value of waiting (depicted by $w_1 w_2$). It is not possible to exactly determine the point of V^*. Hence, at all times after V^*, the law would exceed the costs and could be adopted.

[29] This representation is taken from the works of Avinash Dixit (Avinash Dixit, 'Investment and Hysteresis'(1992) Vol. 6 No. 1 The Journal of Economic Perspectives 107) with modification for accommodating V^*.

Sr. No.	Relationship	Implications for repeal
1.	$\frac{\partial V^x}{I} > 0$	If the costs are irreversible to a higher extent, slower should be the pace to repeal the laws.[30]
2.	$\frac{V^x}{\acute{o}} > 0$	Higher the uncertainty or the variance in the returns of the legislation, slower should be the repeal.[31]
3.	$\frac{V^x}{\acute{a}} > 0$	Repeal should be delayed when the growth rate of the law being repealed is high.[32]
4.	$\frac{V^x}{\ddot{a}} <$	If the short-term benefits of repeal are increasing, repeal may be expedited.[33]

4.3. Hysteresis and its legal implications

Hysteresis[34], although a phenomena best described in physics, may have some implications on post-repeal legal system. It is concerned with the effects which may remain after the repeal of the Act. Main effect would be the savings clause, if any, and more importantly, other enactments where the repealed Act is incorporated/ referenced. Although as a thumb rule, incorporated portion will be saved and referenced portion will not be saved, exceptions to both the rules and complexity of legal system would make it difficult to predict the outcome with certainty.

[30]The costs of legislation are most often sunk costs. They can be reduced only though information benefits and incorporation/ reference practices. One example for slower pace could be delay to enact the Uniform Civil Code.

[31]Uniform Civil Code serves as a good example of this area as well. Further, the delay in enactment of the Companies Act, 2013 could be attributed to this reason as well.

[32]Dodd –Frank Wall Street Reform and Consumer Protection Act, passed in United States in the year 2010, in the opinion of the author, holds significant long term value and should not be repealed as is proposed by President Trump.

[33]The Companies Act, 2013 was amended firstly in 2015 and another Bill to amend the Act extensively is introduced. These amendments have significant benefits for the economy as a whole.

[34]Effects of a phenomena being present although the cause for the phenomena is completely removed.

Further, post-repeal, especially when the new law changes the philosophy of the legislation, resistance from the administrators who are accustomed to earlier philosophy may remain. This can be equated with the memory of the system.[35].

While hysteresis could be built into the timing model shown above, an independent model would certainly throw some interesting analysis[36]. The establishment of a contrary practice in the quasi-repeal by desuetude may also be quantified through this model. Such analysis would also throw up 2 Internal Rate of Return values of the legislators:

$$IRR - \ddot{e}(t)\, i(t) \geq \hat{a}$$

(upper value of IRR where the decision of enacting the legislation is taken)

$$IRR - \ddot{e}(t)\, i(t) \leq \alpha$$

(a significantly lower value of IRR where the decision of repealing the legislation is taken. Such value would be lower when the sunk costs are higher)

This analysis is proposed for a future researchinto this area.

To conclude the economic analysis, the aim of such analysis needs to be reiterated which is to bring objectivity into the process of law-making. While these models may be called mere intellectual abstractions,Parisi and Fonstate that such models provide *"a valuable benchmark against which to measure the actions of real life lawmakers'*[37].

[35] This area of memory of legislators may also be explored from the point of view of Public choice theory/ behavioural economics.

[36]Reference could be made to the work of Avinash Dixit (Avinash Dixit, 'Investment and Hysteresis ' (1992) Vol. 6 No. 1 The Journal of Economic Perspectives 107) and a working paper (R. Cross, M. Grinfeld and H. Lamba, 'Hysteresis and Economics, Taking the economic past into account ' (2008)
< http://math.gmu.edu/~harbir/CSM-08-03.pdf > accessed 04 March 2017.

[37]Francesco Parisi, Vinci Fon, *The Economics of Lawmaking* (Oxford University Press 2009) 32

Conclusion

The repeal is as natural and inevitable in the life of laws as the death is in human life. The legal system must respond to the needs of the society it seeks to regulate. Hence, this cleaning exercise becomes ever more important in extant dynamic environment. Further, we need to accept the reality of non-benevolent law-maker and work towards institutionalization as a check on personal whims and fancies of the lawmakers. The legal system is in dire need of a framework, like the earlier Five Year Plans, for periodic and systematic review of the entire system without any limit on the mandate.In such system, help of economic tools is indeed valuable.

Res Extra Commercium – A Critique of the Misinterpreted Doctrine.[1]

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Introduction

Consumption of alcohol is just a taboo just like many other precepts in Indian society. The taboo emerged during the British rule in India as the Indian masses considered it to be foreign product. This was further highlighted when alcohol prohibition was introduced in the Province of Madras by C. Rajagopalachari in 1937. Since then, India has witnessed a few prohibitions on Indian Made-Foreign Liquor[2], some *in toto*, while others in part. Every citizen has a right to choose his own employment or to carry out any occupation, trade or profession[3] subject only to the limitations imposed by the state in public interest and other grounds stipulated under A. 19(6) of the Constitution.[4] Additionally, A. 301 ensures free movement of goods throughout the territory of India and promotes the economic unity of the country. However, the extent of fundamental rights in relation to trade in liquor remains far from settled law.

Alcoholic beverages, as a marketable commodity, have been hit by the doctrine of *Res extra commercium.Res extra commercium* means outside commerce. In other words, it refers to things not subject to trade and excluded from the sphere of private transaction by law.

Res extra commercium: Origin and Meaning

A citizen's claim to carry on business in liquor is attenuated by invoking the Latin maxim *res extra commercium.* The proliferation of this doctrine

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[1]Research for B R Sawhney Memorial National Moot Court Competition, 2016 held at NALSAR University, Hyderabad.

[2] Indian Made- Foreign Liquor is a paradoxical term for potable alcohol sold throughout the territory of India.

[3]Article 19(1) (g), The Constitution of India. (hereinafter The Constitution)

[4]*Saudan Singh v. N. D. M. C,* AIR 1989 SC 1988.

in Indian jurisprudence can be traced to its firm roots entrenched in Roman law. *Res in commercio*, in Roman law, were things capable of ownership and hence, the subject of property rights. *Res extra commercium*, on the other hand, refers to things incapable of ownership.

Certain kinds of property were devoid of private ownership or acquisition because such ownership would be contrary to its natural impetus. Such property was known as *res extra commercium*. Moreover, no individual could claim any right over such property because it was meant for the common benefit of mankind. Within this wide category, there were many sub-categories. A resource which by its nature could only be used in common was called as *res communes*. Water bodies, edible fish, wild game fell into this category. Property reserved for public use by public functionaries or the political community was categorized as *res publicae*. Public buildings and furniture within them exemplified this category. *Res universitatis* included things held by a corporate body while *res nullius* meant things or tracts of area that belonged to no one. *Res sacrae* (churches) and *res religiosae* (cemeteries) were also streamlined as *res divini*, but are no longer germane because they are now subjects of ownership.

Hence, such intentional classification indicates that morality had no role to play in the classification of property as *res extra commercium*.

In *Angurbala Mullick* v. *Debabrata Mullick*,[5] Justice Chandrasekhara Aiyar held that the *shebaitship* of an idol was *res extra commercium* due to its inalienability. *Shebaitship* involves two ideas: (i) the ministrant of the deity, and (ii) its manager. The emphasis, in this concurring judgement, was essentially on the absence of private ownership over this title and thus in consonance with the concept of *res extra commercium* in Roman law. This continues to be the solitary decision where the expression *res extra commercium* was correctly used by the Supreme Court of India.

Genesis of *Res Extra Commercium*.

The expression, *extra commercium*,was first used in the case of *State of*

[5]AIR 1951 SC 293.

[6]AIR 1957 SC 699. (hereinafter referred as Bombay)

Bombay v. *R. M.D. Chamarbaugwala*.[6] Coincidently, on the very same day, the Supreme Court ruled in the matter of *R.M.D. Chamarbaugwala* v. *Union of India*,[7] incorrectly interpreting the same principle.

The former case involved a challenge to the constitutional validity of the Bombay Lotteries and Prize Competition Control and Tax Act, 1948. Following an obtuse reasoning, the bench opined that if gambling and betting were brought within the purview of Art. 19(1) (g), trafficking of women, sale of obscene books, serial killing and even murder would have an equally guaranteed right in the scheme of the Constitution. Moreover, the judgement also referred to Rigveda and certain scriptures to portray the baneful effects of gambling and betting. In the words of Justice Das, "*gambling activities from their very nature and in essence are extra-commercium although the external forms, formalities and instruments of trade maybe employed and they are not protected either by Article 19(1)(g) or Article 301 of the Constitution of India*." At this juncture, it is pertinent to note that the expression used in the instant case was *extra commercium*, starkly different from the concept of *res extra commercium*.

In the latter judgement, notwithstanding a world of difference between the two expressions, Justice Venkatarama Aiyar laid down that only lawful trading activities deserve protection under Art. 19(1) (g) and Art. 301 of the Constitution and gambling, *per se*, is not a trade but *res extra commercium*.The bench referred to a series of Australian judgments, whereby not even a single judgement ruled that gambling or betting would amount to *res extra commercium*. However, it was subtly held that S. 92 of the Australian Constitution does not incorporate the right to carry on gambling and betting to be eventually treated as trade, commerce or intercourse. This inadvertent error, created by mere intricacies of word play, is genesis of the doctrine of *res extra commercium* in Indian constitutional jurisprudence. Its implications further led to its incessant use to water down the scope and effect of Art. 19(1)(g) as well as Article 301 of the Constitution of India.

[7]AIR 1957 SC 628. (hereinafter referred as RMDC)

Understanding *Res Extra Commercium* as per Indian Constitutional Jurisprudence.

Over the years, the apex court went on to categorize all activities as *res extra commercium* which were perpetuated for private benefit, as opposed to common benefit according to the true meaning of the expression. Subsequent to *Chamarbaugwala*[8] cases, dealing in adulterated foodstuff,[9] acting as a tout[10], dealing in intoxicants[11] and explosives[12] were held to be of deleterious nature through the application of the doctrine of *res extra commercium*. It is imperative to study the reasoning provided by the Supreme Court in these decisions which strengthen the roots of the doctrine of *res extra commercium* in our legal landscape. The operative parts of the rulings are discussed as follows:

1. *Nashirwar* v. *State of Madhya Pradesh*[13] - Hearing a host of civil appeals and writ petitions, the principal question faced by the apex court in this case was whether it was permissible for State governments to auction licenses for carrying on the business of selling foreign liquor which was neither manufactured nor imported by the State government. Central Provinces Excise Act, 1915 and Abkari Act were put into picture. The Apex Court held that since the State can prohibit business in liquor, it also has an adjunct right or privilege of manufacture, sale and possession of liquor. Granting this privilege was to be shaped by virtue of license or lease, thus ruling in favor of the State Governments of Kerala and Madhya Pradesh. The judgment proceeded to give three reasons for completely eliminating trade in liquor from the purview of Article 19 (1) (g) –

   i. That there is the police power of the State to enforce public morality to prohibit trade in noxious or dangerous goods.

8Bombay supra note 6, RMDC supra note 7.
9State of U.P. v. Kartar Singh, AIR 1964 SC 1135.
10Sant Ram, in re, (1960) 3 SCR 499.
11Har Shankar v. Deputy Commissioner AIR 1975 SC 1121; Sat Pal v. Lt. Governor AIR 1979 SC 1550.
12Southern Pharmaceuticals v. State of Kerala, AIR 1981 SC 1863.
13AIR 1975 SC 360.

   ii. That there is the power of the state to enforce absolute prohibition of manufacture or sale of intoxicating liquor.

   iii. That Art. 47 poses a duty on the state to endeavour the prohibition of consumption of intoxicating drinks except for medicinal purposes.

2. *Khoday Distilleries* v. *State of Karnataka*[14]- In yet another instance of alcohol prohibition by the State Government, the Apex Court clearly laid down that no citizen has an absolute and unqualified right to trade in liquor. Endorsing the doctrine of *res extra commercium*, the court opined that "*the exclusion and elimination from business is inherent in the nature of liquor business and it will hardly be proper to apply to such a business, principles applicable to trade which all would carry on.*"

3. *B. R. Enterprises* v. *State of Uttar Pradesh*[15]- This ruling scrutinized the constitutional validity of the Lotteries (Regulation) Act, 1998.One of the contentions raised by the States led the court to a paradoxical situation. It was argued that the States could not run their own lotteries extra-territorially unless the activity qualified as "trade and business" under Article 298. On this note, it was quite apparent that if lotteries were considered to be "trade and business," there was no ground to hold otherwise when it came to Articles 301– 304. Astonishingly, the apex court held that "trade and business" used in Article 298 had a meaning different from, and wider than the expression "trade, commerce and intercourse" in Articles 301– 304. This led to precocious legal debate and sparked widespread criticism from the legal fraternity.

4. *State of Punjab* v. *Devans Modern Breweries*[16]- Adjudicating on the constitutionality of the notification issued by the Government of Punjab, in relation to imposition of import fee on liquor products, the majority view of the Supreme Court laid down that "*it is well stated by a catena of decisions that trade in liquor is not a fundamental*

14(1995) 1 SCC 574.
15(1999) 9 SCC 700.
16(2004) 11 SCC 26.

right. It is a privilege of the state. The state parts with this privilege for revenue considerations. The permissive privilege to deal in liquor is not a right at all."

A coherent reading of these cases and varied interpretations of the Constitution, indicate that the courts in India evolved and nurtured the foreign doctrine of *res extra commercium.*

Dissenting Judgements and Opinions.

The courts also deliberated upon the privilege theory and the doctrine of police power to justify the power of the State for prohibiting or regulating trade in liquor, in accretion to the doctrine of *res extra commercium.* Once sale of liquor is permitted by a State government, every citizen has a fundamental right to apply for a permission to trade in liquor. If he satisfies the prescribed statutory conditions, there is no justification for denying that citizen the right to manufacture or sell liquor. A brief understanding of the above two concepts would sail the raft more smoothly.

1. **Privilege Theory**

The origin of the Privilege theory can be traced to English law. Blackstone defined 'franchise' as a royal privilege of the King's prerogative subsisting in the hands of a subject. This conception of privilege, is therefore, bound with the prerogative of the Crown and has no place in the scheme of the Indian Constitution. Also absorbed by courts in the United States, this theory has been continuously adopted by the Supreme Court to observe that there is no right to trade in liquor and it is exclusively the state's privilege which is parted with for revenue considerations. However, the right to carry on business came to be recognized in the United States as one of the liberties protected by the Constitution. It did not occupy an exalted position like other freedoms. On the contrary, right to carry on business is a freedom specifically protected under Article 19(1)(g) of the Constitution of India. Moreover, it was also held that Article 19(1)(g) makes no distinction between common law trades which could be

carried on by all persons and prerogative trades which could be carried on only under state grants.[17]

2. **Doctrine of Police Power.**

In *A.K. Gopalan* v. *State of Madras*[18], it was held that the content of due process of law had to be narrowed down by the enunciation and application of the new doctrine of police power as an antidote or palliative to the former. From one the earliest decisions of *Brown* v. *Maryland*[19], it is clear that the doctrine of police power was perpetuated to preserve the power of the States in the federal structure of the United States. Hence, it is submitted that when there is a specific distribution and enumeration of legislative powers among the Union and State Legislatures in India,[20] the application of doctrine of police power renders no clarity or certainty to the constitutional scheme of India. When the right and its extent are clearly spelt in the Constitution, there is no necessity to rely on a vague and unwritten doctrine of police power to define the scope of the right. This view was also affirmed by the apex court in *Chiranjit Lal Chowdhuri* v. *Union of India*,[21] holding that *"importing of expressions like "police power", which is a term of variable and indefinite connotation in American Law, can only make the task of interpretation more difficult."*

Boiling down to the doctrine of *res extra commercium*, the scheme of Article 19 is that the fundamental rights are declared in general terms in the various sub clauses of Cl. (1) and the restrictions which can be imposed by the State on such rights are exhaustively laid down in the limitation clauses [Cl.(2) to Cl.(6)]. Hence, whether the State can by making a law, restrict or totally prohibit any trade which is injurious to public interest, is a question to be decided by the court by an application of Cl. (6) of Art. 19.

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[17] *Saghir Ahmed v. State of Uttar Pradesh* AIR 1954 SC 728.
[18] AIR 1950 SC 27.
[19] 25 U.S. (12 Wheat.) 419, 442-43 (1827).
[20] Schedule VII, The Constitution *supra note 3*
[21] AIR 1951 SC 41.

In *Krishan Kumar Narula* v. *State of Jammu and Kashmir*[22], the application of doctrine of *res extra commercium* to Article 19(1) (g) was rejected in the following words, "*the acceptance of this broad argument involves the position that the meaning of the expression 'trade or business' depends and varies with the general acceptance of the standards of morality operating at a particular point of time in a country. Such an approach leads to incoherence in thought and expression. Standards of morality can afford a guidance to pose restrictions, but cannot limit the scope of the right.*" This view was subsequently affirmed in *Amar Chandra Chakraborthy* v. *Collector of Excise, Tripura*,[23] by observing that dealing in liquor was a business and a citizen had the right to do business in that commodity.

Justice B. N. Agarwal dissented from other learned judges[24] while observing that the applicability of *res extra commercium* was judge-made law and the Constitution did not provide for it. He opined that dealing in a commodity which is governed by a statute cannot be said to be inherently noxious and pernicious. The legislature being the final obiter as to morality or otherwise of the civilized society should specifically state as to which business would be criminal in nature and the society will have no say in the matter. Whether dealing in a commodity by a person constitutes a crime or not can only be the subject matter of a statutory enactment. Clearing his stand, he also went on to hold that when a statute governs a trade in a particular commodity, it would not be regulated by the principle of *res extra commercium* but the provision contained therein would only regulate the same.

The authors firmly stand in support of the above dissenting views and opinions. It is further deciphered that Article 19(1) (g) has been wrongly understood in the context of liquor trade and unfortunately, moral considerations have distorted its interpretation. States, in their attempt to have the cake and eat it too, have conveniently fallen back on terms such as police power and *res extra commercium* to justify capricious action

[22]AIR 1967 SC 1368.
[23]AIR 1972 SC 1863.
[24]*supra note 16*

on their part in matters such as auctioning of privilege and imposition of license fee.[25]

Conclusion

The Supreme Court's consistent remarks, noting that liquor and gambling are activities of deleterious nature, turns glaringly ironic when sale of potable alcohol generates the maximum revenue for most State governments in India. Several state lotteries are nothing but an amalgamation of gambling and betting. Furthermore, even if gambling is harmful to the society, there is nothing that prohibits the state from allowing gambling casinos to function without any hesitance. In certain countries, sale of drugs and prostitution also stands legalized.

The incorrect use of this expression underscores the importance of relying on the language used in our Constitution and shows the pitfalls of importing doctrines and theories from other jurisdictions.[26]Judicial decisions must be primarily given on the basis of our own constitutional principles. It is only when the constitution is silent or has failed to contemplate a problem that foreign doctrines may be brought into picture. Even during their application, they should be subject to strict scrutiny.

During the last sixty years, the expression of *res extra commercium* has been wrongly interpreted by the Supreme Court and various other High courts. The authors firmly believe no activity can be called *res extra commercium*. With the Indian Constitution soon turning septuagenarian, the authors are hopeful that courts in India will reanalyse the applicability of *res extra commercium* in the scheme of our Constitution, thus emphasizing the plain rule of interpretation in its literal and ordinary sense.

[25]Arvind P. Datar, *Privilege, Police Powers and Res Extra Commercium - Glaring Conceptual Errors*, 21 Nat'l L. Sch. India Rev. 133-134 (2009)
[26]*supra note 25.*

Enforceability of Shrink-Wrap Contract : A Challenge to Data Protection in India[1]

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Introduction

In recent times, there have been a number of government initiatives such as Aadhaar, NATGRID and e-commerce websites which have led to increased collection and storage of personal data of citizens and this has emerged to be a concern to individual privacy in India. The Right to Privacy is one of the unenumerated rights in the Constitution of India which has multiple facets. However, framework to deal with its infringement is absent. Even in the absence of an overarching data protection policy as to collection, storage, and disposal of data a string of Apex Court judgments ranging from *Kharak Singh* to *Naz Foundation* have construed it to be an essential ingredient of personal liberty under Art. 21 of the Constitution of India.

However, a similar framework is lacking for collection and disposal of data collected by a private party i.e. company, social networking sites, shopping portals etc. There is a huge inflow of sensitive personal information through various means apart from the ones being collected by a government/government-owned/public-private partnership.

Globalization and emergence of technology has accelerated e-commerce which in turn has led to conducting and concluding of such transactions through e-contracts. These have become a boon and brought about trade flexibility in e-businesses and allied service industry. The e-contracts take place without the parties meeting each other, but are formulated by software and generally are of three types namely browse wrap, shrink wrap and

[1]moot research as a part of 1st Symbiosis Law School National Moot Court Competition,2016 from 23rd -25th September, 2016 at Hyderabad.

click wrap contracts. Enforceability of such e-contracts in India is short of a framework and concrete judicial development, and therefore this necessitates to import the same from other legal systems wherein they have been looked into just like any other contract meeting. The essentials of general contractual principles of which free consent ("I agree or I accept" button) being quintessential and bargaining power the focal point, have been recognized and regulated by some of the provisions of the Information Technology Act, 2000[2] read with Indian Contract Act, 1872 and Indian Evidence Act, 1872[3]. The identity of parties of an electronic agreement can be verified in several ways. The parties can use a reliable sign-on process, such as by providing a password, PIN or secured secret code to enable the parties to identify themselves[4]. The Apex court in *Trimax International FZE Ltd. v. Vedanta Aluminum Ltd.*[5] has held that a valid contract can be concluded after verification of electronic records like emails and terms and conditions.

Opening of Package Amounts to Assent :

Shrink wrap agreements have derived their name from the 'shrink-wrap' packaging that usually contains the goods, such as, CD Rom Software. The terms and conditions of accessing the particular software are printed on the shrink-wrap cover of the CD and the vendee after going through the same tears the cover to access the CD Rom. Opening the sealed package containing the CD, however, signifies acceptance of the terms of

[2]Information Technology Act 2000 s 11-13 and 2008 s 10A

[3]http://shodhganga.inflibnet.ac.in/bitstream/10603/38507/14/14_chapter%207.pdf accessed on 2nd March, 2017

[4]Bruce S. Nathan and Terence D., 'Watson, Electronic Signatures, Agreements & Documents; The Recipe for Enforceability and Admissibility 'https://www.lowenstein.com/files/Publication/45e0d333-56b6-485f-835c-011eb4f3aa2f/Presentation /PublicationAttachment/9bde51f9-a5d9-455f-9910-06fa785d5996/1-%20Electronic %20Signatures %20Agreements %20and %20Documents %20 The%20 Recipe%20For%20Enforceability%20an.pdf accessed on 2nd March,2017

[5][2010] (1) SCALE [574]

the license[6]. Thus, shrink-wrap agreements comprise of agreements wherein the product which is purchased bears the terms and conditions and displayed on the box in which the product is sold. By opening the package, consumers agree to a host of additional terms that were not agreed to at the time of purchase[7]. In *Pro CD v. Zeidenberg*[8], the Seventh circuit court held that "just as breaking the shrink wrap seal and using the enclosed computer program after encountering notice of the existence of governing license terms has been deemed to constitute an assent to those terms. Therefore, shrink wrap contracts are valid because there is proper acceptance to the terms with informed consent. Thus, the contract would be completed at the place where the acceptance is communicated.[9]

Shrink Wrap Contracts are valid until terms are not unconscionable:

Shrink-wrap agreements comprise of agreements wherein the product which is purchased bears the terms and conditions and displayed on a box in which the product is sold.Contracts of adhesion, including shrink wrap license agreements, may be legal depending on their specific terms. The seller provides boiler plate language to consumers with the expectation that it will not be amended, or perhaps even understood[10]. Sometimes,one party to the agreement has all the bargaining power and dictates the terms of the agreement to the consumer, who must purchase the software subject to the license terms dictated by the company or decline to purchase (or return) the software. The customers should be given right to return the product within stipulated time[11]. In *Brower v. Gateway Inc.*[12], the court

[6]R K.Singh, Law Relating to Electronic Contracts (2nd ed. Lexis Nexis 2015)133
[7]Oscar, '*Shrinkwrap Licenses Grow Teeth* '(Wired, July 23, 1999), available at http://archive.wired.com/politics/law/news/1999/07/20910 accessed on Sept. 1 2016
[8]*Pro CD, InC. v. Zeidenberg, 86 F 3d [1447,1451]*
[9]*Bhagwandas Goverdhandas Kedia v. M/s Girdharilal Parshottamdas,* [1966] (1) SCR [656]
[10] See RESTATEMENT (SECOND) OF CONTRACTS 1981 s 211(2)
[11]David L. Hayes, *The Enforceability of Shrink wrap License Agreements On-Line and Off- Line*, 1977 Fenwick & West LLP 9 (Mar. 1977)
[12]*Brower v. Gateway,* 246 A. D.2d [252]-[254]

here found that a shrink wrap contract was formed when the plaintiffs retained the software for longer than the 30-day period 'approve or return' period. In cases where the entire license terms cannot be printed on the exterior of the box or appear on the user's screen every time the program is run, then such a shrink license agreement is valid only if the buyer is afforded a right to return the product (and have the refund)[13]. Absence of such clauses or terms would render the contract unconscionable.

The definition of 'unconscionability' as stated in *Williams v. Walker Thomas Furniture Co*[14] has been generally accepted in absence of definition in the UCC. That case defines: "Unconscionability" to include the absence of "meaningful choice" on the part of one of the parties together with contract terms which are unreasonably favourable to the other party. Whether a meaningful choice is present in a particular case or not can only be determined by consideration of all the circumstances surrounding the transaction. In many cases, the meaningful choice is negated by gross inequality of bargaining power. A contract or a clause in a contract will be said to be unconscionable, if it satisfies the test of procedural as well as substantive unconscionability, indicated respectively by the words 'absence of meaningful choice' and 'terms unreasonably favourable' in the above definition; and where more of one is present, less of the other is required. Procedural unconscionability arises when there is an element of oppression or wrong doing in the process of the making of the contract and would include, use of fine print or technical language, lack of knowledge or understanding and inequality of bargaining power. "Substantive unconscionability" on the other hand affects the actual substance of the contract and its terms and will include wide exclusion clauses, or excessive prices etc.

Therefore, the shrink wrap contracts have been upheld by courts as long as they are not unconscionable or do not otherwise violate a law or public

[13]R. K. Singh, Law Relating to Electronic Contracts (2nd ed. Lexis Nexis 2015) 133
[14] 350 F.2 d [445]

policy[15]. If a contract or term thereof is unconscionable at the time the contract is made, the Court may refuse to enforce the contract[16].

Data protection and shrink wrap contracts

Certain services as discussed in the preceding paragraphs require a consumer/ vendee sharing an extraordinary amount of sensitive personal information[17] with the vendor, which are of economic value. Data once collected by a company or by any government agency is out on a public platform can be used for legitimate purposes(research, etc.) which if not guarded by appropriate data collection and disposal security policy could be used for illegitimate purposes such as data mining, selling of data to third party, data breaches, behavioural advertising etc. Usually when any public or private platform collects personal data it is stored in mass or there is mass consolidation which increases the privacy and data security concerns especially in case of private parties where the consent is obtained through EULA (End User License Agreements). E-contracts such as shrink wrap contracts are not explicit or extensive as to how a vendor collects, stores, uses, shares and destroys the consumer's sensitive personal information. Since there is no legislation as in United Kingdom or Germany, the vendor gets both the right to exclude consumer privacy as well choice of law in case of disputes. The vendor who is in a better bargaining position can make enforceability of such contracts complex by including indemnity clause which may exclude data protection on breach of contract and in addition may opt the choice of law as to data protection if the vendor is foreign company or his source/operating system is located in an alien state. The source is important especially in case of Shrink wrap contracts because here the communication of acceptance is made by the originator (vendee) by swiping card details or clicking on 'I agree' and the receipt

[15]*Brower v. Gateway*, 246 A.D.[252] - [254]
[16]*Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr.*, [1986] (3) SCC [156]
[17]The Information Technology (Reasonable Security Practices and Procedures and sensitive Personal Data or Information) Rules, 2011 Rule 3

of the same is generated in the computer resource which is located overseas. Therefore there is need of data protection policy / privacy legislation to protect consumer privacy which is in conformity with multiple international regimes so that it provides protection to data processed within and outside India.

International privacy principles: Lessons from Laws of Germany.

Different legal systems have varied privacy requirements for protection of data and prevent harm to individual whose data is at stake. The EU Data Protection Directive, OECD guidelines and APEC framework have outlined a list of privacy requirements such as organizations' accountability towards personal information, notice to the vendee as to collection policy notification, consent for collection and use, collection limitation (restricting the collection to the identified purpose only), use limitation policy as to disclosure to third parties, Vendee's access to his information and right to correction, security and safeguards adopted to prevent misuse and loss, data quality, complaint resolution, openness, anonymity or de-identification on withdrawal of service or breach of contract and rules as to trans-border data flow. All the above principles are mandatory and need to be adhered by the body which indulges in collection and use of sensitive personal data in these geographies. These all determine the rights of a data subject in relation to use, collection, processing, storage, retention, access, disclosure, anonymity and disposal of sensitive personal information and personally identifiable information.[18]

One of the practices which is worth adopting is one from Germany. It is a well-known fact that the data privacy regulations in the European Union (EU) are among the strictest in the world and Germany has an impregnable policy. In Germany, data protection is primarily regulated by the Federal Data Protection Act (Bundesdatenschutzgesets) (BDSG), which implements the Directive 95/46/EC on data protection (Data Protection

[18]Planning Commission of India,Report of Group of Experts on Privacy (Oct. 2012)

Directive). The laws of Germany let private bodies process or use data by means of data processing systems or collect data for such systems.[19] Private bodies must, in principle, register automated processing procedures before putting them into operation with the competent supervisory authorities if not self-regulated, which in turn is to be regularly audited and reported. In India, under the IT Reasonable Data Security practices, 2011 there is certainly a policy of self-regulation by drafting a data protection policy but it nowhere speaks of regular auditing.In Rule 8 of the said rules, there is reference to international best security practices but no explanation is provided which makes the rules inexplicit. In Germany, there is a strict procedure as to 'use limitation' and 'anonymity' about the data collected and a data controller/ vendor cannot disclose personal information to third parties, except after providing notice and seeking informed consent of the consumer. Even if shared, the third party also shares obligation on data breach. The body corporate has to adhere to the principle of accountability wherein they have to evolve Privacy by design (incorporating privacy in the design of the product).

Critical Appraisal

When we undertake a systematic comparison of data protection policy in India with other legal systems, we find that our domestic policy is merely piecemeal and does not possess any overarching law or enforcement mechanism incorporating the above principles. In such a scenario, a consumer can get redressal through the following means:

- A consumer may seek compensation for deficiency of service if his consent is sought through the terms of e-contract or on grounds of unfair trade practice under the Consumer Protection Act, 1986.

- The body corporate may develop privacy policy voluntarily and even bring in the dispute resolution clause.

[19]Federal Data Protection Act (BDSG) (Germany) s 1(3)

- The scope and extent of IT Act, 2000 is wide enough to encompass any offence committed outside India by any person, irrespective of nationality.[20] S. 1 reads as follows; "If any act involves a computer, computer system or computer network located in India or outside India this act shall apply". The data subject therefore can sue the vendor under S. 43A read with S. 75.

- In addition, the Sensitive Personal Information Rules, 2011 impose an obligation on the body corporate to collect the data in accordance with the procedure laid under Rule 8.

- Even if the vendor pleads implied consent as in case of shrink wrap contracts he is not excluded from liability. The vendee can plead Breach of Confidence and sue for tortuous liability as the data collected has quality of confidence therefore needs to be protected. This need not be explicitly mentioned as it is an equitable principle.[21]

Thus, from the inclusive interlink of shrink-wrap contracts and privacy we can derive two significant observations. Firstly, Shrink wrap contracts are enforceable when there is an informed consent which in turn affects the rights of the data subject. And lastly, India needs an overarching Privacy Act and uniform data protection laws need to be devised in international regime to deal with the complex issues arising out of e-contracts which is also uncodified.

[20]Information Technology Act 2000, s 1

[21]Consumer Privacy, 'The Centre for Internet and Society 'http://cis-india.org/internet-governance/consumer-privacy.pdf/view accessed on 2nd March,2017

Presumption against Implied Repeal

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Introduction

While the legislature has the constitutional power to enact laws, so too the power to repeal laws is also the exclusive prerogative of the legislature. Legislative supremacy in the field of law making and its exclusive privilege to legislate is the underlying principle of constitutional jurisprudence of liberal democracies. A law needs to respond to the changing social, political, economic conditions in the society. A law needs to be flexible enough so as to reflect the changing circumstances in the society without losing its nature as a body of official rules and regulations. This can be achieved through the instrumentality of repeals. Repeal is an abrogation or revocation of an existing law.[1] Repeal can be brought about either expressly or impliedly.[2]

Repeal is express[3] when a new law or a subsequent legislative Act uses words which show an intention to abrogate the earlier act or provision in question.Implied repeal occurs when two legislations or statues are mutually inconsistent and the latter statute repeals the earlier statute pro tanto.[4] There is a general presumption against repeal by way of implication. It is preferred that repeals, if made, should be express and specific. The power to make or repeal laws is a sovereign power or function of the legislature. The judiciary is not at liberty to impliedly repeal laws, and whenever the

[1]Adegoke A. Olanrewaju, 'Repeals of Legislations '(2012) Vol 1 No 1 NIJLD

[2]*Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1KB 733

[3] For example, see: Section 85 of the Arbitration and Conciliation (Amendment) Act, 2015 expressly repealed the Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961.

[4] Justice GP Singh,' *Principles of Statutory Interpretation* '(Lexis Nexis 2016) 14th edition at pp. 729

judiciary has to impliedly repeal any law, it has to act with extreme caution. This paper examines the general principle of presumption against implied repeal, and the circumstances in which courts have held implied repeal to be justified.

The doctrine of implied repeal

The doctrine of implied repeal is based on the Latin Maxim, *"Leges Posteriores Priores Contrarias Abrogant" i.e. the* more recent law overwrites the earlier law that says differently.[5] In simple words in case of a conflict between a later and earlier enacted law, the later enactment takes precedence and the conflicting parts of the earlier enactment are repealed.

Presumption against implied repeal

The doctrine of implied repeal is a judicial invention.[6] However generally, repeal by way of implication is not favored by the legal system itself. The primary reason for this assumption is the presumption at the time of enactment of any law, that the legislature is competent and has knowledge of the existing laws on the said subject matter. Therefore, when the legislature does not specifically provide for a repealing provision, it may be presumed that it was not the intent of the legislature to repeal the existing legislature.

The judiciary is usually reluctant in implying repeal of any statute, and such an interpretation is adopted only when it is unavoidable. Implied repeal has to always be supported by strong grounds.[7] In case of any overlap between the legislations, one statute must be read subject to the other, to give effect to both because it must be presumed that the legislature intended for both the statutes to operate. Only when a new law contains

[5] Francis Bennion, '*Bennion on Statutory Interpretation*' (Lexis Nexis 2010) 5th edition at pp. 304

[6]KP Chakravarty, ' Interpretation of Statutes with General Clauses Act' (Central Law Agency 1978) at pp. 402

[7]*Saraswati v. The Queen (*1991) 172 CLR 1

provisions which are irreconcilable with the former law, can repeal be implied. The burden to prove that it was the legislature's intent to impliedly repeal the existing legislation lies on the party who asserts the same.

While deciding a question of implied repeal, the test of determining repugnancy under Art. 254 of our Constitution[8] will apply. The Court has to consider the following aspects [9]

- Whether there is a direct conflict between the two provisions;
- Whether the legislature intended to lay down an exhaustive code in respect of the subject matter replacing the earlier law and;
- Whether the two laws occupy the same field;

Courts to declare implied repeal when the intention of the legislature is clearly ascertained

The intent of the legislature also needs to be ascertained. The intent of the legislature to impliedly repeal a statute should be clear and manifest. Implied repeal can be inferred if the legislature, by way of enactment of the later

[8]Article 254 in The Constitution of India 1949 Inconsistency between laws made by Parliament and laws made by the Legislatures of States
(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existinglaw with respecttoone of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.
(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State: Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.
[9]*Municipal Council Palai v. TJ Joseph* (1963) AIR SC 1561

act clearly intended to cover the whole subject of the former enactment. In *State of Kerala & Ors v. Mar Appraem Kuri Company Ltd*[10], the Hon'ble Court has held that the Kerala Chitties Act of 1975[11] (state legislation) was found to be impliedly repealed by the enactment of the Chit Funds Act of 1982[12] (central legislation). The intention of the Parliament in enacting the Central Act was to cover the entire field relating to or with respect to chit funds, and in case of direct inconsistencies between the two legislations, the Kerala Chitties Act of 1975 was held to be void.

Courts to declare implied repeal when there is direct inconsistencies between two statutes.

In *Delhi Municipality v. Shivshanker*,[13] the respondent was being prosecuted for selling adulterated vinegar under the Prevention of Food Adulteration Act of 1954. The main question that cropped up before the Apex Court was whether the Prevention of Food Adulteration Act of 1954[14] and the rules of 1955 there-under relating to vinegar were impliedly repealed by the Essential Commodities Act of 1955[15]. The High Court had acquitted the respondent on the ground that Adulteration Act had been impliedly repealed by the Essential Commodities Act, 1955.

The decision passed by the High Court was challenged before the Apex Court. On appeal, the Hon'ble Supreme Court reversed the decision and held that, repeal if not express, must flow from necessary implication as the only consequence. There can be no repeal by implication, unless the inconsistency appears on the face of the two statutes. In the present case, though both the legislations contained regulatory provisions, the former legislation does not render the compliance with the latter impossible, and so repeal cannot be inferred impliedly.

[10](2012)7 SCC 106
[11]The Kerala Chitties Act, 1975 (Act 23 Of 1975)
[12]The Chit Funds Act, 1982 (Act 40 Of 1982)
[13]AIR 1971 SC 815
[14]The Prevention Of Food Adulteration Act, 1954 (Act 37 Of 1954)
[15]The Essential Commodities Act, 1955 (Act 10 Of 1955)

The possibility of impliedly repealing a legislature depends much upon the judiciary. The Courts have in certain circumstances held implied repeal to be justified.

When there exists a prior particular law and later general law

In case there exists a prior special law which deals with a particular subject which is also covered by the later general law, then the prior special law is generally construed to be an exception of the general law. The Court should try and give effect to both the enactments as far as possible. However, when the intention to supersede the prior special law is clearly stated in the later general law, then the prior particular law will be impliedly repealed by the later general law. In *S. Prakash v. K.M Kurain,*[16] the Court held that the object and reasons for the introduction of note 3 [17] in the Kerala State Subordinate Services Rules 1958[18] made it clear that it was the intent of the legislature to apply this rule to all services including the Kerala Agricultural and Income-Tax & Service-Tax rules.Therefore, the principle that a prior particular law may be abrogated by a later general law if the intention of the legislature could be clearly ascertained was upheld in this case.[19]

When there exists a prior general law and later particular law

If the provisions of the special statute are not in a way contradictory to the earlier enacted general law, there is no implied repeal of the general Act. However, if the provisions of the two legislatures are inconsistent with each other, then the applicability of the prior enacted general law can be curtailed, or conditions for the continuation of the provisions can be added or it may be impliedly repealed. In *Dilawar Singh v. Parvinder Singh*[20], the Hon'ble Apex Court held that the S. 19 of the Prevention of

[16] AIR 1999 SC 2094
[17] Added in the year 1992
[18] The Kerala State And Subordinate Services Rules, 1958
[19] *Supra* note 4 at pp. 745
[20] (2005)12SCC 709

Corruption Act, 1988 (later particular law), will have an overriding effect over the general provisions contained in S. 190 of the Code of Criminal Procedure, 1973 (earlier general law).

Where there exists a prior affirmative enactment and a later affirmative enactment

Affirmative enactments can be said to be those enactments which create sources of power for achieving certain purposes for the benefit of a class of persons. Therefore, an affirmative enactment which confers a power on an individual (A) for benefit of another individual (B) is valid until the same power was exercised by the other individual (B) under a later enactment. The exercise of that power by that individual (B) will result in implied repeal of the earlier enactment.[21] Generally, in case of affirmative enactments, earlier affirmative enactment cannot be easily repealed by later affirmative enactment. Only if the two affirmative enactments are so contrary to each other that they are mutually inconsistent with each other, the earlier enacted affirmative enactment will be impliedly repealed by the later affirmative enactment.[22] In *Ramchandra Marwala vs. State of UP*[23], it was held that there was no bar in creating two sources of power to achieve the same purpose, if they act supplementary to each other, and if obedience to one does not involve any disobedience or contravention of the other.

Where there exists a prior enacted and a later enacted law defining offences and penalties

If a later statute describes an offence created by an earlier statute and imposes a different punishment, or verifies the procedure of punishment, the earlier statute is impliedly repealed. However, this principle will not come into effect if the essential ingredients of the two offences laid down

[21] Avtar Singh & Harpreet Kaur, *'Introduction to Interpretation of Statute'* (Lexis Nexis 2014) 4th edition at pp. 265
[22] *Garnet vs. Bradley* (1878) A.C 944
[23] (1984) Supp SCC 28

in the two legislations are different in nature. Both these provisions are applicable only when the subject of prosecution is the same. When the offences under two enactments are distinct and separate from each other, these provisions will not find any application.

Conclusion

In the words of Bennion, "at repeal the floodlight is switched off, plunging everything illuminated by it into complete darkness. The consequence of repeal of a statute is very drastic. It is perhaps because of this reason that the principle of implied repeal is contested so much. It not only poses complex problems before the Court, but in effect, it destroys all inchoate rights and causes of action that had arisen under the repealed statute."[24] The presumption against implied repeal, thus acts as a caution to the judiciary to go slow whenever there is a question of impliedly repealing a piece of legislation. The presumption is stronger in cases where the particular enactment carries more weight or when modern precision is used while drafting a particular enactment.

[24] *Supra* note 6

Right to Health in India : An Appraisal

Sanjana Kulkarni I B.A.LL.B.
Shrirang Ashtaputre, I B.A.LL.B.

"Health is state of complete physical, mental and social well being and not merely the absence of disease."[1]

This is the definition of health as described by the WHO in the Preamble to its Constitution. The fact that WHO goes on to include the "well being" of the person which, in today's world, can be interpreted in a manner, stating the person's ability to lead a socially and economically productive life keeping in mind the mental and social well being of a person thus deemed to be 'healthy.'

The Constitution of India also goes on to talk about "right to health" and has several provisions for the same, expressed directly and indirectly. To begin with, Part IV of the Indian Constitution, i.e. the Directive Principles of State Policy, goes on to state it, in its several Articles. Like for instance:

"Provision for just and humane conditions of work and maternity relief. The State shall make provisions for securing just and humane conditions of work and maternity relief."[2]

Likewise :

"Duty of the State to raise the level of nutrition and the standard of living and to improve public health. The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in

[1] Preamble to the Constitution of WHO as adopted by the International Health Conference, New York in 1946

[2] Article 42 of the Indian Constitution

particular, the State shall endeavour to bring about prohibition of the consumption, except for medical purposes, of intoxicating drinks and of drugs which are injurious to health."[3]

And:

"State shall endeavour to protect and impose the pollution free environment for good health"[4]

In simple words, the Indian Constitution lays great emphasis on providing better work conditions, maternity relief at cheaper rates or even pro bono and better quality nutrition for the population, besides considering privileges for the sick, the disabled and the old ones of the State. It must be noted that anything stated in Chapter IV of the Indian Constitution, i.e. which lies within the Directive Principles of State Policies is non-justiciable, as it lays down the goals which the State has to achieve and maintain on attaining them and hence, cannot act as a guarantee.

The need for defining right to health as a fundamental right occurred with the series of various cases in the Indian Courts, which then gave shape to this concept and later was successfully incorporated in the Indian Constitution[5], by interpreting right to live with dignity as *"all the necessities of life such as adequate nutrition, clothing...."*. Accordingly, anything that affects the right to live with dignity of any person violates his right to life[6]. So it is clear from above that right to live with dignity includes right to health and if this right is violated, then, it is violative of Art. 21 of the Indian Constitution. Stating along the same lines, in *State of Punjab v. MohinderSingh*[7], **"*It is now settled law that right to health is integral right to life.*"** Henceforth, a person can now claim his right to

[3]Article 47 of the Indian Constitution
[4]Article 48(A) of the Indian Constitution
[5] Article 21 of the Indian Constitution
[6]*Francis Coralie Mulin v. Union Territory of Delhi* AIR 1981 SC 746
[7] AIR 1997 SC 1225

health.[8] In *Sunil Batra v. Delhi Administration*[9] the Supreme Court held that the "right to life" included the right to live a healthy life inorder to enjoy all faculties of the human body in their prime conditions. It also includes the right to sleep in peace and even the right to repose and health. Likewise, in *Vincent v. Union of India*,[10] it was held by the Court that a ***healthy body is the very foundation for all human activities***. The Supreme Court in *Paschim Bangal Khet mazdor Samity and Others v. State of West Bengal and Others*[11]held that it was the state's responsibility to provide medical aid to every person in the country for the ones who wish to avail it as it is its' primary duty to secure the welfare of the people and accordingly making it an obligation upon the state. So, building hospitals, assigning able doctors to work there, training young doctors, providing ambulances, setting up health camps and carrying out awareness programs etc. is what the state does, out of obligation, thereby promoting this right to health in the best way possible. However, any failure on the state's part in providing these facilities or adequate treatment could be held violative of Art. 21 of the Indian Constitution, i.e. direct violation of the fundamental rights, by the state itself. In an interesting case, it was questioned whether the State machinery was bound to assure adequate conditions necessary for health and accordingly, it was held that indeed, the State is bound to assure hygienic conditions for living, as by doing the same, it ensures that people live with dignity and hence, upholding the principles as stated in Art. 21 of the Indian Constitution, besides, securing and ensuring the health of the people.[12] Along the same lines, in *Municipal Council Ratlam v. Shri Vardichan*[13] , it was held that even the Municipal bodies are under an obligation to ensure public health. Even the Municipal authorities are expected to maintain a clean environment, to ensure *"public*

[8] (1995) 2 SCJ 29-34, at 30
[9] AIR 1987 SC 1675
[10] AIR 1987 SC 990
[11] (1996) 4 SCC 37
[12] *Municipal Ward v. Municipal Corporation, Gwalior* (AIR 1997 MP 33)
[13] 1980 (4) SCC 162

health". In *Paramanand Katara v. Union of India*[14], the Supreme Court held that every doctor, whether at government hospitals or otherwise has professional obligation to extend his services with due expertise for protecting life. In the same case, it laid down certain guidelines, which state the duty of the doctor, legal protection granted to them and the doctors having no legal bar from attending to the injured person and this has indeed, clearly redefined a 'doctor' in the medical profession.In *Bandhua Mukti Morcha v. Union of India*[15] the Court held that humane working conditions are essential for the workers and if they are deprived of the same, then they are being deprived of their right to health, ultimately being violative of Art. 21 of the Indian Constitution. It held that the workers must be provided with good quality drinking water, medical facilities etc., so that they can live and work with dignity. In *M.C. Mehta v. Union of India*,[16] the Supreme Court held that ***any kind of environmental pollution may cause health problem and therefore, violates right to life***. In *Shanti Star Builders v. Narayan Khimalal Totame*,[17] the Supreme Court was of the opinion that Art. 21 also includes right to decent environment. Also, it would be absolutely correct to point out that the right against rape and right against sexual harassment in work place can be included under the ambit of right to health, as both these activities, when carried out against women not only affect them physically but also mentally, thus, affecting their health, gravely. In *Sheela Barse v. Union of India* and others[18] the Supreme Court entrusted the High Courts to monitor the conditions of "*mentally ill and insane*" women and children in prisons and take effective action, if required. Right to Health is thus, well interpreted by the Indian Judiciary and from all that is stated above it is clear that right to health makes life possible and hence, is the essence of right to life within the ambit of Art. 21.

[14] AIR 1989 SC 2039
[15] AIR 1984 SC 802, 808
[16] 1987 SCR (1) 819
[17] 1996 SCC (1) 233
[18] (1995-(005)-SCC-0204-SC)

The Indian Constitution prohibits human trafficking. Human trafficking involves prostitution which leads to spread of AIDS in the society and thus, inadvertently affects the public health[19]. The Constitution also holds that children below the age of 14 should not be engaged in any hazardous employment emphasising thus on children's health, their safety and protection[20]. Also, effective application of the Consumer Protection Act inorder to deal with deficient medical services has also been interpreted to be as a way of upholding the right to health.[21]

Healthcare in India :

Former Prime Minister Manmohan Singh has rightly said *"We recognise health as an inalienable human right that every individual can justify claim. So long as wide health inequalities exist in our country and access to essential healthcare is not universally assured, we would fall short in both economic planning and in our moral obligation to all citizens."*

Since independence, the Government has come up with several policies to improve healthcare in India. For instance, in 1985, the Government of India launched the Universal Immunization Programme, involving massive vaccination for some diseases, like Tuberculosis, Tetanus, Measles, and Diarrhoea etc. Likewise, in 1995 the Pulse Polio program was launched by the government to eradicate poliomyelitis by vaccinating all children under the age of 5 years.[22] Keeping in mind the whole process of maternity relief, the government launched the Janani SurakshaYojna Scheme in 2005.[23] In 2009, the Government launched The Rashtriya Swasthiya Bima

[19] Article 23(1) of the Indian Constitution
[20] Article 24 of the Indian Constitution
[21] Spring Meadow Hospital V. Harijol Ahluwaliya (AIR 1989 SC 180)
[22] www.nhp.gov.in
[23] www.nrhm.gov.in

Yojana (RSYB), with the objective of providing affordable healthcare for the poor. Besides, the Government introduced schemes to promote healthcare in rural areas. The Swachata Abhiyaan is another initiative taken by the Government to ensure cleanliness in the society and to prevent spread of diseases thereby upholding the right to health on its part. All these policies have had a great effect on the health of the Indian society and upon the healthcare sector, both complementing each other. The number of doctors in India has increased by 9 times since the 1950s and ever since, is increasing, thanks to the government's efforts of opening up of several colleges for training them. Likewise, number of Hospitals and dispensaries has increased by more than 7 times and is still increasing, at a faster rate, thanks to the government's liberal policy of allowing private entities to set up private hospitals, based on its guidelines. Small pox was completely eradicated in 1977 and chicken pox and plague are well under control. Quite interestingly, while the life expectancy of an average Indian was just 33 years in 1951, it was raised upto 65 years by 2011. Maternal mortality has reduced to 254/ lakh birth in 2016 from 677/ lakh births in 1980.[24] Quite recently, polio has been eradicated completely and the government is now focusing on how to check the spread of HIV.India has brought this great improvement in its healthcare sector, by mainly providing safe drinking water and better sanitation facilities for its people starting from the grass root level. Inspite of all this, India's current healthcare rank in the world is 143 out of 188 countries, which clearly indicates that there is a lot more to achieve in the healthcare sector.

Conclusion:

The Indian judiciary has played a great role in interpreting Art. 21 of the Indian Constitution in such a way, so as to include Right to health within its ambit. Consequently this has laid a serious obligation on the state to invest further more into healthcare sector so as to ensure better health for

[24] www.thehealthsite.com

people. It must be understood that only when the population is healthy, it would be capable of working and contributing to the State's GDP. This is why it is rightly said that "Health is Wealth". Hence, India can expect development only when the population is healthy and fit, in its truest sense, which would greatly reflect in the Human Development Index (HDI) aswell.

Animal Constitutionalism

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Human beings and Animals go a long way together, in fact the latter preceded the former in the process of evolution. According to Darwin, we, the *Homo Sapiens*, developed and progressed at a much faster rate considering linguistic, physical, societal, political, social, normative and many other skills. This also led to a rather exaggerated belief in human beings as being smarter in all contexts and as invincible. As a result, came the subjugation of natural resources, environment including forests, rivers, lakes, trees, air, water, plants and animals to the now suffocating levels.

Ancient Indians followed the Laws of Nature, and ancient scriptures like the Vedas and Manusmriti accorded animal and nature a superior existence by recognising elements of nature as a form of the Almighty and assigned almost every animal the holy status of being the 'doot' or messenger of the innumerable Gods in the Hindu religion[1]. But the rise of modernism has convoluted the pro-nature Hindu belief system owing to the budding affinity for commercialism and reviving tendency of domination.

The atrocity on nature, in the present day, is omnipresent, with even law and natural justice[2], and the later conceived notion of Constitution, not being on its side to console. The sole reason for this has been the fact that human consideration has reigned supreme in the process of law making and setting of morality standards, thereby capturing the centre-point and focus of the draftsmen. Thus it is not a surprise that the essence of law has

[1] Significance of Animals- A Vedic Perspective (indianscriptures.com, 2017) http://www.indianscriptures.com/vedic-lifestyle/customs-and-traditions/nature-worship/significance-of-animals-a-vedic-perspective accessed on 22nd March 2017

[2] 'Animal Justice: The Counter Revolution in Natural Right and Law: Inquiry: Vol 22, No 1-4' (Tandfonline.com, 2017)<http://www.tandfonline.com/doi/abs/10.1080/00201747908601864?journal Code=sinq20> accessed 22 March 2017

always boiled down to vesting of rights to humans, safeguarding of human interests and its protection from violation i.e. Anthropocentrism.

This article is confined to the discussion on the accommodation of animals in the Constitution of India, based on the three-fold premise, that human being is not the only living being, animal is an equal living being[3] and animal is not a mere chattel or possession, even though not recognised as a legal person.

The article is three-fold in its discussion, analysing (1) the provisions in the Constitution of India for animals, (2) the feasibility of application of the 'living tree' doctrine, i.e. Constitutional interpretation in a broad and progressive manner to cope with the changing times and dynamics of society and law in the light of a rather rebelling originalist school of interpretation and (3) conclusively stressing on the need for a Constitutional amendment, considering the inadequacy of the Constitution and its interpretation.

Constitutional Rhetoric for Animal

The Constitution of India is conferred the status of the being the Supreme Law of the Land, and its supremacy is also a part of the Basic Structure Doctrine[4]. In such a case, it is not an unknown practice that, every provision and word or expression therein is looked up for rescue and justice (even injustice). This makes every Part, every provision and every expression of the Constitution extremely significant and the significance cannot be overemphasised by the fact that they serve as a synecdoche for the Constitution itself.

Thus, to understand how deep-rooted the sentiments for animals in the Constitution are, regard shall be had for the provisions therein. On a close observation there appears to be only a handful of provisions in the Constitution of India[5] which pertain to or even remotely relate to animals.

[3] There being distinction between living being and legal person

[4] *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1, Para 521, Per Beg J.

[5] Only those provisions having nation-wide application have been considered, i.e. also to say that provisions of Sixth Schedule have not been included, owing to their limited extent of application

The following table mentions the relevant Article, its content, its placement and status in the Constitution:

Article	Content	Authority	Status
1.Article 48. Organisation of agriculture and animal husbandry	*The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.*	Part IV; Directive Principle of State Policy	Part of the original Constitution.
2. Article 48-A.Protection and improvement of environment and safeguarding of forests and wild life	*The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.*	Part IV; Directive Principle of State Policy	Not part of the Original Constitution. Inserted by Constitution (Forty-second Amendment) Act, 1976[6]
3. 51-A. Fundamental duties	*It shall be the duty of every citizen of India* *(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;*	Part IV-A; Fundamental Duties	Not part of the Original Constitution. Inserted by Constitution (Forty-second Amendment) Act, 1976[7]
4. Seventh Schedule, List II – State List, Entry 15	*Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice.*	Schedule to Art 246[8]	Part of the original Constitution.

[6]S.10, Constitution (Forty-second Amendment) Act, 1976.
[7]S.11, Constitution (Forty-second Amendment) Act, 1976.
[8] Subject-matter of laws made by Parliament and by the Legislatures of States

Article	Content	Authority	Status
5. Seventh Schedule, List II – State List, Entry 58	*Taxes on animals and boats*	Schedule to Art 246[9]	Part of the original Constitution.
6. Seventh Schedule, List III – Concurrent List, Entry 17	*Prevention of cruelty to animals.*	Schedule to Art 246[10]	Part of the original Constitution.
7. Seventh Schedule, List III – Concurrent List, Entry 17-B	*Protection of wild animals and birds*	Schedule to Art 246[11]	Not part of the Original Constitution. Inserted by Constitution (Forty-second Amendment) Act, 1976[12]
8. Seventh Schedule, List III – Concurrent List, Entry 29	Prevention *of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.*	Schedule to Art246[13]	Part of the original Constitution.
9. Eleventh Schedule, Entry 4	*Animal husbandry, dairying and poultry.*	Schedule to Art 243-G[14]	Not part of the Original Constitution. Inserted by Constitution (Seventy-third Amendment) Act, 1992[15]
10. Twelfth Schedule, Entry 15	*Cattle pounds; prevention of cruelty to animals.*	Schedule to Art 243-W[16]	Not part of the Original Constitution. Inserted by Constitution (Seventy-fourth Amendment) Act, 1992[17]

[9] Subject-matter of laws made by Parliament and by the Legislatures of States
[10] Subject-matter of laws made by Parliament and by the Legislatures of States
[11] Subject-matter of laws made by Parliament and by the Legislatures of States
[12]S.57, Constitution (Forty-second Amendment) Act, 1976.
[13] Subject-matter of laws made by Parliament and by the Legislatures of States
[14]Powers, authority and responsibilities of Panchayats.
[15]S.4, Constitution (Seventy-third Amendment) Act, 1992.
[16]Powers, authority and responsibilities of Municipalities, etc.
[17]S.4, Constitution (Seventy-fourth Amendment) Act, 1992.

Analysis:

The Table is the basis of the discussion of the provisions, following is the analysis derived:

1. There are only a total of 10 provisions in the Constitution for or pertaining to Animal, including the taxing entry and distribution of subject matter for legislation.
2. Out of the total of 448 Articles in the present Constitution, there are essentially only 3 articles which pertain to Animal.
3. Out of these 10 provisions, 5 provisions[18] are by way of amendment.

   Of the 5 Amendment, 2 provisions[19] have been inserted as Articles in the Constitution in 1976 i.e. after a whopping 26 years from the date of commencement of the Constitution, which shows the trend towards an animal-friendly regime.
4. Of the 10 provisions in the Constitution, 7 are entries[20] in the Schedules of the Constitution, defining subject-matter for legislative competence.

   This is also to say that out of 10 provisions, there are only 3 provisions[21], which are Articles in the Constitution and not mere subject matters for subsequent law to be made by Legislature.
5. Of the 7 entries[22] defining subject matter for legislation, 3 entries[23] are clearly anthropocentric, while 1 entry owing to the greater extent, encompassing men, animal and plant alike is to some extent anthropocentric[24].

[18] Articles 48-A and 51A, Seventh Schedule, List III – Concurrent List, Entry 17-B, Eleventh Schedule, Entry 4 and Twelfth Schedule, Entry 15.
[19] Articles 48-A and 51A
[20] Seventh Schedule, List II – State List, Entries 15 and 58, List III – Concurrent List, Entries 17, 17-B and 29, Eleventh Schedule, Entry 4 and Twelfth Schedule, Entry 15.
[21] Articles 48, 48-A and 51A
[22] Seventh Schedule, List II – State List, Entries 15 and 58, List III – Concurrent List, Entries 17, 17-B and 29, Eleventh Schedule, Entry 4 and Twelfth Schedule, Entry 15.
[23] Seventh Schedule, List II – State List, Entries 15 and 58 and Eleventh Schedule, Entry 4.
[24] List III – Concurrent List, Entry 29

6. Of the 3 provisions[25] in the substantive body of the Constitution, 1 provision[26] is anthropocentric and accommodative of religious sentiments, while the other 2 provisions are more with animal as the focal point.

   Of the 2 provisions from Animal's perspective, 1 provision falls under Part IV i.e. Directive Principle of State Policy (DPSP) which are not enforceable in any court[27] and another is a Fundamental Duty under Part IV-A, to which when principle of *ejusdem generis* is applied, would be not enforceable, owing to the influence of the non-enforceable preceding Part IV, to which it is appended. The enlisting of the provisions of the Constitution, thus sheds light not only on the framework but also the sensitivity of the drafters towards animals and the growing pseudo-affinity which is reflected by the Amendments.

The Two Limbs - Too Limp rooting for Animal

In this section when analysing the two foremost and cardinal provisions in the Constitution for animals, i.e. Articles 48-A and 51A, the discussion is three-fold, discussing author's take on the similarities and the differences between the two Articles and the wide conjoint interpretation bestowed by the judiciary and its critique.

A few similarities are that both the Articles have are as follows:

a. Both the Articles have been introduced by way of the 42nd Amendment, which is not only famous as the Mini-Constitution, but also infamous for the political and constitutional circumstances under which it was passed.

[25] Articles 48-A and 51A
[26] Article 48
[27] Article 37:
" *Application of the principles contained in this Part.*
—the provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. "

b. Both the Articles do not make express mention of term 'animal', rather refer to it as an abstract 'environment' or 'wild life'[28] and 'natural environment' or 'living creatures'[29].

c. Both are essentially voluntary duties of the State to employ, owing to Art. 37 and by judicial interpretation of Fundamental Duty when collectively viewed to be a duty on the State and citizens under Art. 51A (g).

d. Both have apparently been influenced by the cultural heritage, with Art. 51A (g) employing the phrase compassion, often seem to have been used even in the Hindu scriptures[30].

As for the difference between the two :

a. Art. 51A (g) is wider in scope than Art. 48, owing to the phraseology. In fact judicial opinion is that Art. 51A (g) is a manifestation of the spirit and message of Art. 48 and 48-A[31].

b. The former is a Fundamental Duty whose authority and nature is fazed owing to its placement after DPSP, only consensus on it being not enforceable, while the latter is a DPSP with barely any authority being an ideal of the Constitution's Utopia.

Daunting Interpretation

The Court[32] has emphasised that Art. 48A and Art. 51A (g) are the foundations for jurisprudence of environmental protection[33], as a fundamental obligation to protect and show compassion to animals. This has been conjointly interpreted to be the guiding star for statutory

[28]Article 48-A

[29]Article 51A(g)

[30] "Do not get angry or harm any living creature, but be compassionate and gentle; show good will to all". Bhagvad Gita, Two Paths, 16:1-3

[31]*State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*, (2005) 8 SCC 534, Para 51

[32]*Supra 31*

[33]*Supra 31*

interpretation, to the magnanimous extent of testing constitutional validity of any statutory provision or an executive act or reasonableness of restriction cast by law on the exercise of any fundamental right by way of regulation, control or prohibition[34]. As a result of this interpretation, Art. 48 A and Art. 51A (g) have emerged as a powerhouse for voicing animal rights. Thus it can be summed up that all that Art.48A and Art.51A (g) have to offer is nothing but a broad spectrum of interpretation at the hands of the Courts of Law, when neither are enforceable, but have been employed to cast obligation, extend rights and be recognised as Magna Carta of animal rights.

Critique

The fundamental question is whether a DPSP which is not enforceable in the court of law by virtue of Art. 37 and the Fundamental Duty appended to the DPSP, are worthy and capable of such wide interpretations which seems to go overboard the Constitutional intent, even if one accepts the Living Constitution theory, because the basic character of the provision itself has been so ghastly interpreted and construed. Thus there is a conflict questioning the extent of the 'Living Tree' doctrine and supplying of emphasis and interpretation to the Constitution on one hand and the need for safeguarding the original intent as mooted by the Originalist school of Constitutional Philosophy, which favours restricted interpretation to safeguard the original intent of the drafters of the Constitution.

Essentially, even though it can be contended that the debate is over the theories of constitutional interpretation, the question is of the implications of the expansive interpretation and the susceptibility for it to be harrowing as a precedent if applied as an analogy to obligate DPSP and Fundamental Duties.

Also moving away from theories of interpretation, if one is to base the contention on the nature of the Articles, neither DPSP nor Fundamental

[34]*Supra 31*

Duties are essentially rights, they are mere obligations, and no right thus can be conferred without reading the DPSP or Fundamental Duty through the lens of Art 21 of the Constitution, which clearly does not entail animal, as it is confined to 'person' by expression and Animal is not yet recognised as a person, or legal person to say the least.

Thus, though the two Articles distinctly form the basis for animal rights in India, the interpretation bestowed on them is one which staggers Constitutionalism.

Burrowing a way out through Amendment

The personal opinion of the author for striking a balance between the debates on interpretation, is that a Constitutional Amendment is the only apparent way out, to make the Constitution reign supreme in context of animal well-being and enabling it to be looked up to as the fulcrum of animal rights in India.

While contemplating a Constitutional Amendment it is suggested that the manner in which the existing Constitutions were looked up to for drafting the original Constitution, for this Amendment a similar exercise should be employed, for it would not only provide guidance on what can be done, but also be instrumental in pointing out what should be not be done.

A brief study of the World Constitutions undertaken by the author for this, has pointed out that no Constitution in the world, refers to animal rights as such, in fact Animal is presumably clubbed into the notion of 'Mother Nature' representing *inter alia* environment and natural resources. It is because of this that major chunk of rights and privileges and duties are left for the Courts of Law to decide and extend.

Based on the study and research by author, the Constitutions of Bolivia, Ecuador, Germany and Switzerland are the most progressive in terms of recognising rights of nature (which includes animal) or bestowing Animal Protection. While it is a greater political trickle for Bolivia and Ecuador owing to the outbreak of the indigenous people, Germany and Switzerland are rather sensitive.

Rights of Nature are conferred under the Ecuadorian and Bolivian Constitution, with even New Zealand following suit. German Constitution provides for specific protection to animals[35], as a provision of 'Federation of Land'. However Swiss Constitution is the most exhaustive, providing for traffic regulation to prevent harm to animals[36]economic incentives to promoting animal-friendly production means[37], providing for fighting contagious, widespread or particularly dangerous human and **animal** diseases[38] and recognising dignity of animals[39].

Thus if one is to derive at a suggestion for Amendment, it can be admixture of the best practices and provisions of the above-mentioned World Practices, as Part III-A of the Constitution i.e. 'Rights of Nature' to provide not only for animals but also Nature including environment, climate change, etc. However confining to Animal for the purpose of the Article, there must be a specific provision for Animal, conferring dignity of existence as a living being and elevating status from being a mere chattel or property to a new classification of living being, which does not necessarily imply legal person. Right to existence including the right to live a life free of pain and live life peacefully, restricting euthanasia of animal after the animal has

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[35] Protection of the Natural foundations of Life and Animals, Article 20, Basic Law for the Federal Republic of Germany
See https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf

[36] Per Article 84, Federal Constitution of the Swiss Confederation.
See https://www.admin.ch/opc/en/classified-compilation/19995395/201601010000/101.pdf

[37] Per Article 104,Federal Constitution of the Swiss Confederation.
See https://www.admin.ch/opc/en/classified-compilation/19995395/201601010000/101.pdf

[38]Per Article 118,Federal Constitution of the Swiss Confederation.
See https://www.admin.ch/opc/en/classified-compilation/19995395/201601010000/101.pdf

[39]Per Article 120,Federal Constitution of the Swiss Confederation.
See https://www.admin.ch/opc/en/classified-compilation/19995395/201601010000/101.pdf

served its purpose or is ill[40], right to be fairly employed and protected, in the sense of their utilisation as subjects and objects of experiments and intervention, or use in trade and transportation, right to care in cases of domestication, right to territory in the sense that their territory is not encroached upon, right to fair treatment etc. This being said, Mother Nature can be employed as a rhetoric to represent itself in the courts of law, with Friends of Nature, just like *amicus curiae*, leading at the helm of the new wave of Animal Rights.

Conclusion

The intent of the present article has been to highlight that the Constitution, in its original draft, was miserly in providing for animals rights. But the subsequent amendments also did no good and the Constitution in its present form and despite 67 years of judicial craftsmanship bestowing all sorts of interpretation (some even appallingly mindless of limits of derogating originalism), is still not enough to provide solace for animals and to be recognised as watershed for promoting animal rights. The need for change is grave although the Apex Court has passed a landmark judgement[41] by banning Jalikattu and morally binding the Parliament through its expectations in the *ratio* to elevate Animal Right to being a Constitutional Right[42].

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[40]See in this regard 'AVMA Guidelines for the Euthanasia of Animals' (*Avma.org*, 2017) <https://www.avma.org/KB/Policies/Pages/Euthanasia-Guidelines.aspx> accessed 24 March 2017. and
'Euthanasia: The Compassionate Option' (PETA, 2017) <http://www.peta.org/issues/companion-animal-issues/companion-animals-factsheets/euthanasia-compassionate-option/> accessed 24 March 2017.
[41]*Animal Welfare Board of India v. A. Nagaraja*, (2014) 7 SCC 547.
[42]*Supra 41*

Arbitration of Oppression as in Companies Act 2013 : A Utopian approach.

Prajval Albuquerque, III LL.B.

Introduction

Arbitration as an effective method for dispute resolution was realized even before India gained freedom as it was a speedy mode of solving disputes and that it was more confidential. In pursuance of this method to resolve disputes the Arbitration Act of 1940 was passed but with the evolution of time and development of international commerce. The Act simply failed to fulfill the needs of growing international commerce within the country with regards to speedy solving of disputes. The need for a new Act became relevant after the economic reforms of 1992, which opened the gates for massive foreign investment in India. Thus a new Act was formulated on the guidelines of the UNCITRAL model law and so came into picture the Arbitration and Conciliation Act. The Act was comprehensive in nature and although it proved a boon to the foreign investments. It largely ignored one of the other changes that were introduced by the reforms in 1992. By the year 1992, it was clear that the citizens could easily set up Companies with a lot of ease. The Companies Act of 1956 in order to represent this sentiment was amended in 1996 and then in the year 2000. In the meanwhile, no change was made to the Arbitration and Conciliation Act with regards to make company law disputes Alternative Dispute Resolution (ADR) friendly. For that sake even the Amendments made in the Companies Act 1956 till date do not reflect any intention of the legislature to let the Companies or their promoters or the investors to get the benefit of the Alternative dispute resolution mechanism even after throwing open the equity market's doors to the general public, especially the quick and effective benefit of Arbitration. But then again the question is always open to debate that when such a huge amount of public fund is invested in the Companies and whose ownership is distributed over such a large geographical area is it suitable to rely on a quasi-judicial body for decisions

regarding such funds and the future of a company? The ADR System has its benefit too as in a situation where funds are involved priority should always be given to amicable solution for mutual benefit but it must also be noted that benefit thus received must not cause loss to the shareholder holding least number of shares in the company. The most vulnerable problem of the Companies Act 2013 is that it all comes down to the number of shares you hold so even if you wish to exercise minority rights you must have a certain number of shares or at least many of individual shareholders should come together to get themselves recognised as a 'minority'. Is this always possible? Besides there is already a quasi-judicial body to deal with the matters related to the Companies National Companies Law Tribunal, then how can reference to Arbitration be made? Thus a time has come to bring about a change especially with regards to Arbitrability of oppression in order to adopt a Utopian or ideal approach towards Arbitrability of oppression.

Oppression

The word oppression is not specifically defined in the Companies Act of 2013. The Act of 2013 under Ss. 241 and 242 does not make any attempt to define the word oppression but the legislators through the interpretations of the Ss. 397 and 398 of 1956 Act which corresponds with the above sections made provisions to identify what is oppression based on the acts which may be termed as oppressive in nature. The wordings of S. 241 of the Act of 2013 can be summarized as follows: (1) Any member of a company(a) who feels that the affairs of the company are being conducted in such a manner which are against public interest, prejudicial, oppressive with regards to any of its members or against interest of company or (b) such changes are not in the interest of any person or body towards whom the company owes a liability whether by any act changes, alters or replaces any the of directors, or brings about a change in the ownership and if such an act is prejudicial to any class of members. Then they may apply to the tribunal seeking relief against oppression as per the provisions of S.244.

Problems with regards to S. 241

Since the statute does not define the word oppression the entire burden to interpret the word oppression falls on the judiciary. Justice Wanchoo in the case of *Shanti Prasad Jain v. Kallinga Tubes*[1] accepted the explanation given by Lord Cooper in the case of *Elder v. Elder & Watson Ltd*[2]. Which reads as follows: *The essence of the matter seems to be that the conduct complained of should, at the lowest involve a visible departure from the standards of their dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to the company is entitled to rely.* The case further quoted a summary given in Meyer's with regards to determining important considerations which will be applied for determining the scope of S. 241 of new Act which is summarized as follows: The conduct complained i) must be such so as to oppress a minority of the members. ii) Must arise out of the predominant voting power of majority which may at times due to treating the affairs of the company as their own property. iii) There is a wide discretion with the court to provide an alternative remedy to winding up of the company. iv) It is not paramount whether the act committed is legal or illegal but whether the act is oppressive or not is of primary importance. The judiciary while interpreting the word oppression has through its interpretation made it very clear that oppression can only be claimed when the act is so eminently dangerous that it is going to affect their interest in the company as its members rather than just affecting their rights enjoyed by them as the members or the owners of the company. The Companies Act 2013 does not make any attempt to define the word oppression. The difficulty arises as the line drawn by the judiciary is so fine that it is very difficult for a person to identify what is oppression. This dilemma can be seen in the case of *Rights & Issues Investment trust limited v. Style Shoes Ltd.*[3] It was held that increasing the voting rights of

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[1] *Shanti Prasad Jain v. Kallinga Tubes*, AIR 1965 SC 1535/[1965] 1 SCA 556.
[2] *Elder v. Elder & Watson Ltd*, 1952 SC 49 Scotland.
[3] Rights & Issues Investment trust limited v. Style Shoes Ltd, [1964] All ER 628.

the share held by the management was not oppression. Though prima facie it looked like a case of oppression but the court took a stand that this act was beneficial to maintain the current management. Hence it was not oppression. Similarly in another English case where a minority shareholder was removed from his position of working director. Here the court held that this was not oppression as he had suffered the loss as a director and not as a member. There are various other decisions of the court where prima facie the case looks that of oppression but from the decisions of the judiciary in all the cases brought before it that emphasis is not to be given to the act but the motive behind that act. In the case of *Vijay Kumar Narang v. Prakash Coach Builders (P.) Ltd.*[4] it was held that: To constitute oppression the act need not be illegal or violative of any statutory provision but the impact of the act on the complaining member is to be considered. This causes a problem as the interpretation is to be given on facts of each case by the judiciary and in the long run because of a small difference in circumstance the judge may not abide by the earlier precedents and use his own discretion. With due respect to the judiciary at times a wrong precedent may be formed and it might take years to overrule the same, besides this in the absence of definition of term oppression each and every matter will have to be referred to the National Company law Tribunal; firstly to determine whether there is oppression based on its discretion. Only after it has been established will the matter of penalty be argued upon as in S. 242 of the Act.

The second problem with regards to S. 241 (1), it states that the matter in complain is to be that of public interest. The term public interest is not defined in the Companies Act. Hence again it is left to the judiciary to interpret the term public interest. The judiciary with regards to Companies law has not made any particular comment on what is public interest except in the case of *State of Bihar v. Kameshwar Singh.*[5]

[4] *Vijay Kumar Narang v. Prakash Coach Builders (P.) Ltd*, [2012] 114 SCL 132 (Kar.).
[5] *State of Bihar v. Kameshwar Singh*, AIR 1952 SC 252.

It has been observed that the word public interest is not capable of being defined precisely and has no rigid meaning and is elastic and takes its colours from the statute in which it occurs, the concept varying with the time and state of society and its needs. Thus what is public interest today may not be so as to what will be a decade later. In a previously discussed case, it is clear that a legal act may be oppressive in nature. Thus this interpretation though on a case by case basis may be beneficial but subjecting such an open-ended legal terminology such as "public interest" to oppression is a dangerous proposition.

The third problem is with regards to parties to the arbitration agreement. Arbitration clause is a part of every agreement but since there are number of shareholders in a firm signing an arbitration agreement with each of the shareholder will not be possible. Besides, the term oppression can only be complained against when there is a compliance with S. 244 which speaks about the minimum number of shareholders or members or the minimum amount of shares held to make a complaint under S. 241. As per the current Arbitration Act, there must be an agreement between the parties to enforce the oppressive act by a certain shareholder holding the minimum number required shares under S. 244 or any number of shareholders. Hence the question largely remains unanswered so as to who shall be parties to the arbitration agreement?

The last problem is with regards to S. 2 (4) of the Arbitration and Conciliation Act. This section limits the use of Arbitration and Conciliation Act to the limit whereupon it cannot encroach upon any other Act in place. So in a situation where the Companies Act provides for the adjudication by the Company Law Tribunal, then the Arbitration and Conciliation Act cannot be applied to the act of oppression committed.

Why is it necessary to Arbitrate upon Oppression?

The remedies to complaint filed under S. 241 are mentioned in S. 242, Sub-section (1) clause (b) and Clause (a) to clause (m) of Sub-section (2) excluding clause (i) will not lead to any benefit to the oppressed party rather it will only lead to loss to the members of the entire company, even

those members who have not been oppressed nor are oppressing even their interests are being affected. Some may argue that clause (h) is thus an answer to this question but the fact remains that if a director is removed from the board then the goodwill of the company will be tarnished which in turn will affect the value of the shares of the company. One opinion may be that the (2) (b) is a good opportunity for the oppressed people to take their stake and leave the company if they feel oppressed but then again is it not wrong to make the sufferers to leave the company and depriving them of an opportunity to be a part of a profit making company only because of the acts of its directors? For that matter, even in (2)(i) clause it is not expressly mentioned but from its wordings, it may be construed that priority is to be given to the to deposit the amount recovered in Investor Education and Protection Fund over repayment to identifiable victims. But the biggest drawback of adjudicating over oppression by the Company Law Tribunal is that the matter no longer remains confidential and as a result, the parties who are neither oppressed nor oppressing also suffer as the market value of their shares goes down due to the scandal in the company. It is an agreed fact that when so many members are involved even in Arbitration the confidentiality may not remain but at least there is a hope of matter remaining confidential.

Solutions

From the above paragraphs it is clear that judicial interpretations have been given to the word Oppression and from these interpretations, the word oppression can be safely defined in the statute itself so as to free it from the purview of public interest and thus make it arbitrable. The Arbitration and Conciliation does not permit any matter regarding the public policy to be arbitrated upon as in S. 34(2)(b)(ii). From the Judicial decisions, it is clear that oppression consists of four main ingredients. These are: 1) The act must be such that it causes the rights of the minority shareholders to be affected. 2) The act may be legal or illegal. 3) The act was done by the board of directors or the management for the purpose of self-benefit. 4) Any act which oppresses the rights of the minority shareholders but if such an act is done for the benefit of the Company as

a whole then it is not oppression. If a definition in the Act is formulated with regards to the points mentioned above then the matters regarding oppression can become an arbitrable dispute. This solves the first two problems as mentioned in the earlier paragraphs of this article.

The Bombay High court in the case of *Rakesh Malhotra v. Rajinder Kumar Malhotra*[6] opened the gates for referring the matter to Arbitration by the Company Law Board. But such matters should not be with regards to oppression but if the term oppression is freed from the shackles of 'public interest' then there should not be any problem to refer matters regarding oppression to Arbitration, when there is an arbitration agreement in place. The Judgment in *Rakesh Malhotra v. Rajinder Kumar Malhotra* is not the law of the land but this judgment looks favourable with regards to promotion of Arbitration in the country. Thus there is no harm in getting this principle ratified by the Supreme Court. Oppression prima facie looks like a case of fraud and in the case of *Swiss Timing Limited v. Organising Committee, Commonwealth Games 2010*[7]. The Supreme Court held that fraud as a subject matter of a dispute can be arbitrated upon and it is not against public policy to do so. Hence there should not be any problem legislatures to free the term oppression from the restrictions of public interest. Based on all the justifications made in this paragraph it will become possible for the Company Law Tribunal to refer the matter to Arbitration, besides in the form of *Rakesh Malhotra v. Rajinder Kumar* there is also a precedent of High Court to support the contention where a matter before the Company Law Board may be referred to oppression. Hence by upholding this contention, the impediment imposed by the S.2(4) can be removed. This solves our problem with regards to first and second problems.

[6] *Rakesh Malhotra v. Rajinder Kumar Malhotra*, (2015) 2 Comp LJ 288(Bom).
[7] *Swiss Timing Limited v. Organising Committee, Commonwealth Games*, 2010 AIR 2014 SC 3723.

The most important problem which needs to be resolved is with regards to the third issue. That is, with regards to parties to the arbitration agreement. In the case of *Rakesh Malhotra v. Rajinder Kumar*. It was easy to insert an arbitration clause in the agreement as it was all within the family but in reality, the shareholders are spread over a large geographical area and hence it becomes very difficult even to bring them together to fulfil the requirements of S.244 so as to file an application under S.241. The question of signing an Arbitration Agreement is entirely out of the picture and in the absence of laws or precedents in this regard. It leaves room for ample creativity to solve this problem.

To solve this problem first of all the amendment needs to be made to S. 5 of the Companies Act 2013 so as to insert a mandatory Arbitration clause in the Articles of Association of both public and private companies. The clause must contain the details with regards to disputes which may be arbitrated upon and shall include 'oppression' as one such dispute which shall be arbitrated upon. The Articles of Association must also contain the name of the permanent Arbitrator, a panel of Arbitrators or the Institute of Arbitration who shall be designated as the Permanent official Arbitrators of the company.

To solve the issue of parties to the Arbitration agreement the following words may be incorporated in the proposed mandatory amendment to S. 5, *"The parties to the agreement shall be any member or members of the company who come together with so as to form a group to comply with the provisions of S.244 of this Act. The other party to the dispute shall be the Board of directors and or management and for the purpose of Arbitration proceeding the property of the managers and or board of directors shall be attached to any dispute to be referred to the Arbitrator, Panel of Arbitrators or Institute of Arbitration.*

Provision should also be made in the Act so as to make it mandatory for the company to issue a copy of Arbitration Agreement with every IPO and FPO. Any person subscribing the shares shall also sign the Arbitration Agreement and submit it along with the share subscription form. Thus

every member of the company shall become a party to the Arbitration Agreement. When the shares are purchased and sold in the market it shall be presumed that they abide by the Arbitration Agreement which is an integral part of the rights anybody enjoys as a member of the company. So as not to take away the autonomy of Company Law Tribunal, the tribunal on a case by case basis shall decide whether the dispute which is sought to be arbitrated upon is in accordance with the matters to be arbitrated upon as in Arbitration Clause of Articles of Association. This will definitely lengthen the Arbitration proceeding but the primary objective here is not only to speedily dispose off the case but also to prevent the financial loss to members not a party to the suit which will take place if the remedies to oppression as provided under S.242 of the Act are resorted to.

Conclusion :

In the article issues with regards to Arbitration of oppression are discussed and how they may be solved by arbitration because at times even the judiciary feels that it is not right that all the matters be adjudicated upon by it. This can clearly be seen in the approach taken by Bombay High Court in the case of *Rakesh Malhotra v. Rajinder Kumar*. But primarily Oppression is to be brought under the ambit of arbitration to protect the interest of members who are neither oppressing nor being oppressed and to protect the value of their shares. It is utmost necessary to bring oppression under the purview of Arbitration and Conciliation Act.

Though one of the approaches, as stated in the essay, is very hypothetical but it is definitely plausible, although a Utopian or an ideal approach.

Divergence of Views onthe Concept of 'Control' between SEBI and CCI

Stephanie Nazareth, III B.A. LL.B.

Introduction

There are multiple regulators in the Indian regime that are governing a complex system of laws. They include the Competition Commission of India ("CCI"), the Reserve Bank of India ("RBI"), the Securities and Exchange Board of India ("SEBI"), etc. Mergers and Acquisitions ("M & A") have played a significant role in the corporate world and contribute to a major chunk of the economic growth. However, due to the overlapping jurisdictions and a vast number of regulatory approvals, transactions are unnecessarily stalled. Moreover, most of these regulations lack clarity creating delay in timelines and obstructing the smooth M & A process.

This article aims to provide an analysis of the potential areas of overlap in the concept of 'control' under the Takeover Regulations and Competition Act, 2002. 'Control' is an important jurisprudential concept in M & A's as there exists parallel triggers for an open offer under the Takeover Code and merger control notification to the CCI if there is an 'acquisition of control' by one company over another. Hence, the definition and interpretation becomes of significant importance.

The Takeover Code

The securities market is primarily governed by the SEBI. Under S. 11 of the Securities and Exchange Board of India Act, the SEBI is empowered to make certain regulations to govern the securities market and protect interests of investors. One such regulation governing the acquisition of shares or control in a listed company is the *SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011*. The SEBI Takeover Regulations were formulated after extensive consultations. In the last 20 years, it has been revamped twice with several other amendments. Any merger or acquisition of a listed company has to follow the provisions as set out in the Takeover Code.

Objective and Importance of the term 'Control' under the Takeover Code

The Takeover Code is based on the principles of fairness and equality. It aims to provide shareholders an opportunity to exit the listed company in case of a *substantial* acquisition of shares by the acquirer. The Code protects the interest of minority shareholders who do not wish to continue with the company post an acquisition. Any acquisition of shares that crosses a certain threshold or leads to an 'acquisition of control' will trigger a mandatory open offer under the Takeover Code. Open offer is the option given by the acquirer to existing shareholders to sell their shares and exit the company. There is quantitative and a qualitative test to determine the trigger for an open offer. The quantitative threshold is prescribed under Regulation 3 of the Takeover Regulations. For instance, any acquisition of shares that leads to shareholding or voting rights in excess of 25% will trigger an open offer.[1] However, other than share acquisitions, open offers are also triggered in cases where there is an 'acquisition of control.'[2] This is where the concept of 'control' becomes very important.

Definition and Interpretation of 'Control' under the Takeover Code

The definition of control has called upon the close attention of several regulators, jurists and courts due to the uncertainty and ambiguity in interpreting the term. Control is an inclusive definition and it reads: "*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.*"[3]

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[1] SEBI (Substantial Acquisition of Shares and Takeover) Regulations 2011, regulation 3 (1)2

[2] SEBI (Substantial Acquisition of Shares and Takeover) Regulations 2011, regulation 4.

[3] SEBI (Substantial Acquisition of Shares and Takeover) Regulations 2011, regulation 2(1) (e).

The definition is broken into two parts: (a) the right to appoint majority directors; or (b) right to control management or policy decisions of the company. The law is clear and precise with regard to appointment of majority directors to constitute control; however, there is an ongoing debate on the second part of the definition. *'Control the management or policy decisions'* is a wide expression and there is no clarity on whether instances like negative rights or special veto rights will constitute control.

In the case of *Rhodia S. A v the Securities and Exchange Board of India*,[4] an agreement with the acquirer stipulated that approval of acquirer should be obtained for all major decisions affecting the company's affairs and any structural and strategic changes. After reviewing the agreement, the Securities Appellate Tribunal ("SAT") came to the conclusion that though the acquirer did not directly own shares in the target company, the acquirer was in a position to control the company's affairs. However, in *Sandeep Save and others v SEBI*,[5] the SAT held that the requirement to obtain prior approval of Industrial Development Bank of India ("IDBI") or the right to remove and appoint directors on the board did not amount to acquisition of control over the company. According to SAT, the affirmative rights were merely temporary in nature and for the limited purpose of protecting financial investment at IDBI.

Similarly, in the landmark case of *SEBI v Subhkam Ventures (I) Pvt Ltd.*,[6] SAT held that negative rights will not amount to control. In this case, the investor had the right to nominate a director, the right to be present to constitute quorum and also affirmative/veto rights. The question that arose is whether all these rights (negative control rights) constitute 'control' for the purposes of the Regulations. The SAT held that negative rights will not amount to control and an open offer is not triggered. SAT observed: *"Control, according to the definition, is a proactive and not a reactive power. It is a power by which an acquirer can command the target company to do what he wants it to do. Control really means creating or controlling a situation by taking the initiative. Power by which an acquirer can only prevent a company from doing what the latter wants to do is by itself not control."* [7] An appeal was made to the Supreme Court by the SEBI. However, as the parties made an out-of- court settlement, the Supreme Court disposed of the matter without passing any ruling but clarified that the order of SAT will not be considered a precedent and question of law will remain open.[8]

[4](2001) 34 SCL 597 (SAT).
[5](2003) 41 SCL 47 (SAT).
[6]SAT Order (15 January 2010); Appeal No 8/2009.

Recently, to provide some clarity on the issue of 'control', SEBI issued a discussion paper on *Brightline Test for Acquisition of 'Control' under SEBI Takeover Regulations*.[9] The SEBI listed a number of protective rights, i.e. rights which do not amount to control. It stated that rights like appointment of chairman/vice-chairman, any commercial agreements entered into between Acquirer and Target Company conferring certain benefits to the acquirer, special veto rights, etc will not amount to control.[10] The discussion paper attempts to provide guidance on determining 'control' by making a distinction between protective and participatory rights. Any protective right as mentioned above will not constitute 'control' for the purposes of the Takeover Regulations. The suggestions offered by SEBI are not binding but only gives direction to investors and acquirers. In spite of precedents and clarification by regulatory bodies like SEBI, determination on 'acquisition of control' will have to be tested in light of the facts and circumstances of each case.

[7]*ibid.*
[8]*Securities & Exchange Board of India v Subhkam Ventures (I) Pvt Ltd*, SC, Civil Appeal No. 3371 of 2010.
[9]Securities and Exchange Board of India, 'Discussion Paper on "Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations" (14 March 2016) <
http://www.sebi.gov.in/cms/sebi_data/attachdocs/1457945258522.pdf
> accessed 28 February 2017.
[10]*ibid.*

Objective and Importance of the term 'Control' under the Competition Act

The *Competition Act, 2002* was enacted for the purposes of preventing agreements that have an adverse effect on competition, to sustain fair competition in market, to protect the interest of consumers and ensure freedom of trade. Any merger or exercise of market power due to the integration between major companies (competitors) can lead to reduction in players and an undue advantage in hands of the merged entity. Hence, the Competition Act prescribes pre - merger notification to the CCI on any 'acquisition of control.'[11] The understanding of control is very different across statutes. As already stated above, there is a stark difference in the term 'control' under Competition law and Securities law. While the decisions of SAT revolve under the idea of 'effective control' by the acquirer over the target company, the CCI does not follow the same considerations.

Definition and Interpretation of 'Control' under the Competition Act

The definition of 'control' under the Competition Act reads: Control includes '*controlling the affairs or management*' of one or more enterprises or group, either jointly or singly.[12] Controlling the affairs or management of the company is a broad expression and has a wider connotation than the Takeover Regulations. Unlike the decisions of SEBI and SAT, affirmative voting rights or negative rights is considered to be 'control' under the Competition Act.

In *MSM India/SPE Holdings / SPE Mauritius,*[13] the CCI concluded that the right to block special resolutions (affirmative voting right) amounts to negative control which is 'control' for the purposes of the Competition

[11]Competition Act 2002, s 6(1).
[12]Competition Act 2002, Explanation (a) to s 5.
[13]C-2012/06/63.

Act. Similarly, in the case of *Century Tokyo Leasing Corporation and Tata Capital Financial Services Limited,*[14] the CCI held that affirmative rights relating to the following items will constitute 'acquisition ofcontrol' for the purposes of Competition Act:

(a) annual budget;

(b) annual business plan;

(c) commencing new line of business or discontinuing any existing line of business;

(d) appointment of key managerial personnel and their remuneration; or

(e) strategic business decisions.

In the recent ruling of *Alpha TC Holdings Pvt Limited and Tata Capital Growth Fund I,*[15] the CCI listed a number of reserved matters that could amount to exercise of control even if given to a minority financial investor. The CCI reasoned that the list of reserved rights was related to strategic commercial decisions of the company and not mere minority protective rights.

Divergence of Views between CCI and SEBI

The recent Jet-Etihad deal clearly reflects the divergent approaches of the CCI and SEBI with regard to 'acquisition of control.' In this deal, Etihad Airways was acquiring a 24% stake in Jet Airways. Both parties entered into definitive agreements that granted Etihad the right to appoint the Vice - Chairman and the right to nominate two directors on the Board. The CCI noted that as both parties entered into composite combination with the common objective of enhancing their airline business through joint initiatives, the effect of these agreements including the governance structure

[14]C-2012/09/78.
[15]C-2014/07/192.

and the ability of Etihad to participate in the managerial affairs of Jet is significant to establish Etihad's *joint control* over Jet.[16]

However, when SEBI investigated the case to decide if there was any 'acquisition of control', the conclusion was different. The SEBI passed an order,[17] holding that Etihad did not acquire control over Jet under Regulation 2(1) (e) read with Regulation 4 of the Takeover Code. The observations by SEBI, to an extent, distinguished the conceptual difference in 'control' under Takeover Regulations and the Competition Act. According to SEBI, Etihad had the right to appoint only 2 directors out of 12 (which was the total board strength of Jet), it did not exercise any control over the management or policy decisions of Jet and did not have any veto or blocking rights, pre-emptive rights or tag along rights on the transfer of shares. Hence, the acquisition of 24% stake by Etihad did not amount to 'control' and did not trigger an open offer. While coming to this conclusion, SEBI noted that the definition of control under Section 5 of the Competition Act is different from that in Regulation 2 (1) (e) of the Takeover Regulations. It further observed that "*one regulatory agency may be guided by the findings of other regulatory agency on a particular issue only if the two laws are parimateria in their substance and are being applied on the same set of facts and circumstances.*"[18] If we view the language of Explanation (a) to S. 5 of the Competition Act, and Regulation 2(1) (e) of the Takeover Code, one will observe that both contain inclusive definition. The definition of control under 2 (1) (e) is specific with regard to control by way of (a) right '*to appoint majority of directors*' or (b) controlling '*the management or policy decisions.*' However, the definition under the Competition Act is only specific with regard to '*controlling the affairs and management.*' In the Jet - Etihad case, SEBI noted: "*the expression 'affairs and management' is of a*

[16]C-2013/05/122

[17]Jet Airways (India) Limited, Order No. WTM/RKA/CFD-DCR/17/2014.

[18]*ibid.*

much wider connotation than the expression 'management or policy decisions.' There could be a situation wherein by controlling the 'affairs and management' in a company, a person may be in a position to control the 'management or policy decisions' but it may not always be the case."[19]

The objective of the two Acts needs to be understood to analyse the difference in 'control.' As already mentioned earlier, the primary aim of the Takeover Code is fair and equal treatment to all shareholders. It protects the right of investors and provides minority shareholders an opportunity to exit the listed company in the event they are unsatisfied with the change in control or management of the company. This change occurs when there is a *substantial* acquisition of shares or 'acquisition of control.'

On the other hand, the purpose of the Competition Act is to prevent anti - competitive agreements that result in undue advantage or impacts the market structure. Hence, 'control' for the purpose of Competition law has a lower threshold and can occur even with slight influence of the acquirer over the target company. However, the same may not result in 'acquisition of control' under the Takeover Code as it may not lead to a substantial change in the composition of the company. For example, Company 'A' acquires a minority shareholding of 10% in its competitor 'B', with an agreement that allows it to hold two directors in the Board of Company B. Such an acquisition may lead to an alignment in the businesses of A and B with respect to price, market share, etc. This is against the objective of the Competition Act and will constitute to be an 'acquisition of control' for which notice to the CCI will be required. However, the same will not mandate an open offer under the Takeover Code as it will not lead to any major change in the management of the company and does not intend to offer an exit option to shareholders.

[19]*ibid.*

Conclusion

At present, there is still lack of coordination and co-operation between CCI and SEBI. Analysis of cases indicates that regulatory authorities have reviewed the nature of the investor, shareholding pattern, affirmative rights of the acquirer to determine 'acquisition of control' and do not decide purely on a quantitative basis. The major point of contention revolves around negative/veto rights. Investors generally retain certain negative and minority protection rights with a view to protect their commercial interests in the company. However, regulatory bodies in many instances have regarded these factors to result in 'acquisition of control.' There is no strict formula under the Competition Act or Takeover Code to determine what investments result in 'acquisition of control.' Acquisition cases are decided after carefully reviewing the transaction documents and facts and circumstances of the case. Veto rights which affect the ability of a company to carry on its business or influence the structural and strategic changes in the company, quorum restrictions, and natures of agreements entered into between parties need to be carefully scrutinized. What matters under the Takeover Code is the actual control of the investor over the Target Company and whether it leads to a substantial change in management of the company so as to provide an exit opportunity to shareholders, while what matters under Competition law is the acquirer's mere ability to control or intended exercise of control without the need of actual control. Though the discussion paper by SEBI provides some clarity on the issue of 'control', more guidance is required by the regulators and legislature. Until then, investors who do not intend to control affairs of the company must take care while drafting transaction documents to ensure that it does not reflect in any exercise of control.

Liability Of Hospitals For Medical Negligence

Kaanchi Singhal, V B.S.L. LL.B.

Introduction

The modern practice of medicine by commercial hospitals has raised questions of liability for medical negligence. The older structure of hospitals has undergone a change today, consisting of a hierarchy of management and hiring independent doctors for the medical services, although the medical staff of nurses and other equipment remains under the control of hospital. The modern hospital is an institution, which is a combination of all components of medical care, which cannot be provided independently by a doctor or a physician. While medical science continues to progress, organizational structure of such hospitals have been dynamic and cannot be expected to remain the same. This organizational structure involves interdependence on each other, raising complex issues of liability of medical negligence.[1] The dilemma in fixing the liability arises on the question of whether the independent doctors and other medical staff can be considered as "under the control of the hospital" and whether on those basis the hospital can be held vicariously liable for their acts of medical negligence. The clash arises between the choice to go into technical aspects of contract between the hospitals and the employees and doctors or protect the public interest and making the hospital vicariously responsible.

This paper analyses the position of India in this regard along with analyzing the position in English law. Part I discusses about the historical immunity given to hospitals in past. Part II discusses principles of respondent superior and corporate negligence for justifying hospital liability for medical negligence. Part III discusses that a patient can reasonably expect high quality of service from a hospital, which if breached would lead to liability

[1] Alanson W. Willcoz, " Hospitals and the Corporate Practice of Medicine ", (1960) 45, 3 Cornell Law Review, 432, 434

of hospital. Part IV discusses the difference between 'contract for service' and 'contract of service' and its liability for medical negligence. Part V discusses the liability of company directors, in case of medical negligence.

Historical Immunities To Hospital

Historically, for an individual to bring a suit against a hospital, he had to prove that the hospital is responsible for the negligent act. This followed with an accepted defense from the other side of 'Charitable immunity'[2] and 'Government Immunity'[3] under law of tort. Doctrine of charitable immunity first appeared in United States in 1876 in the case of *McDonald v. Massachusetts*[4]. This immunity was based on the ground of lack of funds with the charitable institution to bear the cost of litigation and liability from a tort action.[5] Various theories came up for justifying charitable immunity, but most states have now wholly rejected the idea of charitable immunity.[6]

The theory of Government immunity evolved on the ground that government cannot be sued for the negligent acts of its agents and employees unless it consents to such a suit.[7] Although this doctrine has also been rejected by some states, it still continues in a majority of them.

Principles of Respondent Superior and Corporate Negligence

Hospital liability for negligence is based on two theories of corporate negligence and vicarious liability from the doctrine of Respondent Superior.

i. Origin of Doctrine of Respondent Superior in English Tort Law

Under doctrine of Respondent Superior an employer is liable for tort committed by the employee within the 'course of his employment'. The

[2]*See also* Raymond L. Hanson & Ross E. Stromberg, " Hospital Liability For Negligence", (1969-1970), 21 Hastings L. J. 1, 1
[3]*ibid*
[4] 120 Mass. 432 (1876).
[5]*ibid*
[6]*ibid*
[7]*Faber v. State* (1960) 143 Colo. 240, 353 P.2d 609; *Lewis v. State* (1884) 96 N.Y. 71

test to find out if the person is an employee of the employer is right to control the employee's conduct in performance of his duties[8], which is contrary to an independent contractor.[9]

On various occasions, English courts have considered the question of who can be classified as an 'employee' of the hospital. The staff doctor has been considered as an independent contractor since the hospital has no right of control over his actions and because of his direct relationship with the patient.[10] Physicians were not considered as employees even though they were shareholders or officers of the hospital.[11] In some courts however it has been held that since the hospital pays salary to the physicians, through doctrine of respondent superior hospital remains liable even though hospital may have no control over actions of the physician.[12]

ii. Origin of Theory of Corporate Negligence in English Tort Law

Under this theory the hospital is made liable for negligence if it fails to fulfill a duty directly owed to the patient[13], for example furnishing equipment that is defective, improper or inadequate.[14] Therefore if harm is caused by the use of defective equipment in hospital as opposed to the negligent use of such equipment by staff, the hospital can be made liable directly under doctrine of corporate negligence.

iii. Indian Law

Indian courts in a number of cases have recognized both the principles of Respondent Superior and Corporate negligence to hold the hospital liable for negligence of staff, defective services as well as negligence by surgeons and physicians working independently.

[8]P. Mechem, *Outlines Of The Law Of Agency,* (4th ed. 1952) 349, 237
[9]*ibid*
[10]*See Barfield v. South Highland Infirmary*, 191 Ala. 553.
[11]*Jeter v. Davis-Fischer Sanitarium Co.*, 28 Ga. App. 708.
[12]*Gilstrap v. Osteopathic Sanitorium Co.*, 224 Mo. App. 798.
[13]IIA Hospital Law Manual, *Negligence* (1968) Ch. I, 3
[14]*ibid*

In *Krishna Mohan Bhattacharjee v. Bombay Hospital Medical Research Centre and Ors.*[15] the hospital was liable for medical negligence for employment of negligent staff. The court narrated that employers are liable under the common law principle represented in the Latin phrase, "qui facit per alium facit per se", i.e. the one two acts through another acts in his or her own interests. This is a parallel concept to various liability and strict liability in which one person is held liable in criminal law or tort for the acts or omissions of another. The court further held that the hospital is liable not only for acts done by the staff but also by the surgeons and doctors. "Hospital authorities are not only responsible for their nursing and other staff, doctors, etc. but also for the Anesthetists and Surgeons, who practice independently, but admit/operate a case. It does not matter whether they are permanent or temporary, resident or visiting consultants, whole or part time. The hospital authorities are usually held liable for the negligence occurring at the level of any of such personnel."

In *Joseph Pappachan v. Dr. George Moonjely*[16], Kerala High Court held the hospital liable for medical negligence on the basis of doctrine of corporate negligence: "persons who run hospital are in law under the same duty as the humblest doctor: whenever they accept a patient for treatment, they must use reasonable care and skill to ease him of his ailment. The hospital authorities cannot, of course, do it by themselves; they have no ears to listen to the stethoscope, and no hands to hold the surgeon's scalpel. They must do it by the staff which they employ; and if their staffs are negligent in giving treatment, they are just as liable for that negligence as anyone else who employs others to do his duties for him."

In *Aparna Dutta v. Apollo Hospitals Enterprises Ltd.*[17] Madras High Court discussed the liability of hospital in terms of medical services offered by them and held that a medical negligence by a surgeon employed by the hospital and doctor, hospital's liability could not be precluded. The court

[15] II (2015) CPJ 509 (NC)
[16] AIR 1994 Ker 289
[17] 2002 ACJ 954

observed as follows: "it was the hospital that was offering the medical services. The terms under which the hospital employs the doctors and surgeons are between them but because of this it cannot be stated that the hospital cannot be held liable so far as third party patients are concerned. It is expected from the hospital, to provide such a medical service and in case where there is deficiency of service or in cases, where the operation has been done negligently without bestowing normal care and caution, the hospital also must be held liable and it cannot be allowed to escape from the liability by stating that there is no master-servant relationship between the hospital, and the surgeon who performed the operation, The hospital is liable in case of established negligence and it is no more a defense to say that the surgeon is not a servant employed by the hospital, etc."

Legitimate Expectation From Reputation of Hospital

In *Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and Ors.*[18], Supreme Court held that the quality of services expected from a hospital can depend on the reputation of the hospital. Giving example of AMRI hospital in this case, the court narrated this point in the following words: "The standard of duty of care in medical services may also be inferred after factoring in the position and stature of the doctors concerned as also the hospital; the premium stature of services available to the patient clearly raises a legitimate expectation. We are not oblivious that the source of the said doctrine is in administrative law. A little expansion of the said doctrine having regard to an implied nature of service which is to be rendered, in our opinion, would not be quite out of place. AMRI makes a representation that it is one of the best hospitals in Calcutta and provides very good medical care to its patients. In fact the learned Senior Counsel appearing on behalf of the respondents, when confronted with the question in regard to maintenance of the nurses register, urged that it is not expected that in AMRI regular daily medical check-up would not have been conducted. We thought so, but the records suggest otherwise. The deficiency in service

[18] AIR 2010 SC 1162

enmates therefrom. Even in the matter of determining in medical service, it is now well-settled that of representation is made by a doctor that he is a specialist and ultimately it turns out that he is not that he is not, deficiency in medical services would be presumed."

'Contract For Service' and 'Contract of Service'

In *Smt. Savita Garg v. The Director, National Heart Institute*[19], Supreme Court observed that distinction between 'contract for service' and 'contract of service' cannot absolve the hospital of its liability: "Therefore as per English decisions also distinction of 'contract of service' and 'contract for service', is both the contingencies the courts have taken the view that the hospital is responsible for the acts of their permanent staff as well as staff whose services are temporarily requisitioned for the treatment of the patients. Therefore, the distinction which is sought to be pressed into service so ably by learned counsel cannot absolve the hospital or the institute as it is responsible for the acts of its treating doctors who are on the panel and whose services are requisitioned from time to time by the hospital looking to the nature of the diseases. The hospital or the institute is responsible and no distinction could be made between the classes of persons i.e., the treating doctor who was on the staff of the hospital and the nursing staff and the doctors whose services were temporarily taken for treatment of the patients. On both, the hospital as the controlling authority is responsible and it cannot take shelter under the plea that treating physician is not impleaded as a party, the claim petition should be dismissed."

In the case titled, *Smt. Rekha Gupta v. Bombay Hospital Trust and Anr.*[20], the National Consumer Dispute Resolution Commission, discussed this liability in following words: "the hospital who employed all of them whatever the rules were, has to own up for the conduct of its employees.

[19] AIR 2004 SC 5088

[20] 2003 (2) CPJ 160 (NCDRC)

It cannot escape liability by mere statement that it only provides infrastructural facilities, services of nursing staff, supporting staff and technicians and that it cannot suo motu perform or recommend any operation / amputation. Any bill including consultant doctor's consultation fees are raised by the hospital on the patient and it deducts 20% commission while remitting fees to the consultant. Whatever be the outcome of the case, hospital cannot disown their responsibility on these superficial grounds."

The Supreme Court, in *Achutrao & Ors. v. State of Maharashtra and Ors.*[21], observed that running a hospital is a welfare activity undertaken by the government but it is not an exclusive function of activity of the government so as to be regarded as being in exercise of its sovereign power. Hence the State would be vicariously liable for the damages which may become payable on account of negligence of its doctors or other employees.

In *Venkatesh Iyer v. Bombay Hospital Trust & Ors.*[22], Bombay High Court observed that hospital cannot be held guilty of medical negligence in absence of any cause of action against hospital and in absence of nexus leading to joint and several liability.

Liability of Company Directors

It has been observed in a number of cases that a company owning a hospital cannot be made liable for acts of medical negligence by the hospital. However with regard to facts and circumstances in one case, the high court has held the company to be liable.

In *Indraprastha Medical Corp. Ltd. v. State Nct Of Delhi & Ors.*[23], Delhi High Court held that Company/hospital cannot be made liable for nay personal act of medical negligence by the doctor. The hospital may

[21] JT 1996 (2) SC 664

[22] AIR 1998 Bom 373

[23] 130 (2006) DLT 292

be made liable for administrative negligence in providing proper facilities leading to improper medical treatment of the patient. "The offence of criminal negligence requires a specific state of mind in respect of the person committing the offence. The offence of medical criminal negligence cannot be fastened on the company since the company can neither treat nor operate a patient on its own. It is the doctor working in the company who treats and performs operations. It is the doctor who examines the patients and prescribes medicines. If there is a deliberate or negligent act of the doctor working in the Corporation / Hospital, it is the liability of the doctor and not of the Corporation for criminal negligence despite the fact that due to the act of the doctor of treating patients the corporation was getting some revenue. These days, all doctors with big hospitals, are on panels where they have a fixed fee for examination of patients and for conducting operations. Out of this fee, a percentage is paid to the hospital. The hospital/ company cannot be held liable for the personal negligence of the doctor in giving wrong treatment. However, if there is an administrative negligence, or a negligence of not providing basic infrastructure, which results into some harm to an aggrieved person or such negligence which is impersonal, the hospital can be held liable. But in the case of medical negligence, the Corporation would not be liable and it is the doctor who can be indicted for medical negligence."

Conclusion

The liability of corporate hospitals for medical negligence, has become a major legal dilemma in recent times. However, protecting the interest of people and as a matter of public interest courts have upheld the liability of hospitals for medical negligence by the independent doctors who are not under their direct control of the hospital, as well as staff under its direct control. The above decisions of courts are welcome decisions in matter of public policy.

Testing the validity of demonetization in light of the RBI Act, 1934[#]

Mahima Saini, III B.A. LL.B.

On 8th November 2016, the Prime Minister declared that the currency notes of denominations of ₹500 and ₹1000 (Specified Bank Notes or SBNs) shall cease to be legal tender in order to achieve the three-fold objective : (i) of curbing terrorism financing through Fake Indian Currency Notes (FICN) proceeds, (ii) preventing use of such funds for subversive activities like espionage, arms and drugs-smuggling etc. and (iii) eliminating black money. Later, on 31st December 2016, an Ordinance to that effect was promulgated.

While over 86%[1] of the currency lost its tender value and there was havoc in the economy, various legal questions came up for consideration to ascertain whether the Central Government had the power to initiate such a dynamic move. These issues can be classified into constitutionality aspects and legality aspects of the decision. This article seeks to bring to light the validity of the decision vis-à-vis S. 26 (2) of the Reserve Bank of India (RBI) Act, 1934.

Delegalisation and demonetization- difference

Delegalisation is when a currency unit is stripped off its status as legal tender. It can still continue to be used as a medium of exchange albeit without recognition of its value by the authority. This can be equated to a barter system of sorts where what is exchanged for the other may not have the same value as the other. For example, if one buys groceries and gives delegalized currency notes in return, what the shopkeeper gets are essentially only pieces of paper! The point where it differs from

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[#] Moot research as part of the 28th Kerala Law Academy National Moot Court Competition, 2017

[1] Reserve Bank Of India, Annual Report, 2015-16, p. 89, Table VIII.1 Banknotes in Circulation.

demonetization is that the latter makes the very act of holding (beyond the number permitted by law), transferring or receiving the demonetized currency notes as a punishable offence. To put it in line with the present scenario, the announcement of this decision by way of notification was delegalisation of the SBNs and the subsequent ordinance made it demonetization.

Interpretation of Section 26(2)

S. 26 (2) of the RBI Act reads as under,

> *"On recommendation of the Central Board the Central Government may, by notification in the Gazette of India, declare that, with effect from such date as may be specified in the notification, any series of bank notes of any denomination shall cease to be legal tender save at such office or agency of the Bank and to such extent as may be specified in the notification."*

1. Power to demonetize 'all' series of bank notes

A lot is being debated about whether the power to demonetize 'any' series implies the power to demonetize 'all' series as well. Considering that one of the objectives of introducing the RBI Act was to enable the RBI *'to operate the currency any credit system of the country to its advantage'* and that the Central Government has been given the power to *'direct the non-issuance or the discontinuance of bank notes'* vide S. 24 of the Act, it can be assumed that the Legislature intended to empower the authorities to demonetize all series of notes if the situation so demanded. Moreover, the principle of *ut res magisvaleat quam pereat* says that a legislation has to be construed in a manner that renders it effective instead of letting the provisions fail. Keeping this in mind, considering 'any' to exclude 'all' will render the very provision itself as unworkable since the intention of the Legislature will never be able to be realized to the fullest. In fact, such power has been exercised twice in the past (1946 and 1978) when all series of the relevant denominations of bank notes were demonetized.

2. Power to create exemptions

It may be noted that the action of withdrawing legal tender status of bank notes is subject to two provisos namely;

a) 'Such office or agency of the Bank' and

b) 'To such extent as may be specified in the notification'.

The provisos have been separated by the word 'and' which usually carries a conjunctive meaning. The Government's actions, however, indicate that it has given a disjunctive connotation to 'and'. Indeed, both the provisos stand independent of each other and can be given full and satisfactory meaning.[2]

From the Government's standpoint, it can be understood that the legislature has laid down the former proviso to give a minimum limit to the action of demonetization by stating that the notes of a particular denomination shall cease to be legal tender except atleast in the offices or agencies of the Bank. Since all types of complexities that may arise out of the furtherance of such exercise could not reasonably be in the Legislature's contemplation, the latter proviso was added in the nature of an inclusive one to enable the Government to take such measures as will ensure its smooth implementation.[3] The use of 'such extent' therefore justifies the creation of exemptions in petrol pumps, government hospitals, etc.; the laying down of number of days within which currency could be exchanged and the fixation of withdrawal limits in banks and ATMs as such powers were necessary for carrying out the purposes of the Act.[4]

However if one is to assign a conjunctive meaning, the result will be that the latter proviso when mentioning 'such extent' will actually refer to the extent of the first proviso i.e. the extent to which the delegalized bank notes shall be legal tender at offices and agencies of the Bank. It does not

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[2]*Vidyacharan Shukla v. Khubchand Bhagel & Ors.* AIR 1964 SC 1099.
[3]*State of M. P. v. Bhola* [2003] 3 SCC 1.
[4]*A.G v. Manchester Corpn.* [1906] 1 Ch. 643.

stand independent of the first. This entails that the Government has not been given the liberty to make exemptions for places other than either offices or agencies of the Bank, both of which have been clearly defined in the Act. Moreover, all banks are not covered under the definition of agencies of RBI which means that it was even illegal for the Government to make exemptions at all the banks, leave alone the exemptions in favor of petrol pumps and the rest. Any notification issued under a statute cannot amend or enlarge the scope of the substantive provisions of the parent Act.[5] If the 'conjunctive meaning' idea is adopted, the present series of notifications have not merely enlarged the provision but have changed it altogether.[6]

3. Adherence to principles of natural justice

Audi alteram partem **:** As far as *audi alteram partem* (hear the other side) is concerned, S. 26 (2) only requires the Central Government to receive the recommendation of the Central Board, upon which it can declare certain bank notes to cease to be legal tender. The fact that the public in general wasn't consulted before such a major move may seem to have a strong ideological basis but going strictly by statutory requirements, hearing of the affected party cannot be insisted upon. Consultation is obligatory only when so provided in the enabling statute and not otherwise.[7] Also, the very involvement of two bodies (one statutory and the other executive) in the process of delegalisation serves as a guarantee of sound decision-making which will be based on a balance of all interests.

But considering the magnitude of this decision and the number of livelihoods it impacted, it needs to be asserted that the Government and the RBI have turned a blind eye to this aspect of natural justice. The right of hearing has its roots in the notion of fair procedure and it is settled law

[5]*Tata Sky Ltd. v. State of M.P.* [2013] 4 SCC 656
[6]*U.S. v. Two Hundred barrels of Whisky* [1877] 95 U.S. 571;
Venkateswara v. Govt. of A.P. AIR 1966 SC 629
[7]*Kishan Prakash Sharma v. Union of India* AIR 2001 SC 1493.

that no man is to be deprived of his right to property without having an opportunity of being heard.[8] Prior to giving effect to such an extreme change, it was the prerogative of the authorities to take public opinion and ensure that all consequences of the alleged action were taken into due consideration. It is respectfully submitted that the procedure followed in the current scenario throws light on the patriarchal functioning of the RBI whereas it could have worked like *parens patriae*. It has been held that non-compliance with the rules of natural justice amounts to arbitrariness which is the antithesis to protection guaranteed under Art. 14 and Art. 21 of the Constitution of India.[9]

Sufficiency of notice: As regards the sufficiency of notice, a notification in the Official Gazette as well as through press releases by the Finance Ministry and the RBI will be proper.[10] Further, the Government has taken the defense that prior notice was not possible else the object of the entire exercise would have been frustrated. As has been held in the landmark judgment *JayantilalRatanchand Shah v. Reserve Bank of India,*[11]

"*...an element of surprise was absolutely necessary to ensure that no opportunity was available to the holders of the* Specified Bank Notes (SBNs) *to transfer the same to the possession of others. At the same time it was necessary to afford a reasonable opportunity to the holders of such notes to get the same exchanged.*"

Hence, the requirement of natural justice may be excluded where the nature of the function implies a policy decision.[12]

[8]*N. P. T. Co. v. N. S. T. Co.* [1957] SCR 98;
Style (Dressland) v. Union Territory [1999] 2 SCC 366
.[9] *Rajasthan State Road Transport Corpn. v. Bal Mukund Bairwa* (2), [2009] 4 SCC 299, 317
[10]*M/s. A - One Granites v. State of U. P. and Ors.* AIR 2001 SC 1203.
[11] JT 1996 (7) 681.
[12]*Saxena v. State of Haryana* AIR 1987 SC 1463.

Again, a counter-view could be that a notice which leaves just few hours before its implementation is not sufficient.[13] The judiciary attaches great importance to the facet of sufficiency of notice considering the fact that in certain instances even a three months' notice was held to be not sufficient on ground of it being unconscionable and against public policy.[14] Bearing this in mind, in a scenario like the instant one, it was imperative on part of the Government to give a prior notice.

Doctrine of 'legitimate expectation': This doctrine refers to the expectation that arises from an 'established practice' i.e. consistent acts arising out of the decisions of an authority. It has been held that there is no need for the fulfillment of expectation where an overriding public interest requires otherwise.[15] This doctrine cannot be invoked to fetter changes in administrative policy if it is in the public interest to do so.[16] This means that where there is a conflict between law and equity, it is the law which has to prevail. Equity can only supplement the law, but not supplant or override it.[17]

But this doctrine can also be used to test the arbitrariness of a governmental action.[18] While it does not mean illegitimate flight of fancy,[19] it says that when a person's legitimate expectation is not fulfilled by taking a particular decision by the decision-maker should justify the denial of such expectation by showing some overriding public interest.[20] To the question of legitimacy of expectation from the public stand-point, it can be stated that since demonetization of such a scale has never been done before, it was legitimate for the people to expect an uninterrupted enjoyment of their

[13] *Ramlila Maidan Incident v. Home Secretary, Union of India (UOI) and Ors.* 2012 (3) ALT (Cri) 91

[14] *Central Inland Water Transport Corpn. Ltd. v. Brojo Nath* AIR 1986 SC 1571

[15] [2005] 1 SCC 625.

[16] DD Basu, *Constitution of India* ,vol 2 (8th edn., Lexis Nexis 2008) 819.

[17] *Raghunath Rai Bareja v. Punjab National Bank* [2007] 2 SCC 230, 241-42.

[18] *State of W. B. v. Niranjan* Singh a [2001] 2 SCC 326, 329.

[19] D DBasu, Shorter Constitution of India, vol 1 (14th edn., Lexis Nexis 2009) 166.

[20] *MRF Ltd., Kottayam v. Asstt. Commissioner (Assessment) Sales Tax* [2006] 8 SCC 702, 722.

right to property as well as the arrangement of adequate substitutes to remedy the hardships that were caused due to its implementation.

Conclusion- Author's Remarks

In light of the above discussion, it is submitted that the demonetization law which seeks to address the grave menace of parallel economy in India is a welcome initiative by the Central Government. What is questionable is the power under which it has been introduced and the manner in which it has been sought to be implemented. While on one hand, the provisions of the RBI Act, 1934 serve as a good shield for the Government behind which to clothe its exercise of discretionary power, the side-lining of the principles of natural justice have given this decision a color of arbitrariness and unpreparedness on the other. The jury is still out on the matter as the Apex Court hears the numerous petitions that this decision has invited. It is sincerely hoped that that the Hon'ble Court's judgment will bring clarity to this grey area and set the right balance between power and public policy.

PRESENTATION

Uniform Civil Code- A Gender Perspective[1]

Aishwarya Sivadas, II LL.B.

Introduction

Personal laws were very significant during the pre independence era. However, the continuation of these early laws sans much amendment into the 21st century has brought in gender disparity shaking the essence of the Indian Constitution as laid down in the preamble. There is no need to list out the numerous discriminatory practices which are an outcome of societal norms. Under every religion there are different or similar types of discrimination against women. In Hindu law a number of amendments have been enacted which has helped solve gender disparity to a large extent. Unfortunately, Muslim law has effected little or no enactments to reduce disparity even after so many years of Indian independence.

Article 44

Article 44 of the Indian Constitution provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". Article 44 enumerates a uniform Civil Code for all and it is a long debated topic because it has been a dead letter since the time it was framed in the constitution. The constitutional assembly leaders had conflicting views regarding Art. 44 at the time, leading to its inclusion in the directive principles of state policy which are unenforceable articles. And now, the cries for gender justice find people dusting it out of its dormant existence.

[1]A presentation at Centre for Law and Policy Research Bangalore Talk series, November 29th 2016

Problems with Personal Laws

For years personal laws have been escaping constitutional scrutiny and have been making a mockery of the equality provisions under the Constitution. What is the use of having progressive equality provisions if they do not provide for women's equality? Art. 13 of the Indian Constitution says that any "law" that contravenes a basic right (ensured by Part III of the Constitution) is void which means that the courts shall ensure that all pre- constitutional laws will go through judicial review, to check whether there is any contravention of fundamental rights ensured under Part III of the Constitution. The expression "law" "incorporates any statute, request, bye-law, principle, direction, warning, custom or notification, having in the territory of India the force of law". The promotion of gender equality in India's Constitution begins with Art. 14 and Art. 15, which reinforces equality before the law or the equal protection of the laws and protection from discrimination on the groundsof religion, race, caste, sex, and place of birth. It has already been established in a case that personal laws do not come under constitutional scrutiny with respect to Part III of the Constitution.[2] But this was overruled by another case holding that personal laws are "laws in force" under Article 13 of the Constitution.[3] Since most of the personal laws, especially Muslim Law is gender discriminatory it can be inferred that personal laws contravene with the provisions of Part III of the Indian Constitution.Triple Talaq is banned in several Muslim countries which include Egypt, Iraq, Jordan, Kuwait, Lebanon, Morocco, Syria, Sudan, UAE and Yemen.[4] If such a gender discriminatory provision can be banned in so many Muslim countries, how is it still prevalent in a democratic country like India which stands for equality?

In the Indian context one might argue that Art. 25 provides Freedom of Religion "subject to public order, morality and health and to the other provisions of this part."[5] Art.29 protects cultural minorities reinforcing that

[2]*State of Bombay v. Narasu Appa Mali,* AIR [1952] Bom 84.
[3]*Re, Smt. Amina vs Unknown,* AIR [1992] Bom 214.
[4]M.A. Vaheeda Babu, 'Time to Lift the Veil of Minds' 2016 (4) KLT 17

any minority group in India "having a distinct language, script or cultureof its own shall have the right to conserve the same." So, personal laws of several tribal communities are also sanctified by the Constitution.Consequently, Arts. 25 and 29 should be read along with Arts. 14 and 15. Nevertheless,undesirable gender discriminatory practices should not be categorized as essential religious practices. It should also be kept in mind that, right to worship or to practice religion should not be confused with individual rights relating to inheritance, marriage or divorce, maintenance and adoption.

Silencing internal dissent has been a predicament since long. Here internal dissent refers to the shout for women's equality within personal laws. Those who fight against discriminatory personal laws are labeled as traitors to faith. Here, there is an evident conflict between individual rights and personal laws. However,out of fear of being ostracized from society, women tend not to raise their voice against gender injustice.Over 50,000 Muslim women and men have signed a petition seeking a ban on Triple Talaq. The petition, spearheaded by the Bharatiya Muslim Mahila Andolan (BMMA), has sought the National Commission for Women's intervention to end this "un-Quranic practice"[6]

The forefathers of the Constitution had intended to get rid of the biased Personal laws straightaway. The presence of Article 44 infers that the drafters put upon the Parliament the onus of destroying such prejudicial immoral religious practices by instituting a Uniform Civil Code. Thus Article 44 embodies constitutional morality. Constitutional morality is not about just following the constitutional provisions without contravention but also to ensure that the ultimate aim of the constitution is not disregarded.

The Shah Bano case[7] taught the country that personal laws can become a political battleground. The Supreme Court had passed a judgment saying that the Criminal Procedure Code would override Muslim Personal Law.

[5] "This Part" includes Article 14 and 15.
[6] Himanshi Dhawan, '50,000 Muslims sign petition against triple talaq' *The Times of India* (Mumbai, 1 June 2016).
[7] *Mohd. Ahmed Khan v. Shah Bano Begum* [1985] 3 SCR 844.

But later on, the then Prime Minister pushed in a new Act which had an overriding effect on the above judgment, restricting the liability to pay maintenance within the Iddah period only.[8]

Muslims, being a minority, have a constant need to maintain an identity different from that of the state. And here any type of change or progress for Muslim women in itself threatens the Muslim identity. And this freezes any form of potential internal reform that could take place.

India ratified many international instruments like International Covenant on Civil and Political Rights, 1966, Convention on the Elimination of All forms of Discrimination against Women 1979 (hereinafter referred to as CEDAW) etc. CEDAW is an important instrument for protection and promotion of women's right. It highlights culture and tradition as problems, because cultural practices and traditions all over the world define gender roles in ways that reinforce inequality, enshrine practices that restrict women's lives, and are harmful to women.[9] CEDAW proposes an agenda for national action to end gender discrimination. By signing CEDAW, countries commit themselves to take positive steps – including policy and legal steps – to end discrimination and promote women's equality. Every four years CEDAW States Parties must submit national reports on steps they have taken to comply with CEDAW. India, being a party to it, has not taken enough steps over the years, especially in Muslim Law, to end gender discrimination.

Challenges UCC will face

The first and most important challenge is the threat to identity that the Muslims will experience. Muslim Personal Law is a signifier of their identity distinct from that of the state and so a Uniform Civil Code will be greeted

[8] Muslim Women (Protection of Rights in Divorce) Act, 1986
[9] 'A Bill of Rights For Women' (Inter News) http://www.speakupspeakout.internews.org/?q=section-1-human-rights-knowledge/bill-rights-women accessed 23 November 2016.

with active resistance by them.State intervention into Art. 25 i.e Freedom of Religion is allowed. But there is a question as to what extent the intervention should be allowed.There is also vagueness as to the process of how the Uniform Civil Code will be made and who will control it and so it continues to remain a grey area.

The UCC debate is highly politicized. The forming of the Uniform Civil Code will be a very difficult task in the present political scenario in the context of a threatening Hindutva majoritarianism.

Considering the above arguments, the only way to sensitize the society towards a uniform code is to bring about internal reform within each religion. That will help maintain a higher acceptance rate.

Conclusion

Internal reform of all personal laws will lessen majority minority outcry for a code that is gender just. Enacting a Women's Rights Bill which has provisions that impede discrimination against women in the family framework could have a better effect in the longer run.

There should also be a provision that gives powers to the National Commission for Women in India to make them more prominent, similar to that of the Commission for Gender Equality in South Africaempowered to advice, educate, research, monitor and report issues concerning gender inequality.

In the present scenario there are too many legal nuances and controversies surrounding UCC. Hypothetically, a Uniform Civil Code could focus on rights within the family framework, leaving the rituals embodied in personal laws intact. A Uniform Civil Code should not be constructed, as sometimes suggested, by putting together the best elements from various existing personal codes. This will invite contention. It is far better that a uniform code is framed by some eminent authority like the Law Commission, in consultation with relevant experts and interests, as citizens' charter governing family relations.

LEGISLATIONS 2016-17 HIGHLIGHTS

Aadhar (Targeted Delivery of Financial and other subsidiaries, benefits and services) Act 2016

Jelsyna Chacko, III B.A. LL.B.

This Act aims to provide , a swift delivery of benefits and services to the residents of India having a UID (Aadhar) number. This number will be used for all the benefits linked to the consolidated funds of India or the expenditure incurred from it. The Central as well as the State Governments can use this number for the outlay of benefits and subsidies. Individuals with no Aadhar number will be offered other viable means of identification for the abovementioned delivery of subsidies, benefits and services

The salient features of the Act are as follows:

1. Eligibility –Every individual who has been a resident of India for 182 days in the year preceding the date of enrolment shall qualify to obtain a Unique Identity Number.
2. Information to be submitted –
   I. Demographic information (name, address, date of birth)
   II. Biometric information (finger print, iris scan, photograph)
   III. Other demographic and biometric details can be collected as per regulations of the Unique Identification Authority
3. Use of Aadhar number –
   I. Verifying identity of a person receiving subsidy or service
   II. Proof of identity for any purpose asked by any public or private entity
   III. Can't be used as proof of citizenship or domicile

4. Key functions of UID –
   I. Assigning authentic Aadhar numbers to individuals
   II. Mentioning specifically the demographic and biometric information to be collected during enrolment
   III. Mentioning specifically the usage of these Aadhar numbers
5. Composition of UID –
   I. Chairperson, 2 part time members and a Chief Executive Officer
   II. The Chairperson and members must have at least 10 years of experience in the field of governance, technology, etc
6. Protection of information – Biometric information collected will not be shared with anyone nor displayed publicly, except for purposes specified by regulations.
7. Cases when information may be revealed –
   I. Interest of national security
   II. Order of Court
8. Offences and penalties –
   I. Imprisonment up to 3 years and minimum fine of Rs10 Lakh, if anyone gets unauthorized access to the centralized database revealing any information stored in it
   II. Imprisonment upto 1 year or a fine upto Rs 10,000 or Rs 1 Lakh or with both, if enrolling agency and requesting entry fail to comply with the rules.
9. Cognizance of offence – Court will take cognizance of offence only on a complaint by UID Authority or a person authorized by it.

Anti-Hijacking Act, 2016[1]

Molik Purohit, II LL.M.

An Act to give effect to the Convention for the Suppression of Unlawful Seizure of Aircraft and for matters connected therewith and in the exercise of control of aircraft which jeopardize safety of persons and property.

As compared to the previous Act of 1982, the new Act of 2016 can be considered as a comprehensive legislation to battle against hijacking in the present contemporary world. The Act received the assent of the President on the 13th May, 2016.

The scope of the term "hijacking" has been considerably broadened, by adding the phrase "or by any technological means" considering the ever growing use of cyber space by terrorists. The new definition also includes within its scope any person who organizes or directs others to commit or participates in the offenceare guilty of hijacking.The Act has categorically defined the important terms like hostage, security personnel and the acts of unlawful interference in detailed manner which was missing in the previous Act of 1982.

A noteworthy feature of the Act is addition of death penalty and confiscation of moveable and immoveable property of a person convicted under the Act as a punishment. From the jurisdictional perspective the Act has enhanced the jurisdiction of Indian Courts to take cognizance for the offence of hijacking where such offence is committed by or against a citizen of India or such offence is committed by a stateless person whose habitual residence is in the territory of India.

On the whole, the new legislation is a welcome move, since *inter alia*, it reflects India's response to hijacking, a global concern in international aviation law and the national commitment to update the legislative machinery, by establishing an effective mechanism of combating hijacking.

[1]No. 30 of 2016

The Insolvency and Bankruptcy Code, 2016[1]

Swathy Nair & Swetha Nair, IV B.S.L. LL.B

The code establishes a comprehensive Law dealing with both Corporate and Individual insolvency to bring professionalism and efficiency in insolvency proceedings.

The code aims at expeditious resolution of insolvency matters, promotion of fruitful investments, releasing resources of the banks frozen in unproductive segments and improving the viability of credit materials. The Code amends Companies Act and a number of other Acts to effectively deal with corporate insolvency.

The Code provides a time limit of 180 days within which corporate insolvency should be resolved. Nevertheless, if in this period 75% of the creditors do not agree on the revival plan, the firm will automatically go into liquidation. An extension of 90 days may be granted if the creditors decide by 3/4th majority that the matter is too complex to deal within the prescribed period. The Code also makes provisions for monetary penalty and imprisonment for concealment of property, defrauding creditors and furnishing false information.

The act provides for the establishment of the following institutional framework:

1) Insolvency professionals to conduct the resolution process and manage the company during it.

2) Insolvency professional Agencies to regulate professionals by conducting examinations to enrol them and to enforce a code of conduct.

[1]No. 31 of 2016

3) Information Utilities to collect and disseminate financial information to facilitate insolvency resolution.

4) Insolvency and Bankruptcy Board of India to regulate Professionals, Agencies and Utilities.

5) NCLT(National Company Law Tribunal) and DRT(Debt Recovery Tribunal) to adjudicate corporate and Individual Insolvency respectively.

6) The Insolvency and Bankruptcy Fund of India.

Under the Code, the distribution of proceeds after the liquidation is to be made in the following order:

1) Insolvency resolution process cost

2) Debts owed to secured creditors

3) Workmen's dues for12 months

4) Other employees' dues

5) Debts owed to unsecured creditors

As this legislation enables early and timely insolvency resolution, it is a leap in the correct direction.

The Benami Transactions (Prohibition) Amendment Act, 2016[1]

Celestina Chacko, III BA.L.L.B

An amendment which acts as a breakthrough to eradicate black money and corruption.

This amendment seeks to supersede the Benami Transaction Act,1988 and prohibits Benami transactions and provides for confiscation of Benami property.

This Amendment Act elaborates the definition of Benami transactions and setting up of adjudicating authorities and an Appellate Tribunal along with specified punishment for engaging into the same.

The Amendment Act explains what constitutes Benami Transactions such as property transactions made in a fictitious name, where the owner denies the knowledge and ownership of the property, or the person providing the consideration for the property is not traceable.

The Amendment Act also specifies what does not come under the purview of Benami property, i.e. a property held by the member of a Hindu undivided family, for his or another family member's benefit, and is maintained from sources of income of that family; a person who owns it in a fiduciary capacity and the property held by a person in the name of his spouse or child, and is paid for from the person's income.

The act explicates the authorities and their functions which were to adjudicate the Benami transactions,i.e. an (i)Initiating Officer, (ii) Approving Authority, (iii) Administrator and (iv) Adjudicating Authority.

TheAmendment Act changes the penalty for entering into Benami transactions to rigorous imprisonment of one year up to seven years, and

[1]No. 43 of 2016

a fine which may extend up to 25% of the fair market value of the Benami property.

This amendment also specifies the punishment for giving false information i.e imprisonment of 6 weeks up to 5 years and a fine which may extend up to 10% of the market value of the Benami property.

The act provides for establishing an Appellate Tribunal to hear appeals against any orders passed by the Adjudicating Authority and Appeals against orders of the Appellate Tribunal will lie to the high court.

Session courts which try offences punishable under this act shall be designated as Special courts.

The Real Estate (Regulation and Development) Act, 2016[1]

Praful Shukla, III B.A. LL.B.

The Act was enacted to establish a Real Estate Regulatory Authority for regulation and promotion of the real estate sector and also to ensure that sales of real estate projects occur in an efficient and transparent manner and to protect the interest of consumers in the real estate sector.

The much awaited Real Estate (Regulation and Development) Act, 2015 hereinafter referred to as 'Act' came into force on 26th March, 2016. The object of the Act is to establish a mechanism to increase accountability of the Real Estate Sector and to provide an adjudication machinery for speedy dispute redressal.

The Act contains 10 Chapters.

Chapter I of the Act contains S.1 &2 which deal withShort title, extent and commencement and the definitions of certain words.

Chapter II which extends from S.3 to S.10 deals with registration of real estate projects and real estate agents. It makes it compulsory for the promoter and real estate agent to register a real estate project with the Real Estate Regulatory Authority. The promoters cannot offer a project for sale without registering with the Authority.

Chapter III, titled as functions and duties of the promoter, is the soul of the Act. After registration, the promoter has to furnish details of the project including site and layout plan and estimated time for completion of project. The promoter has to dedicate 70% of the amount received for the said project.

Chapter IV enlists the Rights and Duties of allottees.The allottees have a right to know the site and layout plan and stage-wise status of the project.

No.16 of 2016

The allottee is liable to pay interest to the promoter if he defaults in making payment.

Chapter V establishes the Real Estate Regulatory Authority. S.18 to S.40contain the composition, functions and duties and administrative powers of the authority. The function of the authority is to ensure that both the promoter and allottee fulfil their obligations and to adjudicate any dispute which may arise between the two.

Chapter VI directs the Central Government to establish Central Advisory Council. The Minister of Housing shall be ex officio chairperson of the Council, which shall consist of several other representatives of the Government of India.

Chapter VII establishes the Real Estate Appellate Tribunal. The tribunal has to dispose of any appeal within 30 days. Also the Tribunal is not bound by provisions of the Code of Civil Procedure, 1908 but is to be guided by principles of natural justice. S.43 imposes an obligation on promoter to deposit atleast 30% of penalty or the total amount to be paid to allottee with the Appellate Tribunal if they prefer an appeal

Chapter VIII enumerates various offences and penalties under the Act. S.71 allows any person to withdraw his complaint from the Forum or Commission established under the Consumer Protection Act of 1986 and file an application before the adjudicating officer under this Act.

Chapter IX deals with finance, accounts, audits and reports of the authority.

Chapter X bars the jurisdiction of the Civil Court to entertain any suit with matter connected to this Act. S.92 repeals the Maharashtra Housing (Regulation and Development) Act, 2012.

The Rights of Persons with Disability Act, 2016[1]

Kavya Bharadkar, V B.S.L.

An Act to provide, uphold and enforce the rights of persons with disabilities.

The Rights of Persons with Disabilities Act, 2016 is a remarkable legislative upheaval of the 1995 PWD Act; to give effect to obligations under the UNCRPD. Most importantly, it marks a shift from the controversial Medical model of disability towards the Social model by employing more progressive definitions, recognising the rights and entitlements of PWDs, empowering them through employment, healthcare and social security, encouraging inclusive education etc. It expands PWD protection to 22 (from 7) categories of physical, intellectual, mental and other disability.

Two forms of disability are recognised –benchmark disability and person with disability having high support needs. The principle of reasonable accommodation is evident in the Act, encouraging necessary adjustments where reasonable so that PWDs can enjoy rights equally with other citizens. Chapter II on Rights and Entitlements is more declaratory in nature, guaranteeing equality, liberty, non-discrimination, special position of female and minor PWDs, family, community and reproductive rights, legal capacity (most importantly) and access to voting and justice.

Central and State governments are directed to encourage inclusive education by promoting accessibility and transportation, books and audio support, providing teacher training and scholarships, etc. Chapter IV grants PWDs the opportunity for dignified social contribution by encouraging self employment and micro-credit, skill training and non-discrimination in employment. Chapter V guarantees assistance under State welfare schemes, to the quantum of 25% more than others. The relevant

[1] No.49 of 2016

government is required to provide for nsurance, unemployment benefit, shelter, maternal support and comprehensive free healthcare with barrier free access and priority services; as well as focus on cultural participation and sports.

Persons with Benchmark Disabilities are covered under Chapter VI including children's RTE (Right to Education), 5% reservation in higher education (5%) and employment (4%) as well as a 5% reservation in Government schemes like allotment of agricultural land and housing, poverty alleviation programmes. Part VII lays heavy emphasis on government responsibility towards awareness and mandatory accessibility norms. Five authorities are created under this Act – Central and State Advisory boards, District level committee and Chief and State Commissioner. A Special Court and State and Central Fund are established. The Act enumerates offences and penalties against the person, dignity and welfare of PWDs.

JUDICIAL PRONOUNCEMENTS 2016-17 Highlights

Bachpan Bachao Andolan v. Union of India[1]

Bhavya Pande, V B.S.L. LL.B.

In order to prevent and curb the growing menance of drug and substance abuse amongst children, the Supreme Court has directed the Central Government to formulate and adopt a national plan and also conduct a national survey to generate a national database.

The Supreme Court directed the Union Government to prevent and curb the use of drugs, alcohol and substance abuse amongst children by formulating and adopting a comprehensive national plan within four months. It was also directed to complete a much needed national survey in order to generate a national database within six months and to adopt specific content, related to eradication of drug and alcohol abuse, in the school curriculum under the New Education Policy (NEP) as formulated by the Ministry of Human Resource Development.

The petition was instituted in public interest under Article 32 of the Constitution of India for enforcing the fundamental rights of children particularly those affected by substance use and abuse. The petitioner, 'Bachpan Bachao Andolan', is an NGO working with a vision to create a child friendly society, to end child labour and child trafficking, and to ensure free education for all children as envisaged by our Constitution. To indicate the nature and extent of substance abuse in children across India, the petitioner relied on several reports such as:-

1. Report of the Planning Commission's Working Group on Adolescent and Youth Development for formulation of the 12th Five Year Plan (2012-17)

[1](2017) 1 SCC 653

2. Research study by National Commission on Protection of Child Rights (Aug 2013)
3. Annual Report of the Ministry of Social Justice and Empowerment (2013-14)
4. National Policy on Narcotic Drugs and Psychotropic Substances (NDPS) drafted by Ministry of Finance

The Hon'ble Court took the view that there was a need for a comprehensive formulation of a National Plan which would form the basis of co-ordinated intervention by the Union and State governments along with Government agencies and expert institutions at the national and international levels.

The Court highlighted India's international obligation to curb drug abuse under Convention on Narcotic Drugs 1961, SAARC Convention on Narcotic and Psychotropic Substances 1971, Convention on Rights of Child and Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. The stringent penalties under Sections 77 and 78 of the Juvenile Justice (Care and Protection of Children) Act, 2015 relating to substance abuse were also emphasized.

While deliberating upon the need for a survey and generation of a national database, the Court opined that in the absence of accurate data, a realistic assessment of the nature and extent of policy intervention required would not be possible.

The Court also laid stress on adoption of a holistic solution to deal with issues pertaining to alcohol, tobacco and drug abuse in the school curriculum especially as a part of awareness and sensitization.

Chief Secretary to the Government, Chennai, Tamil Nadu & Ors. v. Animal Welfare Board[1]

Sruthi Bandhakavi, II B.A. LL.B

Jallikattu is not an act essential to religion or any religious practice and therefore, cannot be protected under Art. 25 of the Constitution.

The present case is a review application in response to the decision given in the case *Animal Welfare Board of India v. A.Nagaraj & Ors*[2] sthat banned the annual event of Jallikattu in the state of Tamil Nadu. The case was heard in the Supreme Court by Justice Dipak Misra and Justice Rohinton Nariman.

The Court had to decide whether there was a contradiction between the Prevention of Cruelty to Animals Act, 1960 (PCA Act) and Tamil Nadu Regulation of Jallikattu Act, 2009 (TNRJ Act) and whether Jallikattu can come under the scope of right of freedom of religion.

The Petitioners submitted that the TNRJ Act, 2009 falls under the subject of "agriculture" under Schedule VII List II Entry 14 of the Constitution and thus, is constitutional. They also submitted that Jallikattu, as a harvest festival, is rooted in the religion and needs to be protected under Art. 25 of the Constitution.

Dismissing the petition, the Court held that the TNRJ Act, 2009 which envisages bull fights is inconsistent with the PCA Act, 1960 whose purpose is to prevent any animal cruelty. It further stated that Jallikattu cannot be included under the subject of "agriculture" in the Constitution solely because the event takes place after harvest.

Addressing the issue of Jallikattu and its relation with religion, the Court held that the scope of Art. 25 is limited to the matters of religious doctrine or belief and extends to acts done in pursuance of religion. It concluded that it does not find any connection or association of Jallikattu with the right of freedom of religion and its fundamental facets in Art.25 of the Constitution.

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[1] 2016 SCC OnLine SC 1397

[2] (2014) 7 SCC 547

Common Cause v. Union of India [1]

V. V. Gnanusha, IV B.S.L. LL.B.

Appointment of a Special Investigation Team by the Supreme Court to deal with coal block allocation cases.

The Supreme Court in its order dated 14.05.2015 held that it was completely inappropriate on the part of Mr. Sinha (then the Director of CBI) to meet the accused persons in the coal block allocation cases in the absence of an investigating team or an investigating officer. In view of this the Court felt that it was necessary to hold an enquiry as to whether such meeting/s of Mr. Sinha with the accused persons had any impact on the investigations and subsequent charge sheets or closure reports filed by CBI and subsequently a committee headed by Mr. M. L. Sharma was appointed. A report was submitted by him on 04.03.2016.

It was prayed that the honourable Supreme Court should appoint a Special Investigation Team (SIT) to investigate the abuse of authority committed by the CBI Director in order to scuttle enquiries, investigations and Prosecutions being carried out by the CBI in coal block allocation cases and other important cases.

The Court, instead of appointing an outside body of investigators, continued to repose its faith in CBI to look into the report prepared by Mr. M. L. Sharma and other relevant documents and to conduct an investigation as a SIT into the abuse of authority committed by Mr. Ranjit Sinha with a view to scurry the procedure being carried out by the CBI.

The Court held that a Special Investigating Team led by the Director, CBI may be assisted by two CBI officers nominated by the Director with due intimation to this Court. The Chief Vigilance Commissioner should be taken into confidence by the Director, CBI in terms of investigations.

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[1] 2017 SCC OnLine SC 54

Mr. R. S. Cheema, a Special Public Prosecutor in the coal block allocation cases, would be assisting the Director, CBI and his team on legal issues.

Neither did the Court make any opinion on the merits alleged by the petitioner nor any comment on Mr. M.L.Sharma's report but held that a prima facie case of abuse of authority by Mr. Ranjit Sinha had been made out for investigation in terms of the report.

Gayathri v. M. Girish[1]

Parinita Yadav, II B.A. LL. B.

The Justices declined to entertain the special leave petition in this case where the petitioner-defendant, by seeking numerous adjournments, abused the process of the court.

This is a case where the petitioner-defendant indulged in an abuse of the process of the court by seeking numerous adjournments on various pretexts. Justice Deepak Misra and Justice Rohinton F. Nariman passed quite a satirical judgement with a hint of vexation.

The respondent filed Ordinary Suit No. 1712 of 2007 for recovery of possession and damages. The general power of attorney holder through which the plaintiff prosecuted the litigation, was constrained to come to court on seven occasions, for examination-in-chief. Thereafter, the defendant filed seven interlocutory applications (I.As), under Order XVII Rules 1 and 2 of the Code of Civil Procedure, seeking adjournment. Thereafter, I.A No. 15 was preferred to recall PW-1 for cross-examination and the learned trial judge allowed the said application subject to payment of costs of Rs. 800/-.

In spite of the court granting adjournment subject to payment of costs, the defendant did not cross-examine the witness and continued filing I.As forming the subject matter of I.A Nos. 16, 17, 19, 20 and 21 and the tribulation of the plaintiff, a septuagenarian, continued. The trial court adjourned the matter to 3.10.2015, on which day although the witness was present, both the defendant and her counsel failed to turn up. The trial court posted the suit for defendant's evidence and adjourned the matter. Thereafter, I.A No. 22 of 2016 seeking further cross-examination of the plaintiff was declined by the trial courts with costs of Rs. 1000/-.

[1] 2016 SCC OnLine SC 744

The defendant filed a writ petition before the High Court of Karnataka at Bangalore. The court relied on *K. K. Velusamy v. N. Palanisamy*[2] and held that this is a classic case of abuse of process of law. The High Court dismissed the writ petition without imposition of any costs. *K K. Velusamy*[3] was referred to, to show the purpose of filing an application under Order XVIII Rule 17 of the Code. The Court laid down that if the application is mischievous or frivolous, it is desirable to reject the application with costs.

The Court referred to *Noor Mohammed v. Jethanand*[4] to say that the access to speedy justice is a human right and is not only the creation of law but also is a natural right.

In view of the aforesaid analysis, the Justices declined to entertain the special leave petition and dismissed it with costs assessed at Rs 50,000/-. If the amount was not deposited within eight weeks, the right of defence to examine the witnesses would be foreclosed.

[2] (2011) 11 SCC 275
[3] *Supra 2*
[4] (2013) 5 SCC 202

Haji Ali Dargah Trust v. Dr. Noorjehan Safia Niaz[1]

Ayushi Berry, IV B.S.L. LL.B.

Haji Ali Dargah to allow women to enter into the sanctum sanctorum.

A Public Interest Litigation was filed under Art.226 of the Constitution of India, seeking a writ of Mandamus against the arbitrary denial of access to women in the sanctum sanctorum of the Haji Ali Dargah, Mumbai.

The Petitioners who were the office bearers of the 'Bharatiya Muslim Mahila Andolan' alleged that the entry of women in the sanctum sanctorum which had been permitted upto 2012 and recently was restrained in 2012. This restrain is in contravention to the provisions of Art.14 and Art.15 of the Constitution of India.

The Respondent no.2, the Haji Ali Dargah Trust (a public charitable trust) maintains that the ban is not absolute as it permits the entry of women through a separate entrance which is in consonance with the verses of the Quran and Hadith.

The Court addressed the conflict between Art.14 and Art.15 on one hand and Art. 26 on the other. It asserted that the abridgement of fundament rights is permissible if the ban is an essential practice of Islam. Considering the arguments of the respondent, the Court observed that the Quran or Hadith does not consider the act of women entering the Dargah a sin and hence, the prohibition is not an essential part of Islam. The Court determined that the non-essential religious practices are considered secular and can be regulated by the State.

Moreover, the Trust is governed under the scheme of the government that does not vest any powers in the Trustees in the matters of religion. The Trust cannot override the right to religion under the guise of right to manage the Trust.

The Bombay High Court ordered to restore the status-quo ante i.e. women be permitted to enter the sanctum sanctorum at par with men.

[1] 2016 SCC OnLine SC 1199

Hiral P. Harsora v. Kusum Narottamdas Harsora[1]

Vaishnavi Raul, IV B.S.L. LL.B.

Term "Adult male" from the definition of "respondent" under the Protection of Women from Domestic Violence Act, 2005, struck down.

On April 3, 2007 Kusum Narottamdas Harsora and her mother Pushpa Harsora (Appellants) filed a complaint under the Protection of Women from Domestic Violence Act, 2005 (the Act) against Pradeep, the brother/ son, his wife and two sisters/daughters (female Respondents) alleging various acts of violence against them. The said complaint was withdrawn on June 27, 2007. Later the appellants filed two separate complaints against the same respondents in October, 2010.

Thereafter an application was made before the Metropolitan Magistrate for a discharge of female respondents stating that the complaint was made under S.2 (a) and S.2 (q) of the Act which can be only made against adult male person and therefore the female respondents required to be discharged.

The court passed an order dated January 5, 2012 refusing such discharge. A writ petition was filed against the order dated January 5, 2012 before the Bombay High Court wherein the court discharged the female respondents from the complaint. This order has since attained finality. Thereafter the appellants filed a writ petition in the Apex court wherein the constitutional validity of S.2 (q) of the Act was challenged.

The Apex Court held that if the word "Respondent" is to be read as only an Adult male person then the women who evict or exclude the aggrieved person from the shared household do not come within its ambit.This would then defeat the objects of the Act. Therefore the High Court's judgement was set aside. The words 'Adult male' in S.2 (q) of the Act and its proviso were deleted as they were inconsistent with Article 14 of the Indian Constitution.

[1] 2016 SCC On Line SC 1118

In Re, Punjab Termination of Agreements Act, 2004[1]

Divya Raghuwanshi II LL.M.

The Punjab Termination of Agreement Act, 2004 declared unconstitutional.

In a Special Reference made to the Hon'ble Supreme Court, by the former President late APJ Abdul Kalam under Art.143 of the Constitution of India, the legality of *The Punjab Termination of Agreement Act, 2004* was questioned. The Constitutional Bench of Anil R. Dave, Pinaki Chandra Ghose, Shiva Kirti Singh, Adarsh Kumar Goel and Amitava Roy, JJ presided over the matter. The cause *célèbre* was the impugned Act by the State of Punjab terminating the agreement with State of Haryana for construction of Sutlej-Yamuna link Canal (SYL Canal), while the performance of the agreement terms was in dispute before the Hon'ble Supreme Court.

The questions of law referred to the Apex Court were-

a) the constitutionality of the provisions of the impugned Act;

b) the consistency of it with the Punjab Reorganization Act, 1966;

c) validity of the termination of the agreement by legislation and

d) Whether the legislation was a valid discharge from the obligation.

The State of Haryana contended that the impugned Act was an effort by the state of Punjab to bypass the judgment on completion of the SYL canal. The State of Punjab contended thatS.78 (1) of the 1966 Act is ultra vires of the Constitution of India, and that all acts done in consequence of it including all agreements are null and void.

The Hon'ble Supreme Court, through Anil Dave J., accentuating the supremacy of the Constitution, doctrine of separation of powers and the

[1](2017) 1 SCC 121

rule of law held that the unilateral termination of the agreements between the two States, benefitting other States, through a State Legislation, was *inter alia* in excess of the State legislative powers and unconstitutional. In a supplementing opinion, Shiv Kirti Singh J. emphasized on the peculiar and essential features of the federal set-up and basic tenets of constitutionalism.

Indian Hotel & Restaurant Association &Anrv. State of Maharashtra & Anr[1]

Soumyashree Ray Chowdhury, I B.A. LL.B.

The Supreme Court reinforced the 2013 judgement and allowed the Dance Bars to operate under certain modified conditions.

The petitioner Indian Hotel & Restaurant Association had filed Writ Petition before the Hon'ble Supreme Court before the bench comprising of Dipak Misra and Shiva Kirti Singh, JJ.

The Petitioners had challenged the stringent norms regulating bars, while the Maharashtra government was justifying the need for these restrictions to ensure the safety and dignity of women working in these establishments. The Apex Court on August 30 issued a notice to the Maharashtra Government over a new law for dance bar licences to reply within six months to the notice. The Court had, in the month of May, directed the Maharashtra Government to grant licenses to eight dance bars within two days and asked them to give an undertaking that they would not engage employees with criminal antecedents near the dance area. The Dance Bar Regulation Bill, that was unanimously passed by the Assembly on April 13, among other things, prohibits serving liquor in performance areas and mandates that the premises must shut by 11:30 pm. It also imposes heavy penalties on dance bar owners and customers for not following these rules. The Apex Court had on 2nd March rejected certain suggestions like providing live CCTV footage to police of performances in the dance bars and asked the state government to grant licences to owners within 10 days after they comply with the modified guidelines.

In the case before the apex court the court had noted down seven conditions that were put forward by the counsel appearing on behalf of

[1]2016 SCC On Line SC 215, Writ Petition No. 793 of 2014

the petitioners. The court had dwelled upon these conditions and had modified some of them.

The modified conditions along with the conditions on which there were no objections from the respondents were accepted. It was directed by the Hon'ble court that the respondents shall issue the licenses within ten days after the order was passed.

International Confederation of Societies of Authors and Composers (CISAC) V Aditya Pandey & Ors[1]

Karishma Agrawal, LL.M. II

The Supreme Court has held that dual licenses are not needed for playing songs in public events under Section 14 (e) (iii) of the Indian Copyright Act, 1957

In the instant case the lyrics of the song were written by 'X' (Lyricist), music composed by 'Y' (musician) and sound recording by 'Z' (Sound Recording Company).

'A' (Event Management Company/EventOrganizer) wanted to play the song in public. Earlier, the Delhi High Court Division Bench held that only the owners of the sound recording were to be paid royalty for the communication or broadcasting of the said recording to the exclusion of the lyricists and the composers.

This was an appeal against the High Court order and CISAC who was not the party to the case heard by the Trial Court then, but now became Appellant No 2 in this Petition. Thus the issue raised was, whether 'A' is required to seek license from 'X' and 'Y' forsubsequently playing the song in public even after 'A' had paidfor the broadcasting of the song to 'Z' (Sound Recording Company).

The Apex Court upheld the High Court judgment and concluded that even though the rights provided under S.14 of the Indian Copyright Act, 1957 were independent of each other, the producer of the sound recording (also an author by virtue of S.2 (d) (v)) would still have the right to communicate his work to the public. The Court also held that the case was filed in 2006 where as it was only in the year 2012 that the Amendment

[1]CIVIL APPEAL NO. 9412-9413 OF 2016 (Arising out of S. L. P (C) Nos. 2380-2381 OF 2014)

was brought, wherein S.19 (10) was inserted in the Copyright Act, 1957. Thereby the assignment of copyright in any non-film musical work shall not affect the rights of lyricists and composers to claim an equal share of royalties.

Karma Dorjee & Others v. Union of India & Others[1]

Dipanwita Ghosh, V B.S.L. LL.B.

Supreme Court held that the Governments, both at the centre and the states have a non-negotiable obligation to take positive steps to give effect to India's commitment to racial equality.

The petitioner, Karma Dorjee, a lawyer, filed this writ petition under article 32 of the Indian Constitution.

He drew the attention of the Court to the various instances of discrimination and crimes committed against the people hailing from the north-east. Such acts of discrimination violate the fundamental duty under Article 51A (e) which is to "to promote harmony and the spirit of common brotherhood amongst all the people of India..."

The petitioner sought a writ of mandamus directing the Union and State governments to frame a proper mechanism to deal with cases of racial atrocities, intolerance and discrimination and to all authorities to undertake programmes for inculcating awareness and to sensitise both the public and the law enforcing machinery inter alia.

The judgment delivered by a bench comprising of Justice T. S. Thakur, Justice D. Y. Chandrachud and Justice L. Nageswara Rao on December 14, 2016.

The court opined that ***in order to enhance a sense of security and inclusion, the Union Government in the Ministry of Home Affairs should take proactive steps to monitor the redressal of issues pertaining to racial discrimination faced by north-eastern citizens.*** It suggested the formation of a committee primarily for the implementation of the Bezburuah Committee. It also provided an outline as to its composition and functions. While recognising the gravity of the issue in

[1](2017 1 SCC 799)

this case, the court expressed that "... the problems faced by persons from the north-east traverse a whole range of issues, from the mundane issues of daily life to matters of education, employment, social security and the fundamental right to live in dignity."

The Bench expressed that the mind-set of the people of this country has to be changed across all platforms including all educational institutions, places of work and the societyas a whole. Awareness of cultural history and traditions of the north-east have been said to play an important role in sensitizing people towards this issue and being more inclusive of people from the land of the north-east.

In furtherance the Bench suggested the redressal and monitoring mechanism set out by the Delhi Police in resolving such issues to be monitored by the Union Ministry of Home Affairs, and if found to be effective, be replicated across the country.

Meera Santosh Pal and Ors. V. Union of India and Ors[1]

Surabhi Smita, II B.A. LL.B.

Woman allowed to terminate twenty four weeks pregnancy after foetus was diagnosed with Anencephaly.

The petitioner, Mrs. Meera Santosh Pal, approached the court for the medical termination of her pregnancy on the grounds that her fetus was diagnosed with an untreatable defect called Anencephaly which leaves fetal skull bones and eventually may cause the infant's death during or shortly after the birth while also endangers the mother's life.

The respondents were issued a notice on 11.1.2016 for the medical examination of the petitioner by a medical board comprising of seven doctors. The medical board gave its report on 12.1.2016 during which she was in her 24th week of pregnancy.

The medical board in its obstetric evaluation report confirmed the presence of single live fetus with Anencephaly and that the fetus was without a skull and lacked the chances of survival after birth and continuation of the pregnancy would put the petitioner's life in danger while the termination was within acceptable limits.

The decisive question before the Supreme Court was whether the right to bodily injury can pave way for medical termination of pregnancy. The petitioner argued that according to 'personal liberty' bestowed on her by the virtue of the Article 21 of the Constitution she had the right to make her reproductive choices, in sound mind.

The court relied on the case of *SuchitaSrivastatva v. Chandigarh Administration*[2] which laid the principle that women have the right to

[1] 2017 SC 39
[2](2009) 3 SCC (Civ) 570

abstain from participating in any sexual relationship, adopt birth control methods, to carry a child, to give birth and to subsequently raise him.

After following the report submitted by the Medical Board, the court decided that even though the pregnancy was in its 24th week, having regard to the danger caused to petitioner's life, she was permitted to terminate the pregnancy. The termination was to be performed by the same doctors who had done her medical checkup and further to be supervised by the Medical Board.

M/S Alcon Electronics Pvt. Ltd. v. Celem S. A. Of Fos 34320 Roujan, France and Anr[1]

Sravya Darbhamulla, V B.S.L. LL.B.

Foreign order for costs with interest executable as a decree by District Court, having regard to the principle of 'comity of nations.'

The Supreme Court in the present case dismissed the Special Leave Petition of the Appellant, filed against the order of the High Court of Bombay[2], and confirmed the order of the District Judge at Nashik.The District Court had refused to interfere in the enforcement of orders passed by the High Court of Justice, Chancery Division, Patents Court, English, in the course of a patent infringement claim,by the present Respondents against Appellants (judgement- debtors therein).

These orders were: firstly, dismissal of jurisdictional challenge by the appellants, and secondly, order imposing costs of £12, 229.75. An interest rate of 8 % upon this judgment debt was to be calculated under the Judgments Act 1838 , a provision which has no parallel in Indian law after the deletion of S. 35 (3) of the Code of Civil Procedure, 1908.

The Supreme Court upheld the competence of the District Court to execute these orders as a decree. It stated that a judgment by a foreign court that had attained finality as between the parties could not be impeached except as under S.13. The principle of 'comity of nations' meant that the order of the English Court was to be respected.

The decree was not hit by S.13 (c) of the Civil Procedure Code, as a reasoned order on merits had been passed. Under S.44A (3), explanation 2, the interlocutory order washeld to be a 'decree' executable by the Court.

[1]Civil Appeal V No. 10106 of 2016
[2] Civil Revision Application No. 680 of 2011

In regard to costs being barred under Indian statute, the Court stated that the monetary cap under S.35A applied to imposition of costs for false or vexatious claims and not to compensatory costs under S.35.

As regards to interest, although S.35 (3) of the Civil Procedure Code which had provided for interest on costs had been deleted, a positive prohibition on interest on costs was not contemplated by the Parliament. The Court held that the enforcement of broad substantive rights, bound to the remedy, should not be defeated by an assumption of limitations by the Court. Therefore, the Court was empowered to execute the decree for costs with interest decreed by the English Court.

Mukarrab and others v. State of Maharashtra[1]

Sumedha Kuraparthy, II B.A. LL.B

Medical opinion in age determination vis a vis the juvenility of the accused is not incontrovertible. The purpose of the Juvenile Justice Act, 2000 is not to give shelter to those accused of grave and heinous crimes.

The appellants, convicted under S.302 read with S.149 and S.148 of the IPC, raised a claim of juvenility before the Apex Court. The Court issued orders for ossification tests to be carried out to determine the age of the accused as documentary evidence was unavailable to ascertain the same. The Medical Board opined that the accused were 35-40 years of age on the date of examination.

The Court relying on the *Babloo Pasi case*[2] stated that the medical opinion while being useful is not of a conclusive nature and needs to be considered with other circumstances. It held that given the nature of the case, a blind and mechanical view solely based on the results of radiological examination cannot be adopted. Moreover the accused now having crossed thirty years of age, it is impossible to precisely determine their age.

The Court further observed that while it is an established principle that when there can be difference in views, the courts lean towards holding the accused as a juvenile. However, referring to *Parag Bhati v. State of U.P.*[3] the Court held that the purpose of the 2000 Act was not to offer protection to those accused of heinous offences and that the benefit of benevolent provisions of the Act would apply only to cases with prima facie evidence of juvenility of the accused. In the absence of any other evidence, the Court dismissed the appeal thereby affirming the conviction of the appellants.

[1] 2016 SCC On Line SC 1413.
[2] (2008) 13 SCC 133.
[3] (2016) 12 SCC 744.

Mumtaz V. State Of Uttar Pradesh[1]

VarshaIyer, II B.A. LL.B.

A juvenile is not mentally capable of understanding all the consequences and repercussions of the crime committed. Hence, instead of a serious punishment, the matter is referred to the Juvenile Justice Board.

In a case where Dilshad and Mumtaz were found guilty of an offence, Dilshad being a minor was sent to Juvenile Justice Board and Mumtaz was ordered to undergo life imprisonment.

Appellants Mumtaz and Dilshad by Special Leave Petition to the Supreme Court challenged the correctness of the decision of the High Court of Uttarakhand in Criminal Appeal No. 270 of 2001 affirming their conviction and sentence for offences punishable under S.302 read with S.24 of IPC, 1860.

In the intervening night of 26-12-1990 and 27-12-1990 Radhey Shyam witnessed Pawan Kumar's hands tied and his body set ablaze in the neighbourhood. Radhey Shyam had seen Naseem Khan and Anees Khan set Pawan on fire. The dying declaration of Pawan stated that he was set on fire by Dilshad and Mumtaz.

By the order dated 19-12-1994 the trial court found the appellants guilty under S.302 read with S.34 of IPC and sentenced life imprisonment.

The counsel appearing for the appellants, Tulsi submitted that Dilshad was a juvenile on the date of occurrence of the event. The counsel for the State, Tanmaya submitted that the case of *Jitendra Singh v. State of U.P*[2] relied upon by the appellants should be reconsidered. Tulsi also submitted that the dying declaration fails the test of credibility and advanced

[1] 2016 SCC On Line SC 653
[2] (2013) 11 SCC 193

the second submission stating that no witness was examined on behalf of the defendants.

Under S.20 of the Juvenile Justice Act, 2000, when a person, not crossing the age of 18 but ceasing to be a juvenile under the Juvenile Justice Act, 1986 commits an offence, the court instead of passing any sentence should forward the juvenile to the Juvenile Justice Board.

While holding Dilshad to be a juvenile and guilty of the offence, the court set aside life imprisonment and remitted the matter to the Juvenile Justice Board. On the other hand, by cancelling the bail bonds furnished by Mumtaz, the Court ruled Mumtaz to be taken into custody to undergo the sentence awarded to her.

Narendra v. K. Meena[1]

Renucka Vaiddya, I LL.B.

Forcing the husband to separate from his parents without reasonable cause amounts to cruelty.

The appellant (husband) filed a petition in the Supreme Court against the order of the Karnataka High Court[2] denying him a divorce from his wife on the grounds of cruelty.

He claimed that his wife had subjected him to the following cruel acts:

- Threatened to commit suicide
- Baselessly accused him of having extra marital affairs
- Compelled him to separate from his parents so that she could live independently

The husband sought a divorce stating that it was impossible to live with his wife, and since their marriage in 1992, she had never been happy living with him.

The Court thoroughly examined the facts and reversed the high court's order, providing divorce to the husband on grounds of cruelty.

The Court opined that dealing with suicide threats is stressful for a husband due to the knowledge that if the wife succeeded, it might destroy hislife altogether. The Court stated that allegations of extra marital affairs and doubting the integrity of a person arealso sufficient causes for a divorce. The Court further stated that separating a husband from his parents when they are old and financially dependent on him, without any justifiable cause also amounts to cruelty.

[1](2016) 9 SCC 455
[2]2006 SCC On Line Kar 858

National Campaign on Dalit Human Rights V. Union of India[1]

Sarjerao Padavalkar, V B.S.L. LL.B.

Central and state governments directed to strictly enforce the SC and ST (Prevention of Atrocity) Act, 1989

ThePetitioners who are a voluntary organization aggrieved by the non-implementation of the Scheduled castes and Schedules Tribes (Prevention of Atrocities) Act, 1989 and the Rules made there under, filed a writ petition before the Supreme Court.

The petitioners sought a writ of mandamus from the Apex Court for effective implementation of the Act and the Rules. It was contended by the Petitioners that the Act has been totally ineffective and the people belonging to the Dalit community were still suffering atrocities due to poor implementation of the provisions of the Act.

The Petitioners complained that though the Act is comprehensive enough to deal with the social evil, its implementation has been ineffective. They highlighted various problems like- non registration of cases and various other machinations resorted to by the police to discourage the aggrieved Dalit persons from registering cases under the Act. Delays in filing of charge sheet, accused not being arrested, high risk of release of offenders on bail and filing of false and counter cases being the other problems faced by the Dalit victims. The petitioners also complained of the non-payment of compensation to the victims or their heirs and no access to legal aid.

It was held by the Court that the Constitutional goal of equality for all citizens of the country can be achieved only when the rights of the SC and ST citizens are protected. The State Governments are responsible for carrying out the provisions of the Act, but at the same time, the Central Government too has an important role to play in ensuring compliance of

[1]2016 SCC Online 1488

the provisions of the Act. Consequently, directions were issued to the Central Government & State Governments to strictly enforce the provisions of the Act. Directions were also issued to the National Commission to discharge their duties towards SC & ST and also directions to the National Legal Services Authority to formulate appropriate schemes to spread awareness and provide legal aid to the members of SC & ST communities.

Sabu Mathew George v. Union of India[1]

Umang Motiyani, I B.A. LL.B.

The case deals with the issue of intermediary liability of search engines related to advertisement of pre-natal sex determination and provides for the 'doctrine of auto block'.

In 2008, Sabu Matthew George, an activist, filed a writ petition to ban 'advertisements' relating to pre-natal sex determination from search engines in India. According to the petitioner, the display of these results violated S.22 of the Pre-Conception and Pre-Natal Diagnostic Techniques **(PCPNDT)** Act, 1994. The judgment in this case was given by Hon'ble Mr. Justice Dipak Misra and Hon'ble Mr. Justice Amitava Roy which dealt with the concepts of intermediary liability for advertising context of the PCPNDT Act of 1994.

The respondents argued that they, as intermediaries- '*provided a corridor and did not have any control*'- over the information hosted on other websites. But judgments on December 4th, 2014 and January 1st, 2015 directed the respondents (Google India, Yahoo India and Microsoft Corporation (I) Pvt. Ltd.) not to advertise or sponsor any advertisement which would violate S.22 of the PCPNDT Act 1994. If any such advertisement is obtained on any search engine, the same is required to be withdrawn by the respondents.

By the order dated September 19th, 2016, the Court discussed the *'doctrine of auto block'* and the responsibility of the respondents to block illegal content themselves. In this order, the Court listed roughly 40 search terms and stated that the respondents should ensure that any attempt at looking up these terms would be 'auto-blocked'. The order contradicts the Supreme Court's decision reading down Section 79(3)(b) of the Information Technology Act, 2008 (IT Act) in *Shreya*

[1] 2016 SCC On Line SC 681
[2] 2015 SCC On Line SC 248

Singhal vs. Union of India[2], where the liability of intermediaries was restricted.

Finally, on November 16th 2016, the Supreme Court ordered the respondents, Google, Microsoft and Yahoo to 'auto-block' advertisements relating to sex selective determination. They also directed the Centre to create a 'nodal agency' that would provide search engines with the details of websites to block. Such 'nodal agency' would also allow people to register complaints against websites violating S.22 of the PCPNDT Act.

In its order dated 16th February 2017, the Court has directed every search engine to form an in-house expert committee which will 'on its own understanding' delete content that is violative of S.22 of the PCPNDT Act. In case of any conflict, these committees are to approach the nodal agency for clarification and the latter's response is meant to guide the search engines' final decision.

To review its direction on the resolution of the plaintiff's grievances by the mechanism of the place, the court will take up the case again in April.

Sankalp Charitable Trust v. Union of India[1]

Suruchee Chouhan, I B.A. LL.B.

NEET to be conducted as per notification issued by MCI and DCI on 21-12-2012.

The petitioner, Sankalp Charitable Trust, filed a Writ Petition in the Hon'ble Supreme Court. The Bench consisting of Anil R. Dave J., Shiva Kirti Singh J. and Adarsh Kumar Goel J. presided over the matter.

The idea of NEET was founded in 2010 and was to be given effect from 2012. However, owing to problems raised by CBSE and Medical Council of India it was postponed by a year. In May 2013, the Central Government suddenly conducted NEET all over India. This action when pleaded before Hon'ble Supreme Court, NEET was cancelled and declared illegal and unconstitutional in July 2013 in *Christian Medical College Vellore v. Union of India*[2]. NEET resurfaced before the Apex Court in the instant case, owing to the petition by the Medical Council of India.

It was submitted by the Respondent that NEET was proposed to be held in pursuance of the Notification dated 21st December, 2010, in two phases, phase-1 being AIPMT 2016 to be held on 1st May 2016 and phase-2 for the left out candidates to be held on 24th July 2016, combined results i.e. All India Rank (AIR) would be declared in August 2016. It was submitted that on the basis of the AIR merit list and applications for admission would be invited.

In view of the submissions made, Hon'ble Supreme Court decided that NEET shall be held as stated by the Respondent. The Court further emphasized on conducting NEET, by recalling all the past orders in relation to NEET, implying overruling of the 2013 judgement[3].

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[1] 2016 SCC On Line SC 366

[2] T. C. (C) No. 98 of 2012

[3] *Supra* 2

As a result, unequivocally, all the other admission tests, already held or scheduled for later, for admission to medical colleges - government colleges, deemed universities, private medical colleges and minority / linguistic minority colleges stands scrapped.

Sham Narayan Chouksey v. Union of India[1]

Rashi Malu, V B.S.L LL.B.

All cinema halls mandated to play National Anthem with the National Flag on the screen before the film starts.

A writ petition was filed under Article 32 of the Constitution of India, referring to the enactment of Prevention of Insults to National Honour Act, 1971; thereby highlighting that National Anthem cannot be sung in circumstances which are not permissible and can never be countenanced in law. It laid emphasis on showing the requisite and necessary respect when the National Anthem is sung or played.

Referring to Art.51 (A) (a) of the Indian Constitution relating to Fundamental Duties, the Supreme Court emphasized that it is a sacred obligation of the citizens of India to show respect to National Anthem which is a symbol of Constitutional Patriotism.

The Court directed that there shall be no commercial exploitation of the National Anthem so as to give financial advantage of any kind or benefit to any person. Also there shall be no dramatization and inclusion of the Anthem in any variety show. The National Anthem shall not be printed on any object and never be displayed in a manner which may be disgraceful to its status. Moreover, the cinema halls in India shall play the National Anthemwith the National Flag on the screen, before the feature film begins and all present in the hall are obliged to stand up. The entry and exit doors shall remain closed to prevent any outside disturbance. It has also been directed that abridged version of the National Anthem made by anyone, for whatsoever reason, shall not be played or displayed.

The order was given effect from 10th December 2016 and the same is to be followed in true letter and spirit.

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[1]2016 SCC On Line SC 1411

Star Sports India (P) Ltd. v. Prasar Bharati[1]

Swati Bajpai, I LL.M.

Logos of sponsors or on-screen credits are advertisements for the purpose of S. 3 of the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007.

Organizers of sports events such as ICC, BCCI etc. provide "world feed" or broadcasting signals to distributors such as ESPN. The "world feed" contains features such as hawk-eye view, score cards, player statistics, etc., which enhance viewers' experience. However, this "world feed" also contains sponsors' logos, on-screen credits etc., which the appellant submitted to be an integral part of the "world feed" over which it has no control, and that it is therefore practically unfeasible to remove the same. The appellant contended that it forwarded the "world feed" as received from the organizer, and therefore the logos etc. could not be treated as advertisements by the broadcaster.

The question before the Apex Court in this case was whether these logos etc. violate S. 3 of the Sports Act[2], which makes it mandatory for the sports events broadcaster to share simultaneously with Prasar Bharati, the "world feed" without advertisements[3]; and in exceptional cases, with advertisements along with the sharing of advertisement revenue. The purpose of the above mentioned Act is to provide access tonational sports events to the largest number of viewers and listeners for, the Prasar Bharati coverage reaches almost every nook and corner of the country.

The Supreme Court, while holding that these logos and on-screen credits amount to advertisements, observed that the revenue generated from such

[1] (2016) 11 SCC 433
[2] Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007
[3] Rule 5, Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Rules, 2007

logos etc., must be shared with Prasar Bharati, as the reach of Prasar Bharati is far widespread than that of any private broadcaster, and therefore the viewership of such advertisements gets multiplied. The benefit of advertisement in such a case would accrue to the advertisers, and the broadcasting service provider would definitely be in a position to charge much more for these logos. Accordingly, at the first instance, the "world feed" must be in the best quality possible, i.e., free from any advertisements.

State of Uttar Pradesh v. Subhash Chandra Jaiswal[1]

Gurtejpal Singh, V B.S.L. LL.B

High Courts while dealing with the lis are expected to focus on the process of adjudication and decide the matter without ingraining or engrafting an order going beyond the scope of the controversy.

A writ of mandamus was filed before the Allahabad High Court in relation to alleged fraud and forgery of signature in opening a bank account for obtaining retail licence for a liquor shop. Eligibility condition for issue of such licence was that the licensee and his family must possess good moral character and no criminal background.

On going through the case diary and final report submitted by the Investigating officer the High Court observed that no attempt was made by the investigating officer to test the genuineness of the signature in question. The High Court berated the State government for the sorry state of affairs of maintenance of law and order in the State. Directions were issued to the State Govt. for establishment of separate cadres for investigation and general policing. Further directions were issued including setting up of forensic laboratories at every District Headquarters.

The bench of Dipak Misra and Amitava Roy, JJ noted that the High Court could not have issued such directions which are in the exclusive domain of legislature. It was observed by Hon'ble Court that the Allahabad High Court crossed the boundaries of the controversy that was before it. There may be a laudable object in the mind but the directions must flow from the facts before the court. The courts are required to exercise the power of judicial review keeping in mind the controversy before it. "Judges cannot step into the shoes of a law-maker for the show of judicial valour." The bench referred to various judicial pronouncements to stress that courts cannot take steps for framing a policyas it would amount to transgressing the boundaries of judicial separation.

[1]2016 SCC On Line SC 1434

Subramanian Swamy v. Union of India[1]

Pranay Jaiswal, I B.A. LL.B.

A person cannot be exempted from criminal defamation on the grounds of unreasonable restriction on freedom of speech and expression.

The petitioner Subramanian Swamy, a politician from the State of Tamil Nadu, filed a petition in the Supreme Court challenging the provisions of Indian Penal Code, 1860 (IPC) S. 499 which defines defamation and S.500 that prescribes punishment for it and that it puts reasonable restrictions on Art.19(2) of the Constitution of India.

The Petitioner argued that without the freedom of speech and expression, the growth of healthy and matured Democracy would not be rendered. The State counter argued that criminal defamation on the grounds of right to reputation is protected under Article 21 and civil remedies or monetary compensation is not sufficient.

The Court held that defamation affects the society at large as society is anaggregate of individuals. The Court stated that criminal prosecution is necessary so as to keep check and balance over the swerved behavior patterns of an individual in society so as to maintain equilibrium in the society.

Right to freedom of speech and expression is not absolute and hence one's reputation cannot be compromised for another person's right of speech and expression. It also emphasized on the importance of fraternity and fundamental duty under Art.51 (e) and (j) of the Indian Constitution.

The Court further mentioned that the above stated provisions of IPC are not disproportionate. The reasonableness and proportionality of a restriction is not seen from the point of view on whom the restrictions are imposed but from the interests of general public at large. The Court rejected the contention that defamation cripples freedom of speech and expression and cannot be treated as a guiding principle to adjudge the reasonableness of a restriction.

[1]2016 SCC On Line SC 550

Sushil Kumar V Union of India & Others[1]

Aditi Khobragade, IV B.S.L. LL.B.

The extent to which courts can intervene in matters relating to Sports i.e. The Olympic Qualification System in India

Through the present Writ Petition, the petitioner had challenged the selection of respondent no. 5, i.e Narsingh Yadav by respondent no. 4, i.e Wrestling Federation of India (WFI) for the 74 Kg "Men's Freestyle Wrestling" event at the Rio Olympic Games, 2016. Since, Narsingh Yadav had secured a berth for India in the 74 Kg men's freestyle category for the Olympics by winning a bronze medal in the World Championship, 2015 held in Las Vegas the federation permitted him to represent India.

The trials for the selection to represent India in the World championship were held in July, 2015 in which the petitioner didn't participate due to an injury. Counsel on behalf of the petitioner, in support of his contention, cited the National Sports Development Code, 2011 by relying on the Selection Procedure – National sports Federationis primarily responsible for judicious selection of national teams for participation in major international events based on merit. As such the best sportspersons/team has to be chosen for representing the country.

Also, they relied on the ruling given in *Amit Dhankhar vs UOI*[2] stating that as per the sports code, separate trials are to be conducted for every international event as the sport belongs to the country and not an individual wrestler.The counsel for the respondent defended that the Code, 2011 gives full autonomy to the National Sports Federation in their internal functioning and does not make it mandatory for National Sports

[1]2016 SCC On Line Del 3660
[2]W. P (C) 3919 / 2014 decided on 3rd July 2014

Federation, to hold selection trials for participation in Olympic Games after certain sportspersons have earned a quota berth for the country.

The court held that the decision of who should represent India in a sporting event is best left to the National Sports Federation. The present writ petition and application for trial was dismissed.

The State Of Tamil Nadu Represented By Its Secretary Home, Prohibition And Excise Department And Ors. V. K Baluand Anr.[1]

Aanchal Bhartiya, III B.A. LL.B.

Ban on sale of liquor on National and State Highways.

The present judgment is a product of various civil appeals arising out of Special Leave Petitions right from 2014. It imposes a ban on liquor vending on National and State highways across the country. An agreement of the National Road Safety Council (NRSC), made nearly thirteen years ago to put a bar on issuing of licences to liquor vendors on National highways. Later, the Ministry of Road Transport and Highways (MORTH) issued a circular to State Legislatures in this regard.

The court referred to the Parliamentary intent behind S.185 of the Motor Vehicles Act, 1988, which also points at a zero-tolerance policy in cases of drunken driving. Prima facie, there would be a breach of the fundamental right to livelihood guaranteed by the constitution by such a ban but trade of liquor has been regarded as *res extra commercium* in a number of cases.[2]

The court referred to Art. 47 of the Constitution that directs the State to improve public health. It imposed this ban on parts of such a highway passing through city limits too. The decisions of the Punjab and Haryana High Court and the Tamil Nadu High Court were upheld by banning liquor vending not only on highways but also within 500 metres from them.

Since a return of fee would be asked by people who have already had their licenses renewed and this would have a financial implication on the State; the court allowed them to continue operating till April 1, 2017. After such a date, no liquor vendors will be seen on and around any highway.

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[1] SLP (C) Nos. 14911 – 14913 of 2013

[2] *State of Bihar vs. Nirmal Kumar Gupta*, (2013) 2 SCC 565; *State of Punjab vs. Devans Modern reweries Ltd.* (2004) 11 SCC 26

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