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Articles

Legislations : Highlights

Judicial Pronouncements : Highlights

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Principal's Page

I am pleased to place in your hands the annual volume of Abhivyakti Law Journal for the year 2017-18.

The volume witnesses variety of subjects the student writers have chosen for critical analysis of legal policy reflected either in legislations or judgments of the courts. The writing caters to a wide range of interests of the readers from Corporate Law to Personal Law, Intellectual Property Rights, Arbitration and many other subjects. All the writers deserve rich compliments for their effort. I congratulate all student contributors and Editorial team of Abhivyakti for their efforts in introducing this journal.

Recently, the entire legal world passed through a great turbulent phase when four senior-most judges of the Supreme Court of India vented out their grievances against the manner of working of the Chief Justice of India in a press conference. This move was unprecedented, being first of its kind; it is unprecedented in terms of impact it has made on the minds of millions of Indians who had a different image of the judges of the Supreme Court. It is unprecedented in terms of a rift it created in the legal fraternity who sided or opposed the holding of such press conference. The time alone will prove wisdom or otherwise of this move. Let us hope that the unprecedented move of the Supreme Court judges is not followed anywhere anymore. Let us hope that it will not become an 'ugly precedent'. We hope that the State or Parliament in their wisdom will provide for a grievance redressal mechanism to take care of such situations. As members of legal fraternity it is our responsibility to see that judiciary which is the protector of democracy and justice is strengthened and is kept beyond and above all such controversies in larger public interest.

Vaijayanti Joshi
Principal

EDITORIAL

The ILS Abhivyakti Law Journal,2018 successfully continues with the precedence of providing a forum for students' literary pursuits.

The Journal is a testimony to the academic indulgence among the students which the college strives and nurtures for, as we march towards the ushering in of the centenary celebrations of the ILS Law college.

The several articles written by the students, while on one hand reflect the students'diligence, appreciation and understanding of the multitudinous legal aspects and on the other also display their concern for the development of laws and finding resourceful solutions to the lacunae and defects in the legal system.

We hope that this endeavor of the students would be well appreciated.

Ms. Swati Kulkarni

Dr. Banu Vasudevan

Ms. Swatee Yogessh

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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

The Copyrightability of Tweets: Stretching the Boundaries of Copyright law

Kiran Mary George and Awani Kelkar[1]

"My dog ate my homework last night"

"I hate people"

"I'm going to kill my neighbor's cow".

The statements above are not the author's own thoughts, but constitute only but some among the roughly 303 million tweets that are tweeted per day, as of January 2017[2], on the popular social networking site, *Twitter*. While the company does appear to have been facing a few significant hiccups associated with revenue and user growth[3], the question concerning the copyrightability of the tweets themselves appears to have remained unanswered.

While Twitter itself went live in 2006[4], it would appear that it is only the last half a decade or so that has seen a spike in copyright-claims associated with tweets, with perhaps one of the earliest known instances of tweet-plagiarism dating back only to 2013[5]. Then in 2015, a freelance writer named Olga Lexwell, in a

[1] V BSL LL.B.

[2] Jim Edwards, *"Leaked Twitter API data shows the number of tweets is in serious decline",(*Business Insider,,2 February 2016)<http://www.businessinsider.com/tweets-on-twitter-is-in-serious-decline-2016-2?IR=T> accessed 12 September 12, 2017.

[3] Felix Richter, *'Twitter's User Growth Picks Up Pace as Revenue Stutte'(The Statistta Portal, 26 April 2017)*, <https://www.statista.com/chart/9134/twitters-revenue-and-user-growth/> accessed 12 September 12, 2017

[4] Amanda MacArthur, 'The Real History of Twitter, In Brief'(LIFEWIRE, 26 April 2017) <https://www.lifewire.com/history-of-twitter-3288854> accessed 12 September 12, 2017.Founder Jack Dorsey sent his first message on the website on on March 21, 2006, 9:50pm, which read – "just setting up my twitter"

[5] In 2013, a minister from South Carolina was found to have copied several of his comical tweets from well-known comedians (Hannah Jane Parkinson, 'Twitter removes lifted jokes over copyright infringement claims', (THE GUARDIAN,25 July 2015)<https://www.theguardian.com/technology/2015/jul/27/twitter-removes-lifted-jokes-copyright-infringment-claims>, accessed 12 September 12, 2017.

highly publicized incident, claimed that a joke that she had posted as a tweet, "*saw someone spill their high end juice cleanse all over the sidewalk and now I know god is on my side*"– had been reposted by several Twitter users without accrediting her as the creator of the witty one-liner[6]. Another instance of an infringement claim came in 2017 when music artist Frank Ocean wore a shirt that read "Why be racist, sexist, homophobic or transphobic when you could just be quiet?", which was traced to an online Merchant – "Green Box Shop" – which had in turn copied the tagline from New York student Brandon Male's August 2015 tweet[7]

Twitter's earlier policy in reference to their responses to copyright claims made under the Digital Millennium Copyright Act (DMCA)[8], under Section 512(c)(3) of the Act, involved a complete takedown of the infringing tweet and all its associated retweets, leaving no trace of them whatsoever, and clicking on the URL of a removed tweet would redirect the user to a 404 error page[9]. However, in an effort to create more transparency in its dealings with users, Twitter has now resorted to clearly marking withheld tweets by replacing the original tweet with one that clearly indicates that the content has been withheld[10]. While the platform has been forthcoming in their responses to allegations of copyright infringement, the question really is whether the complainants' claims have any significant legal ground.

Part I of the paper discusses whom the ownership over the tweets themselves lie, as a preliminary question to Part II, which examines the core issue of the paper – the copyrightability of tweets – exploring the two posts of the originality

[6] Dante D'Orazio, 'Twitter is deleting stolen jokes on copyright grounds ', (The Verge, 25 July, 2015)< https://www.theverge.com/2015/7/25/9039127/twitter-deletes-stolen-joke-dmca-takedown > accessed on 12 September, 2017

[7] Daniel Kreps, 'FrankOcean T-Shirt at Center of Debate Over Tweet Copyright', (ROLLING STONE, 2 August, 2017),<http://www.rollingstone.com/music/news/frank-ocean-t-shirt-at-center-of-debate-over-tweet-copyright-w495510> accessed on 12 September, 2017

[8] Digital Millenium Copyright Act, HARVARD UNIVERSITY, https://dmca.harvard.edu/pages/ overview ("The Digital Millennium Copyright Act ("DMCA") of 1998 endeavors to balance the interests of internet service providers and copyright owners when copyright infringement occurs in the digital environment. The DMCA protects internet service providers from liability for copyright infringement by their users, if the internet service provider meets certain statutory requirements")

[9] Francis Bea, 'Copyright Infringing Tweets now withheld, not removed', (DIGITAL TRENDS,5 November, 2012)<https://www.digitaltrends.com/social-media/twitter-policy-changes-for-copyright-infringement-claims/> accessed on 12 September 2017

[10] *ibid*

requirement in copyright law. Part III examines tweets that cannot be copyrighted because as works, they comprise content that are rendered not copyright-able. Part IV then concludes by summarizing the essence of the authors' stance.

Ownership of Tweets

Before embarking upon a consideration of whether tweets are in fact copyrightable, it is worthwhile to consider whether users themselves actually own the tweets that they share. The tweets referred to herein are limited only to the 140-character[11] tweets that possess literary content – the object of Twitter has been to share "small bursts of information"[12], perhaps explaining its 140 character limit per tweet, raising the issue of whether its peculiar nature allows tweets to be recognized as being copyrightable works. While media such as photographs can also be shared on the platform, because their nature is not unlike those shared on any other platform, that the media is shared on Twitter per se does not vitiate or throw in peril the possibility of their copyright-ability.

Twitter's *Terms of Service* categorically state that the users themselves own all the rights associated with the content that they submit, poster display on the platform – "what's yours is yours"[13]. This does not allow the direct inference that since Twitter doesn't own the 140-character tweets, the tweets themselves constitute *original* literary works[14] that are copyrightable. Whilst it is clear that the ownership of the tweets themselves lie with the user that created them, whether these tweets are in themselves copyrightable is an entirely different story.

Copyrightability of Tweets

The copyrightability of a work depends upon the fulfillment of two factors – first, that the work is original, and second, that it is fixed in a tangible medium[15].

[11] Andre Picard, '*The History of Twitter, 140 characters at a time*', (THE GLOBE AND MAIL, 20 March , 2011),<https://beta.theglobeandmail.com/technology/digital-culture/the-history-of-twitter-140-characters-at-a-time/article573416/?ref=http://www.theglobeandmail.com&> accessed on 12 September 2017

[12] *ibid*

[13] *Twitter Terms of Service*, TWITTER, https://twitter.com/en/tos

[14] Section 13(1)(a) of the Copyright Act highlights that copyright subsists in "original literary, dramatic, musical and artistic works".

[15] Berne Convention for the Protection of Literary and Artistic Works, 1971, Article 2 (2)

In order to be entitled to a copyright under the Indian Copyright Act, 1957, a tweet would need to be sufficiently original. Originality is a criterion under Section 13(1) which states that a copyright subsists in "original literary, dramatic, musical and artistic works." Although the term "original" has not been defined under this legislation, it has been subject to much judicial scrutiny[16]. The originality of a work is dependent on two primary pillars – independent creation, and the fulfillment of creativity threshold[17].

A. Independent creation

That independent creation is a necessary requirement to adjudging the copyrightaility of a work has been explicitly recognized by the Supreme Court[18] -further,the Delhi High Court in *Syndicate of the Press of the University of Cambridge v. B. D. Bhandari & Ors*[19] reiterated the essence of the term "originality" as defined by Black's Law Dictionary as being "the quality or state of being the product of independent creation and having a minimum degree of creativity"[20]. Thus, this would allow the direct inference that for a tweet to be copyrightable, it must also have been independently created – a re-tweet[21] cannot on any account, hence, assume copyrightability, and nor can a *copied* tweet.

B. Creativity

Copyright law does not require novelty or distinctiveness - factors that may be taken into consideration while looking into other forms of intellectual property - but requires skills, creativity and labour[22]. What is difficult to determine however, is the *threshold* of this skill, creativity and labour This is important

[16] *R.G Anand vs M/S. Delux Films & Ors*, 1979 SCR (1) 218 (India)

[17] In *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc* (499 U.S. 340 (1991)), the US Supreme Court highlighted that the term "originality" signifies that "the work was independently created by the author (as opposed to copied from other works, and that it possesses at least some minimal degree of creativity"

[18] See *Eastern Book Company & Ors v. DB Modak&Anr,* (2008) 1 SCC (India) ("Precondition to copyright is that work must be produced independently and not copied from another person")

[19] 2009 (39) PTC 642

[20] *ibid*

[21] FAQs about Retweets, Twitter, https://support.twitter.com/articles/77606 ("A Retweet is a re-posting of a Tweet. Twitter's Retweet feature helps you and others quickly share that Tweet with all of your followers.")

[22] Eastern Book Company v. D. B. Modak,AIR 2008 SC 809 (India)

particularlywhen dealing with the copyrightability of tweets, because a *tweet* is not generally approached as a medium of expressing creativity but more of a medium to instantly share ias or information[23]. Moreover the short format of tweets generally serves to limit the creativity or skill that can be displayed in a particular work, although the possibility in itself perhaps cannot be ruled out.

The current standing of courts in India as regards the threshold of creativity was been laid down in the Supreme Court's judgement of *Eastern Book Company v D.B. Modak*[24] and constituted a mid-way approach between the "sweat of the brow"[25] and "modicum of creativity"[26] doctrines. The Court while rejecting the "sweat of the brow" doctrine also recognized that the minimal creativity requirement was too high a standard and hence the proper standard would be a middle ground between the two. The notion of "flavour of minimum requirement of creativity", upheld by the Canadian Supreme Court in the case of *CCH Canadian Ltd. v. Law Society of Upper Canada.*[27]was hence introduced[28]. Hence a tweet need not be novel or non-obvious nor does it need to possess high literary merit, however it must involve some intellectual effort and a certain degree of creativity, for it to be copyrightable[29]. Since tweets can virtually be about anything ranging from a mundane update on personal achievements to the weather to the elections, it can be safely stated that not every tweet is copyrightable.

The Doctrine of Merger

The oft-blurred distinction between an 'idea' and 'expression' is a basic tenet of copyright law[30]. While an expression is copyrightable, the idea that

[23] Justin Fox, "Why Twitter's Mission Statement Matters"- (Harvard Business Review, 13 November 2014) <https://hbr.org/2014/11/why-twitters-mission-statement-matter>accessed on 12 September 2017

[24] AIR 2008 SC 809

[25] See University of London Press Ltd v. Tutorial Press Ltd, [1916] 2 Ch 601; Burlington Home Shopping Pvt. Ltd. v. RajnishChibber, 1995 PTC (15) 278 (India)

[26] *Feist Publications Inc. v. Rural Telephone Service,* 499 U.S. 340 (1991)

[27] 2004 (1) SCR 339 (Canada)

[28] "Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, which gives a flavour of creativity."

[29] *Mattel, Inc. &Ors. vs Mr. Jayant Agarwalla & Ors,* (IA No. 2352/2008 in CS(O S) 344/2008) (India)

[30] The Idea-Expression Dichotomy In Copyright Law;Edward Samuels;56 Tenn. L. Rev. 321 (1989)

it originates from is not[31]. Thus protection is only granted to the actual/ tangible embodiment of an idea[32].

The idea-expression dichotomy was extensively dealt with by the Indian Supreme Court in *RG Anand v Deluxe Films*[33], wherein the Court observed that -

"There can be no copyright in an idea, subject matter, theme, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyright work."

This has been recognized and reaffirmed in several other judgements.[34] However, when an idea and its expression are so interlinked that a distinction cannot be drawn, then copyright protection is not granted to the expression. This is referred to as the doctrine of merger[35]. The rationale behind this is that in the cases of expressions which are inextricably interlinked with the idea, the manner of such expression is limited, and hence protecting the expression would invariably result in protecting the idea itself. An illustration of this would be the rules to any game. These fall outside the purview of copyrightable work since the ways in which they can be expressed are limited. What becomes difficult is understanding at what point the merging of the idea and the expression takes place, i.e. at what point the idea stops and the expression starts. The Courts have applied the levels of abstraction test to resolve this difficulty[36]. The ruling in *Nichols v. Universal Pictures Corp*[37] is the leading law on this issue. The Court observed therein-

[31] The Idea-Expression Dichotomy and Merger Doctrine in the Copyright Laws of the U.S. and the U.K; STEVEN ANG; U.K., 2 Int'l J.L. & Info. Tech. 111, 153 (1994)

[32] See *Donogue v Allied Newspapers-" The idea, however brilliant and however clever it may be, is nothing more than an idea, and is not put into any form of words, or any form of expression such as a picture or a play, then there is no such thing as copyright at all."*

[33] AIR 1978 SC 1613

[34] See *Masters and Scholars of the University of Oxford v. Narendra Publishing House and Ors*, 2008 (38) PTC 385 (Del); *Mansoob Haider v. Yashraj Films, Notice of Motion* (L) No. 502 of 2014 In Suit No. 219 of 2014; *Mattel Inc. v. Mr.Jayant Agarwalla IA* No. 2352/2008 in CS(O S) 344/2008

[35] *Mattel, Inc. & Ors. vs Mr. Jayant Agarwalla & Ors*, (IA No. 2352/2008 in CS (OS) 344/2008)

[36] *Mattel, Inc. & Ors. vs Mr. Jayant Agarwalla & Ors* (IA No. 2352/2008 in CS (OS) 344/2008) (India)

[37] *Nichols v. Universal Pictures Corp.*, (45 F.2d 119)

"Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended."

The levels of abstraction can be understood in the following manner- an idea expressed at the highest level of abstraction in a tweet would be, for instance, "I own a small lamp". As more nuances are added to this particular idea, the detailing increases. A more detailed expression of the same idea would perhaps include a tweet stating "I own a small lamp which is adorned with embellishments. I bought it from the rural villages of India from an old lady who specialized in historical artefacts." Such a tweet would be at a much lower level of abstraction. With the addition of details and the decreasing levels of abstraction, it becomes easier to distinguish the particular expression from the idea which lies at its core.

Twitter, being a platform that severely restricts the word cap on shared tweets, is a medium where this is a high probability that such merger of idea and expression would occur. Twitter imposes a restriction of 140 characters on tweets which invariably means that there is a limit on how nuanced the work can be. This would appear to suggest that there is a high probability that a tweet would be somewhere on the higher levels of abstraction and hence more likelihood of a merging of the expression with the idea. It can hence be safely concluded that due to the limitation of characters, there are higher chances of the work not being copyrightable.

Scène à faire

Scene a fair literally translates into "a scene that must be done"[38]. Although there is no precise definition to this term, a commonly relied upon explanation is provided in the judgment of *Alexander v Haley*[39], wherein the Court describes it as *"incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic"*.

[38] *Alexander v, Haley*, 460 F. Supp. 40 (S.D.N.Y. 1978)

[39] *ibid*

Thus it basically refers to details that are so common to an idea that expressing them flows naturally from that it[40]. Such expressions are not copyrightable so as to ensure that copyright owners do not attain monopoly over common subject matters.

This doctrine is of particular importance to tweets because it is often seen that people tweet similar responses when faced with common situations[41]. An illustration of this is that if people were to describe a hot summer day, it can be speculated that several tweets would likely be on the lines of "Today is so sunny" or "Such a hot day". The elements of "sunny" and/or "hot" are common to a summer day and hence flow naturally from it. Copyright hence would not be granted to such tweets containing common or indispensable elements.

I.Tweets comprising works that cannot be copyrighted

a. Facts

The goal of copyright law in itself, underlines why facts in themselves are deemed unprotect-able under copyright law. The US Constitution bestows upon the Congress the power "[t]o promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries"[42], essentially highlighting that copyright law was introduced to benefit the general public. If facts were deemed "original literary works", nobody could possibly discuss current or historical events without trampling all over someone's copyright and thereby subjecting themselves to possible infringement claims. In Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.[43], the US Supreme Court recognized that "Since facts do not owe their origin to an act of authorship, they are not original, and thus are not copyrightable"[44] – although the Court further also recognized the copyrightability of a compilation of facts[45], a 140-character tweet is

[40] COPYRIGHT: THE SCENES A FAIRE DOCTRINE Leslie A. Kurtz;41 Fla. L. Rev. 79, 114 (1989)

[41] Consuelo Reinberg , 'Are Tweets Copyright-Protected ' ; (WIPO Magazine, 4 June, 2009) < http://www.wipo.int/wipo_magazine/en/2009/04/article_0005.html > accessed on 12 September 2017

[42] Article I, Section 8, Clause 8

[43] 499 U.S. 340 (1991)

[44] *Supra*, at pg.no.341

[45] *Supra* at pg.no.351-361("A compilation is not copyrightable *per se*, but is copyrightable only if its facts have been "selected, coordinated, or arranged *in such a way* that the resulting work as a whole constitutes an original work of authorship.")

unlikely to ever constitute a compilation sufficient to meet the threshold of being an original work of authorship.

With the hammer on the word limit striking at just 140 characters, a vast majority of the tweets that exist on the social media platform have been orchestrated to align with the very goal of the platform – tweets like "I can't believe Donald Trump just became President" or "It's raining heavily in Mumbai again"or "Mosquitoes carry malaria, be safe" cannot possibly constitute fulfill the originality requirement. While the requisite level of creativity is low enough for a vast majority of works to be deemed copyrightable[46], the works must necessarily possess some creative spark, "no matter how crude, humble or obvious"[47], and it is questionable whether a majority of the tweets shared even fulfill this low threshold.

In an article published by the WIPO magazine, it was recognized that "...facts are what tweets are mostly about – from talking about the weather, to communicating what one had for dinner the night before, to complaining about the morning traffic. Whether one expresses them in a funny or unique way does not make a difference. Yes, one can potentially protect a particular expression of a fact, but one cannot then prevent other people from writing about the same fact"[48].

Thus, it can perhaps be stated that where the expression of a fact fulfills the originality threshold in a manner to constitute more than being a mere fact in itself, the statement may be copyrightable to the extent that a verbatim imitation of the content may constitute an infringement.

b. Works that are in the public domain

The public domain has been defined as constituting "creative materials that are not protected by intellectual property laws such as copyright, trademark, or patent laws. The public owns these works, not an individual author or artist. Anyone can use a public domain work without obtaining permission, but no one can ever own it"[49]. Works can essentially fall into the public domain in one of

[46] M. Nimmer & D. Nimmer, Copyright § 1.08[C][1]

[47] *ibid*

[48] Consuelo Reinberg , 'Are Tweets Copyright-Protected' (WIPO Magazine, 4 June, 2009) <http://www.wipo.int/wipo_magazine/en/2009/04/article_0005.html> accessed on 12 September 2017

[49] Rich Stin, 'Welcome to the Public Domain, Stanford University Libraries ',(Stanford University Libraries, October 2010)< http://fairuse.stanford.edu/overview/public-domain/welcome/ > accessed on 12 September 2017

three ways – when works were never subject to copyright protection in the first place, when existing copyright in works is voluntarily given up by their owners[50], and when the term of copyright subsisting in a work expires[51].

When a work is in the public domain, the use of any part of such work in which copyright does not subsist will not amount to infringement. For instance, if a person were to tweet a few lines from Saadat Hasan Manto's*Thanda Gosht* published in 1950, this would not constitute a copyright volation as Manto died in 1955, with the copyright in his works having expired in 2015[52].

Thus, while such tweets would in themselves not amount to copyright infringement, this does not permit the assumption that a work that borrows from content made available in the public domain may be copyrightable. It has been recognized that protection in derivative works[53] "does not extend to any preexisting material, that is, previously published or previously registered works or works in the public domain or owned by a third party"[54] – thus, any material taken from the public domain that forms part of a tweet or any other work is not considered in assessing whether the work conforms to the originality requirement necessary for the work to be deemed copyrightable.

[50] Copyright owners may choose to free their works from the shackles of copyright and instead dedicate them to the public, allowing the works to fall within the public domain and increasing monumentally the accessibility of the works to the public. This may be done through the Creative Commons Organisation (CCO), which "enables scientists, educators, artists and other creators and owners of copyright- or database-protected content to waive those interests in their works and thereby place them as completely as possible in the public domain, so that others may freely build upon, enhance and reuse the works for any purposes without restriction under copyright or database law" (CCO, Creative Commons,< https://creativecommons.org/share-your-work/public-domain/cc0/> accessed on 12 September 2017

[51] See Article 7, *The Berne Convention for the protection of Literary and Artistic works* (1886).The term of copyright in India inthe case of most works is the life of the author plus 60 years from the beginning of the year following the calendar year in which the author dies (Section 22 of the Copyright Act), after which all copyright subsisting in the work terminates, and the work falls into the public domain.

[52] Neelima, '*India Public Domain 2016: 21 Indian authors whose works entered public domain in 2016*',(POTHI 7 January , 2016)<https://pothi.com/blog/2016/01/07/india-public-domain-2016-21-indian-authors-whose-works-entered-public-domain-in-2016/ > accessed on 12 September 2017

[53] 17 U.S.C. § 106(2) of the Copyright Act of 1976 defines a 'derivative work' as "a work based upon one or more preexisting works...."

[54] Copyright in Derivative Works and Compilations, US Copyright Office (Circular 14 2 14.1013), https://www.copyright.gov/circs/circ14.pdf

c. Short Tweets

Under Indian copyright law, short phrases, slogans and short word combinations are not ordinarily protected[55]. It is hence likely that copyright registration of tweets maybe rejected on these grounds. However the possibility cannot be completely ruled out. In an instance in the US, Gabriel J Michael attempted copyright registration of his tweet in January 2014 in the United States[56]. The tweet read–

"*Monkey bar fallacy: a bad person using something makes it bad. E.g., users of monkey bars include: children, TERRORISTS #tor*"

This is an illustration of a tweet that does not fall within the definition of a short phrase[57], slogan[58] or short word combination, but was still rejected protection..[59]Regardless, it is worthwhile to note that a tweet that does in fact fall within the scope of these terms may still be copyrightable. Firstly, that US Copyright law does not protect "names, titles, slogans, or short phrases"[60], while the Handbook of Copyright Law released by the Indian Ministry of Human Resource Development[61] states that "short" phrases and "short" word combinations would not be "ordinarily" protected. Hence two qualifying terms are added in this restriction. That of the phrase or word combination being short and the other that protection would not be granted ordinarily. Thus the possibility arises that there might be certain situations, extraordinary as they might be, in which they may be subject to copyright protection. The second reason for the existence of a possibility of copyright protection to tweets is the evolving jurisprudence of granting copyright protection to short phrases and word combinations in the US and EU. Despite the existence of a similar restriction on copyrightability, a recent judgment of the Federal District Court in California

[55] A HAND BOOK OF COPYRIGHT LAW-Ministry of Human Resource Development-Government of India; *Also see* US Copyright Office Publication, No. 46, Sept. 1958

[56] Gabriel J Michaels, 'Copyright Office Rejected My Attempt To Copyright A Tweet '(Techdirty, 4 August 2014)< https://www.techdirt.com/articles/20140802/07535628090/copyright-office-rejected-my-attempt-to-copyright-tweet.shtml > accessed on 12 September 2017

[57] http://dictionary.cambridge.org/dictionary/english/phrase

[58] http://dictionary.cambridge.org/dictionary/english/slogan

[59] *ibid*

[60] What Does Copyright Protect?, US Copyright Office, https://www.copyright.gov/help/faq/faq-protect.html

[61] *Handbook of Copyright Law*, COPYRIGHT OFFICE, http://copyright.gov.in/documents/handbook.html).

in *Stern v Does*[62], has laid down that the "*copyrightability of a very short textual work—be it word, phrase, sentence, or stanza—depends on the presence of creativity*" – and has thus not entirely ruled out the possibility of its copyrightability.[63]. The ECJ in the case of *Infopaq International A/S v Danske DagbladesForening*[64] has upheld the copyrightability of a text containing merely 11 words. The Court observed that-

"the possibility may not be ruled out that certain isolated sentences, or even parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper or article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article."

Hence, despite existing restrictions, there is a growing phenomenon of granting copyright protection to short texts.

Conclusion

While it would not be incorrect to say, that in theory, there exists a tweet that can successfully sprint past the hurdles posed by the multiple thresholds of copyrightability - in reality, Twitter would by and far appear to be littered with tweets that are in violation of any or all of the limitations posed by the law. However, the EU Court's decision in would likely suggest that the size of the tweets themselves may not necessarily unilaterally nullify the likelihood of copyrightability, where the obstacles posed by originality have been successfully circumvented. As the law currently stands both in India and in other jurisdictions, the absence of leading jurisprudence in the matter has sprouted ample speculation as to the nature of treatment that courts are likely to mete out, in what may be construed as being a particularly ambitious attempt at expanding the scope of copyright law. However, with instances of stolen tweets, like in the case of *Olga Lexwell*, increasingly piling on by the day, it is hoped that courts in major jurisdictions might possibly take a stand on the issue and lead the way.

[62]978 F.Supp.2d 1031 (2011)
[63] *Heim v.Universal Pictures Co.* , 154 F.2d 480, 487 n.8 (2d Cir. 1946)
[64]*Infopaq International A/S v. Danske Dagblades Forening*, [2012] EUECJ C-302/10 (17 January 2012)

The Surging Trend of Cartelization in India

Ashna Chhabra, Anchita Sanghi[1],

Introduction to the Act

Adam Smith famously stated in the Wealth of Nations *"People of the same trade seldom meet together, even for merriment and diversion but the conversation ends in a conspiracy against the public or in some contrivance to raise the prices".*[2]

The Competition Act, 2002 was introduced to fill the uncertainties, to clearly define certain terms related to the Competition practices in the country and to promote equitable distribution of wealth and economic power. Apart from its elementary objectives stated under the Act, the broad objectives of the Act are eumerated under Section 3 to 6 of the Act which includes the prohibition of anti-competitive agreements and abuse of dominant position, regulation of Mergers, Acquisitions, and Combinations.[3]

The Act provides a hierarchy of jurisdiction to resolve the issues which may arise under this Act. The aggrieved party can initially approach the Competition Commission of India (CCI), in case of not being satisfied by its judgment a subsequent appeal is allowed to the Competition Appellate Tribunal (COMPAT) under Sec. 53(b) of the Act[4] and a final appeal can be made before the Supreme court from the judgment of the COMPAT under Sec. 53(T) of the Act.[5] The Competition (Amendment) Act, 2007 was approved by the Parliament in 2007, which brought significant changes in the then existing regulatory infrastructure established under the Competition Act.[6]

Jurisprudential background of Competition law in India

The introduction of the Liberalization Privatization Globalization model (LPG) in the Indian economy in the year 1991 led to significant economic reforms in

[1]III BA LL.B.
[2]Richard Wish, *Control of Cartels and other Anti-Competitive Agreementsin Competition Law Today: Concepts Issues and The Law in Practice* 77-79 (Vinod Dhall ed 2007).
[3] The Competition Act 2002, s 3-6 [hereinafter The Act].
[4] The Act, *supra* note 2, s 53(b).
[5] The Act, *supra* note 2, s 53(T).
[6]*Competition Law Bulletin* (Vol I, No 1, September-October 2009), available at: http://www.manupatrafast.in/NewsletterArchives/listing/CNB%20Vaish/2009/September-October,%202009.pdf

the country because of which the creation of a new Competition law framework became extremely necessary. In this regard, the Finance Minister of India in his budget speech in February 1999 made the following statement;

"The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to Competition law; we need to shift our focus from curbing monopolies to promoting Competition".[7]

In the light of the above statement,a Committee was constituted by the government to recommend a framework for the Competition law in India known as the Raghavan Committee. There were a number of shortcomings in the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP) as compared to the international Anti-trust laws which were highlighted by the Raghavan Committee.The new Competition Act has attempted to eliminate the same. The shortcomings were as follows:

i. The MRTP Act was inadequate in respect of the remedies that were available to the aggrieved parties, it did not provide adequate provisions for imposing penalties or fines in the case of anti-competitive agreements or unfair trade practices.

ii. The Supreme Court has repeatedly acknowledged that the wording of MRTP Act did not provide for any extra-territorial jurisdiction.[8]

iii. The MRTP Act was generic in nature and failed to provide coherent meaning to essential terms used in the Act which created a scope for ambiguity.

Concept of cartelization

Under Sec. 3 of the Act, cartels are defined as "anti-competitive agreements". Sec. 3(1) states that "*no enterprise or association of enterprises or persons or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services which causes or is likely to cause an appreciable adverse effect on Competition within India*".[9] Three essential factors have been identified to establish the existence of a cartel namely- agreement by way

[7] Competition Law in India, *A Report on Jurisprudential Trends* , (Nishith Desai Associates , June 2015),available at: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Competition_Law_in_India.pdf

[8] *American Natural Soda Ash Corporation Ansac* v. *Alkali Manufacturers Association of India AMAI and others* (1998) Comp LJ 152 (MRTPC).

[9] The Act, *supra* note 2, s 3(1).

of concerted actions suggesting conspiracy, fixing of prices and the intent to gain a monopoly, restrict /eliminate Competition.[10]

The most crucial ingredient of cartelization behavior is collusive manipulation of prices by competitors. A mere simultaneous movement of prices especially for homogenous products is not by itself sufficient to prove a cartel.[11]Generally, cartels function secretly without any formal agreement and cartelization leads to higher price above competitive levels.[12]

It has been observed that circumstantial evidence is of no less value than direct evidence for it is the general rule that the law makes no distinction between direct and circumstantial evidence.[13]Thus, the commission is not impeded from using circumstantial evidence for making inquiries into acts, conducts, and behaviors of the market participants to establish the existence of a cartel.

There are certain factors which are conducive to the formation of cartels; these factors have been recognized by the Courts in multiple cases. The factors being the nature of the market;homogeneity of the products and the presence of Active trade associations.[14]

Recent advancements in the discipline of Competition law

There have been huge developments in the field of Competition law and practices to meet the demands of the growing trade and dynamic economy. Few of them are as discussed below:

a. Leniency Programme

It is an incentive to those cartel members who choose to share information and cooperate with the Competition Commission. Section 46 of the Act provides for such leniency provisions which state that the commission may, if satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated Sec. 3, has made a full and true disclosure in

[10] *ITC Ltd* v. *MRTP Commission* (1996) 46 Comp Cas 619.

[11] Re *Alkali and Chemical Corporation of India Ltd., Calcutta* v . *Bayer (India) Ltd.*, Bombay (1984) 3 Comp LJ 268 (MRTPC), Order Dated 3/7/1984; *Association of State Road Transport Undertakings* v. S *Kar Mobiles Ltd* 2002 CTJ 433 (MRTPC).

[12] Dr. V K Agarwal, *Competition Act 2002* (2011).

[13] *Roundtables on prosecuting cartels without direct evidence* OECD 2006, https://www.oecd.org/daf/competition/prosecutionandlawenforcement/37391162.pdf

[14] *Neeraj Malhotra* v. *Deutsche Post Bank Home Finance Ltd* Case No. 5 of 2009, (2011) 106 SCL 62 (CCI).

respect of the alleged violations and such disclosure is vital may impose upon such a producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit than leviable under this Act or the Rules or the Regulations.[15] But this Section also provides for certain conditions which need to be fulfilled in order to avail the benefits of the leniency provision.

It is a kind of Whistleblower protection to encourage and incentivize various Actors connected with the commission of such Competition infringements to come forward and disclose such anti-competitive agreements and assist the Competition authorities in lieu of immunity or lenient treatment.[16]

The reward for the Whistleblowers is generally a large or total reduction in penalties and other incentives can also be offered to the other Whistleblowers if they bring forward decisive evidence. These leniency programs are aimed at creating a race among conspirators to disclose their conduct to enforcers, in some instances even before an investigation has begun and to quickly crack cartels that may have otherwise gone undetected.[17]In 2017, the CCI for the first time exercised the leniency program and granted a reduction in 75% of the penalty to an Applicant under Section 46 of the Act and CCI Lesser Penalty Regulations, 2009(LPR).[18]

Further, for a leniency program to be efficacious it must be made attractive for potential Whistleblowers and the following advantages are provided to them:

I. Immunity

II. Corporate leniency and leniency for individuals

III. Protection from private damage action

IV. Risks related to corruption.[19]

[15] The Act, *supra* note 2, s 46.

[16]Competition Commission of India, *Leniency Programme*, (Advocacy Booklet 8), http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/Leniency.pdf

[17] UNCTAD, *UNCTAD Mena Programme, Competition Guidelines, Leniency Programme* (United Nations Conference on Trade and Development in collaboration with The Ministry of Foreign Affairs of Sweden), http://unctad.org/en/PublicationsLibrary/ditcclp2016d3_en.pdf [hereinafter UNCTAD].

[18]American Bar Association, *International Anti-Trust Bulletin* (July 2017, Vol 2), https://www.americanbar.org/content/dam/aba/publications/antitrust_law/at311000_newsletter_201707.authcheckdam.pdf ; *Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items* , Suo-Moto Case No.03/2014, Order Dated 18/1/2017, www.cci.gov.in/orderscommission/102.

[19] UNCTAD, *supra* note 16.

b. Interpretation of the term "Turnover" under Section 27 of the Act

Under this advantage, the penalty imposed on the party by the CCI is based on the relevant turnover of the party rather than its Gross Turnover. In May 2017, the Supreme Court, a Two Judge Bench upheld the principle of "Relevant Turnover" for imposing of penalties in cases of infringements of the Competition Law. The CCI established an infringement of Sec. 3(3) of the Act and imposed a penalty of 9% of the Gross Turnover of Aluminium Phosphide Tablet Manufacturers which includes Excel Corp Care Ltd., United Phosphorus Ltd., And Sandhya Organic Chemicals Pvt. Ltd. The order of CCI was upheld by the COMPAT in respect of the contravention of Sec. 3(3) of the Act but it imposed the penalty on the relevant turnover of the parties thereby reducing the total penalty imposed on them. The CCI challenged the COMPAT's order before the Supreme Court, claiming that the term '*Turnover*' under Sec. 27(b) must without exception be understood as "*Gross Turnover*" of the Enterprise in question. The Supreme Court affirmed that the penalty imposed on the Relevant Turnover of the Enterprises would be in more consonance with the principles governing the Act.[20]

Landmark Decisions

The Competition Commission of India and the Supreme Court have contributed a number of landmark judgments especially pertaining to cartelization and abuse of dominant position. A few major decisions have been provided below:

I. ***Competition Commission of India (CCI)* v. *Steel Authority of India* (SAIL)**[21]

The Supreme Court in 2010 described the limits of the powers which are to be exercised by CCI and COMPAT. Some pertinent issues related to this case are discussed below:

a) Will the directions of CCI under section 26(1) based on the prima facie opinion formed by it, be appealable under sec. 53(a) (1) of the Act?

[20]*Excel crop care limited* v. *Competition Commission of India and Another* (2017) 6 SCALE 241.

[21](2010) 10 SCC 744.

It was held by the Court that the appealable provisions under the Act do not provide for an Appeal against the direction of the CCI.

b) Whether there exists an obligation on the part of CCI to notify the parties at the preliminary stage and whether it is necessary to record reasons while forming a prima facie opinion?

It was held by the Court that parties cannot seek this as a right since there's no statutory duty imposed on the CCI under the Act. It was also held that CCI is obliged to record reasons on which it has formed a prima facie opinion.

c) Whether the CCI shall be added to the claim as a necessary party?

It was held that the CCI is a proper party in all the cases except those in which it has taken suo-moto cognizance. In case of suo-moto cognizance, CCI shall be regarded as a necessary party.

d) The due procedure to be followed by the CCI for the issuance of an interim order under Sec. 33 of the Act was questioned.

The powers of the CCI were upheld in this regard.[22]

II. *Sri Shamsher Kataria* v. *Hyundai Siel Cars India Ltd and Others.*[23]

In this benchmark case settled by CCI in 2014, it was held for the first time that each car company as dominant in it's respective after sales market and penalized the major car companies for entering into vertical agreements and abusing their dominance. CCI imposed a total penalty of Rs.2,544.65 crores on the Gross turnover of 14 major car manufacturers for violating Sec. 3 and 4 of the Act. CCI observed that the opposite parties had contravened the provisions of Sec. 3(4)(b), 3(4)(c), 3(4)(d), 4(2)(a)(i) and 4(2)(a)(ii), 4(2)(c), 4(2)(e) of the Act. Apart from the imposition of penalties on the car manufacturers, in

[22] *Competition Law Bulletin* (Vol II, No 4, September-October 2010), http://www.manupatrafast.in/NewsletterArchives/listing/CNB%20Vaish/2010/September-October,%202010.pdf

[23] Case No. 03 of 2011 (CCI, 25/10/2014).

order to make the automobile market more competitive and to put an end to the anti-competitive conduct of the car companies, CCI also gave certain directions to be complied by the car manufacturers.

III. *Alleged Cartelization by Cement Manufacturers (Cement Cartel Case)*[24]

Under this case, the MRTP commission took suo-moto cognizance and initiated investigations subsequent to it. There were two major issues which were brought under the scanner of CCI. Firstly, if there existed a violation of Sec. 3 of the Act and secondly if the Respondent Parties also violated Sec. 4 of the Act, it was alleged by the Informant in this particular case that the Respondent parties were deliberately limiting the production and supply of goods in the market and were also engaging in collusive price-fixing. It was held by CCI in this matter that there existed a blatant violation of Sec. 3 of the Act. It further remarked that there were many firms acting in the Cement market and no single firm in isolation could hold a dominant position. Moreover, no investigation was conducted by the CCI to determine the violation of Sec. 4 of the Act.

To meet the needs of the changing economy and evolving trade, the Supreme Court and CCI have laid down certain principles in many more landmark cases.[25]

Indian Competition Law and European Union Anti-Trust Law

The EU competition law has been derived from the treaty and is hence comparatively older and well established. In India, the Competition law is relatively new and is thus lacking in certain aspects. *For example*, it fails to define certain terms pertinent to the Act. The term Adverse Appreciable Effect has not been defined in the Act, although certain factors to determine it have been listed in Sec. 19 of the Act. This creates an ambiguity and makes it difficult to interpret the legislation.

[24] (2012) 116 SCL 648 (CCI).

[25] *In Re Alleged cartelization by Steel Manufacturers* RTPE No. 09 of 2008, initiated under the MRTP Act and disposed of under the Act; *All India Organization of Chemists and Druggists* v. *Competition Commission of India* (2015) CPJ 4 COMPAT ; *Builders Association of India* v. *Cement Manufacturers Association* Case No 29 of 2010; *InRe Indian Sugar Mills Association & Ors* v. *Indian Jute Mills Association & Ors* Case No 38 of 2011; *FICCI-Multiplex Association of India* v. *United Producers/ Distributors Forum* Case No 01 of 2009.

Conclusion

Anti-Competitive Agreements and specifically cartels are considered as the most severe infringement of competition law. As discussed above, in recent times India has become more prone to cartelization due to the dynamic behavior of the industries and frequent entry of new competitors in the market. In addition to the anti-competitive behavior that India has been witnessing in the offline markets recently, the competition regulators have also recognized the existence of anti-competitive conduct in the digitalized economy, especially in the e-commerce sector. The competition authorities in India are working towards the development of policies in this field such as the leniency Programme and making efforts to recognize the rising areas of concern and drawing parallel guidelines and strategies for the same.

Multi-Tier Arbitration- A critique on the validity of Appellate Arbitration Clauses

Anjali Singh[1]

Introduction

With the 2015 Amendment to the Arbitration and Conciliation Act 1996, the judicial response to the conduct of Arbitration proceedings has been laudable. Indian Courts have taken one step forward and fortified the arbitration regime in the country by their interpretation of the Arbitration and Conciliation Act 1996. The amendment introduced a vast multitude of provisions entailing an expansive interpretation of the arbitration agreements and flexibility with respect to arbitration proceedings.

One such instance has been the recent ruling of the Supreme Court in the case of *M/S. Centrotrade Minerals and Metal Inc. vs. Hindustan Copper Ltd.*[2]where a three-judge bench of the Supreme Court following a pro-arbitration approach upheld the validity of a two tier arbitration clause (i.e. Appellate Arbitration Clause). Multi- tier clauses are also known as escalation clauses and they provide for a mechanism whereby the parties are able to resolve the dispute in different stages. Such clauses enable parties to appeal to a secondary tribunal against the decision of the first arbitral tribunal constituted to resolve a dispute. The Supreme Court relied on the principle of party autonomy, the essence of which is that the parties are free to determine both the substantive law and the procedural law.[3]

Legal Considerations: The Arbitration Clause

The question, which arose before the Supreme Court, was as to the validity of a two-tier arbitration clause. The arbitration agreement in Clause 14 of the contract provided:

14. Arbitration- All disputes or differences whatsoever arising between the parties out of, or relating to, the construction, meaning and operation

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[1]III B.A. LL. B.
[2](2017) 2 SCC 228.
[3]Julian D.M. Lew, Loukas A. Mistelis, et al. *Comparative International Commercial Arbitration* (2003) 411-437.

or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in effect on the date hereof and the result of this second arbitration will be binding on both the parties. Judgement upon the award may be entered in any court in jurisdiction.[4]

The agreement provided for arbitration in accordance with the Indian Council of Arbitration Rules (ICA Rules) to be held in India. Subsequently, in the event of any disagreement between the parties regarding the correctness of the first award, the arbitration agreement provided that either of the parties will have a right to appeal against an award in the first instance before an Appellate Tribunal which was to be constituted in accordance with the International Chamber of Commerce Rules (ICC Rules) to be held in London. The substantive law was the Indian Law of Contracts.

Centrotrade initiated arbitration proceedings against HCL. The first tribunal in India delivered a "nil" award i.e. an award passed by the tribunal with no order for damages. Subsequently, Centrotrade appealed to the arbitration tribunal in London which passed an award in favour of Centrotrade. Thereafter, Centrotrade commenced enforcement proceedings in India. HCL challenged the legal validity of the award passed by the second appellate tribunal in the Division Bench of the Calcutta High Court.The Division bench of the Calcutta High Court declared that the award passed by the ICC could not be executed while the time the ICA award remained. The judgement was further challenged before a division bench of the SC, which subsequently referred the matter to a three judges bench. The SC addressed the following pertinent issues regarding validity of two-tier arbitration:

A. Whether the first award was an Arbitration award according to the provisions of the Act.

B. Whether the Arbitration and Conciliation Act 1996 allows for Settlement of Disputes by an Appellate Arbitration Clause.

[4] *M/S. Centrotrade Minerals and Metal Inc. v s Hindustan Copper Ltd* (2017) 2 SCC 228, 230.

C. Whether such an Arbitration Agreement is contrary to Public Policy under Sec. 34 (2) (b) (ii) of the Act.[5]

Judgement

The SC noted that the First award was an arbitral award because an arbitral award can be defined as a final decision by the arbitrators with respect to the dispute submitted to them[6] and the award in the present case fulfilled all the essentials of a valid arbitration award and it did not violate any of the grounds mentioned under Sec. 34 (2) of the Act.[7] Further, the intention of the parties was to settle the dispute by way of an award passed by a tribunal consisting of members of the Indian Council of Arbitration.

Regarding the second issue, the SC noted that, since there is no explicit mandate in the Act[8] on Appellate Arbitration, it is implied that such arbitration is permissible in India. It has to be understood in light of the intention of the parties to the agreement. The new amended act does not expressly prohibit appellate arbitration. Moreover, if Sec. 34-36 are interpreted together, one cannot find any objection to the inclusion of an Appellate arbitration clause. The final and binding nature of an award under Sec. 35 of the Arbitration and Conciliation Act 1996 is subject to any recourse taken by the aggrieved party by providing for appellate arbitration in their agreement. Unless that is done, the second appellate arbitration would be invalid in India.

The SC also noted that the intention of the parties was unambiguous from the wording of the agreement, which clearly permitted the parties to make a second reference for checking the correctness of the first award.

The SC for determining the validity of the arbitration clause differentiated between the statutory right to appeal and the non-statutory right to appeal. It reiterated that though the right to appeal can only be granted by statute, it does not in any way prevent the parties to an arbitration agreement *per se* if they include the right of appeal by mutual consent so that any differences may be settled by them without any court proceedings. The right to appeal under the arbitration agreement amounts to substantive right of the parties and such a right can be enforced at the instance of either party to the agreement.[9]

[5] The Arbitration & Conciliation Act 1996, s 34 (2) (b) (ii) [hereinafter The Act].
[6] *M/S. Centrotrade Minerals and Metal Inc v Hindustan Copper Ltd* (2017) 2 SCC 228 [11].
[7] The Act, *supra* note 4,s 34 (2).
[8] The Act, *supra* note 4
[9] *M/S. Centrotrade Minerals and Metal Inc. vs Hindustan Copper Ltd* (2017) 2 SCC 228 [14].

With respect to the third issue, the SC noted that the award passed by the appellate tribunal was not in derogation of the public policy of India because the parties did not violate any provision of the Arbitration and Conciliation Act 1996.[10] Additionally there was nothing in the Agreement that would be fundamentally objectionable to public policy under the Act.

The SC also emphasised on the principle of party autonomy, which is one of the objectives of the 2015 amendment to the Arbitration and Conciliation Act[11] i.e. to give freedom to the parties to the arbitration agreement to do as they please unless their actions are contrary to public policy. The parties are free to decide not only the procedural law but also substantive law applicable in case of a dispute. In the instant case, Clause 16 of the arbitration agreement provided for construction of a contract in accordance with the law of contract in India.

Critical Appraisal

The present judicial pronouncement is important for many reasons. To state some, since the Arbitration and Conciliation Act 1996 is founded upon the (UNCITRAL) Model Law, an International Commercial Arbitration (adopted in 1985), it would add to the jurisprudence as to how the courts should scrutinize the appellate arbitration clauses. Since Part I of the Arbitration and Conciliation Act 1996 is also applicable to those International Commercial Arbitration proceedings where the substantive law is Indian law, it would increase the prospects of more investor state arbitrations conducted pursuant to Indian law and would lead to India being considered a more friendly destination for the conduct of arbitral proceedings.

Appellate Arbitration is not a new concept.This Principle was also taken into consideration during the drafting of the UNCITRAL Model Law, and while recognizing appellate arbitration clauses, the Report of theWorking Group on International Contract Practices on the Work of its Third Session (of which India was a member) observed that:

"There was wide support for the view that parties were free to agree that the award may be appealed before another arbitral tribunal (of second instance), and that the model law should not exclude such practice although it was not used in all countries."[12]

[10] *M/S. Centrotrade Minerals and Metal Inc v Hindustan Copper Ltd* (2017) 2 SCC 228 [47].

[11] *ibid*

[12] A/CN.9/216 *Report of the Working Group on international contract practices on the work of its third session*, 1626 February 1982, New York.

In spite of the many benefits of the judgement to jurisprudence of the Arbitration law in India, one cannot rule out the disadvantages. Principally that, the presence of an appellate clause would act as a delaying tactic by the Respondent to slow down the whole process.

Further, the Supreme Court in this judgement has not clarified its position to see if it can entertain enforcement proceedings of the first award when the proceedings of the second award are pending before the arbitral tribunal.It is still unclear that whether the Appellate Tribunal can remand the matter back to the first tribunal or not for further consideration i.e. if the Appellate Tribunal can send the order back to the first tribunal for reconsidering its decision.

The Arbitration proceedings in UK, USA, and International Chamber of Commerce (ICC) have adopted a common approach wherein the validity of the multi-tier dispute resolution clause is determined on the basis of the Contractual Agreement. The Arbitration clause should be unambiguous so that clear inference can be drawn by the Arbitral Tribunals with respect to the intention of the parties for incorporation of a multi-tier dispute resolution clause. The parties can mutually agree to refer the matter to an Appellate Tribunal by including it in the agreement.[13]

The judgement has given more legitimacy to the whole process by ruling on the importance of the correctness of the arbitral award and to the unambiguous intention of the parties reflected by the agreement. Upholding the validity of an Arbitral award passed by the Appellate Tribunal in the present case will lead to greater freedom to the parties for the review of awards. Apart from the discrepancies mentioned earlier, the Supreme Court went ahead and interpreted the text of the statute in a unique manner. Though some issues remain to be decided, the judgement passed by the Supreme Court nevertheless is an interesting development in Indian Arbitration Law.

[13] 'Arbitration Clause' https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/ accessed 3 December 2017

Marital Rape: A Conjugal Right or a Crime?

Asmita Topdar[1]

Introduction

Marriage is the union between a man and a woman permitting them to live their life together legally and socially. It is a fiduciary relationship. It unites the two souls. With marriage, both acquire conjugal rights, which they are bound to respect. But now the question which arises is whether under the garb of marriage the husband is entitled to have complete right over his wife's body or in other words, does marriage take away the right from the wife to say 'NO' to the forced sexual intercourse.

Marital Rape or Spousal rape is a forced sexual act by a husband on his non-consenting wife by using threats or physical force. Marital rape is a bit complex than other forms of sexual violence because the victim takes time to first comprehend the happening of the violence and to apprehend the fact that it is done by none other than her own husband. This is at the grassroot level, which leads to non-reporting of such cases in the country. Even if the women consider themselves the victim, they hardly take steps to report the same to the authorities because of fear of society.

It has taken long time from the Tukaram rape case to the horrific case of Nirbhaya gang rape in 2013 for the lawmakers to amend and make laws to address the demand of the society to curb the menace of this evil. Despite the increase in the sexual violence acts, not much attention has been paid to the social evil where a husband atrociously miscarries the rights of his wife by raping her.

Types of Marital Rape

Marital Rape can be broadly classified into two types:

i] Sexual coercion by non-physical means – Husband compels his non-consenting wife to enter into sexual intercourse by using non-physical techniques like putting societal and verbal pressure, threatening to end marital relation etc. In this type of coercion, the husband constantly reminds his wife about her duties. This is less severe than forced sex as there is no use of physical force.

ii] Forced Sex – In this type of coercion, there is an evident use of physical force on the wife by the husband to enter into sexual act. This is further classified into three types:

a) Battering Rape – In this type of forced sex, woman undergoes both physical and sexual violence where the husband forces himself on his non-consenting wife. In some instances wife is battered and undergoes a violent physical abuse after the coerced sexual intercourse.

b) Force-only Rape – In this type husband uses only that amount of force as required to coerce the wife. He may not batter her.

c) Obsessive Rape – Also known as sadistic rape, this involves brutal form of torture on the wife where force is used with perverse sexual acts.

Sec 375 of Indian Penal Code

Sec 375 of IPC provides an exception to marital rape and thus women who are facing sexual abuse at the hands of their husband are denied of their right to justice.

According to this section a man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: firstly, against her will; secondly, without her consent; thirdly, with her consent, when her consent has been obtained by putting herself or any person in whom she is interested in fear of death or of hurt; fourthly, with her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is the man to whom she is or believes herself to be lawfully married; fifthly, with her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent; sixthly, with or without her consent, when she is under sixteen years of age. Exception-Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape.[2]

[1] IIB.A.LL.B.

[2] Indian Penal Code, 1860,no. 45,Act of Parliament.

1) Indian perspective to Marital Rape

The assumption, that marriage comes with the wife's consent to have sex, forms the basis of marital rape. In India, Marital rape is de facto and not de jure.[3]

Marital Rape found its mere reference in The Protection of Women from Domestic Violence Act, 2005.[4] This Act prohibits any act of sexual violence in a live-in and marital relationship. However, this act provides civil remedies only. Marital rape is not treated as a criminal offence in India. In *Bodhisattwa Gautam v. Subhra Chakraborty*, the Supreme Court said that; "Rape is a crime against basic human rights and a violation of the victim's most cherished fundamental rights, namely, the 'right to life' enshrined in Article 21 of the Constitution." However, the very same Court negated the judgement by not recognizing it to be a crime.[5]

There are various theories for non-criminalisation of marital rape. These include:

a) Contract Theory: Marriage is generally treated as a contract and one of the conditions of such a contract involves the implied consent of the wife to fulfil the sexual needs of the spouse as per his will.

b) Women are treated as property: The basic presumption is that the husband is the owner of the wife's body and after marriage the wife loses her right to her body.

c) Less Serious: Non-marital rape is considered more heinous and severe as compared to marital rape. However, the statistics show a different picture altogether.

d) Difficulty in proving: Marital rape is difficult to prove for it being private in nature and takes place behind closed doors.

e) Possible misuse: Criminalisation of marital rape can be misused by women making false claims in the court of law and giving hardships to the husband.

f) It will pose a threat to the family system in the society.

[3]Saif Rasul Khan, *'Marital Rape: The Bitter Truth, International Journal of Law and Legal Jurisprudence Studies'* : ISSN:2348-8212: Volume 2 Issue 4.

[4] The protection of Women from Domestic violence Act 2005, 43, Act of Parliament.

[5]*supra* note 3.

g) Marital rape would destroy many marriages without giving the scope of reconciliation.

Few years back, Ms. Maneka Gandhi, Minister of Women and Child welfare, had submitted in parliament saying that the "concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors like level of education, illiteracy, poverty, myriad social customs and values, religious beliefs, mindset of the society to treat the marriage as a sacrament, etc."[6]

The constitution of India provides for equality of women before law under Art. 14 and Art. 15(1) mandates the state not to discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them.[7] However, Sec. 375 of IPC clearly discriminates women on the ground of equality. It gives protection to women only below the age of 15 from marital rape. No protection for women beyond the age of 15. Article 21 provides the right to live with dignity.[8] But marital rape clearly breaches the right of a married woman to live with dignity.[9] Though protection of the dignity of women is a fundamental duty under the Constitution, casting a duty upon every citizen "to renounce practices derogatory to the dignity of a woman" it seems that domestic violence and marital rape do not come under the definition of dignity.[10] Sec. 375 of IPC highly contradicts The Protection of Children from Sexual Offenses Act, 2012 (POSCO) and The Prohibition of Child Marriage Act, 2006 which defines a child as a person below 18 years of age. The law prevents a girl below 18 years from marrying, but on the other hand, it legalizes non-consensual sexual intercourse with a wife who is just 15 years of age.[11]

Legal Position of Marital Rape in other countries

Today many countries have criminalised marital rape or have repealed the exception despite of their respective domestic issues. These States include Mauritania, Australia, China, France, Albania, Germany, Hong Kong, Italy, Japan,

[6]Shraddha Jandial, *'Should Marital Rape be criminalised in India'*, India Today, March 16, 2016, 14:17.

[7] Art 14. Art 15 (1), Constitution of India

[8] Art 21, Constitution of India

[9]Saloni Joshi, *"Is Rape legal in India after Marriage"*, March 16, 2016, Accessed: https://feministaa.com/2016/03/16/is-rape-legal-in-india-after-marriage/.

[10]Saurabh Mishra and Sarvesh Singh, *"Marital Rape- Myth, Reality and Need for Criminalisation"*, 2003 PL WebJour 12, Accessed: https://www.scconline.com, 12:28.

[11]*ibid*

Sweden, New Zealand, Denmark, Norway, Belgium, the Philippines, Scotland, Ireland, South Africa, Canada, Algeria, Taiwan, U.K, Tunisia, USA, and Indonesia. Turkey in 2005 criminalized marital rape, while Thailand and Mauritius did so in 2007. This step towards criminalising marital rape by other countries represents their acknowledgment towards defining marital rape as a human rights violation. In 2006, it was estimated that marital rape is an offence punishable under the criminal law in at least 100 countries and India is not one of them.[12] According to the 'UN Women's 2011 Progress of the World's Women: In Pursuit of Justice' report, Marital rape is a criminal offence in about 52 countries, including USA, Canada, UK, France, Mauritius, Thailand and the neighbouring country Bhutan.[13] What is that which prevents us from joining the 100+ countries in the world, which even includes our neighbouring countries like Bhutan, China and Mauritius?

Study of Reports

a) 172nd Law Commission Report, 2000

In its 172nd Law Commission Report, 2000 submitted by chairman B P Jeevan Reddy to the then Law Minister Ram Jethmalani, the commission recommended that the existing Sec. 375 of IPC defining rape should be substituted by the definition of sexual assault. The definition of sexual assault contained in Sec. 375 should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.[14] However, they also retained the exception regarding marital rape. Sec. 376 has been redefined to provide for punishment for sexual assault. Also they recommended to enhance the punishment. But the government did not take any action to either modify or delete Sec. 377 of IPC.

With the practice of custodial rape on young boys, the committee also propounded that rape related laws should be made gender neutral. There was also a proposal to include a new offence under Sec 376-E, defining "unlawful sexual conduct". In reference to the Supreme Court judgement that sexual assault on any part of the body should be construed as rape in the case *Sakshi v. Union of India and Others*[15], the committee tried to bring about substantial changes in the law regarding rape.

[12]Dr. Bhavish Gupta and Dr. Meenu Gupta, Marital Rape - Current Legal Framework in India and the Need for Change, 2013 GJLS Vol. 1 No. 1, ISSN. 2321-1997.
[13]UN Women's, 2011, Progress of the World's Women: In Pursuit of Justice report.
[14]*supra* note 3
[15]*Sakshi v. Union of India and Others*, 2004, 5 SCC, 518.

b) Justice Verma Committee Report

This committee was formed to give recommendations for amending the Criminal Law so as to provide speedy trial and to enhance the punishment for criminals accused of committing sexual violence against women. It was headed by Justice J.S. Verma, former Chief Justice of the Supreme Court and the other members on the Committee were Gopal Subramanium, former Solicitor General of India and Justice Leila Seth, former judge of the High Court. The Committee submitted its report on January 23, 2013 wherein they demanded for criminalisation of marital rape. Notwithstanding the fact that the report has been submitted over four years back, the government has not taken any action for treating it as an offence. However, the Parliament said any sexual assault by a husband on his wife during the period of their judicial separation must be treated as a cognizable offence.[16] The recommendations proposed by the committee involved the following:

- Law ought to specify that marital relationship is not a valid defence against statutory rape
- Marriage or intimate relationship cannot justify lower sentences for rape
- Exemptions from marital rape stems from out-dated notion which regards wife as a property
- Marriage in modern times should be regarded as a partnership of equals

Statistical Data

Since the Indian judiciary does not recognise marital rape as a crime, many cases remain unreported. According to the UN Population Fund, more than two-third of married women in India, aged 15 to 49, have been beaten, or forced to undergo sexual intercourse. The United Nations published a report that had a mention that 69% of Indian women believe that occasional violence was justified, for instance when she refused to have sex or when she does some activity not in accordance with husband's will. In 2011, the International Men and Gender Equality Survey revealed that one in five had forced their wives or partners to have sex. Further statistical research reveals that 9% to 15% of married women are subjected to rape by their husbands. According to a study conducted by the International Centre for Women (ICRW) and the United Nations Fund for Population Activities (UNPFA) in 2014 in eight states of India for providing some insights into sexual violence, one third of men in these

[16] Accessed:WWW.prsindia.org/parliamenttrack/report-summaries/justice-verma-committee-report-summary-2628/.

eight states have admitted that at some point in their marital life they have forced their wives to enter into sexual act.

The United Nations Committee on Elimination of Discrimination against Women wanted India to criminalise marital rape. The previous UNDP Chief Helen Clark stated that, "The issue is not one of culture but of consent. If India fails to criminalise marital rape it would flout the Sustainable Development Goals (SDG)."[17]

Conclusion

Rape is a criminal offence whether committed by a stranger or a husband. It is immaterial whether the woman is married or single.

The questions, which arise frequently, are whether a woman loses her dignity and right to her body after marriage? Does she have no right to say 'NO'? Does her will and consent become immaterial after marrying her husband?

If a 15 year old unmarried woman is raped, law is there to protect her but if a 15 year old married woman is raped by her husband she is unlikely to get justice. This critically shows the defect in the legislation. Further, if the legal age for giving consent to sex is 18 years under Criminal Law (Amendment) Act, 2013 then how can parliament give approval to the exception in Sec. 375 of IPC, which says sexual intercourse by a husband with his own wife is not rape if the wife is above 15 years of age.

Article 21 of the Indian constitution provides the right to live with dignity and marriage cannot become an exception to Article 21. Woman should be empowered to say 'NO' if she is unwilling to enter into sexual act. Marriage should not become a license to rape. The state should take immediate action in order to treat it as an offence. Also removal of the exception in Sec 375 of IPC is a must. Looking at the discriminatory nature of the society, the need of the hour is significant change in the outlook, perception and mentality of the society. Denying justice to the victimised women for the sake of protecting the sanctity of family system in the society would be a failure of the state towards ensuring justice to women. Justice cannot be denied by continued encouragement of atrocities against women year after year. We take pride of being a civilised nation but we need to ponder whether we have really evolved intellectually enough to ensure an equitable status to woman, where a man does not objectify his wife or where a spouse is not merely for sexual satisfaction?

[17]Rupa Bhattacharya, Debate and Necessity: Criminalising Marital Rape, May 17, 2016, Accessed: https://swarajyamag.com/ideas/debate-and-necessity-criminalising-marital-rape, 20:42.

Disability in the Millennium: Analysis of the Irony of Sexual Abuse and the Tort of Wrongful Life.[1]

Varad S. Kolhe[2], *Sagar Samant*[3]

Introduction

Echoing the sentiments of Michael Oliver, "To be constantly and consistently denied the opportunity to work, to make a constant material contribution to the well-being of society, to be positioned as not being fully human, indeed, is the root cause of being labeled as 'others' or *Useless Eaters*, as Simon Smith's CD suggests. Our culture only allows us to be Christopher Reeve or Christy Brown precisely because we are not fully involved in working all those industries that produce images about us. Racism and sexism further separate us from our humanness when they attempt to deny a disabled woman the right to mother the child she has given birth to. Finally the welfare state tells us not to worry because even if we are a burden on our caretakers, we will still be cared for - by the vast professional army or our loved ones who work tirelessly on our behalf, rather than allowing us the dignity to work for ourselves and indeed, to become ourselves. Are the times really changing for disabled people?"

Abuse

As per Indian Census Survey conducted in 2011, 2.21% of India's population i.e., 26.8 million people suffer from disability with women comprising 11.8 million of the same. It is simultaneously astonishing and disheartening that almost 80% of disabled women are victims of violence and they are four times more likely than others to suffer sexual violence.[4] Moreover, this abuse is perpetuated at home, special schools or government institutions not only by persons employed there but also by the very people who are supposed to protect them, including medical professionals, relatives and friends. The Mental Health Care Act, enacted in 2017 effectuates the protection and promotion of the rights of disabled

[1]Research Paper presented at One Day National Conference on Critical Reflections on Disability Sensitive Legal Order, held on 26th August, 2017 at ILS Law College, Pune.
[2] III B.A.LL.B.
[3] III B.A.LL.B.
[4]As derived from report submitted by Disabled People's International (India) and its partners to the Committee on the Elimination of Discrimination against Women (CEDAW), in September, 2013.

women such as right to community living[5] and right to protection from cruel, inhuman and degrading treatment.[6]

In such a scenario, the most tangible solution to this societal mishap, as resorted to by disabled women's kin and ratified by the state on reaching puberty, is sterilization, in essence, hysterectomy i.e. expulsion of the uterus from the human body. United States was the first country to undertake sterilization for eugenic purposes after a US Supreme Court judgment unleashed waves of forced sterilizations.[7] Its repercussions were quite evident by 1963, when over 60,000 people were sterilized without consent. In Russia, medical intervention without the patient's consent in the case of mentally disabled individuals is authorized by law.[8] Similarly, 1045 girls with disabilities under the age of 18 years were forcibly sterilized in Australia during 1992-1997.[9] Unfortunately, India has a history no different from the above illustrations.

While hysterectomy is performed by putting forth excuses such as inability of women to maintain menstrual hygiene and persistent difficulty of maintaining their health faced by institutions, such excuses often benefit the convenience of care taker institutions adversely affecting the health of the mentally handicapped women. Families opt for hysterectomy not for the fear of abuse but because of the fear of discredit that the unwanted pregnancy caused by abuse may bring to them, with the utilitarian principle justifying the mercy killing of people who are termed as 'useless.'

Hysterectomy, like all other surgical procedures is not devoid of dangerous consequences to health of the patient, giving rise to a spectrum of complications which may arise in the future. Post-operative fever and infection, hemorrhage, formation of blood clot in the lungs, damage to surrounding organs during surgery and urinary complaints constitute ubiquitous occurrences. It's baneful consequences also include Residual Ovary Syndrome, a painful adnexal mass aggregated in the pelvis, perpetuating general pelvis discomfort and pain during sexual intercourse in the future. Such procedures, under the knife may also be

[5]Mental Health Care Act, 2017, § 19
[6]Mental Health Care Act, 2017, § 20
[7]*Buck* v. *Bell*, 274 U.S. 200 (1927)
[8]Law on Fundamentals of Russian Federation Legislation on Public Health Care (Law No.5487-1) (passed on July 23, 1993, published on August 18, 1993 in Ross. Gazette) translated in Joint Publications Research Service, Document No. JPRS-UST-94-002, 33, Item 1318, Ch. 6, Art. 34
[9]Elizabeth Hastings, *'Burning Issues for People with Disabilities'*, available at <http://www.wwda.org.au/hasting.htm .>, accessed on 12 September 2017

performed under disguise, for example, a doctor while carrying out a normal procedure may pretend to have accidently caused harm to the uterus and subsequently remove it, thus escaping all liability by colluding with the parents of the disabled woman.

India is a signatory to the United Nations Convention on the Rights of Person with Disabilities, 2007, which guarantees all intellectually disabled women "the right to full bodily integrity."[10] Elaborating on the legal aspect of this precept, at the very outset, it is of utmost pertinence that disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens.[11] The right to physical integrity is the central tenet of the broad right to life, liberty and security of person guaranteed by the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.[12]The CEDAW General Recommendation on Health prohibits coercion and non-consensual sterilization[13]. Furthermore, mental health-care principles strictly oppose sterilization as a treatment for mental illness.[14] In accretion, Article 5 of United Nations Universal Declaration of Human Rights lays down that "no one shall be subjected to torture, cruel or degrading treatment or punishment" and Article 16 'confirms the right to marry and found a family.' Lastly, the right of women to make reproductive choices comes within the ambit of personal liberty as perceived under Article 21 of Indian Constitution.[15] The right to physical integrity encompasses appurtenant reproductive freedoms, including the right to make decisions regarding one's health and the right to be free from sexual abuse and exploitation. Women and girls with disabilities must be guaranteed emancipation from encroachments of both these freedoms of their physical person.[16]

[10]Convention on the Rights of Persons with Disabilities, Article 17
[11]Declaration on the Rights of Disabled Persons, proclaimed by UN General Assembly Resolution No. 3447 (XXX) of 9th December 1975, at 3.
[12] Universal Declaration of Human Rights; Article 6, International Covenant on Civil and Political Rights, Article 3,
[13]General Recommendation No. 24: Women and Health, Article 12; *Committee on the Elimination of Discrimination Against Women*, 20th Session, at 22, U.N. Doc. CEDAW/ C/1991/WG.II/ WP.2/Rev.
[14]The Protection of Persons with Mental Illness and the Improvement of Mental Health Care, Article 12, A/RES/46/119
[15]Jagdish Swarup , *Constitution of India*, (3rdedn., Vol. 1, at 1234)
[16]UN Committee on the Elimination of Discrimination against Women (CEDAW); Article 6, CEDAW General Recommendation No. 12: Violence against Women, 1989.

The irony seems stark when women become more prone to abuse as their chances of conceiving are completely eliminated. If a mentally disabled woman, who is fertile, is subjected to forced sexual intercourse, stimulating unwanted pregnancy, there are concrete traces, which can lead to busting of the crime and aid investigation. However, if a permanently infertile disabled woman is subject to the offence of rape, she may not even be able to express the mental trauma and physical pain she experienced, thus, making her more vulnerable to further sexual abuse, rendering her helpless.

In conclusion, it is submitted that contraceptive pills, medroxy-progesterone injections, and intra uterine devices can be used for contraception and menstrual management of mentally disabled women. Together with behavioral management, these methods could help with menstrual hygiene.

Wrongful Life

In the area of birth-related claims, there are three torts that are commonly mentioned: wrongful pregnancy, wrongful birth, and wrongful life.[17]The theory of wrongful life, the subject of this paper, applies when the impaired child brings a suit on his or her own behalf. In a wrongful life case, the child claims the defendant wrongfully deprived the parents of information which would have prevented the child's birth and that the child was a foreseeable victim of such wrongful deprivation of information.[18]

Confusion often arises as to the nature of a wrongful life claim. The child's claim is that he never should have been born, in other words, that he would be better off dead.[19] By bringing this cause of action under wrongful life, the child in effect says, "I am here in this world, but I shouldn't be. I am prepared to live with my disabilities, but as a direct result of a health care provider's breach of the duty owed directly to my mother and indirectly to me, I deserve and need help so I can survive in this world."

Certain Instances when the court denied the action of Wrongful Life[20]

[17] *Miller* v. *Johnson*, 231 Va. 177, 181, 343 S.E.2d 301, 303-04 (1986)
[18] *Harbeson* v. *Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983)
[19] Smith (n 16)
[20] For more instances, see *Becker* v. *Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807 (1978); *Park* v. *Chesin*, 386 N.E.2d at 808-09; *Siemieniec* v. *Lutherran General Hospital*, 117 Ill . 2d 230, 512 N.E.2d 691 (1987); *Bruggeman* v. *Schimke* , 239 Kan. 245, 718 P.2d 635 (1986)

a) *Gleitman v. Cosgrove*[21]- Being the seminal wrongful life case, it involved a physician who failed to accurately advise a pregnant woman of the possible impact of German measles on her unborn child. The New Jersey Supreme Court denied a cause of action for wrongful life for three reasons: That plaintiffs did not allege the physician could have ordered therapy of any kind which would have decreased the possibility of the gestating infant being born with defects; according to the court, a determination of how the plaintiff could be returned to nonexistence is an impossible undertaking; and even if damages could be defined, they would pale in comparison to the preciousness of life. Astonishingly, *Roe v. Wade*[22] which gave women the unfettered right to an abortion within the first trimester of pregnancy, had not yet been decided.

b) *Smith v. Cote*[23] - The physician failed to diagnose rubella in a pregnant woman, and the child was subsequently born with congenital rubella syndrome. In denying a cause of action for wrongful life, the New Hampshire Supreme Court discussed the enigmatic determination of whether a person's life is worthwhile. The court also stated that recognizing the cause of action for wrongful life would lead to increased discrimination against handicapped people. Finally, the court noted the state of New Hampshire would, henceforth, allow parents in wrongful birth actions to recover post-majority extraordinary expenses for the care of the child, thereby eliminating in most cases the need to recognize the tort of wrongful life.

Certain Instances when the court allowed the action of Wrongful Life[24]

a) *Turpin v. Sortini*[25] - The parents' first child was born totally deaf. They consulted a licensed specialist in the diagnosis and treatment of hearing and speech defects. The specialist advised them that the child's hearing was within normal limits, although, in fact, the child was totally deaf. The parents relied on the professional's assessment and conceived a second child who also was born totally deaf. In allowing a cause of action for wrongful life, the California Supreme Court reasoned that the child exists, suffers, and deserves to be compensated. The child never had a chance to be born healthy

[21] 49 N.J. 22, 227 A.2d 689 (1967)
[22] 410 U.S. 113 (1973)
[23] 128 N.H. 231, 513 A.2d 341 (1986)
[24] For more instances, Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984)
[25] 31 Cal.3d 220, 182 Cal. Rptr. 337, 643 P.2d 954 (1982)

and the court found it impossible to measure existence against nonexistence. In addition, the mother has the right to decide for the child whether to abort or bring the child to term. Therefore, when the defendant negligently fails to diagnose a hereditary ailment, he or she harms the potential child, as well as the parents, by depriving them of information, which may be necessary to determine whether it is in the child's interest to be born with defects or not to be born at all. Hence, the child can recover special damages because damages can be calculated with relative certainty and because parents may not always be available to sue.

b) In *Harbeson v. Parke-Davis, Inc.*[26]- In the instant case, a pregnant woman suffered a seizure and was diagnosed as an epileptic. Her physicians prescribed Dilantin, which she took during the remainder of her pregnancy, and she gave birth to a healthy child. Desiring to have more children, the parents consulted their physicians about the effects of the continued use of Dilantin on any future children. The physicians informed them that Dilantin could cause cleft palate and temporary hirsutism. However, none of the physicians conducted literature searches or consulted other sources for specific information regarding the correlation between Dilantin and birth defects. The mother, relying upon the advice of the physicians, became pregnant two more times. Both of these pregnancies resulted in children born with other substantial defects related to the use of the drug.

In allowing a cause of action for wrongful life, the Washington Supreme Court explored the concepts of duty, breach of duty, causation, and damages. In fact, this is one of the few cases addressing the tort of wrongful life that attempts to analyze breach of duty in relation to the traditional elements of proving a tort case. First the court reasoned that a duty may extend to persons not yet conceived at the time of a negligent act or omission and is limited by the concept of foreseeability. Second, according to the court, the tort of wrongful life does not disavow the sanctity of a less than perfect human life, because awarding damages to a severely handicapped child neither results in a disavowal of life nor lessens his or her status as a member of society. Third, allowing the wrongful life cause of action will foster societal objectives of genetic counseling and prenatal testing, and will also discourage malpractice. Fourth, "recognition of the duty (to the unborn or

[26]98 Wash. 2d 460, 656 P.2d 483 (1983)

unconceived child) will provide more comprehensive and consistent compensation for those injured by such malpractice (at least for extraordinary out-of-pocket expenses) than would be available where the duty is confined to the parents." Fifth, causation in a wrongful life case easily fits into the traditional tort molds of "but for" and proximate cause. Sixth, general damages (including damages for pain and suffering) are not ascertainable because of the need to compare existence with nonexistence. Finally, the court reasoned that the child may recover special damages (for extraordinary care) because those damages are readily ascertainable.

Wrongful life and the traditional tort framework of duty, causation, and damages.

a) *Identification of Injury* - The courts have developed a recurring theme in their denial of wrongful life actions: that no injury has been suffered on the part of the claimant by his birth. The basic problem with terming the life as a wrongful injury is that the child never had a chance to a normal life; the choice was unfortunately between impaired life or no life, not between impaired life and non-impaired life.[27] Considering life as the injury leads the courts to the unwanted task of determining whether it would have been better never to have been born, "a mystery more properly left to the philosophers and theologians."[28] A more pragmatic approach to the issue of injury, which includes the preciousness of life reasoning, has been to suggest that there is no right not to be born. An interesting argument used to counter the idea that there is no right to be born without handicaps has been to analogize the wrongful life action to the concept of a right to die. "Simply put, the judiciary has an important role to play in protecting the privacy rights of the dying. It has no business declaring that among the living are people who never should have been born."[29]

b) *Criteria for defining injury* - As the court queried in the case of *Elliot v. Brown*[30], "What criteria would be used to determine the degree of deformity necessary to state a claim for relief?" The child for whom the action has been brought cannot be asked whether he would rather be dead; he is too young or too uncomprehending to understand the question. The parents

[27]*Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984
[28]Becker (n 22)
[29] 513 A.2d at 353
[30] 381 So. 2d 546 (Ala. 1978)

have decided for the child that the quality of his life warrants a wrongful life action. Whether or not the child prevails in his action, the court record always exists to remind the child that at least his parents, if not a jury, determined that he would have been better off had he been never born.The growing awareness of disabled people as productive members of society and the legislation passed to aid handicapped persons should not be undermined by a judicial determination that entire groups of people have "wrongful" lives.

c) *Incalculability of general damages* - There is no rational way to measure life against nonlife; and even if a measure could be divined, the damages are too speculative.[31]

Conclusion

Wrongful life claims pose serious problems as to what criteria define a "worthless" life. It allows parents to declare that their child's life is not worth living, straining the family unit and leaving the child to speculate later on the value of his existence. Additionally, a judicial determination of a life as "wrongful" because of an accompanying handicap makes serious inroads into the progress made toward the changing society's attitudes toward the disabled. The harshness of the remedy does more than encourage diligence among those in the profession; it discourages the actual practice of that profession because of high litigation and insurance costs,[32]and increases the costs of the industry itself.[33]The courts probably would not want to hold that a mother has the duty to abort, especially given the fact that for many people abortion is not a viable alternative due to religious or moral beliefs. Forcing someone to place their child for adoption is equally difficult.[34] This raises another question, could a child after reaching majority bring a wrongful life action against his parents because he was brought into the world instead of being aborted?

[31]*Turpin* v. *Sortini*, 31 Cal. 3d 220, 235, 643 P.2d 954, 963, 182 Cal. Rptr. 337, 346 (1982); *Harbeson* v. *Parke-Davis*, Inc., 98 Wash. 2d 460, 482, 656 P.2d 483, 496-97 (1983); *Procanik by Procanik* v. *Cillo* , 97 N.J. 339, 353-54, 478 A.2d 755, 763 (1984)

[32]P. Danzon, Medi cal Malpractice 85 (1985). *See also* for an earlier study, G. Burghart, Medical Malpractice and the Supply of Surgeons in The Economics of Medical Malpractice 103-23 (1978)

[33]*Id.* 2-4 and 131-32 (1985)

[34]*University of Arizona* v. *Superior Court*, 136 Ariz. 579, 586; 667 P.2d 1294, 1301 (1983)

India always has had a strong policy of protecting the family, as is obvious through an examination of its succession law and family laws implicit in these provisions in the recognition of the importance of the family unit. To allow parents to declare that their child's life is not one worth living could easily strain the parent-child relationship and leave the child to later ponder his own self-worth.

In conclusion, it is in fact appurtenant to note that normal people may, at sometime, also become disabled and that the word "abnormal" also includes "normal."

Section 28 of the Indian Contract Act, 1872 – A Law with a Flaw

Harini Sutaria, Junaid Lirani[1]

The legal arena has faced dilemma over how to construe the clause of agreement in restraint of legal proceedings.The general law of contract recognizes promises made for consideration as legally enforceable agreements. However it frowns upon certain promises and prohibits their enforcement, including those that are dealt with in Sec. 28 of the Indian Contract Act,1872. With reference to the present position, it is important to understand why parties should be allowed to insert their own clauses of prescription, when they are not allowed to insert their own clauses of limitation. This position is prima facie illogical, and there exists no countervailing or overriding consideration that justifies this illogicality. This article deals with the evolution of Sec. 28 as it stands today and the pressing need to amend it further in consonance with the intent and object that it was enacted for.

Introduction

For the efficient functioning of any legal system, a fundamental requisite is that such system should be built on the aspirations of people, law or legal system, which will not work in vacuum for the simple reason being that the social conditions are the deciding factors for the adoption or bringing about any change in the legal system. The law works in the best interest of the common man and is of great importance from the point of view of economic justice and avoidance of hardship to consumers.

Sec. 28 of the Contract Act[2], (hereinafter referred to as "Sec. 28") has undergone various criticisms, changes, recommendations and finally an amendment, which further requires an amendment. Among the seven provisions dealing with void agreements, Sec. 28 has seen the maximum legislative action.

After a number of recommendations, amendments and judicial pronouncements, Sec. 28 has evolved to its present form and interpretation (though still anomalous).

[1] V BSL LL.B.

[2] Section 28, Indian Contract Act, 1872, Act No. 9, Acts of Parliament, 1872.

The Law Commission of India, in its 13th report[3] as well as 97th report[4] had raised concerns over the inadequacy of the Section in dealing with prescriptive clauses in contracts i.e. clauses extinguishing rights under a contract on the expiry of a specific period. However, it was only the 97th report which led to a partial amendment of the Section. The evolution of Sec. 28 dealt with in this article can be broadly classified into the following heads:

a. The law as it existed before the amendment.

b. The recommendations of the 97th Law Commission Report.

c. The amendment of 1997.

d. The need for further amendment.

The Existing Law

Section 28 as it stood before the amendment in its main paragraph provided as under:

Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual proceedings in the ordinary tribunals or which may limit the time within which he may thus enforce his rights is void to that extent.

Thus, the Section frowned upon agreements which restricted the time within which a party to an agreement could enforce his rights under a contract by initiating proceedings in a court of law and accordingly declared such agreements to be void to that extent. However, on a close scrutiny of the Section, it can be observed that the Section does not go on to invalidate an agreement in the nature of prescription, meaning thereby an agreement which extinguishes the rights of a party at the end of specified period, if not enforced.

On a bare perusal of Sec. 28, it can be deduced that the parties to an agreement are not allowed to substitute their own periods of limitation for the period already laid down in the law of limitation. However, they are allowed to substitute their

[3] 13th Law Commission of India Report, *Examination of the Provisions of the Existing Act, indicating the changes proposed,* available at http://lawcommissionofindia.nic.in/1-50/Report13.pdf.

[4] 97th Law Commission of India Report, *Section 28 of Indian Contract Act, 1872 – prescriptive Clauses in Contracts,* available at http://lawcommissionofindia.nic.in/51-100/report97.pdf.

own prescription periods, i.e., they are free to provide that a party shall be discharged from all liability under the contract if the party fails to sue within a specified period. The anomaly that is caused is due to the latter proposition and the subsequent problems created by it. This article would go on to analyze whether such a proposition is sound in justice and a logical practice.

For the better understanding of the situation that existed before the 1997 amendment, certain landmark case laws are discussed:

In the case of *Vulcan Insurance Co.*[5], the Supreme Court held that a clause in an insurance policy that provided for forfeiture of all benefits in case a suit was not brought within a specified period was valid and was not hit by the provisions of Section 28.

In *Food Corporation of India*[6], the clause in the agreement that the appellant would not have any right under the bond after the expiry of six months from the date of termination of the contract has been held not to be contrary to Sec. 28 of the Act nor it imposes any restriction to file a suit after six months.

The Apex Court in *National Insurance Co. Ltd.* v. *Sujir Ganesh Nayak and Co.*[7], while determining the validity of Clause 19 of the contract entered into between the parties, held that a distinction is to be made between a contract which seeks to forfeit the rights of the parties and one which seeks to curtail the time for enforcement of such rights. It was further held by the court that while the former is barred, the latter is permitted.

Demerits of the Law (Before Amendment)

The summary of the position of the law that existed before the 1997 amendment and the need to amend the existing law has been explained in the preceding paragraphs.

From the interpretation of the existing law, it is easy to identify the distinction that exists between a "right"and a "remedy". This distinction forms the ultimate basis of the existing law, where a clause barring a remedy is void but a similar clause barring a right is considered to be valid. This position of law not only causes serious hardship but also defeats the very purpose of economic justice.

[5] *Vulcan Insurance Co. V Maharaj Singh*, AIR 1976 S.C 287.
[6] *Food Corporation of India v New India Assurance Co. Ltd.*, AIR 1994 SC 1896.
[7] *National Insurance Co .Ltd .v Sujir Ganesh Nayak and Co .*, AIR 1997 SC 2049.

The judgments cited above reveal that generally such clauses are inserted in cases wherein the parties are not in an equal bargaining position. Due to the unequal bargaining power of the parties, the party in a superior position receives an advantage of limiting his liability by insertion of prescriptive clauses. Further, it is worth noting that a rather serious clause of extinguishing of rights is permissible while a trivial one of extinction of remedy is not. At this juncture, it is worth contemplating as to why parties should have the freedom to insert their own terms of prescription when they are debarred from substituting their own periods of limitation.

The above mentioned situation can be explained by referring to the case of *The New India Assurance Co. Ltd.*[8], where the division bench of the High Court held that the condition of forfeiture was not within the scope of Sec. 28 and hence a suit commenced more than three months after the rejection of the claim under the insurance policy was not maintainable.

In the landmark case of *Girdharilal v. E.S. & B.D. Insurance*[9], the insurance policy provided for the forfeiture of all benefits arising under the policy on failure to institute a suit within three months after rejection of the claim.

In *Kerala Electrical and Allied Engineering Co. Ltd.*[10], there was a clause in a bank guarantee, which provided that a suit to enforce claims was to be filed within six months from the date of expiry of guarantee given by bank. The Court opined that such a clause was perfectly valid and was not hit by Sec. 28.

Although all the judgments referred to above are in harmony with one another; it cannot be denied that such a short period allowed to a party for enforcement of his rights causes a great amount of hardship. The major sufferers in this case are consumers, who are not in an equal bargaining position as against big business firms, insurance companies and banking institutions.Thus, an amendment was required to eliminate the uncertainty of the existing law. Every decision involving the application of Sec. 28 was based on the subtle distinction between an extinction of a remedy and that of a right, thereby allowing nearly all agreements to escape the purview of the Sec. 28.

[8] *The New India Assurance Co. Ltd.v Radheshyam Motilal Khandelwal and Ors*, AIR 1974 BOM 228
[9] *Girdharilal v. E.S. & B.D. Insurance, AIR 1924 Cal 186.*
[10] *Kerala Electrical and Allied Engineering Co. Ltd v Canara Bank*, AIR 1980 KER 151

Comments Received

The inadequacy of Sec. 28 was brought into notice for the very first time in the 13th Law Commission Report[11], way back in the year 1958. It highlighted the hindrance that this Section caused to the construction of insurance policies but ignored the problems of interpretation and thus did not lead to a successful to amendment of the section. However, the Law Commission, in the year 1984 recognized the anomaly caused by the section and took up the issue *suo motu* to ensure the certainty and symmetry of law.This was the focus of the 97th law Commission Report[12], which received 14 replies in response to the working paper. Of these five were from High courts, six from the State Governments and three from associations of businessmen. All the responses received favored the amendment of the section, regarding it as legally justified and desirable.[13]

Of the five High Courts that sent replies, three supported the amendment while two stated that they had no comments to make. Of the three that responded in affirmative, one of them regarded the amendment as wholesome and fully justified in order to achieve the goal of public justice.

All the six law departments of State governments agreed that Sec. 28 needs amendment as envisaged in the report. The Governments of Punjab, Madhya Pradesh and West Bengal suggested that not only Sec. 28 but other relevant laws such as those relating to insurance, common carriers, adhesion contracts, etc be taken into consideration.

The Union Law Minister while presenting the Bill said, "The distinction between what is meant by extinguishment of a right and what is meant by extinction of a remedy is very fine and a number of litigating contracting parties have found it difficult in practice to ascertain this very fine difference. This anomaly is sought to be cleared by virtue of this amending Sec. 28."

Further at the XI Lok Sabha Debates, Session III (Winter), 1996, Justice Guman Mal Lodha while admitting the existence of the anomaly, recognized the need to amend Sec. 28 along with giving a comprehensive consideration for improving, uplifting and making the Indian Contract Act, 1872 up to date.

[11] *Supra note 2.*
[12] *Supra 3*
[13] *Supra.* 3.

The Amendment of 1997

After a careful consideration of all aspects of Sec. 28 as it existed before 1997, prolonged debates and discussions, finally an amendment was brought about to invalidate contractual clauses which extinguished rights of a party on the expiry of a specific period in tandem with suggestions put forth by the 97th Law Commission Report. The Indian Contract (Amendment) Act, 1996, on 8 January 1997, introduced the following clause into Sec. 28.

Every Agreement which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to the extent.

The impact of this new paragraph was considerable as it changed the entire basis of Sec. 28. In the case of *Mahajan Silk Mills Pvt. Ltd.*[14], clause 21 of the agreement provided for the carrier to be discharged from all liability if suit is not commenced within one year after delivery of the goods or the date that the goods should have been delivered.It was held by the Court that on referring to the amended Sec. 28, it could clearly be concluded that a clause of limitation in the agreement to reduce the time limit for enforcement of rights or extinguishment of rights, would be void except those covered by the exception clauses. Thus, clause 21 of bill of lading was prima facie held to be void and inoperative.

Banking Law Amendment Act, 2012

Banks and insurance companies received the above mentioned amendment negatively. Henceforth,insurers and guarantors were not able to extinguish rights under contracts of guarantees and insurance prior to the expiry of the statutory limitation period. The Limitation Act, 1963 prescribes for a three year period for filing a suit relating to a claim under an insurance policy or a guarantee. In cases where the government is the beneficiary of the guarantee, the period of limitation is thirty years. Due to the 1997 amendment, an insurance company would be required to maintain its liability until the period of limitation is over. Similarly since banks generally charge their clients for guarantees issued at their behest till the date of expiry, they would necessarily have to charge guarantee commissions till the date of expiry of the limitation period.

[14] *Mahajan Silk Mills Pvt. Ltd v M.V. MSc Elena*, 2000 (3) BomCr 841

Prior to the amendment made by the Indian Contract (Amendment) Act, 1996 in Sec. 28, bank guarantees incorporated clauses that required the claim under the guarantee to be made within six months from the expiry of the bank guarantee, otherwise the liability of the bank would be extinguished. After the amendment, if a beneficiary of a bank guarantee invoked the guarantee within the claim period during the validity period, and if the bank refused to make the payment, the beneficiary would be permitted to file a suit against the bank within the period mentioned in the Limitation Act, 1963 and any clause restricting the bank's liability would be regarded illegal and *void ab initio*. Genesis of this amendment can be traced back to the 97th law commission report[15] which highlighted the serious hardship consumers dealing with big business had to undergo due to the clause extinguishment of rights under contracts.

In 1998, the Narasimha committee put forth the apprehension of banks as they could no longer limit their liabilities under bank guarantees to a specified period. After the 1997 amendment, banks were bound to carry such guarantee commitments for long periods as outstanding obligations. Further the Andhyarujina committee was setup in 1999, which recommended that a proviso be added to Sec. 28 to permit banks to stipulate that rights under a guarantee would be extinguished if no claim was made within the specified period which shall not be less than year.

Thus, under the Schedule of Sec. 17 of Chapter V of the Banking Amendment Act, 2012, Exception 3 was inserted to the existing Sec. 28 of the Indian Contract Act, 1872. The exception reads as follows;

This section shall not render illegal a contract in writing by which any bank or financial institution stipulates a term in a guarantee or any agreement making a provision for guarantee for extinguishment of the rights or discharge of any party thereto from any liability under or in respect of such guarantee or agreement on the expiry of a specified period which is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of such party from the said liability.

The Need for Further Amendment

As pointed out in the introduction, Sec. 28 can further be amended with respect to terms of insurance policies. There seems to be no legitimate rationale behind making available the benefit of the third exception only to banks and financial

[15] *Supra* note 3.

institutions but not to corporations and insurance companies. It is an inherent failure on the part of the legislature to make such a distinction between banking and non banking institutions. After the 1997 amendment, policies of insurance companies have been barred from substituting their own periods of limitation and thus, they are bound by the general period of limitation as laid down in the Limitation Act, 1963, which is three years.

It is also essential to lay emphasis on the nature of insurance contracts. The contracts of insurance are such that in order to achieve the desired object, a prompt approach is required in case of asserting a claim. This is needed because of the simple reason of safeguarding the interest of justice, which is the primary motive of creating laws in any country. It is important to understand that damage can be measured more accurately when it is fresh than after a period of three years, which is a long enough time to tamper with the evidence as well as cause it to be completely destroyed.

In most of the developed common law countries, contracting parties have the freedom to mutually decide on a period within which any suit under such contract must be filed. In England, a clause imposing a limitation on the period within which an action can be brought after a loss occurs is held to be valid. In English law, there exists no rule similar to that provided for in Sec. 28 of the Indian Contract Act, 1872. The case of Ruby General Insurance[16] should be referred to, for better understanding of the situation at hand.

Therefore, insurance companies would be justified in putting a time limit within which a claim relating to a loss suffered maybe enforced; failing which all rights under the policy would come to an end. This situation should be analyzed properly, and either an exception of insurance policies should be substituted or Sec. 28 should be completely done away with.

Conclusion

The amendment rectifying the defect in Sec. 28 of the Indian Contract Act, 1872 should be given a literal and logical interpretation. The intention of the legislature should be properly appreciated in the light of parliamentary debates, objects and reasons for the amendment, law commission report to make sure that the amended section fulfils the purpose of Sec. 28 (b) of the Indian Contract Act, 1872. However, light must also be thrown upon the intention of amending a particular section and to ensure that the amendment successfully caters to the interest of justice and equity.

[16] *Ruby General Insurance Co. v Bharat Bank*, AIR 1950 H.P 350

Analysing the Indian Approach to Fiduciary Duties of Directors

Amala Maria George[1]

Introduction

The concept of fiduciary duties has been discussed in various judicial decisions the world over and is a common principle of Companies statute or jurisprudence related to Company law. The concept of directors' responsibility to act with bona fide intentions and for the benefit of the company/ shareholders/ stakeholders is common in different jurisdictions. The fiduciary duties of directors have been compared to the Agency-Principal relationship, where the directors act as agents.[2] The courts have frequently relied on Common law principles of Equity to understand and interpret the fiduciary duties owed by the director and have explained the position of a director of a company as an agent.[3] There has been discussion on the role of directors as paid agents or officer, who contracts in the name of the company[4];the courts have used the Trustee and *C'est Qui Trust* relationship albeit in a limited sense to explain the fiduciary duties of a director.[5] In Imperial Hydropathic Co. v Hampson case, Bowen LJ observed-

"Directors are described sometimes as agents, sometimes as trustees and sometimes as managing partners. But each of these expressions is used not as exhaustive of their powers and responsibilities but as indicating useful points of view from which they may for the moment and for the purpose be considered."[6]

While the Courts are unanimous that fiduciary duties are owed by directors,their opinions differ in so far as to whom these duties are owed to. The issue of whether this obligation is owed towards the company or its shareholders or its stakeholders ought to be examined. Broadly there are three theories with regards to whom the fiduciary duties are owed to-

[1] IV B.A.LL.B.
[2] *Regal (Hastings) Ltd v Gulliver* (1942) UKHL 1
[3] *Ferguson v Wilson* (1866) LR 2 Ch App 77
[4] *Smith v Anderson* (1880) 15 Ch D 247
[5] *Albert Judah Judah v Ramapada Gupta* (1960) 30 Comp Case 582 (Cal)
[6] *Imperial Hydropathic Co v Hampson* (1883) 23 Ch D 1

To The Shareholders -

Shareholders' primacy is predominantly followed in the US and was explained in *Dodge v Ford Motor Company* wherein it was held that the primary aim of a company was to maximise the profit of the shareholders.[7]In *Katz v Oak*[8] the Delaware Chancery court upheld the Shareholder wealth maximization theory and opined that it was the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders and explain how its fiduciary relation stands if its within law. The USA is generally considered to be in favour of the shareholders' primacy theory and therefore the directors owe fiduciary duties to the shareholders and not to the stakeholders and the company.It is also argued by some academicians that there is 'primacy duality' as regards allegiance of the directors in exercising their fiduciary duties whereby the directors' fiduciary obligations to the company as a separate legal entity is co-equal to the directors' duty to shareholders.[9]

The shareholders' primacy theory is critiqued as inconsiderate to the other stakeholders in a company like creditors and employees. Another flaw is the minority shareholders being excluded in practical application of the shareholders primacy theory. Many countries like the UK and India have now rejected this theory in favour of the directors owing duty to the company instead of the shareholders.

Another variation or partial acceptance of fiduciary duties owed to the shareholders has been explained in *Peskin v Anderson*[10]. The fact that a director owes duties to the company does not preclude him from also owing duties to individual shareholders. It was stressed, that a fiduciary duty to shareholders will arise only if there is a "special factual relationship between the directors and the shareholders in the particular case". *Sharp v Blank*[11] explained this stance of courts by distinguishing the normal situation in which the director owes fiduciary responsibility to the company and the exception in which duty is owed to shareholders due to a special factual relationship and therefore a duty arises to provide information to shareholders. This was reiterated by the Supreme

[7] *Dodge v Motor Ford Co* 170 NW 668 (Mich 1919)
[8] *Katz v Oak* 508 A.2d 873 (Del.Ch. 1986)
[9] Robert G. Eccles and Tim Youmans, *'Materiality in Corporate governance: The statement of significant Audiences and Materiality'*, §2, http://www.hbs.edu/faculty/Publication%20Files/16-023_f29dce5d-cbac-4840-8d5f-32b21e6f644e.pdf
[10] *Peskin v Anderson* (2001) 1 BCLC 372
[11] *Sharp v Plank* (2015) EWHC 3220 (Ch)

Court of India[12] and *it was also held that special factual relationship principle extends to the matter of issue of additional shares as well.*[13]

To The Stakeholders -

The idea that directors owe fiduciary responsibility not only to the shareholders who have elected them but also to other groups like creditors, employees and consumers has developed from the stakeholder theory which expresses the idea that companies are dependent upon stakeholders for success, their views should be taken into account during managerial discussions and therefore a fiduciary duty is owed to them as well. Protection of stakeholder rights has been discussed in the OECD Principles on Corporate governance.[14] The stakeholder theory suggests that the purpose of the firm is not only economic value creation for the shareholders but broader social interests also are a concern.While discussing the stakeholder theory, the question arises as to who constitutes the term 'stakeholder'? There is no universal definition of the same. Stakeholders can be defined to include all individuals or groups who can substantially affect, or be affected by, the welfare of the firm—a category that includes not only the financial claim holders, but also employees, customers, communities, and government officials.[15] Directors owing duty to stakeholders has now been incorporated into Company law statutes of countries like India and the UK.[16]

Enlightened Shareholders View is another variation of the Stakeholders and Shareholders theory in which it is proposed that in the long term view, shareholders value maximization would include stakeholders concerns being addressed as well and therefore both will be taken into consideration for best corporate governance practices[17].

Another stance taken by courts is that while the company is a 'Going concern', the fiduciary duties owed by directors is only to the shareholders and not to the creditors, but in case of winding up or companies in the insolvency zone, the

[12] *Sangramsinh P. Gaekwad v Shantadevi P. Gaekwad* AIR 2005 SC 809
[13] *Dale and Carrington v P.K. Prathapan* (2005) 1 SCC 212
[14] OECD Principles on Corporate Governance, May 1999
[15] Edward R. Freeman, Strategic Management: A Stakeholder Approach, Pittman Books Limited, 1984, §53.
[16] Sec 172 UK Companies Act, 2006; Sec 166 Indian Companies Act 2013
[17] Michael C. Jenson, Journal of Applied Corporate Finance (Fall 2001), Value Maximization, Stakeholder Theory, and the Corporate Objective Function, http://papers.ssrn.com/abstract_id=220671

fiduciary duties owed shifts primarily to the creditors[18] as held in *West Mercia Safety wear Ltd v. Dodd*[19]. This case was also cited with approval by the Supreme Court of India in *Bakemans Industries Pvt. Ltd. v. New Cawnpore Flour Mills and Ors.*[20]

To The Company

The principle of the directors owing fiduciary duties to the company was laid down in 1902 in *Percival v. Wright*[21] and is the general position upheld in judicial decisions in India. The Madras HC upheld the principle that directors have no duty towards individual shareholders.[22] From this it is very clear that, the directors are trustees to the company and not of individual shareholders. Directors are appointed to manage the affairs of the company and they owe fiduciary duties to the company though not to the creditors, present or future, or to individual shareholders.[23]This has been approved by the Supreme Court of India in *Nanalal Zaver v Bombay Life Assurance Co. Ltd.*[24]and same principle is laid down in India in case of *Nanalal Zaver v Bombay Life Assurance Co. Ltd.*[25]

This viewpoint was elucidated in *Peskin v Anderson*[26] and now this stance has been codified in the UK Companies Act, 2006[27]. The general rule does not warrant the directors as agents or trustees of members or shareholders and accordingly they do not owe fiduciary duties to them. However an exception has been carved out to this rule on the basis of a separate contract entrusting such responsibility on the directors.The main fault with this theory of the directors owing fiduciary duties to the company is that, the company although being a separate legal entity serves to promote the people interested in it.Therefore distinction of the interests of the company vis-à-vis the shareholders, creditors, employees, and consumers becomes difficult.[28]'Company's interests' becomes an umbrella term which allows for wide interpretation.

[18] *Chamundi Chemicals and Fertilisers Ltd. (In Liquidation) v M.C. Cherian and Ors* ILR 1993 KARNATAKA 620
[19] *West Mercia Safety wear Ltd v Dodd* (1986) 4 ACLC 215
[20] *Bakemans Industries Pvt. Ltd. v New Cawnpore Flour Mills and Ors* AIR 2008 SC 2699
[21] *Percival v Wright* (1902) 2 Ch 401
[22] *Ramaswamy Iyer v Brahmayya & Co.*(1966) 36 Comp Cas 270
[23] *Multinational Gas and Petrochemical Co. Ltd. v Multinational Gas and Petrochemical Co. Ltd* (1983) Ch 258
[24] *Nanalal Zaver and Anr v Bombay Life Assurance Co and Anr* 1950 AIR 172
[25] *Nanalal Zaver and Anr v Bombay Life Assurance Co and Anr* 1950 AIR 172
[26] *Peskin, supra* note 9
[27] Section 170 of the UK Companies Act, 2006
[28] *Brady v Brady* 1988 BCLC 20

Position of Law In India

The position of Indian law with regard to the question of fiduciary duties and to whom it is owed has evolved over time. The Companies Act, 1956 had not codified the duties of directors and it was only the Companies Act, 2013 which codified the duties of directors[29]. Prior to the Companies Act 2013, the Indian Courts have primarily upheld that fiduciary duties are owed to the company view point.[30]However in the 2013 Act, a pluralistic view[31] of the above discussed theories has been incorporated. Section 166 (2) of the 2013 Act provides-

"A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment."[32]

The pluralistic view taken in the Companies Act, 2013 therefore includes not only the three theories discussed herein but also the community and the environment. The statute does not prioritize or provide any order in which the interests are to be taken into consideration. Therefore there may be situations in which the interests of the different parties may be conflicting.

Practical considerations and applicability of Statutory Fiduciary duties

Although the statutory provisions provide for this pluralistic view, the practical application remains to be examined in due course. Decisions of the board not taken in accordance with the pluralistic view incorporated in the Indian Companies legislation are difficult to be enforced and challenged in a court of law.The Companies Act, 2013 incorporated provisions under Compromises, Arrangements and Amalgamations[33]and Oppression and Mismanagement[34] which provide for safeguarding the interests of creditors and minority shareholders and public interest. Even though these provisions for protecting stakeholder interests are entrenched in the statute, the recourse to law in breach of fiduciary duties for stakeholders is minimal as the Courts refuse to evaluate the decisions of the Board in most cases citing the 'Business judgement' rule[35].

[29]Section 166, Companies Act, 2013
[30]*Nanalal, supra* note 23
[31]House of Commons Trade and Industry Committee, The White Paper on Modernising Company Law, Printed April 1, 2003, §7
[32] Section 166 (2), Companies Act, 2013
[33]Chapter XV, Companies Act, 2013
[34]Chapter XVI, Companies Act, 2013
[35]*Cochin Malabar Estates and Industries Ltd. v P.V. Abdul Khader and Anr* (2003) 114 Comp Cas 777 (Ker)

The rule works on the presumption that the directors are acting in the best interests of the company and the court should not and is not qualified to interfere with the commercial judgement of the Board. The business judgement rule gives directors a lot of freedom to decide corporate policies and thus the directors are positioned to pursue the interests of their respective nominators or constituency without being conspicuous. Within this discretion accorded to directors by corporate law, these are positioned to ultimately determine themselves what the objective of the corporation is.[36]While this rule is essential for allowing and encouraging the directors to take risks in investments and other corporate decisions, the effect of such unfettered freedom also needs to be questioned.

One of the recent instances in India which raised eyebrows on the corporate governance regime in place was the removal of TATA's CEO- Mr. Cyrus Mistry with what on the face of it seemed a departure from the highest level of corporate governance claimed by the closely held company. It is alleged that the control of the promoter group was exercised in the removal of the Managing director of the group of companies.[37] Control may be exercised directly–for example through the removal and replacement of directors when the controlling shareholder has the requisite voting power–or more indirectly, for example through explicit or implicit threats to remove insubordinate directors.[38]The stance taken by Indian courts in earlier decisions is that shareholders can remove directors without reasons being specified.[39] In such instances the Managing Director has no other relief under the law other than a petition[40] in the NCLT under Oppression and Mismanagement[41].

[36]Martin Gelter, GeneiveHelleringer, *'Lift not the Painted Veil! To Whom are Directors' Duties Really Owed'*, Illinois Law Review (Vol 2015 No.3), §1117, https://illinoislawreview.org/print/volume-2015-issue-3/lift-not-the-painted-veil-to-whom-are-directors-duties-really-owed/
[37]UmakanthVarottil, *'The Tata Episode: Corporate Governance and the Continuing Influence of Promoters'*, http://indiacorplaw.blogspot.in/2016/11/corporate-governance-in-india-and.html
[38]Deborah A. DeMott, *'The Mechanisms of Control'*, 13 *Connecticut Journal of International Law* 233-255 (1999), §236-38, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1755&context=faculty_scholarship
[39]*LIC v Escorts* (1986) 59 Comp Cas 548 SC
[40]Cyrus Mistry takes TATA Group to court moves Company Law Tribunal claiming oppression, Dec 21st, 2016,http://economictimes.indiatimes.com/news/company/corporate-trends/cyrus-mistry-takes-tata-group-to-court-moves-company-law-tribunal-claiming-oppression/articleshow/56085155.cms
[41]Section 241, 242 of the Companies Act, 2013

In closely held companies, a common feature in Indian companies, the various theories discussed herein are not practically applied. There is a closely held shareholding pattern and therefore there is a concentration of directors who are influenced by the promoter group.[42] These companies may not in practice follow the spirit of the law with respect to the Fiduciary duties owed under the Companies Act when it comes to protecting the interests of communities, environment especially and often also the shareholders. For closely held companies'value' may encompass expectations, commitments, and measures not relevant to other shareholders. It was therefore rightly observed by the Delaware court that family run businesses believe that their businesses stand for something more than their stock price.[43] Tensions amongst the family may be reflected in decisions concerning the business. Within a family company certain assets and operations may carry symbolic values for family members that may not resonate with the other shareholders and this might also make them unwilling to objectively address the other shareholders' concerns.[44] These same characteristics apply to closely held companies with a concentrated shareholding pattern in India and across the world. There have been instances where the controlling shareholders have used the company to steer their personal/ family interests which may be quite contrary to the overall interest of the company. Founding members of a family business or group controlled business may have emphasis on their legacy–in the form of a corporate culture that treats workers and consumers well, or a commitment to product quality or certain parameters different from normal companies' interests like family interests/ ethos.[45]An example of this would be the reason given by TATA Sons for the removal of Mr. Mistry from TATA Sons as 'repeated departures from the culture and ethos of the group'[46].Therefore the need for a revaluation of corporate governance matters in promoter driven companies is important.[47]

[42]UmakanthVarottil, *'Evolution and Effectiveness of Independent directors in Indian Corporate Governance'*, Hastings Business Law Journal (Summer 2010, Vol. 6, No.2, Pg 281), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1548786

[43]*In re Topps Co. Shareholders Litig.*, 926 A.2d 58, 90 (Del. Ch. 2007).

[44] Deborah A. DeMott, *'Guests at the table?: Independent Directors in Family influenced Public Companies'*, 33 Journal of Corporation Law 819-863 (2009), §6, http://scholarship.law.duke.edu/faculty_scholarship/1918

[45] OECD Principles *supra* note 13

[46]Statement from TATA Sons, Oct 27th, 2016, http://www.tata.com/article/inside/statement-from-tata-sons-october-27

[47] *'The TATA Sons Imbroglio: Whither Corporate Governance'*, http://indiacorplaw. blogspot.in/2016/10/the-tata-sons-imbroglio-whither.html

Conclusion

Recent developments in the corporate governance field have shown the need for more guidelines and effective provisions to meet the legislative intent of Sec. 166. The pluralistic approach although adopted in the Indian Companies Act, 2013, ought to be re-examined to strengthen its applicability in spirit. Securities and Exchange Board of India (SEBI) in its consultation paper has recognised the need for laying down specific fiduciary responsibilities for controlling shareholders.[48]India recently moved to mandatory Board evaluation under the Companies Act, 2013[49] and the SEBI LODR (Listing Obligations and Disclosure Requirements) Regulations, 2015. The SEBI LODR carried references to Board evaluation but appears to be vague in its requirements which has made it a mere compliance requirement which most companies just follow in letter and not in spirit. The SEBI has now come up with a 'Guidance note on Board Evaluation'[50] which lays down a set of parameters and a format keeping in mind best global practices and in an attempt to standardize the Board evaluation.

Provisions like Oppression and Mismanagement, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 need to be supplemented with other mandatory provisions to ensure the best corporate governance practices. The SEBI has been recently giving priority to corporate governance matters and has been contemplating methods to make the Board evaluation requirements more than a mere compliance-checklist procedure[51], and there have been talks of strengthening the role of independent directors.[52]

[48]SEBI Consultative Paper on Review of Corporate Governance Norms in India, January 4, 2013, http://www.sebi.gov.in/cms/sebi_data/attachdocs/1357290354602.pdf

[49] Section 134 (3)(p) of the Companies Act, 2013 read with Rule 8(4) of the Companies (Accounts) Rules, 2014 [50] *SEBI 'Guidance note on Board Evaluation'*, http://www.sebi.gov.in/cms/sebi_data/attachdocs/1483607537807.pdf

[51] Seventh meeting of the International Advisory Board (IAB) of the Securities and Exchange Board of India (SEBI) PR No. 4/2017, http://www.sebi.gov.in/sebiweb/home/detail/35601/yes/PR-Seventh-Meeting-of-the-International-Advisory-Board-of-SEBI

[52] SEBI plans stricter norms for independent directors, Times of India (June 15, 2017)

Piracy Paradox- Intellectual Property Right's Grey Space

Akriti Tyagi[1]

The fashion industry is interesting because it is part of IP's "negative space." It is a substantial area of creativity into which copyright and patent do not penetrate and for which trademark provides only very limited protection. Piracy is "the unauthorized and illegal reproduction or distribution of materials protected by copyright, patent, or trademark law".[2] In the context of fashion industry, piracy includes: (1) piracy in fashion design and (2) piracy in logo or label of fashion brand. Fashion design piracy occurs when the designs of a particular designer or brand have been copied and incorporated by other designers in their lines. This article shall look into the design piracy and gauge why this industry is a growing success even with a low IP regime.

"Being copied is the ransom of success", Coco Chanel once said.[3] Copying has been rampant since the earliest of times. It dates back to the 18th century, when seamstresses at the Court of Versailles tried to bribe Marie Antoinette's dress maker to find out what she would wear next. In 1978, the J.P. Tod firm marketed a shoe called the "Gommino," a leather moccasin with a sole made of rubber "pebbles." In the mid-2000s, dozens of shoe designers began marketing their own versions of shoes with rubber "pebbles" as the design did not have protection.[4]

India does not cater to recognizing fashion apparel as intellectual property. The designs may be registered under the Designs Act, but the registration requires an average of 12 months and the fashion industry is too progressive for such a time period, with designs changing every 6 months. If a designer endeavours to get a copyright, he cannot reproduce the particular design more than 50 times which is highly improbable.[5]

[1] V BSL LL.B.
[2] Black's Law Dictionary (Ninth Edition, 2009), p. 1266
[3] http://www.latimes.com/news/la-oe-dilberto10oct10-story.html accessed 8th September, 2017
[4] Kal Raustiala and Christopher Sprigman *'On The Piracy Paradox: Innovation and Intellectual Property in Fashion Design'* (2006) Virginia Law Review https://papers.ssrn.com/sol3/papers.cfm?abstract_id=878401 accessed 4th September, 2017
[5] The Copyright Act 1957, s 15

Piracy is considered paradoxically beneficial for the fashion industry as even when originators that suffer harm may not be strongly incentivized to break free of the low-IP equilibrium because, often, they are also copyists. Being a copyist and an originator is relative. The house that sets the trendone season may be following it the next and in a world with more than two designers, one is more likely, over time, to be a copyist than to be copied. Original ideas are few,and more often than not, ideas are reworked and reincorporated. Often the industry calls it "referencing".

There are predominantly two interrelated theories that are foundational to the continuing viability of fashion'slow-IP equilibrium, relating to the economies of fashion.

Induced obsolescence

Clothing is a status-conferring good. Most forms of apparel are "positional goods." These are goods whose value is closely tied to the perception that they are valued by others; what we buy is partially a function of what others buy. The desirability may rise as some possess it, but then subsequently fall as more possess it. Particular clothing styles and brands confer prestige. A particular dress or handbag from Gucci or Prada has value, in part, because fashionable people have it. It confers an elite status on the owner. For the class of fashion early-adopters, the mere fact that a design is widely diffused is typically enough to diminish its value. It can no longer signify status if it is widely adopted.

Some examples being of diffused trends:

- Jeans- Bell Bottom Jeans gave way to skinny jeans in 2006 which was continued and became so common that a new trend of "boyfriend jeans" came about in 2014.[6]
- Boots- In 2009, thigh high boots were seen on the runways and rampantly followed; which led to a change in 2011 wherein ankle boots became the trend.[7]
- Skirts- in 2005, Long flare skirts were very popular amongst Indian women. This lasted for about 2 years and the trend disappeared in 2007.

[6] https://www.liveabout.com/the-history-of-jeans-2040397 accessed 9th September, 2017
[7] https://en.wikipedia.org/wiki/Fashion_boot#2000.E2.80.932017 accessed 9th September, 2017

The early adopters move to a new mode; those new designs become fashionable, are copied, and diffused outside the early-adopter group. Then, the process begins again. If copying were illegal, the fashion cycle would occur very slowly. In short, piracy paradoxically benefits designers by inducing more rapid turnover and additional sales. It also leads to a greater platform for creative energy.

Anchoring

If the fashion industry is to successfully maintain a cycle of induced obsolescence by introducing new styles each season, it must communicate to the consumers when the styles have changed. A low-IP regime helps the industry establish trends via a process referred to as anchoring. The industry produces a variety of designs which are somewhat related to each other and defines the season's trends. This level of design coherence and direction is gained through copying. Designers refer to each other and accelerate the season's themes so it is clearly visible to the consumers whether a particular apparel belongs to a season. Anchoring thus encourages consumption by conveying to consumers important information about the season's dominant styles, for example, stripes, Bandeaus, floral, puffy sleeves and mules were the trends of Spring 2017[8]

Induced obsolescence and anchoring help explain why the fashion industry's low-IP regime has been politically stable and successful and how it is benefitting to the designers and the fashion houses.It globally values 1.7 trillion USD [9]. More fashion goods are consumed in a low-IP world than would be consumed ina world of high IP protection precisely because copying rapidly reduces the status premium conveyed by new apparel and accessory designs, leading status-seekers to renew the hunt for the next new thing.

The only problem in the low IP regime would be immediate communication. As soon as the design is showcased on the runway, photographs are sent all over and the copying process can begin almost simultaneously. This situation of copying without a lag would be problematic as early adopter consumers would like their design to remain exclusive for a little while and also it might lead to competition for the originators. In practical use, this problem does not persist that much because, of all the designs released, there are a few that gain popularity and a

[8]https://luxelookbook.me/2017/01/05/style-guide-11-major-trends-of-2017/ accessed 9th September, 201

[9]https://cleanclothes.org/resources/publications/factsheets/general-factsheet-garment-industry-february-2015.pdf accessed 7 th September, 2017

few that are dismissed. The copyists would have to wait a while to observe the fashion trends and do a market analysis to gain insight on what is being desired by the masses and accurately gauge the situation; thereafter reproduce the desired designs.

Since copying often results in the marketing of less expensive versions, thus the masses are able to get trendy clothes at a fraction of the price, examples being H & M, Forever 21 and Zara; well-known trademarked brands which bring the fashion from Milan into the hands of the common consumer at reasonable prices. The big fashion houses such as Gucci and Valentino come up with desirable apparel and market the products in such a nature that the consumers desire them. Unfortunately, there are only a handful who can afford them. Had there been proper IP protection, brands such as H&M would not be able to copy the designs and hence the designs wouldn't have been available to the masses. In the present scenario, those who can afford the elite fashion houses buy their products, and everyone else turns to the common chain stores, which are selling similar designs. This has led to an increase in the economy since everyone is now spending on their wants, at a level they can afford, as well as it gives a sense of self satisfaction and boosts the self confidence amongst the masses that they are up to date with the prevalent trends.

Usually there is nothing so immensely unique about a design that only one particular person can come up with. The design entails the cut of a sleeve or a floral pattern or the colour coral. There are only a limited number of cuts and prints the designers have to work with. If protection is granted on those attributes, then soon there will come a time wherein no new design can be generated as fashion flows from one pattern to the next. Older patterns are often used as references and some additional changes are made to them so they feel comfortable yet unique. It will be a deterrent in the route to creativity if the designers cannot be inspired.

Every designer markets the apparel in their own name or in the name of the Fashion House so the rightful owners are recognized and ample credit is given to them for their work. Since the brands serve to different classes of people there is no scope of confusion.Therefore, the copyists do not serve as a competition for the originators as it is the trademark and the brand that confers a status on a design.

The Case for Palestine

Saurav Roy & Alefiyah Shipchandler[1]

Introduction

The idea of a Jewish State was first proclaimed by Theodor Herzl several years ago. At that time, there were absolutely no grounds to justify such claims (such a claim being based on a "right of return"). Thus, the eventual crystallization of a Jewish State in Palestine is hardly less than a miracle. While the statehood of Israel has now been concretely established, the status of Palestine under international law is yet to be determined.

Historical Background of the Palestinian Statehood Conflict

The contested territory of Palestine was initially under the Ottoman Empire. However, after the Empire's defeat and dissolution during World War I ("WWI"), the territory was put under the mandate of its colonial acquirer – Britain.[2] This mandate commenced a process of international supervision of colonial administration, thereby permitting Britain to administer Palestine. It was envisaged that the mandates would find their natural and only conclusion in the attainment of independence by the mandated territory.[3]

During the late 19th Century, Europe witnessed the golden age of 'nationalism' and with it, the rise of modern Zionism.[4]In 1917, the British Government, in order to garner popular Jewish support during WWI, released the Balfour Declaration which endorsed the creation of a Jewish homeland in Palestine. It also facilitated Jewish immigration to the concerned territory which had the consequence of creating a critical Jewish presence in Palestine. For resident Palestinians this influx of outsiders, who were then given various preferences, was extremely threatening. This resulted in a very hostile atmosphere.

[1] IV B.A.LL.B.

[2]Covenant of the League of Nations 1919 (adopted 29th April 1919), [1919] UKTS 4 (Cmd. 153), Art. 22.

[3] Editorial Comment, *Termination of the British Mandate for Palestine*, 2 Int'l L.Q. 57 (1948).

[4]Zionism is a national revival movement that supports the re-establishment of a Jewish homeland in the now contested Palestinian territory.

Thus, eventually when the British intended to terminate their mandate over the Palestinian territory, Great Britain argued that it could not leave Palestine as a unitary self-governing state, but it should be able to relinquish its trusteeship if the territory were divided into two states. In order to solve the conflicting objectives of Zionism and Palestinian nationalism, the United Nations General Assembly (UNGA) on 29th November, 1947 adopted 'Resolution 181(II)', proposing a partition of Mandatory Palestine and the creation of independent Arab and Jewish States and a Special International Regime for the city of Jerusalem.[5]This was the *first, last, and only legally authorized demarcation of the Israeli-Palestine border.* It was legally authoritative not because it took the form of a United Nations (UN) Resolution, but solely because the UN Resolution itself served as a ratification of the British proposal to divide the Mandate and leave its governance to the people.[6] The problem however was that the Resolution did not envisage a community acting as a people and with discernible leadership and representation expressing a claim to self-determination and independence.[7]

The effect of the Resolution was the "Declaration of the Establishment of the State of Israel", on 14th May, 1948. In addition to Resolution 181, the Jewish Agency relied for its claim to Palestine on self-determination and ancient title.This declaration was followed by other sovereign states bilaterally recognizing the state of Israel as a sovereign nation-state.[8] The creation of a state and a declaration by its people were thus preceded by a legal fact creating some factual conditions, suggesting that there was an expectation that, the community will seize upon the legal "green light" of statehood.[9]This proclamation was however not well received by neighbouring Arab nations, who invaded "the new State" in an act of support to the Palestinian Arabs, resulting in the 1948 Arab-Israeli War. Israel emerged victorious in this war, which further cemented their claim for statehood. In addition to this, Israel also invaded those territories which had been handed over to the Palestinians under Resolution 181(II). This

[5]UNGA Res 181(II) (29 November 1947) UN Doc A/RES/181(II). https://unispal.un.org/DPA/DPR/unispal.nsf/07F0AF2BD897689B785 256C330061D2533 accessed 7 September 2016.

[6]Anthony D 'Amato, *'Israel's Borders under International Law'*, Northwestern University School of Law, Public Law and Legal Theory Series No.06-34.

[7]Aitza M. Haddad, *'Recognition of Palestinian Statehood: A Clarification of the Interests of the Concerned Parties'* (2012) 40 Ga.J. Int 'l & Comp. L. 341.

[8]Including the United States of America and the former USSR.

[9] *supra* note 6.

resulted in a drastic demographic change with Palestinian refugees fleeing their homes from areas that subsequently became Israel. This was then followed by increased Jewish immigration to the contested territories. Such mass population movements have made it impractical to return to the legal boundaries set forth in the Partition Plan of 1947.

The Six-Day war of 1967 further increased the size of Israel at the expense of the Palestinians. In the direct aftermath of the war, the United Nations Security Council (UNSC) passed Resolution 242 calling for the withdrawal of Israeli forces "from territories of recent conflict" and "achieving a just settlement of the refugee problem."[10] Israel took the position that it was not legally required to withdraw from the West Bank and the Gaza Strip that it had just conquered, and that it could erect Israeli settlements in those territories.

Even though the attempt to establish a Palestinian state proved fruitless, the Six-Day War still had a positive consequence for Palestinians, whereby a number of Palestinian organizations joined together to form the Palestinian Liberation Organization (PLO). The PLO created "The Palestine National Charter", a declaration of Palestinian identity and sovereignty, with the expressed goal of establishing a sovereign Palestinian state. The PLO, recognized as the 'sole legitimate representative of the Palestinian people' was ultimately granted observer status by the UNGA and in 1988 when the PLO adopted the "Declaration of Independence of Palestine", proclaiming the new State of Palestine, the UN upgraded the observer seat of the PLO, according it the designation "Palestine" without explicitly referring to it as a state.[11]However the PLO has now split into two groups- Fatah and Hamas, whose approaches to claiming statehood are radically divergent.

The Legality of Palestine's Claims for Statehood

The PLO has been constantly lobbying for the international recognition of the State of Palestine. These efforts have been ongoing ever since the Palestinian Declaration of Independence in November 1988, in a session-in-exile held by the Palestinian National Council. In light of the same, it becomes necessary to analyse the legality of Palestine's claims and whether they are good in law or

[10]UNSC Res 242 (22 November 1967) UN Doc S/RES/242. https://unispal.un.org/DPA/DPR/unispal.nsf/0/7D35E1F729DF491C85256EE700686136 accessed 5 September 2016

[11]*Background on Observer Status at the UN, Permanent Observer Mission of Palestine to the United Nations.* http://www.un.int/wcm/content/site/palestine/pid/11550 accessed 4 September 2016.

not. The issues involving "criteria for statehood" and the various specific effects and implications of recognition, are intertwined and complex in the eyes of international law.[12] The status of Palestine draws its sustenance from modern developments of international law.

The most authoritative definition of a 'state' under international law can be found under Article I of the Montevideo Convention on the Rights and Duties of States.[13] A few key elements of the definition are as under:

a. The state must be a territorially defined entity;

b. It must have a relatively stable population and its population and territory must be under the control of its government[14]; and

c. This entity must have the capacity to explicitly or implicitly engage in diplomatic relations with members of the international community.[15]

To properly understand the nuances of the ingredients of statehood, an in-depth analysis of the same is necessary.

a. Population

The criteria of population with relation to Palestine's claims has been contentious ever since the initiation of the Class A Mandate.[16]However, under this Mandate, Britain announced a policy for Palestine, under which the people were to secure a homeland in Eretz Israel, for the Jewish people. This was further emphasized in the Balfour Declaration. Art. 22 of the Balfour Declaration gave the Palestinians the right of self-determination. However, as it also provided for an undertaking to promote a Jewish homeland in Palestinian territory, Art. 22 could

[12]David O. Lloyd, *'Succession, Secession, and State Membership in the United Nations '* (1994) 26 N.Y.U.J. Int 'l L. & Pol. 761.

[13]Wasim I. Al-Habil, *'Occupations, A. Diaspora, and the Design of Local Governments for a Palestinian State'* (Nov. 5, 2008) (unpublished Ph.D. dissertation, Cleveland State University), http://etd.ohiolink.edulsend-pdf.cgi/AlHabil%20Wasim.pdfcsul226688053 accessed 8 September

[14] Winston P. Nagan & Alitza M. Haddad, *'Recognition of Palestinian Statehood: A Clarification of the Interests of the Concerned Parties'*, 40 Ga.J. Int'l & Comp. L. 341 (2012), available at http://scholarship.law.ufl.edu/facultypub/590 accessed 9 September 2017.

[15]'State Defined' in *Restatement of the Law, Third of the Foreign Relations Law of the United States (1978)* para 201.

[16]Assaf Likhovski, *'Law and Identity in Mandate Palestine'* 21-22 (2006) (the "Mandate for Palestine" which was granted to the British by the League of Nations accelerated a massive growth in the Jewish population adding to the diversified remnants of the late Ottoman Empire made up of wealthy Muslims, middle class Christian merchants, and peasants and nomads).

not be implemented.[17] Thus, it becomes important to analyse how true the Palestinian identity remains in today's day and age. Careful research has shown that there does exist a continuity in the Palestinian national identity.[18] It is our submission, thus, that Palestinians do possess a robust national identity which can be clearly recognized under the UN Charter framework. Moreover, there has certainly been a permanent Palestinian population in the West Bank and Gaza areas.[19]

b. Determinable Territory

Another key criterion for the determination of statehood is a determinable territory.[20] It is the authors' submission that the relevant UNSC resolutions with relation to the determining of territory of Palestine indicate a determinable territory. However, Israel's ultra-nationalist interests in the expansion of their territory lead to a complicated situation with regards to the issue. Despite various international interventions and promises, Israeli Prime Minister Benjamin Netyanahu has not ceased the construction of Israeli settlements in the West-Bank region. This approach is in line with his ultra-nationalist, right-wing tendencies. In light of this dynamism of territories, the Montevideo Convention on the Rights and Duties of States prescribes certain qualifications, which state that if a Palestinian state is to exist, the agreed-upon boundaries must be such that they create a viable territorial base for a state.[21]

c. Functional Government

The issue of governance is one of the most complex issues in the question of statehood. Under the Oslo Accords, a Palestinian National Authority (PNA) was set up.[22] However, the agreement left the issues relating to the final status of Palestine up to the negotiations between Israel and the PNA. This move implicitly left the PNA with a certain level of internal and external autonomy

[17]Francis A. Boyle, *'The Creation of the State of Palestine'* (1990) 1 Eur. J. Int 'l L. 301.
[18]Rashid Khalidi, *'Palestinian Identity: The Construction of Modern National Consciousness'* (Columbia University Press 2010).2017.
[19]CIA World Factbook, *West Bank and Ga2za*, https://www.cia.gov/library/publications/the-world-factbook/geos/we.html accessed 6 September 2016.
[20]James R. Crawford, *'The Creation of States in International Law'* (2nd edn, Oxford Scholarship Online 2007).
[21]Justus Reid Weiner & Diane Morrison, *'Legal Implications of "Safe Passage" Reconciling a Viable Palestinian State with Israel's Security Requirements'* (2007) 22 Conn. J. Int'l L. 233.
[22] Declaration of Principles on Interim Self-Government Arrangements, Isr.-PLO, Sept. 13, 1993, art. 1.

and competence. It is the authors' opinion that the UNSC resolutions which recognize the West Bank and Gaza Strip areas as Palestinian land give the PNA *de jure* recognition. Additionally, it is our opinion that the legally binding nature[23] of the UNSC resolutions trumps Israel's illegal occupation of the Palestinian lands.

In terms of a functioning government, it is the authors' opinion that the PNA is competent in and of itself and meets the criteria for statehood unambiguously. The PNA does meet some of the criteria with relation to ability to enter into relations with other states.[24] Additionally, the PNA's observer status at the UN,[25] its participation in international organizations,[26] and the international recognition it has received from the world community[27] is testament to the legitimacy of its claims for statehood.

Concluding Observations

The authors are of the opinion that the most practical and tenable solution to the Palestinian question is the two-state solution, which ideates the concept of having two different states for two groups of people.

a. Elements and Framing of a Two-state Solution

While the conventional path to statehood runs through the United Nations, the UNSC and the UNGA have wrestled with the complicated questions of Israeli and Palestinian statehood since those bodies' founding. The two-state solution envisages 'two states for two groups of people' and has been advocated for from the time of the 1947 UN Partition Plan. It offers the only realistic prospect for lasting peace and attainable justice for Israelis and Palestinians. Considerable diplomatic efforts have gone into negotiating a two-state solution between the parties, the most significant one being the Oslo Accords, which eventually culminated into the Camp David Summit in 2000. No mutually satisfactory agreement has ever been reached. The basic elements of a two-state solution

[23]Gudrun Kramer, *'A History of Palestine: From The Ottoman Conquest to The Founding of the State of Israel'* (Princeton University Press, 2008), at 306.
[24]Christopher C. Joyner, *'International Law in the 21st Century: Rules for Global Governance'* (Rowman & Littlefield, 2005).
[25] UN G.A. Res 3237 (XXIX), U.N. Doc. A/RES/3237 (Nov. 22, 1974), https://unispal.un.org/DPA/DPR/unispal.nsf/0/512BAA69B5A32794852560DE0054B9B2 accessed 10 September 2017.
[26] Appendix B: *International Organizations and Groups*, CIA World Factbook, http://www.cia.gov/library/publications/the-world-factbook/appendix/appendix-b.html#C accessed 11 September 2017.
[27]Taylor & Francis Group, *The Europa World Year Book* 2004: Volume II 3325 (45th ed. 2004).

are however established and widely, though not universally, accepted by Palestinians, Israelis and many states in the Middle East.[28]

These elements include:

1. Israel would withdraw from nearly all of the West Bank and end its blockade of Gaza. The new Palestinian state would be territorially contiguous on the West Bank, with equitable access to water resources and a secure land connection between the West Bank and Gaza. If Israel retains small agreed-upon portions of the West Bank, the Palestinian state would be compensated with land of equal size and value from Israel;
2. The two sides would agree to security provisions designed to protect them from attack;
3. Jerusalem would be a shared and open city. Jewish neighbourhoods would be under Israeli sovereignty and Palestinian neighbourhoods under Palestinian sovereignty. The western portion would become the internationally recognized capital of Israel. East Jerusalem would become the capital of the Palestinian state; and
4. The issue of Palestinian refugees would be resolved in a manner that satisfies the Palestinian concern for justice and historical recognition but would not jeopardize Israel's character as a Jewish-majority state.[29]

This solution, however, is rapidly being foreclosed by ever-expanding Israeli settlements and other "facts on the ground" such as checkpoints, restrictions on movement, and land confiscation.[30]

b. Israeli Settlements in West Bank

Israeli settlements began, in modest number and in population, in the years immediately following the Six-Day war in the West Bank area. Currently, residential housing sits upon approximately three percent of the territory of the West Bank, within some 120 settlements.[31]

[28] Alan Berger, Harvey Cox, *'Israel and Palestine: Two States for Two Peoples, If Not Now, When?'* at https://scholar.harvard.edu/files/hckelman/files Israel%20and%20Palestine_Two%20States%20for%20Two%20Peoples.pdf accessed 12 September 2017.
[29] *ibid.*
[30] Khaled Elgindy, *"Palestine Goes to the UN: Understanding the New Statehood Strategy in Foreign Affairs"*, Vol. 90, No. 5 (September/October 2011), pp. 102 113.
[31] Henry J. Steiner, *"West Bank Settlements and Boarders"*, in Alan Berger and Harvey Cox (eds), *'Israel and Palestine: Two States for Two Peoples, If Not Now, When?'* at https://scholar.harvard.edu/files/hckelman/files Israel%20 and %20Palestine_Two%20States%20for%20Two%20Peoples.pdf accessed 12 September 2017.

Israel, the PLO and PA, non-governmental organizations (NGOs) and legal experts have all expressed views about the legal status under international law of the occupation and of the construction of settlements. The Israeli government's arguments, made before its own High Court of Justice, to the UN and to other countries, have claimed that Israeli policies and actions comply with conventional and customary international law.The dominant, indeed overwhelming, opinion of other states—including almost all democratic states, UN organs, the EU, NGOs and foreign legal experts—holds that the settlements are illegal under international law. Agreement is even deeper that settlements constitute a major block to peaceful resolution of the conflict.[32]

On 23rd December 2016, the UNSC passed Resolution 2334 (2016), which declares Israeli settlements in the West Bank area as illegal and untenable in the eyes of international law.[33] The Resolution also goes on to state that the settlements are a *"major obstacle to the vision of two States living side by side in peace and security."*[34] The Resolution was passed with 14 affirmative votes and one abstention, notably from the United States of America (USA).[35] This Resolution, thus serves as key insight into the geopolitical stance of major players like India, Russia and the USA with relation to the Palestinian question. However, it is important to note that the change in regime in the USA has brought about some confusion in USA's official stance.[36] This has prompted the international community to demand the Trump administration to make their position on the Israel-Palestine conflict clear.[37]

It is the authors' opinion that the illegality of the Israeli settlements coupled with the legally binding nature of Resolution 2334 tilt the issue towards the Palestinian cause. It is only a matter of time before the international community takes cognizance of Palestine's competence to be declared a state for the purposes of international law.

[32] *ibid.*
[33] UNSC Res 2334 (23 December 2016) UN Doc S/RES/ 2334 at http://www.un.org/webcast/pdfs/SRES2334-2016.pdf accessed 10 September 2016.
[34] *ibid.*
[35] *ibid.*
[36] 'White House will not push for two-state solution in Middle East', (*DW*, 15 February 2017) http://www.dw.com/en/white-house-will-not-push-for-two-state-solution-in-middle-east/a-37555323 accessed on 7 September 2017.
[37] 'Palestinian officials urge US to clarify stance on future state', (*DW*, 5 August 2017) http://www.presstv.ir/Detail/2017/08/08/531061/Palestine-Saeb-Erekat-US-Trump-stance-Palestinian-state accessed 8 September 2017.

International Commercial Arbitration and Domestic Arbitration in India: The Distinction

Rupal Panganti[1]

Introduction:

In the era of globalization and economic revolution, arbitration has become a principle mode of resolving disputes between the parties in every aspect of international trade, commerce, investment, transfer of technology, construction work, banking activities and the like. Arbitration is considered to be an important alternate dispute redressal process which is to be encouraged because of high pendency of cases in the courts and cost of litigation. Arbitration has to be looked up to with all earnestness so that the litigant public has faith in the speedy process of resolving their disputes by this process.[2]

An arbitration is the reference of dispute or difference between not less than two parties, for determination after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction.[3] Arbitration depends on the agreement between the parties under which parties agree to be bound by the decision given by the arbitrator. Consent of all the parties to dispute is necessary to proceed with arbitration.

Generally, there are two kinds of arbitrations, domestic arbitration and international arbitration.Domestic arbitration means an arbitration relating to a dispute arising out of legal relationship whether contractual or not, where both the parties to the arbitration agreements are the nationals or residents of the same country or the agreement provides for arbitration in the country of the parties to the arbitration agreement. Whereas International arbitration is likely to be defined as arbitration between parties of different nationalities, or arbitration between parties of same nationalities where there are one or more other factors that connect the arbitration to a second country[4].

In India, arbitration is governed by the Arbitration and Conciliation Act, 1996. This Act has been passed to consolidate and amend the law relating to domestic

[1] IV BALLB, ILS Law College Pune.
[2] *State of J & K v. Dev Dutt Pandit*, (1999) 7 SCC 399, 349
[3] Halsbury's Laws of England, 4th Edn., Vol. 2, para 501
[4]International Arbitration and Mediation (A practical guide) by Michael Mcilwrath and John Savage (Pg. 5, I-016)

arbitration, international commercial arbitration and enforcement of foreign arbitral. The Act was enacted by the Parliament in the light of the UNCITRAL Model Rules.

According to clause (c), of Article 51 of the Constitution of India which talks about respect for international law, municipal courts are bound to apply the municipal law where there is unavoidable conflict with international law, but out of respect for international law and comity of nations, the municipal courts would so interpret rules of the municipal law that they would, if possible, not be inconsistent with those of International law[5].

UNCITRAL Model Law is an 'outstanding contribution' made by the United Nations to international arbitration[6]. It is the Model Law on International Commercial Arbitration. UNCITRAL Model has been prepared with the objective of progressive harmonization and unification of the law of international trade.[7]

Domestic arbitration:

Domestic arbitration can be defined as arbitration between parties of same nationalities. In India, the Arbitration and Conciliation Act, 1996 in Sec. 2(7) read with Sec. 2(2), defines the term 'domestic arbitration as an arbitration which takes place in India and is governed by the law of India. Part I of the Act deals with domestic arbitration and according to Section 2(2) this part shall apply where the place of arbitration is India.

In other words 'Domestic arbitration means an arbitration relating to a dispute arising out of legal relationship whether contractual or not, where none of the parties is:

i) An individual who is a nationality of, or habitually resident in, any country other than India; or

ii) A body corporate which is incorporated in any country other than India; or

[5] Gramophone Co. v. Birendra A, 1984 SC 667
[6]Russell on Arbitration by David St. John Sutton, Judith Gill, and Mathew Gearing (Pg. 23, 1-049)
[7] *Konkan Railway Corp. Ltd. v. Mehul Construction Company*, (2000) 7 SCC 201

iii) An association or a body of individuals whose central management and control is exercised in any country other than India; or

iv) The Government of a foreign country

International arbitration:

Article 51(d) of the Constitution of India states that, 'The State shall endeavor to encourage settlement of international disputes by arbitration.'

International arbitration is likely to be defined as arbitration between parties of different nationalities, or arbitration between parties of same nationalities where there are one or more other factors that connect the arbitration to a second country. These could be the place of arbitration or perhaps the subject matter of the dispute being in that second country, or even the applicability of a foreign law. By choosing international arbitration as their dispute resolution mechanism, parties are bargaining for something different: an effective, neutral proceeding that will be equally familiar to both the parties and one which will be adapted to resolving disputes between parties from different countries and cultures.

Section 2(1) (f) of the Arbitration and Conciliation Act, 1996 defines International Commercial Arbitration as, arbitration relating to disputes arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is:

a) An individual who is a national of, or habitually resident in or any country other than India

b) A corporate body which is incorporated in any country other than India

c) A company or an association or a body of individuals whose central management and control is exercised in any country other than India

d) the government of foreign country.

The arbitration agreement will be considered as International arbitration agreement where one of the parties is a foreigner, notwithstanding the fact that the arbitration is to take place in a particular country.[8]

[8] *Gas Authority of India Ltd. v. SPIE CAPAG, S.A.*, AIR 1994 Del 75

The Distinction between International and Domestic Arbitration:

International arbitration, in lot of situations, stands in contrast to domestic arbitration. Domestic arbitration is nothing but a slightly modified form of litigation which takes place in the court of law. The only difference is that the procedures are conducted in front of the arbitrator and not the judge. Unfortunately for many parties, the advantages of an international arbitration are easy to lose if a party does not defend its expectation of a truly international proceeding. Let us discuss the distinction between the International and Domestic arbitration is detail:

1. **Parties:** According to section 2(1) (h) of the 1996 Act, "party" means a party to an arbitration agreement. In case of domestic arbitration, the arbitration is between parties of the same nationality. Whereas in case of international arbitration, at least one of the parties to the dispute domiciled out of India or the subject matter of dispute lies outside India.

2. **Appointment of Arbitrator:** Parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

   In case of domestic arbitration, where a party fails to appoint an arbitrator within 30 days from the receipt of a request to do so or the appointed arbitrators fail to appoint the third arbitrator within 30 days from the date of their appointment, a party may make a request and then the appointment shall be made by the Chief Justice of the High Court within whose local limit the cause of action arises.[9]

   However in the case of an International Commercial Arbitrator, reference has to be made by the Chief Justice of India.

   In the case of *Comed Chemicals Ltd.* v. *C. N. Ramchand*[10], a British national and professional expert entered into an agreement with a company. He was made a director and CEO of a subsidiary of the company. 40% of the equity shares of the subsidiary were also allotted to him. The agreement provided for arbitration. A dispute arose. The Supreme Court said that he could not be regarded as a mere employee of the company. The arbitration therefore would be an international

[9] *Jugal Kishore v. Ramesh Chandra*, AIR 1997 Raj 50

[10] *Comed Chemicals Ltd.* v. *C. N. Ramchand*, (2009) 1 SCC 91

commercial arbitration. An application for appointment of an arbitrator before the Chief justice of India was maintainable.

3. **Nationality of Arbitrator:** Parties can appoint person of any Nationality as arbitrator. Section 11(9) of the 1996 Act provides that in the case of the appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities. Commenting upon this provision in *Malaysian Airlines System-II* v. *Stic Travels (P) Ltd*[11], the Supreme Court said:

"While nationality of the arbitrator is a matter to be kept in view, it does not follow from Sec. 11(9) that the proposed arbitrator is necessarily disqualified because he belongs to the nationality of one of the parties. The word 'may' is not used in the sense of 'shall'. The provision is not mandatory."

4. **Place of Arbitration:** The choice of place is very important in both domestic and international arbitration. It is an important factor in terms of applicability of procedural law as well as enforcement of awards.

However, the place of arbitration is nothing but the geographical location chosen by the parties where the arbitral proceedings are to be conducted and it does not always affect *lex arbitri* i.e. the law governing the proceedings.

The Delhi High Court, in the case of *PCP International Limited v. LancoInfratech Limited,* OMP (I) No. 350/2015, recently had occasion to decide which Indian court would have territorial jurisdiction in a domestic arbitration. The court, distinguishing the *venue* of arbitration from the *seat*, held that an arbitration being conducted at a particular specified ***venue*** (*where the seat was not specified*), does not attach territorial jurisdiction of the courts of that venue in a domestic arbitration. The judgment further clarifies that the jurisdiction of courts in a domestic arbitration would be determined in accordance with the principles contained in the Code of Civil Procedure, 1908, i.e., (i) where the contract is executed; (ii) where the contract is to be performed;

[11] *Malaysian Airlines System-II* v. *Stic Travels (P) Ltd,* (2001) 1 SCC 509

(iii) where the payment under the contract has to be made; or (iv) where the defendant/respondent resides.[12]

In a recently concluded case *Eneron India Ltd., Vs Eneron Gmbh*[13], the Supreme Court of India has settled the law in India with regard to seat and venue in international arbitration proceedings. Normally the seat of arbitration carries along with it the choice of that country's arbitration law. Even though the concept of seat of arbitration and its importance is well known a very peculiar situation arose in this case because the venue of arbitration was specified in the arbitration agreement and seat of arbitration was not specified by the parties. Since venue was specified as London, the Courts of UK and India passed contra orders assuming jurisdiction because of the scope for interpretation in the recitals of the arbitration agreement. Finally, Supreme Court of India relying on Judgments of various foreign Courts and Indian Courts settled the issue between the parties and also the law for international arbitration disputes in India.

5. **Applicable laws (*lex arbitri*):** In domestic arbitration in India, the procedures of the matter are governed by the Arbitration and conciliation Act, 1996. Where the venue of arbitration is India then the substantive law of India is applicable[14]. Parties cannot exclude provisions of law in case of domestic arbitration. Whereas international arbitration can take place either in India or outside India, where there are ingredients of foreign origin in relation to the parties or the subject matter of the dispute. According to the 1923 Geneva Protocol, *"The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place"*. There is no difference between international commercial arbitration which take place in India and international commercial arbitration which take place outside India. In case of international arbitration, parties by

[12] Niyati Gandhi and Vyapak Desai, *'Supervisory And Territorial Jurisdiction In Domestic Arbitrations In India'* - Kluwer Arbitration Blog (*Kluwer Arbitration Blog* , 2015) <http://arbitrationblog.kluwerarbitration.com/2015/09/24/supervisory-and-territorial-jurisdiction-in-domestic-arbitrations-in-india/> accessed 2 October 2017.

[13] *Eneron India Ltd., v. Eneron Gmbh,* AIR 2014 SC 3152

[14] *Bharat Aluminium Co. v. Keiser Aluminium Technical Services Inc.*, (2002) 9 SCC 552

way of an agreement can exclude application of certain domestic laws[15]. However if it is nowhere expressly provided in the contract, laws of the nation where the agreement is executed are applicable[16].

Section 28 of the Arbitration and Conciliation Act, 1996, talks about the rules applicable to substance of dispute. Where the place of arbitration is situated in India, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive laws for the time being in force in India. Whereas in international commercial arbitration,—(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;(iii) failing any designation of the law under clause (i) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

It was held in *National Thermal Power Corporation* v. *Singer Company*[17], the parties have the freedom to choose the law governing an international commercial arbitration agreement. Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication, a presumption that the parties have intent that the proper law of contract as well as the law governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held.

6. **Applicability of Indian Domestic Laws to International arbitration:** Sec.2(2) of the Arbitration and Conciliation Act, 1996 provides that Part I of the Act will apply where the place of arbitration is in India. The clause is an inclusive clause and it does not exclude applicability of this Part to International arbitration. And hence unless

[15] *'Bhatia International v. Bulk Trading S.A.'*, (2002) 4 SCC 105

[16] Arbitration Law Reporter 452 Del

[17] *National Thermal Power Corporation* v. *Singer Company*, (1992) 2 SCC 551

and otherwise agreed by the parties, Part I of the Act will be applicable to International arbitration which takes place outside India as well.

Where an international commercial arbitration is held in India, the provisions of the Part I will compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of the Part I. In the case of International Commercial Arbitration held outside India, provisions of Part I will apply unless the parties by agreement express or implied, exclude all or any of its provisions. In that case, the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply in the latter case[18].

7. **Awards:**An award can be defined as a decision that finally disposes of the substantive disputed issues that it addresses. It should have the legal effect of *res judicata* as regards those issues. It is the duty of the arbitrators while rendering the award to decide the dispute in accordance with the applicable rules of laws and procedures, and in view of evidence before them. The arbitrators must make every effort to make sure that the award is enforceable by law.

Domestic arbitration awards in India are governed by Part I of the Arbitration and Conciliation Act, 1996. For International awards both the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) as well as the Geneva Convention on the execution of foreign arbitral awards 1927 have been adopted and included in the legislation i.e. Part II of the said Act.

8. **Enforcement of Arbitral Awards:** In the case of enforcement of domestic awards in India an application can be filed before the principal civil court of the original jurisdiction, including the high court in exercise of its ordinary original civil jurisdiction. This court can decide on questions forming the subject-matter of the arbitration. The applicable court does not include any civil court of a grade inferior to the principal civil court, or any small claims court. The awards can be enforced within 12 years from the date of award.

[18] *National Agricultural Cooperative Marketing Federation India Ltd.* v. *Gains trading Ltd,*. (2007) 5 SCC 692

In the case of an international arbitration in India the same procedure is applicable as domestic arbitration. According to Sec. 49 of the AC Act, where the court is satisfied that the foreign award is enforceable, and the award shall be deemed to be decree of that court. The limitation for filing enforcement proceedings for arbitral awards is three years. Once the enforcement is allowed, the award is deemed decreed and execution can effectively be done within 12 years from date of the award.

Conclusion: Arbitration is considered to be the new trend worldwide as parties prefer to resolve their dispute without getting involved intolitigation. The fundamental principle of arbitration is consent of the parties. The question of applicable procedures arises only and only when there is no agreement between the parties.The Arbitration and Conciliation Act, 1996 is the governing law in India for matters related to arbitration. Both the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) as well as the Geneva Convention on the execution of foreign arbitral awards 1927 have been adopted and included in the legislation with respect to the enforcement of foreign awards. Even though the domestic law governing arbitration in India is similar to the UNCITRAL Model Law, there are a number of differences in international and domestic proceedings as discussed in this paper.

Decoding divorce in Islam : An overview of Triple Talaq

Ojaswi Shankar[1]

Introduction

Islam, in its long drawn history of about 1500 years, has evolved itself into one of the greatest of all religions with over 1.8 billion followers, known as 'Muslims'. It is considered by far to be the most misunderstood and misrepresented religion, because of the sheer ignorance of its followers. '*Nikah*' translated to 'marriage' is a contract underlying a permanent relationship based on mutual consent on the part of man and woman. The preachers of Islam grossly misunderstand one quintessence subject. Marriages are considered sacred, apart from being religious, to the nature, and dissolution of *nikah* is a "sin" as per the Holy book of Quran. Islam disapproves of divorce to a great extent, and lays down proper modes and practices of dissolution, if at all necessary. 'Triple Talaq' is one such practice that originated in the pre-Islamic Arabia, also known as Jahillyha Period or the Time of Ignorance. This tradition was followed during the time of first Caliph Abu Bakr and for two years during the second Caliph Umar. However, the practice was abolished with the advent of Islam and Prophet Muhammad in Arabia. Prophet was of the view that when divorce is pronounced in one sitting, be it thrice or hundred times, it has to be treated as one. Nevertheless, it is still practiced in the modern times, though it blatantly disregards the basic human rights enshrined to each and every human.

Divorce in Muslims

Divorce is known as '*Talaq*' in Islamic Law. It is not mere a word that fascinates others, but it dissolves the purest relationship between a husband and a wife. *Talaq* in its original sense means 'repudiation or rejection of marriage', but in Islam, it means a termination of the contract of marriage forthwith.

Divorce: Different Forms

At present in the Muslim Law, there are the following distinct modes through which a marriage can be dissolved and the relationship between a husband and a wife can be terminated.

[1] II B.A.LL.B.

A. Divorce by the unilateral act of the husband

A husband can unilaterally, without the wife's approval, give divorce according to any of the forms approved by the Muslim Law. This is known as "*Talaq*" (Arabic) in Islamic Law, whose literal meaning is, "taking off any tie or restraint". The pronouncement of Talaq may be either revocable, which is an approved form of divorce, or irrevocable, which is an un-approved form. A revocable form of "Talaq" gives a "locus poenitentiae" to the man, but irrevocable form leads to undesirable consequences without giving him a chance to reconsider the question.[2]

This type of divorce is further classified as under:

i. ***Talak-e-ahsan:*** 'Talaq-e-ahsan' is a single pronouncement of 'talaq' by the husband followed by a period of abstinence, known as 'Iddat' which is ninety days or three menstrual cycles (in case, where the wife is menstruating). If the couple resumes cohabitation or intimacy, within the period of 'iddat', the pronouncement of divorce is treated as having been revoked. Therefore, 'talaq-e-ahsan' is revocable. However, on the third pronouncement of such a 'talaq', the couple cannot remarry, unless the wife first marries someone else, and only after her marriage with other person has been consummated and later dissolved (either through 'talaq' - divorce, or death). Amongst Muslims, 'talaq-e-ahsan' is considered as – 'the most proper' form of divorce.[3]

ii. ***Talak-e-hasan:*** 'Talaq-e-hasan' is pronounced in the same manner, as 'talaq-e-ahsan'. Herein, in place of a single pronouncement, there are three successive pronouncements in a period of three months. If after the first two pronouncements, there is resumption of cohabitation within that period, the pronouncement of divorce is treated as having been revoked. If the third 'talaq' is pronounced, the marriage stands dissolved, where after, the wife has to observe the required 'iddat'. As against 'talaq-e-ahsan', which is regarded as 'the most proper' form of divorce, Muslims regard 'talaq-e-hasan' only as 'the proper form of divorce'[4].

[2] A. A. A. Fyzee, Outline of Muhammadan Law (1974), 150-51.
[3] *Shayara Bano v. Union of India*, 2017, SCC, 963, 13.
[4] *Shayara Bano v. Union of India*, 2017 SCC 963, 14.

- ***Talak-e-biddat:*** This is effected by one definitive pronouncement of 'talaq' such as, "I talaq you irrevocably" or three simultaneous pronouncements, like "talaq, talaq, talaq", uttered at the same time, simultaneously[5]. In 'talaq-e-biddat', divorce is effective forthwith. The instant talaq, unlike the other two categories of 'talaq' is irrevocable at the very moment it is pronounced. Even amongst Muslims 'talaq-e-biddat', is considered irregular.

B. Divorce by mutual agreement

This type of divorce is instituted by wife and is known as '*Khula*'. It comes into existence when the wife makes an offer to the husband for the termination of the matrimonial alliance, with due consideration, and the husband accepts it. Where, however both the parties mutually agree to dissolve the marriage, it is known as '*Mubaraat*'. Both of these forms of divorce come into existence with the consent of both the parties, husband particularly as without his consent the divorce would be incapable of being enforced.

C. Judicial divorce

The marriage can be dissolved by a petition filed by either party in the qadi court to obtain divorce, but they must have compelling grounds for obtaining divorce.[6]

Concept of Triple Talaq

"Talaq, Talaq, Talaq", when pronounced by the husband, the marriage automatically ends right away, making both the parties free from each other. This method of giving divorce by pronouncing the word "Talaq" three times by the husband is known as "Triple Talaq" or "Talaq-e-biddat".

It is different from the practice of "talaq-ul-sunnat", which is considered the ideal form of dissolution of marriage contract among Muslims.[7]

In the practice of talaq-e-biddat, when a man pronounces talaq thrice in a sitting, or through phone, or writes in a talaqnama or a text message, the divorce is considered immediate and irrevocable, even if the man later wishes to re-conciliate. The only way for the couple to live together is, through *nikahhalala-*

[5] *Shayara Bano v. Union of India*, 2017, SCC, 963, 15.
[6] Abed Awad and Hany Mawla, (2013) The Oxford Encyclopedia of Islam and Women.
[7] What is instant triple talaq, The Indian Express, Aug 22, 2017, 4:52.

which requires the women to get remarried, consummate the second marriage, get divorce, observe a three-month iddat period and return to her husband. After the pronouncement when divorce takes place, wife becomes totally separated from the husband in terms of responsibilities and relationship.[8]

Triple talaq has been supported by the Hanafi school of law amongst Sunni muslims in India for centuries. Sunni muslims, which constitute a majority of muslimsin India, are the ones who practice triple talaq, as the Shias do not recognize it.

The Holy Quran onTalaq

As per Muslims, Quran was revealed by God to the Prophet Muhammad over a period of 23 years. Shortly after his death, Quran was completed by his companions, who either had written it down, or had memorized parts of it. Caliph Usman- the third, in the line of Caliphs recorded a standard version of Quran, which is now known as 'Usman Codex' and is treated as the original rendering of Quran, as other different compilations had differences of perception.

- 'Verses' 224 to 227 of the Section 2 of 'sura' II disapproves thoughtless oaths, thereby insisting on a proper solemn and purposeful oath, carefully observed. The above verses caution husbands from making an excuse in the name of God, since God looks at the intention, and not mere thoughtless words. It is in these circumstances, that 'verses' 226 and 227 postulate, that the husband and wife, in a difficult relationship, are allowed four months to see whether an adjustment is possible. It also prescribes reconciliation, but if the couple is against it, Quran ordains, that it is unfair to keep the wife tied to her husband indefinitely. It is in such a situation that Quran suggests that divorce is the only fair and equitable course. However, it is still recognized as the most hateful action, in the sight of God.

- 'Verses' 229 to 231 contained in 'section' 30 of 'sura' II allows divorce for the reason of mutual incompatibility, but cautions the couple to not act in haste, and repent thereafter. To prevent erratic and fitful separations and reunions, a limit of two divorces is prescribed. After the second divorce, the parties must definitely make up their mind, either to dissolve their ties permanently or to live together honorably, with mutual love. Reunion is not easy after the second divorce. 'Verse' 230 recognizes the permissibility of reunion after two divorces. When divorce is pronounced between the two parties for the third time, it becomes irreversible, until the woman marries another man and he divorces her (or is released otherwise from the matrimonial tie on account of his death).

- As per the 'Verses' 232 and 233 of 'section' 20 of 'sura' II, the termination of the contract of marriage is treated as a serious matter for family and social life. It commends every lawful advice which can bring back those who had lived together, provided there is mutual love and they can live with each other on honorable terms.

- Quran casts a duty on men to maintain their women. 'Verse' 35, contained in 'section' 6, of 'sura' IV, sets out the course of settlement of family disputes. It requires the appointment of two arbitrators - one representing the family of the husband, and the other representing the family of the wife, and dissolution must be mandated only after the possibility of reconciliation is explored.

- 'Verse' – 1, contained in 'section' 1 of 'sura' – LXV, endorses the view, that divorce is the most hateful, of all the things permitted, in the sight of God. It proscribes a husband from turning out his wife/ wives from his house. Reconciliation is recommended at every stage, whenever possible. The first serious dispute between the couple is to be submitted to the family counsel, which must represent both sides. As per the 'verse', divorce must be pronounced only after the period of prohibitory warning. At each stage, there must be consideration and reconciliation is recommended till the last stage. 'Verse' 2 maintains that, everything should be done fairly, safeguarding the interests of all. The parties must remember that such things have a bearing on all aspects of their life, and therefore, impress upon the parties, to fear God, and ensure that their determination is just and true.

The understanding of the abovementioned relevant 'verses' of Quran, reveals that nowhere it is clearly mentioned that triple talaq at a time will be considered three-talaqs and, hence is not in conformity with the unambiguous edicts of Quran and therefore, cannot be considered to be as the valid constituents of Muslim 'personal law'.

[8]What is instant triple talaq, The Indian Express, Aug 22, 2017, 4:52.

Muslim Personal Laws in India

Sharia or Islamic Laws are the religious laws forming part of the Islamic tradition[9]. It is derived from the writings of Quran along with the unwritten customs, which governs the Islamic society. Additionally, the Shariat is also based on the Hadith, (actions and words of the Prophet Muhammad as recorded by his companions).

'Personal Law' dealing with the affairs of those who profess Muslim religion is governed by the Muslim Personal Law (Shariat) Application Act, which was passed in 1937 with the aim to formulate an Islamic law code for Indian Muslims. Sec. 2 of the Act states that, "notwithstanding any custom or usage to the contrary, in all questions regarding intestate marriage, including talaq, ila, zihar, lian, khula and mubaraat, the rule of decisions in case where the parties are Muslims shall be the Muslim Personal Law (Shariat)". It has done away with the unholy, oppressive and discriminatory customs and usages, under which the status of Muslim woman was disgraceful, to the extent the same was contrary to the Muslim 'personal law' (Shariat).

Recognition of 'Talaq-E-Biddat'

The practice of 'talaq-e-biddat' as a means of divorce has been abrogated, through statutory requirements, the world over. The Arab states that have abolished the triple talaq includes Algeria, Egypt, Jordan, Kuwait, Lebanon, Libya, Morocco, Sudan, Syria, Tunisia, United Arab Emirates and Yemen, along with southeast Asian countries like Indonesia, Malaysia, Philippines. Pakistan, Bangladesh and Sri Lanka also have enacted laws against the muslim divorce practice[10]. The mere fact that most of the abovementioned countries that have either abolished or brought legislations against the archaic and intolerable practice of triple talaq are the ones having Islam as their official state religion is enough to conclude that the practice of triple talaq was not at all an essential ingredient of the muslim sect.

Constitutionality of Triple Talaq

The Muslim Personal Law (Shariat) Application Act, 1937 deals with the application of Sharia, which governs divorce in Muslims. Among the various

[9]British & World English: sharia, Oxford: Oxford University Press, 4 December 2015.
[10]Pakistan, Egypt among 19 countries that have abolished triple talaq , The Indian Express, Aug 22, 2017,20:05.

forms of divorce, 'talaq-e-biddat' is considered to be the most detestable and draconian form of divorce, and is considered to be invalid and unconstitutional, as it is repugnant to the principle of natural justice and is against the fundamental rights enshrined in Part III of the Constitution.

Article 14 of the Constitution, which talks about equality before the law, provides that no person is above the law, it is the law, which is supreme, and every person is equal in the eyes of law, irrespective of gender or religion. The husband in case of giving triple talaq has unequivocal right to divorce the wife while the wife cannot do the same. When the marriage is undertaken by the mutual consent of both the parties, then it is unfair to dissolve it unilaterally, which is violative of the Art. 14. Giving of such triple talaq is manifestly arbitrary, as it does not recognize equality of status of Muslim women with that of men. Moreover, it is unreasonable as no reconciliation process is initiated before the divorce.

The wife does not even have a right to resort to judicial proceedings, which is also an unjust violation of the principle of natural justice.Triple Talaq distorts the fundamental rights enshrined in the Art. 15 of the Constitution, which prohibits any form of discrimination. The obnoxious practice has given all the rights of divorce to men, leaving behind women as mere puppets at the hands of their husbands. Muslim women suffer on account of their gender.

Also, the practice of 'talaq-e-biddat' and divorce of women without proper reconciliation violates the basic right to live with dignity of every muslim woman.[11] The personal liberty of a person cannot be taken away by a law, which is arbitrary, unfair or unreasonable. There must be some semblance of reasonableness when a law is trying to restrict someone's right to personal liberty[12]. Hence, the practice is repugnant to Art. 21 of the Constitution.

So, it can be said from the above instances that triple talaq is 'un-Constitutional' as it violates the fundamental rights of the citizens enshrined in the Part III of the Constitution.

Supreme Court on Triple Talaq

On October 16, 2015, the Supreme Court questioned the Muslim personal law practices of marriage and divorce, and in a rare move, registered a suo moto

[11] *A. S. Parveen Akthar v. The Union of India* (UOI), 2003-1-LW(Crl)115.
[12]*Maneka Gandhi v. Union of India*, 1978, SCC 248.

public interest litigation (PIL) petition titled 'In Re: Muslim Women's Quest for Equality' to examine whether arbitrary divorce, polygamy and nikahhalala violate women's dignity.

A five-judge Constitution Bench was set up to decide on the issue and they came up with the understanding that, the Holy Quran has attributed sanctity and permanence to matrimony, as per the verses of Quran. However, in extremely unavoidable situations, talaq is permissible. But attempts for reconciliation, and if it succeeds then revocation, are the Quranic essential steps before talaq attains finality. In triple talaq, this door is closed, hence, triple talaq is against the basic tenets of the Holy Quran and consequently, it violates Shariat[13].

Justice Kurian, one of the judges of the Constitution bench, noted that merely because a practice has continued for long, that by itself cannot make a practice valid if it has been expressly declared to be impermissible. He further stated that, the whole purpose of the 1937 Act was to declare Shariat as the rule of decision and to discontinue anti-Shariat activities. Hence, no constitutional protection can be granted to triple talaq as it goes against the tenets of Quran.

Justice Rohinton F. Nariman and U.U. Lalit were of the view that, "given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. This being the case, this form of talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India".[14] Therefore, the Shariat Act, in so far as it recognizes and enforces Triple Talaq is within the meaning of the expression "law in force" in Article 13(1), and must be struck down to the extent it enforces Triple Talaq.

After due consideration, the Supreme Court in a majority judgment of 3:2 set aside 'talaq-e-biddat' as a "manifestly arbitrary" practice and hence, "void", "illegal" and "unconstitutional".

[13] *Shayara Bano v. Union Of India*, 2017, SCC, 286.
[14] *Shayara Bano v. Union of India*, 2017, SCC 963

Conclusion

Considering the facts that triple talaq is un-Islamic, negated by highly regarded Islamic scholars, that such a practice has been invalidated in many Muslim-majority nations and that it blatantly violates provisions of Constitution of India, the Supreme Court has taken a proactive role in banning the misogynistic practice of Triple Talaq, and has set forth a very strong example in the society. The verdict is a monumental and historic, and it is not only the victory of women, but more than that, it is the victory of Islam. Justice has not been meted out to the Muslim women for ages but now, the Muslim women in India will be able to enjoy their fundamental rights and the dangling sword of divorce over their head forever, will now be bygone tales of the past, thereby upholding the ideal of 'women empowerment' in the society.

Maharashtra City Taxi Rules, 2017: A Drive Too Far?

Alefiyah Shipchandler[1]

Introduction:

On 4th March 2017, by way of notification, the Maharashtra Government enacted the Maharashtra City Taxi Rules, 2017[2] allegedly under the powers conferred on it by the Motor Vehicles Act, 1988[3]. The main purpose of the Rules is to bring mobile app-based cab aggregators such as Uber India Ltd and Ola Ltd., under uniform regulation on similar lines as any other taxi service provider. While the said Rules seek to level the playing ground and ensure fair competition, this subordinate legislation does not only go beyond the parent legislation but also appears to contradict the same. Thus, following the enactment of these Rules, six drivers plying cabs with both Ola and Uber approached the Bombay High Court challenging the rules as discriminatory, in violation of Art. 14 of the Indian Constitution and beyond the scope of the parent legislation.

The Rules lay down certain conditions which are discriminatory and which impose unreasonable liability on both the drivers as well as the aggregators. They further misconstrue the relation of the drivers with the aggregators by treating it as an employer – employee relationship. The Rules also prescribe outright prohibitions, which subordinate legislations are ideally not entitled to impose. Lastly, the Rules themselves are possibly *ultra vires* since the Act does not empower the State Government to draft rules with reference to certain provisions of the Act.

Maharashtra City Taxi Rules, 2017:

1. Definition of 'Aggregator'.

The definition of 'aggregator' has not been provided for anywhere under the Act. However, according to R. 2(1)(ii) an 'aggregator' can be defined as a person who is an operator or an intermediary / market place who canvasses or solicits or facilitates passengers for travel by taxi and who connects the passenger / intending passenger to a driver of a taxi through a technological platform,

[1] IV B.A.LL.B.
[2] Hereinafter, 'Rules'.
[3] Hereinafter, 'Act'.

whether for any consideration or not. A strict interpretation would thus imply that the Government cannot draft rules for a class of persons under an Act, when the Act itself does not provide for such class of persons.

The Rules have allegedly been enacted under Sec. 93 of the Act which deals with 'agents' and 'canvassers', Sec. 95 which deals with contract carriages and Sec. 96(1) and (2), which bestow ample power in the State Government to enact Rules for dealing with the provisions of the concerned chapter of the Act. Thus as far as Sec. 93 goes, the section deals with only two activities performed by the each of the two classes: selling tickets for the public service vehicle by the agent, and with soliciting of customers by the canvasser for the public service vehicle. Hence, the section deals with only two categories of persons, and only when they perform the two specified functions. Hence, Sec. 93 (1) of the Act cannot travel beyond this limited scope. The Act does not talk about 'aggregators'.

It is pertinent to note that in the case of *Satish N.*[4], the Karnataka High Court, interpreted 'aggregator' under the Karnataka on – Demand Transportation Technology Aggregator Rules, 2016[5] (which are analogous to Rules under contention) as inclusive of 'canvassers' and 'operators' and thus concluded the Karnataka Rules to be *intra vires* of the Act. The petitioners had claimed that companies such as Uber and Ola, were merely 'facilitators' who by providing a technological platform connected the intending passengers with the driver of a taxi and thus did not amount to either 'canvassers' or 'solicitors'.

A 'canvasser' has been defined as, *"a travelling salesman who goes out on the road soliciting orders for his firm and taking with him samples of the goods or wares his house deals in."*[6] The noun 'canvasser' thus refers to a person who canvasses on behalf of *another* person. Similarly, to solicit means, *"to entreat (a person) for or to do something; to importune", "to ask for or to seek."*[7] Taking this into consideration, the Karnataka High Court examined the nature of the service agreement that was entered into by the aggregators and the drivers. It concluded that the relationship between the two independent contractors was a "symbiotic one" and that,

> *"The permit holder allows the aggregator to use advertising and marketing "to attract new Users (passengers)." The aggregator*

[4] *Satish N. and Others v. State of Karnataka* , (2017) 2 Kant LJ 6.
[5] Hereinafter, 'Karnataka Rules'.
[6] P. Ramanatha Aiyar, Advanced Law Lexicon (4th edn., Lexis Nexis 2015).
[7] *ibid.*

> *attracts the passengers, through advertisement, to the vehicles owned and registered by the permit holder on the aggregator's platform. The aggregator collects the fare from the passenger on behalf of the permit holder. The aggregator remits the fare to the permit holder on a weekly basis. For the service of providing the passengers, and for collecting the fare, the permit holder, in turn, pays a 'Service Fee', and a 'booking fee', to the aggregator. Thus, simply put, the aggregator does work on behalf of the permit holder"*

As far as the activity of soliciting was concerned, the Court concluded,

> *"... by making alluring offers, the petitioner-Company is entreating the passenger to register with its platform, for the purpose of taking taxis, owned by the permit holder. Therefore, the petitioner-Company, as an aggregator, is certainly soliciting the customer/ passenger strictly for the purpose of taking only those vehicles which are registered on its platform, and which belong to the permit holder."*

While this seems to be the established law for the time being, it can still be argued that the aggregators do not canvass or solicit for a particular known individual. They are only advertising for their platform and are not pleading with passengers on behalf of any individual driver. If this view were to be accepted the Rules would fall foul of the parent Act as enlarging the scope of the Act. It is a well established provision of law that if a rule goes beyond the rule making power conferred by the statute or supplants any provision for which power has not been conferred, it becomes *ultra vires*.[8] Before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely

(1) it must conform to the provisions of the statute under which it is framed; and

(2) it must also come within the scope and purview of the rule making power of the authority framing the rule.

If either of these two conditions is not fulfilled, the rule so framed would be void.[9] Thus, a rule cannot travel beyond the scope of an enabling act.[10] *Additional*

[8] *Union of India and Ors. v S. Srinivasan*, (2012) 7 SCC 683.
[9] *General Officer Commanding-in-Chief v Dr. Subhash Chandra Yadav*, (1988) 2 SCC 351.
[10] *Additional District Magistrate (Rev.) Delhi Administration v Shri Ram*, AIR 2000 SC 2143.

District Magistrate (Rev.) Delhi Administration v Shri Ram, AIR 2000 SC 2143.

2. Unfair and Discriminatory Nature of the Rules.

The various Rules under challenge as discriminatory can be summarized as hereunder,

Rule	Provision
R. 5 Vehicles Profile	
(1)	Each taxi is to have an engine capacity of 980 CC, while 30% of the total taxis attached to an aggregator shall have a 1400 CC engine capacity.
(3)	Vehicles attached are to operate under an "App Based City Taxi Permit"If any taxi is operating under a permit under S. 74 of the Act and gets attached to an aggregator, it will be deemed to be operating under the permit issued by the said Rules.
(5)	Requirement of temperature control devices.
(6)	Vehicles operating under the Rules are to be driven on clean fuel. Conversion of existing vehicles to clean fuel within one year.
(10)	Taxis to be painted in a specified colour. Exemption granted to taxis operating under previous schemes.
(20)	Taxis with All India Tourist Permits (AITPs) not permitted to operate under the Rules.
R. 7	Driver's Profile
(5) & (6)	Vicarious liability imposed on the licensee with reference to quality of drivers, conduct with passengers, police verification, profile of drivers and ownership of vehicle.
(7)	Joint and several responsibility for unauthorized use of permit or violation of any provisions contained in the Rules.
R. 9 Fees	Discriminatory imposition of license fee according to engine capacity.

A. Discriminatory Rules.

As far as R. 5 of the Rules are concerned, they lay down unfair conditions which have to be satisfied by vehicles plying under the said Rules. Taxis operating under earlier schemes, such as City Taxis and Black and Yellow taxis, have however been exempted from these conditions. The deeming provision of R. 5(3) is also extremely arbitrary and unfair.

In *Satish N.*[11]the Court held that, earlier schemes deal with the owners of taxis who have been granted permits under Section 74 of the Act; the Aggregator Rules do not deal with the owners of the taxis. It deals with the aggregators, who are merely canvassers for the permit holder. Further,

> *"Merely because the Operator and the aggregators are engaged in providing taxi service to the passenger, this by itself would not place both of them on identical footing. Their function may be similar, but their status and the provision under which they are covered are different. Hence, they form two separate and distinct classes. Therefore, they can be subjected to two different sets of conditions, rules and regulations."*

The Court based its reasoning on the position that if the legislature reasonably classifies persons for legislative purposes so as to bring them under a well-defined class, it is not open to challenge on the ground of denial of equal treatment that the law does not apply to other person.[12]There however arises a fundamental problem with the Courts reasoning in the above case. In the case of *Shri Ram Krishna Dalmia,* [13] the Supreme Court held that,

> *"In order to pass the test of permissible classification two conditions must be fulfilled,*
>
> *(i) that the classification is founded on intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and,*
>
> *(ii) that differentia must have a rational relation to the object sought to be achieved."*

[11]*supra* note 3.
[12]*State of A. P. v. Nallamilli Rami Reddy,* (2001) 7 SCC 708
[13]*Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar and Ors,* 1958 AIR 538.

In the present case, where the object of the Rules is to ensure fair competition, the conditions imposed on the aggregators and taxis plying with them tend to rather tilt the scale in favour of brick and mortar taxis. Even if it is assumed that the two classes of taxis are distinct, the second essential of 'reasonable classification' is not fulfilled. Unfair and discriminatory conditions imposed in the name of fair competition would thus violate Art. 14 of the Constitution of India.

B. Contradictory Provisions.

In addition to this another rudimentary dilemma arises with reference to Sec. 88 (9) of the Act. This section deals with the issue of AITPs. The Act also provides that every permit issued under this Act shall be complete in itself and shall contain all the necessary particulars of the permit and the conditions attached thereto.[14] These permits are further valid for a period of five years. R. 5(20) thus appears to outright prohibit these AITP vehicles from operating under the Rules and is contradictory to the provisions of the parent Act. Common law has adequately laid down that, *"delegated legislation can only regulate and it cannot outright prohibit"*.[15] The effect of this rule is an unlawful de – recognition of Sec. 88(9) and Sec. 85 of the Act. Further under Sec. 88(14) of the Act, only the Central Government is empowered to make rules for carrying out the provisions relating to AITPs.

C. Vicarious Liability and Employer – Employee Relationship.

As far as the imposition of vicarious liability goes, the Rules misconstrue the relationship between the aggregators and the drivers as that of an employer – employee (apart from the fact that the same liability does not exist *qua* permit holders under other taxi schemes). A similar question as to whether the drivers of the companies amount to their employees is also pending before the Delhi High Court, and remains to be decided.[16]It is interesting to note that the Labour

[14]Motor Vehicles Act 1988, s. 85.
[15]*Foley v. Padley,* (1984) 154 CLR 349.
[16]*Delhi Commercial Driver Union v. Union of India and Ors.*, W.P.(C) 3933/2017.This pending case deals with whether such drivers are entitled to various benefits that are normally available to employees under labor law provisions.
https://drive.google.com/file/d/0BzXilfcxe7yuMWNMNnVnZndISmc/view.

Court of California has ruled that such drivers are in fact employees of Uber.[17] In this case, the Court relied on *S.G. Borello*[18] where some key questions for consideration were,

1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal?
2. Whether or not the work is an integral part of the regular business of the principal/ alleged employer?

The Court also looked at *Yellow Cab Cooperative*[19] where it was held, that the drivers were not engaged in any occupation distinct from that of the Company. Rather, their work was the basis for the Company's business. It was further held that,

> *"The question of control remains highly pertinent to the distinction between employees and independent contractors. The evidence showed that the company exercised pervasive control over the driver and that the driver's efforts were undertaken for the company's benefit, such that a characterization as an employer-employee relationship was justified."*

A similar observation was made in the United Kingdom as well.[20] However these decisions are still under appeal and the question still remains to be determined.[21]

An argument on behalf of such aggregator – Companies is however that, they are essentially technology companies and not in the business of providing transportation services. While this contention has been struck down in foreign jurisprudences it is important to note that in India at least, the drivers who ply with such aggregators do not exclusively provide their services to a particular

[17] *Barbara Ann Berwick v. UBER Technologies Inc.*, Superior Court of California, C. No. CGC-15-546378. http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1988&context=historical

[18] *S.G. Borello & Sons Inc. v. Dept. of Industrial Relations*, (1989) 48 Cal. 3d 341.

[19] *Yellow Cab Cooperative v. Workers Compesation Appeals Board*, (1991) 226 Cal.App.3d 1288.

[20] *Mr Y Aslam, Mr J Farrar & Others v. Uber B.V., Uber London Ltd, Uber Britannia Ltd*, 2016 WL 06397421.

[21] See, https://www.theguardian.com/technology/2017/apr/19/uber-appeal-uk-employment-ruling-drivers-working-rights.

aggregator.[22] In light of such an arrangement, the drivers appear to be in the nature of independent contractors and not employees, making vicarious liability applicable under the Rules, incorrect.

Conclusion:

While the position of law relating to certain contentions is still unclear and remains to be decided, the analysis of the Court in such cases is extremely important. Considering the niche area of technological platforms, clarity with reference to their functioning and subsequent regulation is imperative not only for the Companies but also for those who provide their services as well as for the end users.

While regulation of these technological platforms and aggregators may be necessary, the rules enacted for the same must ensure parity and must not under the guise of fair competition, unreasonably favour brick and mortar taxis. The subordinate legislation must be framed keeping in mind the aim and scope and must not be permitted to contradict the provisions of the parent legislation.

The decisions of the Bombay and Delhi High Courts will go a long way in conclusively determining the position of such aggregators *vis a vis* the drivers and will also affect rights and liabilities of concerned parties in the long run.

[22] Rule 10(1) (p) of the Karnataka Rules itself directs aggregators to allow the permit holder who is in operation under his Company to operate his vehicle simultaneously with any other aggregator as per his discretion.

Legal Regime for and of Persons with Disability

Saranya Mishra[1]

Introduction

As similar as the title may sound to the widely accepted definition of 'Democracy' by Abraham Lincoln i.e. *"of the people, by the people and for the people"*, the paper intends to highlight that while the legal regime is 'for[2]' and 'of[3]' Persons with Disability (PWD) it is not 'by' them, i.e. also to hint at the non-inclusive law making process.

Society has posed to be a common universal barrier, differentiating the PWD in almost all spheres, *inter alia* education, employment, family life, life with dignity, access to public spaces and transportation. This phenomenon stems out of not only ignorance and lack of sensitivity, but also when a figment is sensitised, which has the mainstream perception of PWD as an object of pity and charity. PWD are handicapped not by their disability but by social, cultural and attitudinal barriers. This affects enjoyment of equal rights and opportunities. Disability rights activist, Judy Heumann notes:

> *"Disability only becomes a tragedy for me when society fails to provide the things we need to lead our lives—job opportunities, or barrier-free buildings, for example. It isnot a tragedy to me that I am living in a wheelchair."*[4]

The paper is divided into two parts, International Legal Framework and the Indian Legal Framework. In the first part, author delineates the transition of the PWD (including mentally disabled) from a rather charitable objective view (till late 20th Century) to a subjective outlook of the society, endeavouring to enable and reduce barriers for the PWD, reflected, internationally as well as nationally by way of a legally friendlier regime which is more inclusive than ever. In the second part, author focuses on the Indian Laws and highlights the contradictions therein.

[1]IV B.A.LL.B.
[2]In the author's opinion, 'for' connotes a legal regime for the benefit/welfare/protection of PWD.
[3]In the author's opinion, 'of' connotes that the legal regime belongs to PWD.
[4]Joseph P. Shapiro, *NO PITY: People with Disabilities Forging a New Civil Rights Movement* (Indian reprint by Universal Book Traders, New Delhi 1993)19-20

International Legal Framework

The international legal framework is divided into the pre-UNCRPD regime and Post UNCRPD regime for the sake of convenience, as it was not until United Nations Convention on Rights of Persons with Disability (UNCRPD)[5] that PWD had a specific legislation of which they were accorded pride of place in negotiation process.

A. Pre-UNCRPD

The Pre-UNCRPD period is flanked with multiple Conventions and Declarations, however none of them pertained specifically to the PWD, providing for them in an incidental manner, while those few Action Plans and Rules which did, were adopted without the participation of PWD.

As regards Human Rights, the Universal Declaration of Human Rights (1948),[6] the International Covenant for Civil and Political Rights (1966)[7] and the International Covenant for Economic, Social and Cultural Rights (1966),[8] also referred to as the International Bill of Human Rights collectively were at the force.

a. Universal Declaration of Human Rights (UDHR) adopted by the UN General Assembly in 1948 is recognised as the first international instrument streamlining Human Rights. The standards of Human Rights set out in the UDHR are accepted by all nation states alike. Its illustrative Preamble *"recognises the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".*[9]

b. International Covenant for Civil and Political Rights (ICCPR) lists out several rights that were of relevance to disability.[10] This Convention is also recognised as the bedrock of non-discrimination, however it is

[5] Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter as 'UNCRPD'].
[6]*Universal Declaration of Human Rights*, GA Res. 217 A (III), U.N. GAOR, 3rd Sess., UN Doc. A/810 at 71 (Dec. 10, 1948) [hereinafter as 'UDHR'].
[7]International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171GA [hereinafter as 'ICCPR'].
[8]International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter as 'ICESCR'].
[9]UDHR, preamble.
[10]*See* ICCPR, Art. 26.

debatable that the disabilities were within the conceptualisation of the original draft.

c. International Covenant for Economic, Social and Cultural Rights (ICESCR) has the same roots as ICCPR, i.e. in the UDHR and the process that led to it. It does not explicitly refer to disability, but the same is read into 'other status' in Art. 2.2.[11] It also recognises the right to health and health care.[12]

However, as is clear the International Bill of Rights makes no specific and categorical mention of PWD and the major rights that can be drawn is of equality, social security and health care, in tandem with the right to live.

Apart from the International Bill of Rights, there are also the following which incidentally provide for protection of PWD:

a. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);[13]

b. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);[14]

c. Convention on the Rights of Child (CRC);[15]

d. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMW).[16]

Of the above mentioned only CRC contains a specific disability related Article, requiring State parties to recognise the rights of children with disabilities to enjoy "full and decent" lives and participate in their communities.[17]

[11]Article 2.2 of the ICESCR states 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[12] ICESCR, Art. 12.1.

[13]International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195.

[14]Convention on the Elimination of All Forms of Discrimination against Women, Sept. 3, 1981, 1249 U.N.T.S. 13.

[15]Convention on Rights of Child, Dec. 2, 1990, 1577 U.N.T.S. 3.

[16]International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, July 1, 2003, 2220 U.N.T.S. 3.

[17]Convention on Rights of Child, Art. 23.

In addition to the afore-mentioned international instruments, UN General --Assembly proclaimed the year 1981 as the International Year of Disabled Persons (UN IYDP),[18] inviting national, regional and international level action plans to emphasis on equal opportunity and 'full participation and equality'. The year was critical in understanding how image of PWD depends on social attitudes, posing as a major barrier to the realization of the goal. This was followed by 'United Nations Decade of Disabled Persons 1983-1992'.[19]

UNIYDP also set the stage for the various regional reforms in Asia and Pacific. The Economic and Social Commission for Asian and Pacific Region (ESCAP) established in 1947[20] has been the regional front runner for the rights of PWD in Asia and Pacific, the only region to take such action and pay attention on disability issues in the aftermath of UNIYDP and UN Decade of Disabled Persons. It took a unique initiative at a meeting convened at Beijing in December 1992, wherein it adopted 'Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region'[21] and declared 'Asian and Pacific Decade of Disabled Person 1993-2002' (APDDP 1)[22]. The primary focus and goal of the Decade was expansion of opportunities for the full participation of people with disabilities in society and their equality in the development process. The Asia and Pacific Decade was extended by another decade, i.e. 2003-2012 in May 2002 by adopting Resolution 'Promoting an Inclusive Barrier Free and Rights based Society for Persons with Disability in Asia and Pacific in the 21st Century'.[23] The most landmark contribution of ESCAP is the 'Biwako Millennium Framework'[24] adopted in October 2002. The Biwako Framework sets out 21 targets[25]*inter alia:*

[18]*International Year of Disabled Persons*, G.A. Res. 31/123, U.N. GAOR, 31st Sess,, U.N. Doc. A/Res/31/123 (Dec. 16, 1976).

[19]*World Programme of Action concerning Disabled Persons*, G.A. Res. 37/52, U.N. GAOR, 37th Sess., U.N. Doc. A/Res/37/52 (Dec. 3, 1982).

[20]*Economic Commission for Asia and the Far East*, ECOSOC Res.37(IV), U.N. .ESCOR, at 13, U.N. Doc. E/RES/37(IV) (March 28, 1947) .

[21]*Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region*, E/ESCAP/902, annex I (1992).

[22]*SeeImplementation of the World Programme of Action concerning Disabled Persons*, U.N. GAOR, 48th Sess., Agenda item 109, U.N. Doc. A/48/462 (Oct. 4, 1993).

[23]*Promoting an inclusive, barrier-free and rights-based society for people with disabilities in the Asian and Pacific region in the twenty-first century*, ESCAP Res. 58/4, U.N. ESCOR, 58th Sess., U.N. Doc. E/ESCAP/58/4 (May 22, 2002).

[24]*Biwako Millennium Framework for Action Towards an Inclusive, Barrier-Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific*, U.N. Doc.E/ESCAP/APDDP/ 4/REV.1 (Jan. 24, 2003)

[25]*ibid.*

a. Self-help;
b. Women with Disability;
c. Detection, Intervention and Education of PWD;
d. Employment of PWD;
e. Access to Information;
f. Poverty alleviation; and
g. Access to Public Transport.

There are few other soft laws adopted concerning PWD, which majorly suffered from the vice of non-inclusion of the PWD in the process of discussing, negotiating and making the law for which they were denounced, like Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care[26] which faltered at biomedical assumption of 'mental illness' and endorsed involuntary admission, detention and treatment for PMI and was explicitly denounced by the World Network for Users and Survivors of Psychiatry.

B. UNCRPD

UNCRPD was the culmination of 4 years of negotiation and discussions, ultimately adopted on 13 December 2006[27], along with its Optional Protocol.[28] It was not only the first Human Rights Convention of the 21st Century and fastest negotiated human rights treaties, it was also the first comprehensive specific convention for PWD endeavouring to promote, protect and ensure full and equal enjoyment of all human rights by the persons with disabilities depending upon their needs and situations. It is regarded as a paradigm shift from 'charity-based' approach to 'rights-based' approach for persons with disability.[29] It came into force in May 2008. UNCRPD is also applauded as the International Instrument which recognises the inherent value of PWDs.

UNCRPD *inter alia* proclaims that disability results from interaction of impairments with attitudinal and environmental barriers which hinders full and active participation in society on an equal basis with others.[30] The most noteworthy rights asserted on PWD by UNCRPD are enlisted below:

[26]*The Protection of Persons with mental illness and the improvement of mental health care*, G.A. Res. 46/119, U.N. GAOR, 46th Sess., at 118, U.N. Doc. A/Res/46/119 (Dec. 17,1991).
[27]UNCRPD.
[28]Optional Protocol to the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2518 U.N.T.S. 283.
[29] http://www.cuts-international.org/CART/pdf/Dis-Ability_Junction_03-2011.pdf
[30]UNCRPD, preamble (e)

1. Equality and non-discrimination;[31]
2. Right to life;[32]
3. Accessibility;[33]
4. Liberty and security of person;[34]
5. Freedom from torture or cruel, inhuman or degrading treatment or punishment;[35]
6. Living independently and being included in the community;[36]
7. Respect for home and the family;[37]
8. Education;[38]
9. Health;[39] and
10. Work and employment.[40]

C. Observations

The traditional approach to disability was of deeming their rights as included in the overall and universal human rights, denying special status for their disability, on the redundant and superficial reasoning that all are essentially human beings, which implies natural and human rights of PWD. This was further worsened by the isolated health and welfare approach which addressed the needs of the marginalised PWD as objects of charity as it neglected their social, political and economic needs.

The transition, thus was of perspective and scope from myopic view to a more holistic view in the late 20th Century, when rights of PWD gained recognition and own standing. The transition can also be attributed to change in the thought process, from adopting a subjective approach acknowledging the PWD entitlement to enjoy same opportunities to live a full and satisfying life as equal members of the society from the erstwhile objective approach viewing PWD as incapable, abnormal set of persons deserving pity and charity. The same is

[31]UNCRPD, Art. 5; *See also* Art. 12.(Equal recognition before the law).
[32]UNCRPD, Art. 10.
[33]UNCRPD, Art. 9; *See also* Art.13 (Access to justice).
[34]UNCRPD, Art. 14 ; *See also* Art.18 (Liberty of movement and nationality).
[35]UNCRPD, Art. 15; *See also* Art.16 (Freedom from exploitation, violence and abuse).
[36]UNCRPD, Art. 19.
[37]UNCRPD, Art. 23
[38]UNCRPD, Art. 24.
[39]UNCRPD, Art. 25.
[40]UNCRPD, Art. 27.

reflected in international instruments like UNCRPD and subsequent domestic laws like RPD Act and MHC Act.

Indian Legal Framework

The Indian Legal Framework has kept pace with the international developments and enacted domestic laws recognising rights of PWD.

A. Constitution

The Constitution of India is the supreme law of the land and PWD rights can be accommodated and read into it. The following is the brief of the provisions of Constitution which champion PWD rights.

a. Preamble *inter alia* guarantees social justice and equality of status and opportunity to all the people of India.

b. Part III recognises *inter alia* right to life and equality, which are at the heart of almost every disability right. It also provides for freedom from oppression, suppression and exploitation which when coupled with the right to life and personal liberty works harmoniously for achieving the goal of equal distribution of economic and social resources envisioned by the Constitution of India.[41]

c. Part IV Directive Principles of State Policy in tandem with Part IV-A Fundamental Duties of the citizens underline the importance of preserving the individual liberty of people guaranteed by the Constitution.[42] It also mandates the State to accord justice to all members of the society in all the facets of human activity.[43]

d. Schedule VII, List II, Entry 9 provides for 'Relief of Disabled and Unemployable' as subject matter for legislation.

B. Enactments

While States have the competence to draft laws for PWD,[44] the laws have been drafted by the Union by virtue of Article 253, in view of the international obligations imposed on India by the UNESCAP and UNCRPD for enacting PWD laws domestically.

[41] *See* Constitution of India, 1950, Arts. 14, 15, 19 and 21.
[42] Constitution of India Arts. 38, 41 and 51-A.
[43] *Consumer Education & Research Centre* v. *Union of India*, [1995] 3 S.C.C. 42.
[44] Constitution of India, 1950, sch VII, list II, entry 9.

The law passed in recognition of obligation under the UNESCAP 'Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region' was the Persons with Disability Act, 1995 (PWD Act). The latest laws to be enacted in light of the ratification of UNCRPD are the Rights of Persons with Disability Act, 2016 (RPD Act) and Mental Health Care Act 2017 (MHC Act). The RPD Act has been applauded for a grammar of benefit which strives to make changes for the better.[45]

Contradictions

It is also interesting to note how RPD Act and MHC Act are riveted over Right to Health and Community Life of Persons with Mental Illness[46].

Right to Health Care

While on one hand RPD Act provides for free Health Care however with a qualification based on family income,[47]on the other hand the MHC Act provides that every person shall have access to mental health care without any income limitation.[48] The latter is *writ large* a friendlier health care regime which aims at real empowerment of the PWD.

Herein RPD Act must be aligned with the MHC Act.

Right to Community Life

Similarly in the case of the right to community living, while the RPD Act without any riders mandates in clear and unequivocal terms that PWD shall have the right to live in the community[49], the MHC Act *prima facie* elaborates on the right to community life by prohibiting segregation, it contemplates a situation whereby this right can be fettered and that is in the case of long term care of mental health,[50] which is also to say that persons with severe mental illness may not be able to enjoy community life and liberty to live independently owing to their mental condition, which requires 'long term mental care'. It also does not provide for consent and willingness of such person to be extracted from community for

[45] *Justice Sunanda Bhandare Foundation v. Union of India*, 2017 S.C.C. On Line SC 481, Para 10.
[46] Rao GP, Ramya VS and Bada MS, *"The rights of persons with Disability Bill, 2014: How "enabling" is it for persons with mental illness?"* [2016] Indian Journal of Psychiatry 121.
[47] Rights of Persons with Disability Act, 1995, Sec. 25 [hereinafter as 'RPD Act'].
[48] Mental Health Care, Act 2017, Sec. 18 [hereinafter as 'MHC Act'].
[49] RPD Act, Sec. 5.
[50] MHC Act, Sec. 18.

such health care. Even though this situation expects such staying away from community for the shortest period possible, there is a qualification imposed on right to community.

Herein, MHC Act should be aligned with RPD Act.

Conclusion

"Non-disabled (persons) do not understand disabled ones."[51]

There is no denying this as, no matter how progressive the society globally or domestically becomes or strives to be, a non-disabled person without first-hand experience of disability shall harbour a legal regime which will provide only for the *prima facie* needs of the PWD, proving inadequate for the practical requirements of the PWD. The next step for enabling PWD is a greater legislative and social policy inclusion, with first immediate need for focus on synchronising RPD Act and MHC Act with each other, based on best practices.

[51] *supra* note 4.

Enforceability of Foreign Awards in India

Madhulika Khatri[1]

Introduction

There has been a noticeable shift in recent times from litigation to arbitration as the most favorable means of dispute resolution for settlement of international commercial disputes because the latter avoids unnecessary vexation, expense and delay. Under the BJP Government, India is keen on encouraging international trade and luring the largest FDIs. In order to achieve that, it needs to facilitate an arbitration-friendly regime for easy enforcement of not only domestic awards but also foreign ones. It has thus become pertinent to evaluate the enforceability of foreign awards in India.

In a domestic legal system, legislation usually provides for the enforcement of arbitral awards made within that state. By and large, that system is not problematic because a state's governmental control-legal and physical-ordinarily extends to assets within its territory. Problem arises, however, where an award is obtained in one state but its enforcement is sought in another. Sensitive and complex issues of state sovereignty and the extraterritorial effect of award arise. The primary solution to these enforcement issues is embodied in various multilateral international conventions. India is currently party to New York Convention and Geneva Convention on the recognition and enforcement of award. It has enacted domestic legislation to give effect to these conventions.

Previously, a foreign award was enforceable in India under the Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration (Protocol and Convention) Act, 1937. These two Acts have been repealed by the Arbitration and Conciliation Act, 1996 (hereinafter referred as "the Act").

New York Convention Awards

Brief History

The first international Convention for execution of foreign arbitral awards was the Geneva Protocol on Arbitration Clauses, 1923 which was drawn up on the initiative of the ICC. It was followed by Geneva Convention on the Execution

[1] III BA LL.B.

of Foreign Arbitral Award, 1927. India became a signatory to it on 23rd October, 1927 and enacted a legislation to give effect to it.

Various problems were encountered in the operation of the Geneva Treaties. One of the major shortcomings being the problem of Double Exequatur, i.e., the successful party would have to apply for enforcement in the country of origin where the award was made, before applying for enforcement in other countries. This led to the adoption of United Nations Convention on the Recognition and Enforcement of Arbitration Awards, 1958 (New York Convention) which is an improvement of the Geneva Convention, 1927. By virtue of Article VII, the Geneva Protocol, 1923 and Geneva Convention, 1927 ceased to take effect between the contracting parties. The Geneva Convention awards have thus become obsolete.

Definition of New York Convention Awards

Before getting into the intricacies of enforcement, it is pertinent to discuss definition of New York Convention Awards. Section 44 of the Act is based on Article I and II (1) and (2) of the New York Convention and acts as a definition clause for enforcement of New York Convention awards. Interpreting Sec. 44, Supreme Court[2] has held that a particular award is a "foreign award" for the purpose of New York Convention if the following conditions are satisfied:

1. The legal relationship between the parties must be commercial.
2. The award must be made in pursuance of an agreement in writing; and
3. The award must be made in a Convention country.

The definition laid down in Sec. 44 is narrower than the scope of New York Convention set out in Art. I (1), which provides that in addition to foreign awards, the Convention 'shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought'[3]. These awards are referred to as 'non-domestic' awards. Scholars[4] have neatly summarized these non-domestic awards as follows:

a. An award made in the State where enforcement is sought under the procedural law of another state; or

[2]*Centro trade Minerals & Metals Inc. v. Hindustan Copper Ltd*, (2006) 11 SCC 245
[3]The New York Convention 1958, Article I
[4]G. Born, (2014). *International Commercial Arbitration* , Kluwer Law International, p. 2380.

b. An award made in the State where enforcement is sought under the arbitration law of that state but regarding a dispute of international element; or
c. An award that is regarded as 'a-national' in that it is not governed by any arbitration law.

However, India does not differentiate between non-domestic awards and foreign awards. It adopts the approach that 'non-domestic awards' are those made in a territory outside India's national territory.

Limiting The Scope of Enforcement Through Reservations

Article I (3) of the Convention allows a contracting state to limit the scope of enforcement of New York Convention awards by declaring Reservations. India has made two reservations under this provision.

1. Commercial Reservation

It limits the scope of this Convention to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Indian Law. A generally accepted interpretation of the meaning of 'commercial' is provided by Supreme Court in *RM Investment Trading Co Pty Ltd v. Boeing Co.*[5]:

"The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not..."

The expression "commercial" should therefore be construed broadly having regard to manifold activities which are integral part of international trade.

2. Reciprocity Reservation

A Foreign Award can be made enforceable if it has been made 'in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which New York Convention applies'[6]. In accordance to this provision, the Central Government has currently declared 48 countries as the reciprocating countries.

[5]*RM Investment Trading Co Pty Ltd v. Boeing Co.*, (1994) 4 SCC 541
[6] The Arbitration and Conciliation Act 1996, Sec. 44(b)

I. PRE-ENFORCEMENT REQUIREMENTS

Relevant Court for Filing Application for Enforcement

After the amendment[7], High Court has become the Court of first instance in all cases and now parties will not have to track the assets in remote corners of India. This is a positive step as the Honorable Judges of High Courts are more experienced and well versed with Arbitration laws to handle enforcement of foreign award.

The Supreme Court in *Brace Transport Corporation of Monrovia, Bermuda v. Orient Middle East Lines Ltd., Saudi Arabia*[8] held that enforcement of the award can be done wherever the assets of the losing party are located. The award would have to be filed for its enforcement in a court which would be able to enforce the award, i.e., where the respondent would have properties, movable or immovable, which could be attached and sold in the execution of the award.[9]

Evidential Requirement

Article IV(1) of the Convention requires only two items to be furnished by the party seeking enforcement:

a) The original award or a duly authenticated copy thereof;

b) The original arbitration agreement or a duly certified copy thereof.

States are free to make their procedure even less onerous if they wish. Japan does not require the submission of the arbitration agreement.[10] In contract, India requires additional documents. Sec. 47(1) (c) of the Act requires not only production of original award and the arbitration agreement but also 'such evidence as may be necessary to prove that the award is a foreign award'.

Additionally, if the documents are in a foreign language, the party seeking enforcement of the award shall produce a certified English translation of the arbitral award, and the arbitration agreement.[11]

[7] Arbitration and Conciliation (Amendment) Act 2015, Sec. 21
[8] *Brace Transport Corporation of Monrovia, Bermuda v. Orient Middle East Lines Ltd., Saudi Arabia,* 1995 (Supp) 2 SCC 280
[9] *Wireless Developers Inc. v. Indigamers Ltd*, 2012 (2) Arb LR 397 (Bom) (DB)
[10] Japanese Arbitration Law, Article 46
[11] The New York Convention, Article IV(2)

Grounds for Resistance of Enforcement

Section 48 sets forth seven grounds for refusal to enforce a foreign award. The scope of a foreign award is limited to grounds mentioned in Sec.48 and does not enable a party to impeach the award on merits in such proceedings[12].The first five are contained in Sec. 48(1), and the remaining two are contained in Sec. 48(2). The grounds enumerated in Sec. 48(1) are:

1. Existence or validity of the arbitration agreement,
2. Lack of due process of law,
3. Jurisdictional defects,
4. Composition of the arbitral authority and application of proper arbitral procedure and
5. Status of the award.

The court may exercise its discretion to refuse enforcement of a foreign award on any of these five conditions, only if the party objecting to enforcement, makes a request, furnishes proof of the existence of any of these conditions. If such a party fails to plead and prove existence of any of these conditions, the court will not exercise its jurisdiction to refuse enforcement. However, with respect to the last two conditions, in Sec. 48(2), the Court may *suo motu* refuse enforcement.[13] It is then for the party seeking enforcement, to satisfy the Court that

1. The subject-matter of the dispute is capable of settlement by arbitration in India;
2. The enforcement would not be contrary to the *public policy of India*, and the award was not induced or affected by fraud or corruption.

Recent Amendments have reaffirmed the judicial interpretation in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[14] by laying down that an award is in conflict with the public policy, only if:

1. The making of the award was induced or affected by fraud or corruption or was in violation of Sec. 75 or 81; or
2. It is in contravention with the fundamental policy of Indian Law or
3. It is in conflict with the most basic notions of morality or justice.[15]

[12] *Renusagar Power Co. Ltd. v. General Electric Co.,* AIR 1994 SC 860
[13] *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 2008 (4) Arb LR 497
[14] *Shri Lal Mahal Ltd. v. Progetto Grano Spa,* 2013 (3) Arb LR 1 (SC)
[15] Arbitration and Conciliation (Amendment) Act, 2015, Sec. 22

This Section replicates Article V of the New York Convention, 1958 which employs a permissive rather than mandatory language in stating that the enforcement 'may be' refused. Sec. 48(1) and (2) both used the permissive 'may' and not the mandatory word 'shall' or 'must' for refusing enforcement. In other words, even if any of these conditions does exist, the legislature has left it to the discretion of court to enforce or refuse enforcement, depending upon the facts of a particular case. This is a positive step for establishing a pro-enforcement regime.

New ground created by judicial interventionism

Apart from the aforementioned grounds, the interventionist approach of Indian judiciary in *Bhatia International v. Bulk Trading S. A.*[16] and *Venture Global Engineering v. Satyam Computer Services Ltd,*[17] has created a new ground for resisting enforcement of foreign awards. In these cases, it was held that the Indian courts had the same powers in respect of a foreign arbitration as they did in respect of a domestic arbitration. This meant that in addition to being able to refuse enforcement of a foreign award, the Indian courts could also order interim measures in foreign arbitration proceedings, and set aside foreign arbitral awards on the petition of the losing party. In other words, foreign arbitrations that were already regulated by the courts of the seat of arbitration were also exposed to intervention by the Indian courts.

This was particularly troublesome in the enforcement context. It meant that losing parties could undermine awards on several fronts. First, they could resist the winning party's petition to enforce the award under Part II of The Act. In parallel, they could lodge a petition under Part I of the Act (relating to domestic arbitrations), to set aside the award; and possibly also apply to the courts at the seat of the arbitration. This meant that the award could not be enforced until all the actions had been heard.

The watershed decision in *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Ltd.*[18] (BALCO Case) has overturned the reasoning in *Bhatia International* and *Venture Global*. Under this new regime, the powers that Indian courts can exercise in relation to domestic arbitrations cannot be exercised in relation to foreign seated arbitrations.

[16]*Bhatia International v. Bulk Trading S.A,* (2002) 4 SCC 105
[17]*Venture Global Engineering v. Satyam Computer Services Ltd,* (2008) 1 Arb LR 137
[18]*Bharat Aluminium Co. v Kaiser Aluminium Technical Services Ltd,* (2012) 9 SCC 552

However, despite encouraging signs in BALCO, there still remains some uncertainty regarding the enforcement of foreign arbitral awards in India. Since the Supreme Court has restricted the application of BALCO to disputes arising from agreements executed after the date of the judgment (6 September, 2012), the Indian courts shall still apply the interventionist reasoning of *Bhatia International* to any arbitration agreement executed on or before the date of BALCO judgment.

Enforcement of Foreign Award as Decree

Once the court decides the enforceability of the award under Sec. 47 and 48, it is only then that the foreign award would be deemed to be a decree under Sec. 49 available for execution.[19] Thus, if the court, on examination of the material before it, is satisfied that the conditions resisting enforcement are not made out, the award will be enforced as the decree of that court. This decree can be executed in terms of Order XXI of the Code of Civil Procedure.[20] Further, the court can decide the enforceability and execution of award in common proceeding.[21] The party need not take separate proceedings, one for deciding the enforceability of the award, and the other for execution.

II. Post-Enforcement Requirments

Registration and Stamping

There is no provision in the Act which stipulates that a foreign award requires registration. Non –registration of a foreign award is not a ground for refusal of enforcement under Sec. 48. However, Sec. 17(1) of The Registration Act, 1908 requires compulsory registration, if an award creates, declares or assigns a right, title or interest in the immovable property.[22]

The issue whether a foreign award requires compulsory registration was settled by Supreme Court in *Harendra H. Mehta v. Mukesh H. Mehta*[23]. The Court held that a foreign award would not require registration as such;however it would require registration where the decree/order on the basis of compromise affects the immovable property other than that which is the subject-matter of the suit or proceeding.

[19]*Fuerst Day Lawson Ltd. v. Jindal Export Ltd.*, (2001) 6 SCC 356
[20]*Force Shipping Ltd v. Ashapura Minechem Ltd.*, 2003 (3) Arb LR 432 (Bom)
[21]*Fuerst Day Lawson Ltd. v. Jindal Export Ltd.*, (2001) 6 SCC 356
[22]*Satish Kumar v. Surinder Kumar,* 1969 (2) SCR 244
[23]*Harendra H. Mehta v. Mukesh H. Mehta,* (1999) 5 SCC 108

The Act is silent about the stamping of an award, however Indian Stamp Act, 1899 requires stamping of award.[24]

Limitation Period

The Act does not contain any provisions prescribing the time limit for enforcement of award. In absence of any provision, the provisions of the Limitation Act, 1963 will come into play. The view taken by Madras High Court in *Compania Naviera Sodnoc SA v. Bharat Salt Refineries Ltd.*[25] is that under Sec. 49 of the Act, since a foreign award is already deemed to be a decree of the Court, the party having the foreign award can execute the said decree as per Art. 136 of the Limitation Act, i.e. within a period of 12 years.

III. Non-Convention Awards

The issue of enforcement of a foreign award passed in a non-Convention country was settled by a three judges bench of the SC in *Badat and Co. v East India Trading Co.*[26], which held that such awards are enforceable in India on the same grounds, and in the same circumstances, in which they are enforceable in England under the common law on the ground of justice, equity and good conscience.

This position was disturbed by a three-judge bench in *Bhatia International Case*[27], where the bench observed that it is not possible to accept that the Act does not make a provision for arbitration taking place in a non-Convention country. It held that such an award is to be considered as Domestic Award, even though the Act nowhere provides that its provisions are not to apply to Arbitrations which takes place in a non-convention country.

The applicability of the Act to award of a non-Convention country was put to rest by Constitution Bench in *BALCO Case*, which reinforced the position given in *Badat and Co.* case, by observing that foreign award made in non-convention country cannot be enforced under the Act. This is so because the clear intention of the Indian legislature was not to include such awards within its ambit.

[24]The Indian Stamp Act 1899, Sec. 35
[25]*Compania Naviera Sodnoc SA v. Bharat Salt Refineries Ltd*, AIR 2007 Mad 251
[26]*Badat and Co. v East India Trading Co*, AIR 1964 SC 538
[27]*Bhatia International v. Bulk Trading S. A*, (2002) 4 SCC 105

IV. Enforcement of Foreign and Domestic Awards comparison

There are two-fold differences between enforcement of a foreign award and a domestic award:

1. Application for enforcement

   A domestic award does not require any application for enforcement; whereas, a foreign award is required to go through an enforcement procedure by making an application for enforcement. Once the court is satisfied that the foreign award is enforceable, the award becomes a decree of the court and executable as such.

2. Setting aside of Award

   Unlike domestic awards, there is no provision to set aside a foreign award. In relation to a foreign award, the Indian courts may only enforce it or refuse to enforce it but they cannot set it aside.

V. Conclusion

Recent legislative amendment of the Act and plethora of pro-arbitration judgments suggest that the Indian legal system has significantly moved towards creating a facilitative environment for enforcing foreign arbitral awards. In certain aspects, however the Indian law lags behind the Convention and universally accepted standards. For instance, Indian law mentions non-compliance with the rules of morality as a ground for the refusal of enforcement of an award, whereas no such ground is recognized under the Convention. Such a requirement may lead to broad or conflicting interpretations, undermining the required uniformity. Further, additional evidential requirement other than those prescribed under the convention are required to be submitted which makes the process onerous. India should also consider repealing the provisions with respect to enforcement of Geneva Convention awards as these have become virtually obsolete by way of Art. VII of the New York Convention. In spite of the fact that we have come ahead, some improvements are necessary to bring India in line with the advanced legal regime in the world.

Admissibility of Child Witness in the Court of Law: Reflections on Some Legal Concerns

Siddharth Nandodkar[1]

Introduction

In any criminal trial, witnesses form an integral part of the pre-trial investigation as well as during the actual trial. For pre-trial procedures i.e. police investigations, which assist the prosecution during case hearings, are largely helped by witness statements. On the other hand, witnesses are also essential for a successful defence of the accused. As opposed to lifeless documents, witnesses can provide an actual representation of the overall events. Further, even if we take into account the importance of documentary evidence, witnesses put life into those documents. E.g. if we look at documents such as an F.I.R., Panchnamas and Medical Reports, the persons who made those documents i.e. the Investigating Officer (IO), Panch witnesses and Doctors, respectively are to be examined in court. If this is not done then the evidentiary value of such documents is reduced to nullity. Also, when any court is unable to answer questions regarding technical topics such as foreign law, science, art, or identity of handwriting or finger impressions, it calls upon experts from those fields. Witnesses are of different types, which includes, *inter alia*, eyewitnesses, character witnesses, expert witnesses etc. One of the most debated kinds of witnesses are child witnesses. This paper aims at clearing the air regarding admissibility and importance of the testimonies of child witnesses as regards Indian law and jurisprudence.

Who May Testify in Court?

According to the Indian Evidence Act,

> *"All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."*[2]

[1] V BSL. LL.B.
[2] Section 118, Indian Evidence Act, 1872.

Thus, the only condition as regards the competency of witnesses is that they should be capable of understanding the questions put to them.[3]

The restrictions given under this section are not just of age or infirmity, but that such age or infirmity should obstruct the person from understanding the questions put to them. In addition, a *prima facie* reading of the section shows that it is the discretionary power of the court to determine whether a person is a competent witness or not.

This leads to the question as to whether a child can be a competent witness. There have been numerous cases wherein the courts have regarded as well as disregarded the testimonies of child witnesses due to certain circumstances. However, in any case, the importance of a witness cannot be undermined. So why should the testimony of a child be struck out merely because of his age?

The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation and is a question distinct from his credibility when he had been sworn or affirmed.[4]The Court is at liberty to test the capacity of a witness to depose by putting proper questions. It has to ascertain in the best way from the extent of his intellectual capacity and understanding, whether he is able to give a rational account of what he has seen or heard on a particular occasion.[5]

Can a Child Testify in Court?

The provision under Sec. 118 of the Evidence Act, does not simply bar the acceptance of evidence of any child. It is up to the discretion of the Court whether to admit certain evidence or not. As per the provisions of the Oaths Act, 1969, oath or affirmation has to be made by all witnesses who may be lawfully examined or who may give or be required to give evidence before a court of law.[6] However, the proviso to Sec. 4(1) of the Oaths Act says that where the witness is a child under 12 years of age and the court is of opinion that though the witness understands the duty of speaking the truth, he does not understand the nature of oath or affirmation, then such witness need not make any oath or affirmation and the absence of such oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of such witness to state the truth.[7]

[3] *R. v. Hill* [1851] 2 Den CC 254.
[4] Ratanlal and Dhirajlal, The Law of Evidence, (25th Edn. Lexis Nexis 2013) 678
[5] *Id.*
[6] Section 4 (1) (a), Oaths Act, 1969.
[7] *ibid.*

As regards the competency of a child witness, Indian Courts have relied on the proposition developed by Justice Brewer in *Wheeler v. United States.*[8] In his opinion, "*the evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convicted about the quality thereof and reliability can record conviction, based thereon.*" Under the Indian jurisprudence, even if the witness is a child, his evidence shall not be rejected, if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell her and thus a child witness is an easy prey of tutoring.[9]

Thus, it can be said that evidence of a child must not be discarded, but is to be subjected to careful scrutiny. Further, the Supreme Court opined that in case of a child witness, there is a high possibility of tutoring and that children do not understand the duty to speak the truth.[10] Also, apart from scrutiny of the testimony, by itself, evidence of a child witness has to be seen and analysed in light of other witness statements and circumstances. This helps in giving more authority and credibility to the child's statement. The Indian courts have used this procedure in various cases to examine a child witness' testimony.[11]

In view of what has been discussed above, the law on this issue can be reviewed to the effect that the testimony of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no adornment or improvement therein, the court may rely upon his evidence. In *Himmat Sukhadeo v. State of Maharashtra*,[12] a 13 year old boy had accompanied the two deceased in the instant case, i.e. his father and his uncle to plough fields where the incident took place. The boy hid himself till the coast was clear and then ran home and narrated the incident to the other family members. The Apex Court ruled that he understood the full implications of what he was saying and that despite a stiff cross-examination, nothing could be brought out that would discredit his testimony. Further, the Court upheld the conviction based on the testimony of that child even though there was little corroboration.

[8] 159 US 523 [1895]
[9] *Panchhi v. State of Uttar Pradesh* AIR 1998 SC 2726; Also see *S. Amrutha v. C Manivanna Bhupaty* AIR 2007 Mad 164.
[10] *State of Bihar, etc. v. Kapil Singh, etc* AIR 1969 SC 53.
[11] *State of Bihar, etc. v. Kapil Singh, etc* AIR 1969 SC 53; *Bhagwan Singh and others v. State of M. P.* 2003 AIR SCW 617; *Janki Back v. State of Chhattisgarh* 2014[3] CGLJ 416.
[12] AIR 2009 SC 2292

In another case, an accused was awarded a death sentence, which was later reduced to life imprisonment by the Supreme Court, relying on the testimony of a 5-year-old child. The child was not administered the oath owing to his age but it was decided by the court that the child was a witness of truth and not a witness of imagination. He answered all the questions put to him with a nod or shake of his head.[13]

In a landmark judgment[14] the Supreme Court observed that, the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge. The Judge must notice his manners and his apparent possession or lack of intelligence. In order to ascertain the same, the Judge may examine the child and such a preliminary examination acts as a precaution measure to test the competency and credibility of the child and to ensure absence of any tutoring.

Therefore testimony of a child witness sometimes turns out to be very crucial. The only test that the court has to apply is to corroborate the testimony or determine concretely that the child understands the questions and the implications of his answers.

Credibility and Corroboration of Testimony of a Child Witness

All that is required in considering the evidence of a child witness is scanning it carefully and if after doing so it is found that there are no flaws or infirmities in the evidence of a child, there is no impediment in accepting the evidence of a child. Children are pliable and their evidence could easily be shaped.[15] Normally a Court should look for corroboration in such cases but that is more by way of caution and prudence than as a rule of law. This rule was laid down by the Privy Council in *Mohamed Sugal Esa Mamasan Rer Alalah v. The King.*[16]

It has been quite rightly stated by the King's Bench[17] as well as by the Supreme Court[18] (later on) that the evidence from which corroboration is sought "must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in

[13] *Suresh v. State of U. P.* AIR 1981 SC 1122.
[14] *Nivrutti Pandurang Kokate & Ors. v. State of Maharashtra* AIR 2008 SC 1460
[15] *In Re: Sheikh Umar Saheb Alias Umra v. Unknown* 1957 CriLJ 919.
[16] AIR 1946 PC 3
[17] *King v. Baskerville* 1916-2 KB 658.
[18] *Rameshwar Kalyan Singh v. State of Rajasthan* AIR 1952 SC 54.

some material particular to the testimony of the accomplice or complainant that the accused indeed committed the crime."

Further, if it is found that other relevant circumstances indicate that the testimony of a child may be unsafe to rely upon, then the court should not rely upon that evidence without further corroboration from independent sources.[19]Although this does not mean that the corroboration as to the identity must extend to all the circumstances necessary to identify the accused with the offence, yet there has to be an independent evidence which would make it reasonably safe to believe the witness's story that the accused was the one who committed the offence.[20]Furthermore, the maxim *falsus in unofalsus in omnibus* has no application in India and as such a witness cannot be branded a liar and his evidence cannot be discarded on the sole ground that a part of his testimony was not reliable.[21]

Relevancy of Child Witness

The evidence of a child witness is very important. In cases of domestic violence and other offences, which may take place within the four walls of a home, where no outsider may be present, a child can be a very important witness, especially being the sole eyewitness. Further even in cases when a child may not always be a natural witness, children tend to have a very strong memory and may actually paint a clear picture of the alleged scene of crime. Yes, this may be subjected to exaggeration, but it is here that the role of the Court is important. Since the time when the testimony of a child was first considered till today, the importance and relevancy of such testimony has grown exponentially.

Discussing the relevancy of the evidence of a child witness as regards gruesome offences, the Supreme Court in *State of U.P. v. Krishna Master held that,*

"there is no principle of law known to this Court that it is inconceivable that a child of tender age would not be able to recapitulate facts in his memory witnessed by him long ago."

In this case the witness claimed on oath that he had seen five members of his family being killed by the Respondents by firing gun shots. The Court observed

[19]*State of Bihar v. Kapil Singh* AIR 1969 SC 53; *Bhagwan Singh and Ors v. State of U.P.* AIR SCW 617

[20]*Bhagwania v. State of Rajasthan* 2001 CriLJ 3719.

[21] Ram Jethmalani and D.S. Chopra, The Law of Evidence, (Vol. II, 2nd Edn, Thomas Reuters 2016) 2027.

that a child of tender age is unlikely to forget the gruesome murder of family members for his whole life and would certainly recapitulate facts in his memory when asked about the same at any point of time.

Thus the Supreme Court has observed that a child has the ability of recollect some acts or actions that have happened a long time back if it related to some macabre incidents and or to his own family.

Conclusion

The debate looming over the status of a child as a witness will always be everlasting. The legislation governing child witnesses does not give any clear answer so as to put the debate to rest. Thus, all interpreters have to rely on jurisprudence of the Privy Council and the Courts of India. However, since the Judges, are also humans, their decisions and observations will differ from case to case. Such variations will again give rise to debates. This will continue to be a never ending loop until the legislature provides a concise, precise and direct answer regarding the validity of the evidence of a child.

The Real Estate (Regulation and Development) Act, 2016: Too harsh on the 'Promoters'?

Ayush Wadhi[1]

What is the Real Estate (Regulation and Development) Act, 2016?

The Real Estate (Regulation and Development) Act, 2016 or commonly known as RERA 2016, is a recent legislation passed by the Indian Parliament, which regulates the trade practices in the real estate sector. Rayja Sabha passed the act on 10th March 2016 and by the Lok Sabha on 15th of March 2016. There are 92 sections in the Act. 52 sections out of these 92 Sections came into force on the 1st day of May 2016 and the rest of the sections on the 1stday of May 2017. RERA aims at not only new real estate projects but also the on-going real estate projects where the completion as well as the occupancy certificate have not been received. A completion certificate is the one, which is provided by local authorities after evaluation of the real estate project if it has been executed in accordance to the defined norms and approved designs. It is very important to obtain a completion certificate because in case properties operate without it, residents are threatened to be evicted and the city engineering department will penalize the properties for not paying property tax. So, to get a completion certificate, the promoter first has to register his real estate project under RERA. Though there are exceptions to this mentioned in Sec. 3 (2) of the Act, which states that a project does not require registration where the land proposed to be developed does not exceed 500 sq. meters or the number of apartments to be developed does not exceed eight when the promoter has already obtained a completion certificate and for the purpose of repair or re-development and it does not include sale of property. The Secs. 4 and 5 of the Act state the procedure of registration and the grant of registration respectively.

Who is a 'Promoter'?

Sec.2 (z) (zk) of the Real Estate (Regulation and Development) Act, 2016 defines a promoter. In simple terms, Promoter is:-

1. A person who constructs a building or a part of building into apartments for selling all or some of the apartments to other persons.

[1]II B.A. LL.B.

2. A person who develops a land into a project whether or not it contains structures for selling it to other persons.
3. Any development authority or public body in respect of allottees of buildings or apartments constructed by such authority or plots owned by such authorities or placed at their disposal by the government.
4. An apex State level Co-operative housing finance society and a primary housing society which constructs apartments or buildings for it members.
5. Any person who acts himself as a builder, colonizer, contractor, developer, estate developer, or by any other name claims to be acting as the holder of power of attorney from the owner of the land.
6. Such person who constructs any building or apartment for sale to general public[2].

Who is an 'Allottee'?

Sec. 2 (d) of the Real Estate (Regulation and Development) Act, 2016 defines an allottee. An allottee in relation to a real estate project is a person to whom a plot, apartment or building, as the case may be, has been allotted, sold or transferred by the promoter. It does not include a person to whom a plot, apartment or building is given on rent.

How are the RERA rules to be implemented?

According to Sec. 84 of the Act, the appropriate government, within a period of six months of the commencement of the Act may by notification make rules for carrying out the provisions of this Act. This includes all 29 States and 7 Union Territories excluding Jammu and Kashmir. All the States and Union territories in India excluding Jammu and Kashmir were supposed to notify the RERA rules by 31st July, 2017. But, as on 28th August, 2017 only 17 states have notified the rules which include Andhra Pradesh, Bihar, Chhattisgarh, Gujarat, Haryana, Himachal Pradesh, Karnataka, Kerala, Madhya, Pradesh, Maharashtra,Odisha, Punjab, Rajasthan, Tamil Nadu, Telangana, Uttar Pradesh, Uttarakhand. All of the Union territories have notified the rules. The states, which are yet to notify the rules, include Arunachal Pradesh, Assam, Jharkhand, Manipur, Meghalaya, Mizoram, Nagaland,Sikkim,Tripura, Goa, and West Bengal[3].According to Sec. 3 (1) of the Act, the promoter shall not advertise, market, book, sell, and

[2] The Real Estate (Regulation and Development) Act, 2016: Sec. 2 (z) (zk)

[3] RERA: States that have notified the rules, 2017, <http://apnarera.com/rera-states> Accessed 28th August, 2017

offer for sale, unless registered under the real estate regulatory authority established under this Act, provided that the projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the authority for registration within three months from the commencement of this act. Various states have kept several ongoing projects out of the scope of RERA even though those projects have not received completion and occupancy certificate and this has led to the dilution of the Central RERA Act. However, since the state rules are subordinate legislations, they cannot as a general rule of law, be in violation of the provisions of the principle legislation. The position on this discrepancy is yet to be settled. The Courts and the central government have reached out to such states and asked them to align the provisions of the state rules with the central legislation.

How is the money to be managed under RERA?

The promoter has to make a declaration supported by an affidavit which shall be signed by the promoter or any other person authorized by the promoter which states that seventy percent of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose, provided that the amount of money withdrawn from this account is proportional to the percentage of completion of the project only after it is certified by an engineer, an architect and the Charted Accountant in practice and this account shall be audited within six months after the end of the financial year by a CA in practice[4]. So this separate account basically acts as an Escrow Account which means that the money will be kept in that account only for the purpose of the construction of the specific real estate project and nowhere else. This provision in the Act is a response to the wrongful trade practices that were carried out by the promoters like diverting the money realized from one project to a different project. This led to delays in providing the possession of the houses to the buyers.

How will RERA affect the prices in the Real estate sector?

The real estate prices are expected to rise after the implementation of RERA. That is because previously, the real estate were sold on basis of the "Super built up area" but RERA proposes the "Super area" or the "Carpet area" basis.Carpet area is the total area of the apartment excluding the thickness of the inner wall.

[4] Section 4 (1) (l) (D)

It is the actual area you get for use in the real estate property purchased. "Built up area" is the total area of the apartment including the thickness of the inner walls. Generally, 70% of the built up area is equivalent to the carpet area of the apartment. The "super built up area" is the sum of the built up area and the common area that includes stairway, corridors, lifts, etc. In the pre-RERA system, the properties were sold on basis of Super built up area, which was very profitable to the promoters, but post RERA implementation, carpet area basis has to be used which will cut the profits of the promoters to a very large extent as the area sold is being cut by 30% to 35%. As a result, to neutralize this, the promoters will obviously increase the prices of the apartment per square feet (psf) in order to maintain the previous prices of the apartment.

For example: If previously, the area of sale according to super built up area of an apprtment was 1000 sq feet with a rate of Rs. 3000 psf, the cost of the total apartment including built up area and the common area will be Rs. 30 Lakhs. But after the implementation of RERA, only the carpet area has to be considered, which is approximately 70% of the super built up area, and is equivalent to 70% of 1000 sq ft. that is 700 sq ft. Now, in order to maintain the Rs. 30 Lakh price, the builder/promoter will increase the price of the real estate land to Rs. 4286 (approx). That is an increase of about 42% in the prices of the apartment psf.

After passing of the Act, there were a lot of additional expenses that were to be incurred by the promoter which include Registration charges, quarterly filings, maintenance of the website. Also, restriction on the sale of open parking spaces, restriction on use of the cash from the escrow account that has to be created which will contain 70% of the entire amount of money paid by the allottees. These extra expenses will be covered by the promoter by increasing the prices of the property. Hence, the rates in the real estate sector are expected to rise up.

Rohit Gera, MD, Gera Developments and VP Credai, Pune Metro, says, "Before the introduction of RERA, the risk on account of delays, quality, title, and changes in the project were all borne by the customer. As a result, most customers had to deal with some sort of the default and were forced to bear the cost of this default. These costs will now be borne by the developer and there will be a consequential premium that the flat purchasers will have to pay for transferring this risk to the developer. In my opinion, there is no headroom for developers to absorb these increased costs and immediately upon the first opportunity we will see this cost being transferred on to the home purchase by way of an increase in prices[5]."

[5] Economic times report, <http://economictimes.indiatimes.com/wealth/real-estate/will-rera-impact-real-estate-prices/articleshow/58577393.cms>, Accessed 4th September, 2017.

What will the effect of GST and RERA be on the real estate sector?

With the GST system of taxation being introduced on 1st July, 2017, the real estate sector saw a significant change in the taxation system of the real estate. Previously, for under construction buildings, each state levied Value Added Tax (VAT), the Centre levied the Service tax. Along with this, there are additional levy, which include Registration charges and stamp duty. But with the implementation of GST, the tax rate is fixed to 12% for under construction buildings (excluding registration charges and stamp duty). The number is quite high as compared to the previous taxation system, which summed up to nearly 5.5% of the total cost of the property (an increase of 6.5% - VAT and service tax summed up to 5.5%).

But, the costs are not expected to rise much because the builders can now claim input credit from the taxes paid on the materials used for construction. Input tax credit is basically exemption given to the overall tax to prevent double taxation.

For example: A promoter purchases bricks, cement, steel etc. for the construction of the building. He pays taxes on purchasing those items in accordance to their respective invoices. So, later, when he has to pay tax on the finished product, he can claim exemption for the taxes previously paid by him for the raw materials. In this way he can claim input tax credit.

Hence, even after the input tax credit benefit to the promoters, the prices for the end users are expected to rise.

But, if a person buys a ready to move flat, that is a flat in a building, which has obtained occupancy certificate, GST won't be applicable. It is payable only for those flats which are under construction. Thus, the flats with Occupancy Certificate are outside the ambit of both RERA as well as GST.

Why is RERA too harsh on the promoters?

- *The Position of Deadlock:*

After the implementation of RERA, a lot of builders/developers/promoters have been facing a lot of problems. The centre, in order to have transparency between the allottees and the promoters, have taken a lot of stringent steps against the latter. The entire procedure of the real estate market, which has been followed since a very long time has been changed. This will adversely affect the builders. All of their plans, to complete certain stages of the project, to advertise it, will all be delayed because now, the builders have to register their projects under RERA, which is a tedious process. Several states have not notified the rules

that are to be followed, which leaves not only the promoters but also the allottees in a helpless position. This has ultimately lead to a *deadlock* where neither the promoters can carry on with their construction activities, nor can the allottees be given their homes for which they have already paid because the buildings are not receiving completion as well as occupancy certificate. The real estate sector has been facing a lot of losses on account of the delay that has been caused due to the implementation of RERA.

- *Hefty Penalties:*

The chapter VIII of RERA talks about the offences, penalties and adjudication. A promoter, if he fails to register his project under RERA, shall be punishable with imprisonment, which may be extended up to three years, or with fine which may extend up to a further ten percent of the estimated cost of the real estate project, or with both[6]. The cost of the real estate projects are really very high and paying 10% fine is hefty.

Moreover, in case of structural defect or any other defect in workmanship, the quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development, if brought to the notice of promoter within five years from the date of handing over the possession, then the promoter shall rectify those defects within a period of 30 days with no charge, and if he fails to do so, he shall be liable to compensate in a manner provided by this Act[7]. Getting the rectification done within thirty days without any charge is again harsh on the promoter, because the promoter will now be liable to extra costs that have to be spent on the rectification of the defect. And five years is a really long time to notice a structural defect or any defect as mentioned above. A building, even if it is not having any structural defects for a period of four years but due to excessive rain or any other natural calamity, has now become noticeable, the promoter will be liable even if he had used materials according to prescribed standards.

What are the promoters contending in the Courts?

Two distinct group of builders have moved the High Courts in Maharashtra and Madhya Pradesh challenging the law, in particular, those sections that put old project, started before the law was passed and are yet to be completed, under the ambit of this Act. The courts have asked the central government to respond to the petitions, which mentions that Sec. 3 that talks about ongoing projects is

[6] Section 59 (2)
[7] Section 14 (3)

applied retrospectively and is against constitutional safeguards. They have also challenged Sec. 59, which defines the penalty for the violations of the Act[8].

In the petition filed by four developers, namely Swapnil Promoters and Developers, Swapnil Associates, Sukhyog Constructions and M/s Guru Constructions in the Bombay High Court, they have contended that the provisions of the Act are "most arbitrary and draconian." It further reads,.... "the provisions of the Act are impracticable and onerous conditions have been imposed upon the promoters which cannot be fulfilled how-so-ever the promoter tries to comply with the same." This clearly brings out the opinions of the promoters as to the arbitrariness of the provisions of the Act. Furthermore, the petition says, "The penal provisions are made applicable to ongoing projects ignoring the settled legal principle that penal provisions can never have retrospective operation." The Builder and Developer association (petitioners), which represents a group of builders, in Madhya Pradesh contended against the impracticality of depositing 70% of the amount collected from buyers in a separate account, in addition to the sections in ongoing projects[9]

Conclusion:

Due to the implementation of RERA, builders are facing not only financial crisis, but also mental torture which can be clear from the fact that the allottees are putting a lot of pressure on the builders, in recent weeks, in the form of protests. Recently, the buyers of the Amrapali projects (which are amongst the top 10 builders in Noida) have threatened to go on a sit in protest if the promoters were not booked by the police. Hence, in this way, even though it has many benefits for the buyers, the promoters are the ones who have to face this difficult phase of implementation of the Act, and pay many penalties even though several state governments are still working on the notification of the rules, ultimately leading to a situation of deadlock. Hence, we can say that it is too harsh on the promoters.

[8] Hindustan Times Article <http://www.hindustantimes.com/india-news/rera-deadlock-homebuyers-in-limbo-as-builders-move-court-ahead-of-deadline-for-registering-projects/story-GCtH7nMb5cbHIMRvcNMyDJ.html> Accessed 6th September, 2017, Paragraphs 3 and 4.

[9] Hindustan Times Article <http://www.hindustantimes.com/india-news/rera-deadlock-homebuyers-in-limbo-as-builders-move-court-ahead-of-deadline-for-registering-projects/story-GCtH7nMb5cbHIMRvcNMyDJ.html> Accessed 6th September, 2017, Paragraphs 3 and 4.

Anti Money Laundering Regime in India & United Kingdom

Jash Vaidya & Aditi Khobragade[1]

Introduction

Money Laundering is a process whereby criminals try to hide and disguise the correct source and ownership of the proceeds by avoiding prosecution, conviction and taking away of the illegal money. Financial Action Task Force (FATF) defines money laundering as the 'processing of these criminal proceeds to disguise their illegal origin'[2]. One of the earliest definitions has been derived from United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances 1988, Art. 3(1)(b) has declared only the activity from the proceeds from drug trafficking as money laundering.[3]. As per the United Nations Office on Drugs & Crimes (UNODC) money-laundering is the 'method by which criminals disguise the illegal origins of their wealth and protect their asset bases, so as to avoid the suspicion of law enforcement agencies and prevent leaving a trail of incriminating evidence'[4]. The inherent objective of those involved in money laundering is to make it extremely difficult for the law enforcement agencies to track the laundered money from the source to its eventual manifestation in form of property and assets.One of the major successes of the Proceeds of Crime Act 2002 (POCA) was to streamline the Anti-Money Laundering (AML) legal regime of the UK by eliminating the issues of drug trafficking related predicate offences and non-drug trafficking offences.

By examining the sources of AML law and initial efforts in the area, we shall be able to ascertain in the article the direction taken by both states. A Comparative analysis of AML regimes of UK and India shall enable us to understand the specific challenges relevant to both states.

[1] V BSL LL.B.

[2] 'IBA Anti-Money Laundering Forum - Financial Action Task Force (FATF)' (*Anti-moneylaundering.org*, 2017) <https://www.anti-moneylaundering.org/FATF.aspx > accessed 6 October 2017.

[3] United Nations Convention Against Illicit Traffic In Narcotics Drugs and Psychotropic Substances 1988.

[4] 'Introduction To Money-Laundering' (*Unodc.org*, 2017) <http://www.unodc.org/unodc/en/money-laundering/introduction.html?ref=menuside> accessed 10 September 2017.

Prevention of Money Laundering – Global Initiatives

Since money laundering is an international phenomenon, transnational co-operation is of a critical importance in the fight against this menace. A number of initiatives have been taken up to deal with the problem at the international level. The major international agreements addressing money laundering are –

1. United Nations Convention against Illicit trafficking in Drugs and Psychotropic Substances, popularly known as the Vienna Convention.
2. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime.
3. The Basel Committee on Banking Regulation Supervisory Practices.
4. The European Union and the International Organization of Securities Commissions.
5. The Financial Action Task Force on Money Laundering (FATF or Task Force).

The Financial Action Task Force on Money Laundering- FATF is an inter-governmental body comprised of twenty-nine members and two regional organizations. Although it is not a part of the Organization for Economic Cooperation and Development (OECD), its Secretariat is housed in the offices of the OECD in Paris.It is a policy-making body which functions to generate political will required to bring about national legislative and regulatory reforms and ensuring transparency. FATF was established in 1989 at the Economic Summit of the G-7 when the major industrialized countries that are members of that organization recognized that money laundering posed a threat to the global banking systems and to financial institutions.[5]

The Financial Action Task Force was required "to examine money laundering techniques and trends, review the action which had already been taken at a national or international level, and set out the measures that still needed tobe taken to combat money laundering.[6]"

[5]Kathryn L. Gardner, *'Fighting Terrorism the FATF Way'*, Lynne Rienner Publishers, Vol. 13, No. 3 (July– Sept. 2007), pp. 325-345.

[6]'IBA Anti-Money Laundering Forum - Financial Action Task Force (FATF)' (*Anti-moneylaundering.org*, 2017) <https://www.anti-moneylaundering.org/FATF.aspx> accessed 6 October 2017.

The United Kingdom Regime

The first specific legislation in UK dealing with confiscation was passed on the 10th January 1987. The Drug Trafficking Offences Act 1986 empowered the courts to seize the proceeds of drug trafficking. The Criminal Justice Act 1988 paved way to encompass other non-drug related indictable offences. It was only after 1993 when Europe made conscious attempts to solve impending issue of money laundering, that United Kingdom's Anti-Money Laundering regime evolved. The primary statutes underpinning the UK anti-money laundering regime include the POCA and the Terrorism Act, 2000. POCA was enacted to improve and restore public confidence in the confiscation system[7]. It has been deliberately drafted to clamp down hard on offenders seen to exploit a laxity in the law to live off the proceeds of crime. Money laundering has been defined in Sec.340(11) of the POCA as an act which constitutes an offence under Secs.327,328 and 329, or an attempt, conspiracy or incitement to commit any of those offences, or aiding, abetting, counselling, or procuring their commission. The principal money laundering offences in Secs.327 to 329 of POCA are very broadly worded and in essence prohibit doing anything with assets, including merely possessing them, where such assets are or represent the "proceeds of crime".[8] Sec. 327 of POCA leaves no stone unturned for accused by including five different ways - conceal, disguise, convert, transfer or remove the criminal property the jurisdiction under it.[9]Therefore, Sec. 327 can essentially be said to cover the 'placement' stage of money laundering, according to the widely used classification endorsed by Gilmore, Ellinger and the FATF. Likewise there are several defenses in form of Sec. 338 of POCA that allow a person concerned to make a protect disclosure. The concerned person is exempted on grounds of reasonable excuse. The definition of reasonable excuse has not been properly illustrated in the legislation nor does any leading case. The second offence under Sec.328 concerns arrangements through acquisition, retention, use or control of property, which one knows or suspects of being criminal.

[7]'Confiscation Order Blogs – Reviewing The History Of The Proceeds Of Crime Act' (*Criminal Defence Lawyers - Berkeley Square Solicitors*, 2017) <http://www.bsblaw.co.uk/blog/category/confiscation-order-blogs-reviewing-the-history-of-the-proceeds-of-crime-act> accessed 10 September 2017.

[8]'The UK Anti-Money Laundering Regime: The Practical Effects For Business – BCL Solicitors LLP' (*BCL Solicitors LLP*, 2017) <http://www.bcl.com/the-uk-anti-money-laundering-regime-the-practical-effects-for-business/> accessed 10 September 2017.

[9]The Proceeds of Crime Act 2002, Sec. 327

In the case of *R v.Anwoir (Ilham)*[10] it was decided by the Court of Appeal, Criminal Division, that the prosecution can argue that the property in question is derived from criminal proceeds by showing that it is derived from illegal conduct or an offence, or by proving that the way in which the property was handled clearly suggested that it was derived through crime. This extends and explains the measure of objectivity prevalent in the three basic offences under Secs.327-329.This extends and explains the measure of objectivity prevalent in the three basic offences under Secs.327-329.

In the case of *R v. Saik (Abdulrahman)*[11],decided by House of Lords, Court of Appeal, a difference was maintained between the basic offences under Secs.327-329 and conspiracy to commit these offences. It was held that the mens rea required for the basic offences is one merely of suspicion, while the mens rea requires knowledge instead of mere suspicion, for conspiracy to commit these offences under Criminal Law Act 1977 Sec.1(1).

Alongside POCA 2002, the Money Laundering Regulations 2007 (MLR 2007) form the cornerstone of the UK's AML legal regime. According to Andrew Haynes the MLR 2007 attempted to replace the rule based AML regime with a risk based regime.[12] The increasing cost of compliance is one of the principal reasons which has deterred implementation of MLR 2007. The Money Laundering Regulations 2007 seemed to overburden small and medium firms and thus made the objectives unachievable. The stringent due diligence process has meant failure of KYC Norms and thus United Kingdom has gone forward in coming up with Money Laundering Regulations 2017.

Prevention of Money Laundering – Indian Initiatives

During the second half of the 20th century, with the increasing threat of modern and sophisticated forms of transnational criminal activity, concern has arisen over the lack of effective national laws to combat organized planned crime and the laundering of its proceeds. India has had various separate laws to deal with smuggling, narcotics, foreign trade violations, foreign exchange manipulations etc., and special legal provisions for preventive detention and forfeiture of property etc., which were enacted over a period of time to deal with such serious crimes.

[10]*R v. Anwoir (Ilham)*, [2009] 1 W.L.R. 980
[11]*R v. Saik (Abdulrahman)*, [2007] 1 A.C. 18 (HL)
[12]Andrew Haynes, *"Money Laundering: From Failure to Absurdity"*, (2008) 11(4) Journal of Money Laundering Control 303, 312

Prevention of Money Laundering Act, 2002

In view of an urgent need for the enactment of a comprehensive legislation for preventing money laundering and connected activities, confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money laundering etc., the Prevention of Money Laundering Bill 1998 was introduced in Parliament on 4th August 1998. The Act has come into force with effect from 1st July 2005. It has been amended in 2005, 2009 and recently in 2012. The objective of the Act is to prevent money-laundering and connected activities and to provide for confiscation of property derived from, or involved in money-laundering and for matters connected therewith or incidental thereto.[13]

In *Abdul Karim Telgi & Anr. v. Union of India*[14] the High Court of Madhya Pradesh affirmed that it does not blindly follow the provisions of the Act but looks into the depth of the activities of the accused, the loss and damages caused to the Government and the public; and gives punishment which is proportional to the criminal act.

In *Union of India v. Hassan Ali Khan & Anr*[15] the Supreme Court held that the offence of money laundering is an offence of a grave nature. A person indulged in it cannot escape from the hands of the law. If such an offence is committed, strict actions will be taken.

Three steps of Money Laundering are-

- Placement- It refers to the physical disposal of bulk cash proceeds derived from illegal activity.
- Layering- It involves the wire transfer of funds through a series of accounts in an attempt to hide the funds' true origins.
- Integration- It is the stage at which the money is integrated into the legitimate economic and financial system and is assimilated with all other assets in the system.

[13] C. Satapathy, *'Money Laundering: New Moves to Combat Terrorism'*, Economic and Political Weekly, Vol. 38, No.7 (Feb. 15-21, 2003), pp. 599-602.
[14]*Abdul Karim Telgi & Anr. v. Union of India*, 2014(2) JLJ 136
[15]*Union of India v. Hassan Ali Khan & Anr*, [2011] 11 SCR 778

Salient Features of the Act

I. Offence of Money Laundering and its punishment

An offence of money laundering is said to be committed when a person in any way deals with the proceeds of crime.[16] The proceeds of the crime referred above include the normal crimes and the scheduled crimes. The punishment prescribed is 3 to 7 years of rigorous imprisonment for an offence of money laundering with fine[17]. In case of an offence mentioned under Part A, imprisonment would extend up to 10 years.

II. Attachment, Adjudication and Confiscation

The confiscation of the property under the Act is dealt in accordance with the Chapter III of the said Act. An official not below the rank of Deputy Director can order attachment of proceeds of crime for a period of 180 days, after informing the Magistrate of the area. Section 8 lays detailed procedure of adjudication. After the official forwards the report to the Adjudication Authority, this Authority should send a show cause notice to concerned person/s within 30 days. After considering the response and all related information, the Authority can give finality to the order of attachment and make confiscation order, which will thereafter be confirmed or rejected by the Special Court.

III. Obligations of Banking Companies, Financial Institutions and Intermediaries

The reporting entity is required to keep record of all the material information relating to money laundering and forward the same to the Director. Such information should be preserved for a span of 5 years[18]. The functioning of the reporting entity will be delegated and supervised by the Director who can impose any monetary penalty, issue warning or order audit of accounts, if in case the entity violates its obligations.

IV. Enforcement Paraphernalia

• Adjudicating Authority - The PMLA empowers the Central Government to constitute an Adjudicating Authority having a Chairman and 2 members and to

[16]Prevention of Money Laundering Act 2002, Sec. 2(u): any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country.
[17]Prevention of Money Laundering Act 2002, Sec. 4
[18]Prevention of Money Laundering Act 2002, Sec. 12

define their scope of functioning and other terms of service. The Authority has been given autonomous power to regulate its adjudicating procedure.[19]

• Administrator - The property laundered will be taken care of, i.e., managed after confiscation by an Administrator who will act in accordance with the Central Government.

• Appellate Tribunal - All appeals from an order made by Adjudicating Authority will lie to an Appellate Tribunal constituted by the Central Government.

• Special Courts - The Central Government, after consulting the High Courts is empowered to designate Court of Sessions as Special Courts.

• Authorities under the Act - There shall be the following classes of authorities for the purposes of the Act, namely: (a) Director or Additional Director or Joint Director, (b) Deputy Director, (c) Assistant Director, and (d) such other class of officers as may be appointed for the purposes of this Act.

V. Summons, Searches and Seizures etc.

The power of surveying and scrutinizing records kept at any place is conferred on Adjudicating Authority. The Authority may ask any of its officials to carry on the search, collect relevant information, place identification marks and thereafter send a report to it.[20]

Anti Money Laundering Standards

RBI issued Master Circulars on Know Your Customer (KYC) norms/ AML standards/ Combating of Financing of Terrorism (CFT)/ Obligations of banks under PMLA and Banks were advised to strictly follow certain customer identification procedure for opening of accounts and monitoring transactions of a suspicious nature for the purpose of reporting it to the appropriate authority. These KYC guidelines have been revisited in the context of the Recommendations made by the FATF on AML standards and on Combating Financing of Terrorism (CFT). Banks have been strictly advised to ensure that a proper policy framework on KYC and AML measures with the approval of the Board is formulated and put in place. The objective of KYC Norms/ AML Measures/ CFT Guidelines is to prevent banks from being used, intentionally or unintentionally, by criminal elements for money laundering or various terrorist

[19]Prevention of Money Laundering Act 2002, Sec. 6
[20] Prevention of Money Laundering Act 2002, Sec. 16

financing activities. KYC procedures also enable banks to know/understand their customers individually and their financial dealings better, which in turn help them, manage their risks prudently.

The Financial Intelligence Unit - India (Fiu-Ind)

The Financial Intelligence Unit - India (FIUIND) is the nodal agency in India for managing the AML ecosystem. It has significantly helped in coordinating and strengthening efforts of national and international intelligence, investigation and enforcement agencies in pursuing the global efforts against money laundering and related activities crime. These are specialized government agencies created to act as an intermediary between financial sector and the law enforcement agencies for collecting, analyzing and disseminating information, particularly about suspicious financial transactions. It receives prescribed information from various entities in financial sector under the Prevention of Money Laundering Act 2002 (PMLA) and in appropriate cases disseminates information to relevant intelligence/ law enforcement agencies which include Central Board of Direct Taxes, Central Board of Excise and Customs Enforcement Directorate, Narcotics Control Bureau, Central Bureau of Investigation, Intelligence agencies and regulators of financial sector. FIU-IND does not investigate cases.

Conclusion

India has taken up various Anti-Money Laundering measures to curb these criminal activities but loopholes and lacunae in implementation of the same has meant that the objective of the Act has not been achieved in its pith and substance. POCA and PMLA face similar complexities due to advancement in technology, non-fulfilment of KYC norms, the widespread act of smuggling, lack of comprehensive enforcement agencies. Combating the offence of money laundering is a dynamic process since the criminals are abetted by advancement in technology and are continuously looking for new ways to do it and achieve their illicit motives. India has taken extensive measures in order to curb with the issue of money laundering. It can rightly be said that the manpower has been tripled as there is Directorate of Enforcement which leads all the money laundering cases and investigations related to it in the country; there is also Financial Intelligence Unit which tracks down and analyses the risk of money laundering through the agencies reporting to it and there is time to time upgradation of the legislative framework through the proposed changes. Neither the Indian Legislation nor the United Kingdom Legislation defines concerned person or reasonable excuse which gives rise to increase in criminal activities as the criminals get an easy leeway. Thus, there arises need to have a uniform AML regime throughout the globe.

Scope for Islamic Banking and Finance in India

Sharanya Shivaraman & Saurav Roy[1],

Introduction

Islamic banking or 'sharia' compliant finance[2] refers to an activity, which relies on the practical application of Islamic economics and is compliant with *sharia* law. Islamic Banking refers to an activity, which relies on the practical application of Islamic economics and 'sharia' compliant finance. It has been described as *"a system through which finance is provided in the form of money in return for either equity, or the rights to share in future business profits, or in the form of goods and services delivered in return for a commitment to repay their value at a future date"*.[3]

Islamic finance prohibits *"Riba"*, which can be defined as any interest paid on loans of money.[4] Moreover, any investment in businesses or goods, which are considered as fundamentally contrary to Islamic principles, such as alcohol, is also prohibited (*haram*).[5] Thus, it can be effectively argued that there are three key principles enshrined in Islamic finance, namely:

a. Equity

The prohibition of *riba* is a strong indicator of the principle of equity in Islamic finance, as it seeks to protect the interests of the weaker party in a financial transaction. Additionally, Islamic finance also seeks to promote equity by preventing uncertainty in contracts and elusiveness in payoffs. Transacting parties have a duty to disclose vital information, thus preventing asymmetry of information.[6]

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[1] IV B.A. LL.B

[2] Farooq, Mohammad Omar, *'The Riba-Interest Equation and Islam: Re-examination of the Traditional Arguments'* (2009). Global Journal of Finance and Economics, Vol. 6, No. 2, pp. 99-111, September 2009. Available at SSRN: https://ssrn.com/abstract=1579324 accessed 5 September 2017.

[3] This quote is derived from the keynote address delivered by Dr.Mabid Ali Al-Jarhi, the then Director of the Islamic Research and Training Institute, at the Conference on Islamic banking and finance held at Brunei, Darussalam, Brunei and jointly organized by IRTI and the University of Brunei during 5-7 January 2004.

[4] *supra* note 2.

[5] Muhammad Akram Khan, *'What Is Wrong with Islamic Economics? Analysing the Present State and Future Agenda'* (Edward Elgar Publishing, 2013).

[6] Mumtaz Hussain, Rima Turk, *'An Overview of Islamic Finance'* [2015] IMF 120.

b. Participation

By ensuring an increase in wealth from productive activities only, Islamic finance promotes the principle of participation. Any return on capital invested is legitimized by the proportionate risk-taking, which is determined ex-post, based on asset performance and project productivity.[7]

c. Ownership

Islamic finance mandates ownership of assets before transacting with them and is also called 'asset-based' financing, since it creates a strong link between the real economy and finance. Islamic finance upholds the sanctity of contracts and advocates for the preservation of property rights.[8]

Islamic finance and the 2008 Global Economic Crisis

The global financial crisis in 2008 was viewed by the international community as the most potent economic crisis since the Great Depression in the 1930s. It started with the subprime mortgage market crisis in the United States of America and then developed into a full-fledged economic meltdown with the collapse of the Lehman Brothers, a popular investment bank.[9]A chain of unprecedented events characterised it, such as:

- Sharp decline in global equity markets;
- The failure or collapse of numerous global financial institutions;
- Governments of a number of industrialised countries allocated in excess of $7 trillion bailout and liquidity injections to revive their economies;
- Commodity and oil prices reached record highs followed by a slump; and
- Central banks reduced interest rates in coordinated efforts to increase liquidity and avoid recession and to restore some confidence in the financial markets.[10]

[7] *ibid.*
[8] *ibid.*
[9] Mark Williams, Uncontrolled Risk: Lessons of Lehman Brothers and How Systemic Risk Can Still Bring Down the World Financial System (General Finance & Investing) [McGraw-Hill Education; 1st edition (April 12, 2010)].
[10] M. Kabir Hassan, *'The Global Financial Crisis and Islamic Finance'* at http://www.sesric.org/imgs/news/image/585-paper-1.pdf accessed 6 September 2017.

It was estimated that the size of the Islamic banking industry at the global level was close to $820 billion at the end of 2008.[11]An adherence to Islamic finance saw a large number of banks perform profitably, even during the worst periods of the crisis.[12]*Measures* such as smaller investment portfolios, lesser margins of leverage and a strong compliance to *sharia* principles led to these banks successfully surviving the effects of the crisis in 2008.

Islamic banks served as a beacon of hope during the economic crisis and helped achieve economic stability as well. Owing to a large amount of solvency on which they could rely on, large Islamic banks lent a substantial amount of their portfolio to the consumer sector, which was a sector that was comparatively lesser affected by the crisis.[13]

Instruments in Islamic Finance

During the developmental stages of Islamic finance, it was regarded as an ascent industry, which was struggling to meet competition. Initially, the growth of Islamic finance was organic and largely concentrated in countries where the Muslim population was significant. In recent times, Islamic finance has witnessed burgeoning growth and now has a presence in more than 75 countries in both Muslim and non-Muslim dominated communities. In fact, it has been observed that"*Islamic financial institutions have been able to enter international markets successfully, currently managing $700 billion in assets and the size of dealings affects local markets in some countries. The average of world-wide growth rate in the size of the assets of Islamic banks and institutions has been 24% over last five years.*"[14]

One of the most important aspects of Islamic finance, which makes regulation in the field imperative, is the concept of *Sukuk* bonds. The *Sukuk* holder obtains a share of a tangible asset or business venture and also a share of the total corresponding risk associated with that venture or asset. The basic idea, thus, is that the risk assumed by the bond holder is commensurate to the ownership. *Sukuk* bonds involve the issuer purchasing the underlying assets and allowing

[11] IMF, Islamic Banks: More Resilient to Crisis? (*IMF Survey,* 4 October 2010) https://www.imf.org/en/News/Articles/2015/09/28/04/53/sores100410a accessed 7 September 2017.
[12] *ibid.*
[13] *ibid.*
[14] Aulia Fuad Rahman, Hosam Alden Riyadh, *'Islamic Finance: Current, Future Trends and Challenges'* at http://jibfnet.com/journals/jibf Vol_4_No_2_December_2016/4.pdf accessed 9 September 2017.

them to invest in a special purpose vehicle, trading, or leasing them on behalf of the investors (*Sukuk* holders), using the funds raised through the issued certificates (*Sukuk*).

In the Islamic finance system, the depositor and the bank will come to an agreement wherein both parties will share the profit or loss at the end of the financial year. The bank will invest in stocks, bonds, infrastructure projects and so on. If the loss arises, the shareholders of the bank will absorb the loss. The instruments of Islamic finance, hence, operate on a profit and loss sharing basis. The instruments can be enumerated as follows;

Investment Financing can be done in three ways, namely:

- *Musharakah* is a scheme where a bank joins another entity to set up a joint venture. The parties participate in the project in varying degrees. Profit and loss are shared in a predetermined fashion. This is not very different from the joint venture concept. The venture is an independent legal entity and the bank may withdraw gradually after an initial period.
- *Murabahah* is a system where the bank contributes the finance and the client provides the expertise, management and labour. Profits are shared by both partners in a predetermined proportion. When a loss occurs, the loss is borne entirely by the bank.
- Islamic finance also allows for financing because of an estimated rate of return. The bank stipulates a specified rate of return on a project that seeks financial support. If the project results in a profit more than the estimated rate, the excess goes to the client. If the profit is less than stipulated, the bank will accept the lower rate. In case a loss is suffered, the bank will take a share in it.

Trade Financing is done in the following ways:

- *Leasing* is a provision where the bank buys an item for a client and leases it to him for aspecified period. At the end of that period the lessee pays the balance on a previously agreed price and becomes the owner of the item. *Mark-up* is a similar provision where the bank purchases the asset for the customer, whichis later bought back by the customer at a predetermined price using profits generated from the asset.

- *Sell-and-buy-back* is an arrangement whereby a client sells one of his properties to the bank for a stipulated price payable on condition that he will purchase the property or asset back after for an agreed price. The bank also enters into hire purchase transactions with the client.
- The *letter of credit* arrangementis where the bank guarantees the import of an item using its own funds for a client, on the basis of sharing the profit from the sale of this item or on a mark-up basis.
- Banks also have a provision for sanctioning loans without interest but they cover their expenses by levying a service charge.

A. Indian Scenario

Accurately speaking, there are no Islamic banks in India. There are, however, a few types of Islamic Financial Organisations (IFOs) that carry out financial transactions on an interest free basis. There are several Baitul Mals, which work in cities as well as villages. About ten to fifteen Islamic banks with deposits of close to INR 75 crore are operating across the country in various states. They function in the form of Non-Banking Finance Companies (NBFCs). These Islamic banks usually work towards the needs of the local areas in which they are situated. They have limited resources since they are not capital-intensive corporations.

Regulatory Framework

Islamic finance can be integrated into the conventional banking set up either by making the two compatible or by allowing separate Islamic finance windows, which are accessible within the banking sector. Currently, Islamic finance is not covered by banking regulations. They are licensed under Non-Banking Finance Companies Reserve Bank Directives (Amendment) Act 1997[15], and operate on profit and loss based on Islamic principles. The Reserve Bank of India (RBI) has introduced a compulsory registration system for this sector. In the Monetary and Credit Policy for the year 1999-2000, *"it was proposed that in respect of new NBFCs, which seek registration with the RBI and commence the business on or after April 21, 1999, the requirement of minimum level of net owned funds will be INR 2 crore."*[16]

[15]RBI /2004/ 94, *'Master Circular on Lending to Non-Banking Financial Companies'* at https ://rbidocs.rbi.org.in/rdocs/notification/PDFs/52048.pdf accessed 8 September 2017.
[16]*India Budget, 'Monetary and Credit Policy - Union Budget'* at http://indiabudget.nic.in/es99-2000/chap33.pdf accessed 10 September 2017.

Obstacles to the Growth of Islamic Banking

Islamic banks may be vulnerable to *displaced commercial risk*, which is especially relevant where they are competing with conventional banks. This competition may constrain Islamic banks and their shareholders to free up a part of their profits to pay the competitive rates of return to their clients, or to avoid subjecting their investment account holders to bear losses in cases when the return on underlying assets falls short.[17] This has led to complexities in the manner in which Islamic banks build reserves against losses and how these are treated in the calculation of regulatory capital.[18]

a. Power to Issue Cheques and Financial Constraints

The RBI requires all banks to maintain certain reserves with it to maintain the liquidity equilibrium. Islamic finance primarily functions on the profit sharing. Interest, which is the means of sustenance for banks, is removed from the equation when it comes to Islamic finance. The biggest issue acting as a permanent impediment for Islamic banks functioning in countries with interest-based banking is that they cannot function as banks unless powers of issuing cheques are given to them.

b. Financial Products Are Interest-Based

There are three key aspects to this issue, as described below:

- Conventional banking assets and instruments are all interest based. However, the current framework does not accommodate provisions for regulation of such banking practices. The mechanism to maintain reliability of the banking institution through cash reserve requirements needs to be modified to meet the needs of Islamic finance. Another constraint is the difficulty in maintaining capital adequacy, which would render Islamic banks unable to interact with interest based banks and the large money market in India.

- In Islamic finance, there is a high rate-of-return risk. Finance is subject to an equity investment risk because the assets are made up of physical investments, the returns of which are uncertain. There is a significant risk that market interest rates may rise beyond the rate of return that can be funded by the Islamic banks' own assets.

[17]Alfred Kammer, Mohamed Norat, *'Islamic Finance: Opportunities, Challenges, and Policy Options'* (2015) IMFSDN/15/05 at https://www.imf.org/external/pubs/ft/sdn/2015/sdn1505.pdf accessed 11 September 2017.
[18]*ibid.*

- Similarly, the practice of asset-based financing sometimes leads to a high concentration in real estate and commodities investments, and to the creation of complex corporate structures. Another relevant issue that arises is that Islamic finance is more consumer and individual finance centric rather than industry centric since it thrives on certainty of the investment of the bank.

Looking Ahead

A working paper issued by the World Bank has aptly observed that: *"Many Islamic banks offer financial products that, while being Sharia compliant, resemble conventional banking products. It is unclear, however, whether they effectively are structured as such, thus providing the same incentive structure to depositors, banks and borrowers as conventional banks, or whether the equity-like character is still present, thus impacting the incentive structures of all parties involved."*[19]

There is a need to institute mechanisms, which ensure transparency and remove scope for regulatory arbitrage in countries where Islamic banks are active. The regulatory clarity imbibed in banking and financial institution laws and regulations, and robust discourse between Islamic standard setters and national regulators are needed, along with a strong cooperation between Islamic and global standard setters in developing appropriate standards for the industry.

The Islamic banking industry is subject to many standards. However, given the unique nature of Islamic bonds, special standards have been developed through informed standard-setting bodies. There are two major standard setters in the industry, namely the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), established in 1990, for Sharia accounting and auditing standards, and the Islamic Financial Services Board (IFSB), set up in 2002, for regulatory and supervisory standards. These institutions have nurtured technical standards and guidance notes catering to the dynamic needs of the industry by working closely with the Basel Committee and similar conventional standard-setting bodies to ensure coherence and consistency with their standards.[20]

Another important aspect to consider while harmonising Islamic and conventional banking practices is that the regulators do not always have the ability to ensure that banks have a sound framework for Sharia compliance in

[19]Thorsten Beck, Asli Demirgüç-Kunt, OuardaMerrouche, *'Islamic vs. Conventional Banking: Business Model, Efficiency and Stability'* (2010) WPS5446 at http://documents.worldbank.org/curated/en/482731468333056240/pdf/WPS5446.pdf accessed 10 September 2017.
[20] *ibid.*

place nor do they take responsibility for assessing whether Sharia advisors are fit and proper. Moreover, differences in Sharia interpretation can lead to a lack of harmonization both within and across borders, which could affect trust in the industry.[21] The IFSB and AAOIFI recommend the establishment, at the bank level, of an independent Sharia Supervisory Board (SSB), a well-resourced internal Sharia review process, and periodic external sharia reviews.

Conclusion

Recently, the Executive Board of the International Monetary Fund (IMF) has adopted a decision to strengthen the financial stability in countries with Islamic banking. It is believed that the emergence of hybrid financial products, though similar to conventional banking products may raise financial risks, which include complex risks such as governance and consumer protection concerns, and reputational risk. In conclusion, the Directors of the IMF encouraged additional work to be carried out by staff and other relevant international bodies and standard setters, to better understand the nature of these activities and how they can be effectively regulated.[22] The battle towards financial inclusion and recognition of the Islamic finance in India has been a long drawn struggle. The move towards meeting the standardised practices is even more complex and requires commitment to institute the requisite structures.

The potential for Islamic finance and the benefits it has on offer can be effectively explained by an excerpt from the speech of Dr. Lagrade, (Managing Director of the IMF) delivered at Kuwait in 2015: *"I think it is also fair to say that Islamic finance's underpinning principles of promoting participation, equity, property rights and ethics are all 'universal values'. And yet, despite these important benefits and the clear potential, there is still a long way to go to fulfil the maximum potential of Islamic finance. Today, it represents less than 1 percent of global financial assets and is still very much concentrated in a few markets. So there is clearly room to grow, especially given that the features of Islamic products can appeal to a much wider group".*[23]

[21] *ibid.*

[22] Randa Mohamed Elnagar, *'IMF Executive Board Adopts Decisions to Strengthen the Financial Stability in Countries with Islamic Banking'* (*IMF*, 21 February 2017) https://www.imf.org/en/News/Articles/2017/02/21/PR1753-IMF-Board-to-Strengthen-the-Financial-Stability-in-Countries-with-Islamic-Banking accessed 12 September 2017.

[23] Christine Lagarde, *'Unlocking the Promise of Islamic Finance'*, Speech by Christine Lagarde, Managing Director, International Monetary Fund at the Islamic Finance Conference, Kuwait City, Kuwait; November 11, 2015' (*IMF*, 11 November 2015) https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp111115 accessed 12 September 2017.

Place of Effective Management (POEM) concept in India – Critical Analysis

Stephanie Nazareth[1]

Introduction

Tax is a major source of income for any Government. Most countries in the world tax persons either on the residence based rule or source based rule. 'Residence' and 'source' are fundamental principles in international taxation. 'Residence' is when income is taxed if the person has a resident status or resides in the State. 'Source' is when income is taxed based on the origin of the income. If a person is resident in India, he will be taxed on his entire income accruing globally (global income)[2] whereas if a person is a non-resident only income that is accruing or deemed to accrue in India, i.e. sourced (earned) income will be taxable.[3] For any company to avoid paying taxes on their global income, they must fall under the non-resident tax status.

All persons, be it an individual or company, are subject to tax in India under the Income Tax Act, 1961. The Article focuses on the taxability of a company in India. The Finance Act, 2015 made certain amendments to the Income Tax Act. Post the amendment; the 'Place of Effective Management' (hereinafter referred to as POEM) concept was introduced to substitute the earlier test. The Article elaborates on this new concept of POEM, the guidelines for determination of POEM, a comparison of the concept in other countries and the challenges that companies may face.

Resident status in India prior to the Finance Act, 2015

Prior to the amendment made by the Finance Act, 2015, Section 6(3) of the Income Tax Act, 1961 stated that a company will be considered resident in India if (i) it is an Indian company or (ii) the 'control and management' of its affairs is situated wholly in India.[4] Hence, a foreign company would be

[1] IV B. A. LL.B.

[2] Sec. 5(1) of the Income Tax Act, 1961

[3] Sec. 5(2) of the Income Tax Act, 1961

[4] Sec. 6(3) of the Income Tax Act, 1961 (prior to amendment in 2015)

considered a resident in India only if the control and management could be proved to be situated 'wholly' in India. As a result, very rarely foreign companies were considered tax residents in India. The control and management test was introduced for the first time in the Income Tax Act, 1922 and it stood the test of time. It was an objective test and was easy to determine when a company could be regarded as a 'resident' for tax purposes. If the management of the company was not 'wholly' conducted in India during the concerned financial year, tax residence could not be established.

In the case of *Radha Rani Holdings (P) Limited v Additional Director of Income Tax,*[5] the court figuratively compared 'control and management' test as 'the head and brain.' The court held that the head and brain of a company is the board of directors, and the board of directors must exercise complete local control in order to be determined as a resident. It was relatively easy to interpret 'control and management' before it was amended. However, at the same time, foreign companies escaped tax liability by showing that board meetings and decisions were not wholly conducted in India. Hence, the government found it necessary to amend the law and align its domestic law with international standards like the Double Taxation Avoidance Agreements (DTAA) and the Organisation for Economic Co-operation and Development's (OECD) Model Tax Convention.

Resident status in India post the Finance Act, 2015 (Introduction of POEM)

The concept of POEM was introduced in the budget 2015. In the Memorandum to the Finance Bill, 2015, the honourable Finance Minister gave the following explanation for the new amendment: "*The modification in the condition of residence in respect of company by including the concept of effective management would align the provisions of the Act with the Double Taxation Avoidance Agreements (DTAAs) entered into by India with other countries and would also be in line with international standards. It would also be a measure to deal with cases of creation of shell companies outside India but being controlled and managed from India.*"[6]

[5](2007) 110 TTJ Delhi 920

[6] Memorandum explaining provisions of the Finance Bill, 2015, http://indiabudget.nic.in/budget2015-2016/ub2015-16/memo/mem1.pdf

Accordingly, Sec. 6(3) of the Income Tax Actwas amended and substituted by the following: - acompany is said to be a resident in India if: (i) it is an Indian company or (ii) its *place of effective management in that year is in India.*[7] The explanation further provides that POEM means a place where key management and commercial decisions necessary for the conduct of business of an entity as a whole are made.[8]

Guidelines to determine company's Place of Effective Management.

The provisions of POEM have been effective from the financial year 2017. The guidelines to determine when a company is resident in India according to POEM rules were issued by the Central Board of Direct Taxes (CBDT) on 24thJanuary 2017. There has been a paradigm shift in approach with the introduction of POEM; from an objective standard to a subjective test. The CBDT guidelines clearly state that determination of POEM depends on the facts and circumstances of each case. Moreover, it emphasises looking at the 'substance' over form and the determination has to be done on a yearly basis. A company may have more than one place of management; however, it can have only one place of effective management.[9]

In order to determine POEM, companies are divided into two categories – those that have an 'active business outside India' (ABOI) and 'passive business outside India.' A foreign company is engaged in active business outside India if its passive income is less than 50% of its total income, and less than 50% of the following is situated in India:-(a) its total assets, (b) total number of employees. Further, the payroll expenses on such employees must be less than 50% of its total payroll expenditure.[10] In the above circumstances, if a foreign company has active business outside India, the place of effective management will not be held to be situated in India and hence the company is not considered a 'resident' of India. Passive income has been defined as income that is incurred from various heads like royalty, dividend, capital gains, rental income and transactions that take place among its associated enterprises.[11]

[7] Sec. 6(3) of the Income Tax Act, 1961

[8] *ibid.*

[9]Guiding Principles for determination of Place of Effective Management (POEM) of a company, Circular No. 06 of 2017 issued by Central Board of Direct Taxes. (hereinafter referred to as "POEM Guidelines 2017")

[10] Para 5, POEM Guidelines 2017

[11] Para 5(c), POEM Guidelines 2017

All companies that do not fall under ABOI, i.e. for all passive companies, POEM is determined depending on two circumstances:

(i) persons who are responsible in making key management and commercial decisions for the company as a whole[12], and,

(ii) Identification of where these decisions are actually being made.[13]

The *place* of decision making of a company is more relevant than the implementation of such decisions.[14] Many other factors must be looked into in order to determine POEM. The guiding principles released by the CBDT reflect on each of them. They are as follows:

(a) Location: the location where key management decisions are taken by the company is an important factor for determination of the place of effective management. It is relevant to note that a mere formal meeting held by a company is not sufficient for identification of POEM. However, if the place of the meeting is also the place where the key management and commercial decisions are taken, it will be relevant in identifying POEM. Hence, there is a difference between the place of meeting and place of decision making. Secondly, if the board has delegated the power of key management and commercial decisions to senior management, shareholders or promoters etc. of a company, then the POEM will be the location where the delegated authorities make the decisions.[15]

(b) Company's head office: this is another important factor for determination of POEM. The place where the company's senior management and staff are located and where their main business is conducted will be the place of effective management. However, if a company is decentralized and they have different locations of functioning, the head office of the company will be where majority of the senior management is primarily based or the place where they meet to take key commercial decisions.[16] Sometimes, the senior management may function from different locations and may participate in meetings through video conferencing or telephone. In such cases, the head office of the company will be the place where the highest level of management such as managing director etc. is located.

[12] Para 8, POEM Guidelines 2017
[13] *ibid.*
[14] Para 8.1, POEM Guidelines 2017
[15] Para 8.2 (ii), POEM Guidelines 2017
[16] *ibid*

(c) Shareholder's involvement: Generally, shareholder's decisions will not be relevant for determination of POEM. However, in certain situations a shareholders involvement can determine the place of effective management. For e.g. if there exists a formal agreement or by actual conduct the shareholders limit the power of the senior management or take away the company's real authority to make decisions, it may result in effective management. But, this identification needs to be made on a case to case basis only.[17]

(d) Secondary factors: If the above guidelines fail to make a clear identification of POEM, two secondary factors can be taken into consideration: (i) place of substantial and main activity carried out by the company or (ii) place where accounting records of the company are kept.[18]

Further, determination of POEM needs to be made on facts that clearly establish effective management or control of the company and not on isolated facts. For e.g. existence of Permanent Establishment (PE) of a foreign company in India is not conclusive proof of place of effective management.[19] Sometimes a foreign entity may have a place of PE in India but the effective management and control may not be occurring in India. Similarly, the fact that some directors of a foreign company reside in India, or local management is carried out in India or the existence of support functions of a foreign entity are carried out in India is not conclusive proof nor sufficient to prove POEM.[20]

(e) Additional safeguards: the guidelines issued by the CBDT have attempted to follow the principles of natural justice before determining a company's POEM. It clearly states that the Assessing Officer (AO) before initiating any proceedings of holding a foreign company as resident in India shall take prior approval from the Commissioner or Principal Commissioner, as applicable.[21] Further, any proposal by the AO in holding a foreign company as resident in India shall be undertaken after seeking prior approval of a collegium[22] and such collegium shall provide the company with an opportunity of being heard before issuing any further directions.

[17] *ibid.*
[18] Para 8.3, POEM Guidelines 2017
[19] Para 9 (ii), POEM Guidelines 2017
[20] *ibid*
[21] Para 11, POEM Guidelines 2017
[22] Para 11.1, POEM Guidelines 2017

The comprehensive guidelines released by the CBDT attempts to frame certain rules and checklists while determining POEM of a foreign company, in order to consider them as tax 'residents' in India. However, the larger question that arises is how these guidelines can be implemented, whether they are an efficient means of taxation and the possible repercussions that they may create.

Taxation rules in other countries

Countries have different ways of taxing companies based on their residence in the particular State. It is important to note that all countries do not follow the rule of POEM. For e.g. France follows a territorial system of taxation. Any company or any branch of a foreign company in France is only taxed on the profits received by the businesses i.e. the profit earned from the French source.

UK follows a system where companies are taxed only if they are centrally managed or controlled in the UK. This is substantially different from the concept of POEM as adopted in India. There is a difference between control or management and 'effective management.'

Similarly, in Germany, only companies that are registered or have a legal seat or place of management and control in Germany are considered to be residents in the State. The same rule applies in Singapore. Only corporations that exercise control and management of its business in Singapore are considered as a tax resident. In USA and Canada, residence depends on the place of incorporation of the company. Similarly, in Brazil, companies are taxed on their global income only if it is resident in the State and this determination is made if the foreign company is incorporated in Brazil.

Criticism of the POEM concept

The intention behind POEM is to use it as a tiebreaker rule for avoidance of double taxation. According to Article 4(3) of the OECD Model, in a situation where a company has dual residency, it will be deemed to be resident in the state where its 'place of effective management' is situated.[23] However, in order for a foreign company to be regarded as a resident in India through POEM, it is necessary to know whether other countries accept India's determination of

[23]Article 4.3, Articles of the OECD Model Tax Convention on Income and Capital,. (22 July 2010)

POEM. For e.g. a company may have dual residence in USA and India, with India following the POEM rules. With the tie-breaker rule, the company will be regarded as a resident in India as it follows POEM. However, if USA does not accept India's determination of POEM, it poses a problem for companies and States alike.

Furthermore, the POEM guidelines make a distinction between passive and active business outside India. A company that has an ABOI is not considered to have POEM in India. This distinction places an unnecessary burden on companies for providing additional documents and proving their place of business according to criteria laid down in the guidelines. More importantly, to identify a company as having ABOI, the data of the past three years is to be taken into account.[24]It means that companies will be assessed on POEM based on the past assessment years. This fails to give companies the requisite time to reorganize their business structure and bring them out of the resident tag. As POEM is a yearly test, it would have been practical to assess companies for ABOI only on data relevant for the year.

Multinational companies and start-ups have to take precaution with their subsidiaries in India, as global taxation will occur even for minor control and oversight from India. The POEM guidelines are also very ambiguous and vague. For e.g., it clearly states that there can be more than one place of management but a company can have only one place of 'effective' management.[25]However, the guidelines go on to state that if in a particular year, POEM is considered to be in India and outside India, company shall be presumed to have POEM in India if it has been mainly or predominantly in India.[26] This again creates further confusion and complication in identifying a company's tax status. The guidelines are subjective and fail to provide clarity on how theyfunction vis-a-vis each other. It makes use of words like 'may', 'will often be', and 'very important factor'but fails to clarify what constitutes 'often' and what is a more important factor than another. Further, identifying POEM through location of video conferencing or telephone becomes difficult. Moreover, as the process has to be repeated yearly, it raises apprehensions of untimely dispensation of cases and leave the companies in lurch every year.

[24]Para 7.2, POEM Guidelines 2017
[25]Para 6, POEM Guidelines 2017
[26]Para 10, POEM Guidelines 2017

Conclusion

The concept of POEM attempts to align its domestic law with international standards. However, whether it is a step in the right direction is still a question mark. It opens a Pandora's Box and fails to establish a clear set of principles for determination of POEM. The guidelines have made it incredibly problematic for companies to maintain data and records of the past assessment years, further, the subjective nature of the guidelines leaves a lot of scope to interpretation in the hands of authorities. As a result, companies will be taxed on their global income even if they are not effectively or entirely operating in India. Fundamental questions remain unanswered in the new guidelines. Firstly, there is no universally recognized definition of POEM. Many countries do not use this concept of taxation. How effectively POEM can be used as a tiebreaker rule is still to be seen. Secondly, the principles are only for guidance and not binding, hence no one principle can be decisive in itself.[27] Thirdly, the test is subjective and is determined on a case by case basis. There are a lot of loopholes and un-ironed creases in the POEM principles which will lead to unnecessary hindrance and increased litigation in the Indian taxation regime.

Therefore, there must be further deliberation and discussion on this concept. Courts and tax authorities must not make any decision in haste. We are yet to see the fruitfulness or repercussions of these new guidelines on the 'Place of Effective Management' rule.

[27] *ibid*

The Bankruptcy Code- A Much Needed Paradigm Shift

Saee Athalye[1]

Introduction

When a company fails, its failure not only affects the promoters but various other stakeholders. To cause minimal damage to these stakeholders, it is imperative to have an insolvency regime that is well defined and expeditious. This will enable a Company to either be rehabilitated fast or be liquidated without a significant depletion in the value of its assets.

Until 2016, the Corporate Insolvency laws in India were in disarray. The *Doing Business Report*[2] ranked India 137 out of 189 economies for resolving insolvencies, taking on an average 4.3 years to resolve insolvency issues and recovering as low as 25.7 cents per dollar. For personal insolvency, there were two separate Acts which were subject to different state amendments resulting in different insolvency procedures in each state.

The need for a single uniform insolvency code was thus strongly felt. In response to this, Finance Minister Mr Arun Jaitley moved the Insolvency and Bankruptcy Bill in the Lok Sabha on 28th December 2015. After careful scrutiny and a few amendments the Insolvency and Bankruptcy Code, 2016 (the Code) finally got a nod from the Parliament on 11th May 2016. With the passage of the Code, India now has a new and effective legislation covering both corporate and personal insolvencies.

Corporate Insolvency

Shortcomings in the Previous Regime

Before the Code was passed, Corporate Insolvency was governed by four statutes:

i. The Companies Act, 1956/2013

ii. Sick Industrial Companies Act, 1985 (SICA)

[1] V BSL. LL.B.

[2] World Bank & International Financial Corporation, *Doing Business Report Series* < http://www.doingbusiness.org/data/exploreeconomies/india/#resolving-insolvency> accessed 6 July 2016.

iii. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI)

iv. Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI).

Each statute had a different forum to resolve disputes resulting in parallel proceedings in the High Courts, Board of Industrial and Financial Reconstruction (BIFR), Debt Recovery Tribunals (DRT) and the Company Law Boards. Sometimes different creditors initiated proceedings in different fora[3], while sometimes debtors initiated proceedings under the SICA while the creditors filed Winding up Petitions under the Companies Act[4] or sought relief under the SARFAESI[5]. One such example is *BHEL v. Arunachalam Sugar Mills Ltd.*[6]., where 5 different proceedings were initiated by different creditors under different statutes raising question as to which Act superseded the others.There were several discrepancies and shortcomings in these statutes, all of which led to an unwarranted delay in the winding up of companies.

1. Sick Industrial Companies Act, 1985 (SICA)

The provisions of the SICA mandated the establishment of the Board of Industrial and Financial Reconstruction (BIFR), an adjudicatory body whose purpose was to assess whether a company was financially viable or not. If a company was found to be viable, the BIFR could approve the revival plan made by the management of the company or its creditors. Financially unviable or 'sick'companies were then recommended for liquidation to the High Court. This statute had several shortcomings-

(i) Although the SICA was the only statute that dealt with the revival of companies, it applied only to certain industrial companies, excluding other companies from its ambit.

(ii) On an average, it took the BIFR a period of 6.5 to 8 years to give a verdict, leading to a serious depreciation in the value of the company's assets and invariably leading to liquidation.

[3]*Kritika Rubber Industries v. Canara Bank,* Civil Appeal No. 190/2008 (Kar).
[4]*Oswal Foods Limited,* [2008]145 Comp Cas 259(All); *Re:Consolidated Steel and Alloys,* Civil Appeal No. 1031 of 2008 in C.P. No. 428 of 2002 (Del).
[5]*Asset Reconstruction Co. India P. Ltd v. Shamken Spinners Ltd,* [2011] AIR Del 17; *M/S Digivision Electronics Ltd. v. Indian Bank* , W. P. 13056/2005 and others (Mad).
[6] O.S.A. No. 81 of 2011 (Mad).

(iii) Since the SICA did not dispossess the debtors of their assets, it was being used as a 'safe haven' by debtors who often siphoned off assets from creditors.[7]

Thus, while the number of cases registered in the BIFR steadily decreased, the cases heard by alternate forums like the Corporate Restructuring Cell increased.[8]

2.Companies Acts, 1956

Under the Companies Act, which governed the liquidation of companies, either the creditors or the company could file a petition for liquidation. A major drawback of these provisions was that they did not provide for a moratorium period till the liquidation order was passed leading to several counter claims filed in different fora resulting in multiplicity of proceedings and a further delay.

3. SARFAESI and RDDBFI

Due to the abuse of SICA by the debtors, two Acts viz. SARFAESI and the RDDBFI were passed. Under the SARFAESI, secured creditors could take charge of the collateral without the intervention of any court and tribunal, allowing them to settle their claims speedily. Under the RDDBFI Act, banks and financial institutions fulfilling certain conditions could go to the Debt Recovery Tribunals (DRT) to recover their debt. However, these Acts were highly inconsistent with the SICA and Companies Act. For example, since SICA provides for a moratorium period[9], there was uncertainty regarding the initiation of proceedings under the SARFAESI or RDDFI during the pendency of as suit filed under SICA.[10]The Companies Act did not provide for a moratorium period, due to which secured creditors would resort to SARFAESI to take charge of collaterals even after the liquidation order was passed. Since the assets of the company were vested with the liquidator after the order was passed, a question of whether the secured creditors could still take charge of collaterals under SARFAESI arose.[11]

[7]Kristin Van Zwieten, *'Corporate Rescue in India: The Influence of the Courts '*, (2014) 3 JCLS< file:///C:/Users/Admin/Downloads/SSRN-id2466329.pdf > accessed 13 July 2016.
[8]Board of Industrial and Financial Reconstruction, *Year Wise Registered Cases* < http://bifr.nic.in/casesregd.htm. last seen on 10/07/2016 >; Corporate Debt Reconstructuring Mechanism Progress Report as on *31/12/2016* < http://www.cdrindia.org/pdf/CDR-Performance-December-2016.pdf > accessed 15 March 2017.
[9]Sick Industrial Companies Act 1985, Sec. 22.
[10]*KSL Industries v. Arihant Threads Ltd.,* Civil Appeal No. 5225 of 2008 (SC).
[11]*Indian Bank v. Sub-Registrar,* Writ Appeal Nos. 1420 and 1424 of 2013 and O.S.A Nos. 34 and 35 of 2013 (APHC);

There was thus no assurance of recovery even after legal proceedings ended as orders could be challenged by means of another action initiated against the same debtor. These discrepancies led to a system where it took years to decide the fate of an insolvent, causing serious depreciation in the value of assets held by the company and adversely affecting all the stakeholders, including global investors.

Changes Introduced By The Bankruptcy Code

The primary objectives of this code are to consolidate all the existing laws into one single insolvency law, to provide speedy dissolution or revival of companies and to prevent depletion of assets. Some of the key features of this code are-

1. Establishment of Intermediaries

To ensure that all the processes are carried out smoothly, the Code provides for setting up the following intermediaries-

Insolvency and Bankruptcy Board of India (IBBI)

The Code makes provisions for setting up the IBBI to act as a regulator. The Board is responsible for making regulations and for approving and overseeing various Information Utilities and Insolvency Professional Agencies. Accordingly, The IBBI was formed on 1st October 2016 in New Delhi under the Chairmanship of Mr M.S. Sahoo.

Insolvency Professional Agencies

Embracing another feature of the Insolvency laws of United Kingdom and Singapore, the Code provides for establishing Insolvency Resolution Agencies consisting of Resolution Professionals who help both companies and individuals in carrying out the various processes laid down in the Code. As of today, there are three registered Insolvency Professional Agencies in India.

Information Utilities

Under the older regime, it was observed that asymmetry of information available to creditors proved to be a major barrier to fair negotiations. In order to eliminate this barrier, the Code makes provisions for setting up Information Utilities that collect and assemble information and make it available to anybody who approaches them.

2. Adjudicatory Mechanism

A linear and simplified hierarchy of adjudicating authorities has been established with non-conflicting jurisdictions- corporate debtors shall be governed by the National Company Law Tribunal (NCLT) while individual and partnerships shall be dealt with the Debt Recovery Tribunal (DRTs). Appeals from these adjudicatory bodies shall lie to the National Company Law Appellate Tribunal (NCLAT) and the Debt Recovery Appellate Tribunal (DRAT) respectively. Ultimate appeals from both shall lie to the Supreme Court.

3. Insolvency Resolution Process (IRP)

Unlike the insolvency regimes of UK and Singapore, Indian companies that were not covered by SICA had no other recourse but to initiate winding up proceedings. Under the Code, every company has to undergo the IRP wherein the Resolution Professional along with the creditors chalks out a revival plan within the prescribed period, failing which the company is liquidated. A few significant provisions relating to the insolvency resolution process are-

Classification of creditors

The Code categorizes creditors as financial creditors and operational creditors- financial creditors being creditors providing loans or similar credit facilities for an interest and operational creditors being creditors to whom money is owed with respect to any good purchased, services provided or any dues payable. Unlike the Companies Act, this Code protects the interests of operational creditors by allowing them to file for IRP as well.

Moratorium

Another key feature introduced in the Code is the moratorium period that commences once the application is accepted until the IRP ends. During this period, neither can any suits be filed with respect to the insolvency in any court or tribunal, nor can debtors alienate any of their assets. The Code also clearly states that no action can be initiated under SARFAESI while the IRP is ongoing, eliminating all jurisdiction issues that arose under the SICA.

Time bound procedure

The Legislature, in order to tackle the core defect of the old regime i.e. inordinate delay has made every process in the Code time bound. It mandates that the resolution process should end within 180 days and can only be extended by

another 90 days if the NCLT and 75% of the creditors deem it necessary. If within that period, a resolution plan is not accepted by the creditors or the NCLT, the company goes into liquidation. Due to these provisions, a process that typically took around 7-8 years under the SICA will now be completed within a year.

4. Liquidation

While the Code encourages Companies to work out a revival plan, it also has provisions for liquidation which get triggered in certain cases. The liquidation order of the NCLT acts as a discharge notice for all employees and workers of the company, so they can settle their dues and look for other opportunities. Unlike the Companies Act, the Code gives priority to dues payable to secured, unsecured and operational creditors over government dues in its distribution. In the long run, this would increase the availability of finance, reduce the cost of capital, promote entrepreneurship and lead to faster economic growth.[12]

Individual Insolvency And Bankruptcy

Shortcomings In The Previous Regime

Before the Code, two acts governed individual insolvency- the Presidential Town Insolvency Act (PTIA), 1909 and the Provincial Insolvency Act (PIA), 1920. The PTIA applied to the presidency towns of Bombay, Calcutta and Madras while the PIA applied to the other parts of India. These Acts were loosely modelled according to the UK Law, which itself was repealed in 1986.[13] These laws failed to provide uniformity, as various states had their own amendments to the Provincial Insolvency Act.

These Acts too, had several drawbacks- the assets to be taken over by the official assignee included all assets owned by the debtor, including dwelling units and office tools, leaving the debtor with no means to start over. There was no specific time period for a discharge order to be caused by the court, causing unwarranted delays in the discharge of an insolvent. Due to these delays, creditors started losing faith in the system and most of them started using adverse means like muscle men to recover money from creditors. The practice of hiring muscle

[12] *supra* note 2.

[13] Siva Ramann, Renuka Sane & Susan Thomas, *'Reforming Personal Insolvency Laws in India'* Working Paper No. WP-2015-035 (2015) 6 IGIDR < http://www.igidr.ac.in/pdf/publication/WP-2015-035.pdf ,> accessed 27 July 2016.

men became so prevalent that the Reserve Bank of India (RBI) had to issue Guidelines on Fair Practices for Lenders[14] to curb them.

Changes Introduced By The Code

The code provides three remedies to debtors and creditors- the Fresh Start Process (FSP), The Insolvency Resolution Process (IRP) and the Bankruptcy Process.

1. Fresh Start Process

This process is based on the Debt Recovery Offer provisions of UK's Insolvency Act 1986 and is ideal for small-time debtors, who donot have enough assets to pay off their debts, for who the IRP would be costly and ineffective. Such debtors can make an application to the DRT for a fresh start and on admission; the DRT passes an order discharging the debtor of all his debts.

2. Insolvency Resolution Process

While the Individual IRP process is similar to the Corporate IRP process, a feature unique to it is the provision relating to an 'interim moratorium' commencing from the date of application and till the date of acceptance or rejection of application.Once the application is accepted, the debtors along with the Resolution Professional draw up a repayment plan.

3. Bankruptcy Process

The Bankruptcy Process has been drafted along the lines of the earlier acts. Once a bankruptcy application is accepted by the DRT, the property of the debtor lies in the hands of the bankruptcy trustee. He collects claims from the creditors and distributes the proceeds from the sale of those assets. The DRT then passes a discharge order, whereby the bankrupt is discharged from his debt, and several restrictions are imposed on him. Unlike the PTIA or the PIA, this Act excludes certain fundamental assets like dwelling units and office tools, giving the debtor a fair chance to start over and establish himself.

[14] *"Guidelines on Fair Practices Code for Lenders issued by the Reserve Bank of India* , RBI Notification DNBR (PD) CC. No.054/03.10.119/2015-16 (2005) < https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9823&Mode=0> accessed 15 March 2017.

Drawbacks And Challenges In Implementation

Policy Drawbacks

Creditor favouring

After the filing of the first case under the NCLT Mumbai[15], the Code has been accused of being unfair to the debtor and going against the principles of natural justice. The regulations governing corporate insolvency, unlike the operational creditors do not require financial creditors to give a demand notice to the debtors before filing an application.[16] There is also no provision in the Code giving the debtor an opportunity to be heard before the admission of the application. Neither the Code nor the regulations provide any mechanism to the debtor to challenge this application made by the creditor. Due to this, the constitutionality of the Code was questioned before the Bombay High Court for contravening the principle of '*Audi Alteram Partem*'. *While the writ was dismissed because of a subsequent appeal filed before the NCLAT, it pointed out a glaring flaw in the Code that needs to be addressed promptly.*

Inadequate protection of Operational Creditors

In a Corporate IRP, while the objective of giving operational creditors the right to file claims was to safeguard their interests, this isn't being effectively achieved as they do not have a right to approve or disapprove a repayment plan in the Committee of Creditors. They are only allowed to have one representative with no voting rights in the committee.

Implementation of the time restrictions

While the time restriction placed on every process under the Code is one of its best features, it can also prove to be extremely detrimental. With a time limit of 7 days on the admission of claims there may be cases where due to the increased burden on the NLCTs and DRTs, claims are admitted or rejected hastily without careful scrutiny. Similarly, due to the fear of liquidation, the revival plans formulated may be passable but not optimal. However, the efficacy of these provisions can only be judged after scrutinizing their implementation and collecting feedback from various stakeholders in the years to come.

[15] *ICICI Bank Ltd v. M/s. Innovative Industries Ltd.* , Civil Petition No.01/I (NCLT Mumbai).

[16] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016, Sec. 8

Infrastructural Requirements

Apart from these loopholes, the Code has huge infrastructural demands that need to be met in order to ensure the smooth execution of the Code. The Code vests the power to adjudicate individual insolvencies with the DRTs. At present, there are only 33 DRTs in India dealing with RDDBFI and SARFAESI cases, and already have about 59,645[17] cases pending. These have now been vested with vast jurisdictions to tackle individual insolvency too, placing an enormous burden on them.Moreover, unlike district courts that are present in every district, DRTs are currently located only in big cities and townships like Mumbai, Delhi, Chennai, Calcutta, etc, making it very inconvenient for people living in remote areas to file claims.The NCLTs got notified only in June 2016, with 11 benches in major cities only. It will take some time before the NCLTs start functioning smoothly.

Conclusion

On 16th January, 2017 the NCLT, Mumbai on admitting the first ever application under the Code marked the commencement of the new Insolvency regime in India. Many creditors have already started exhibiting their faith in the new Code by resorting to it as a remedy. In the meanwhile, IBBI has already passed a series of regulations to regulate the various intermediaries involved in the process. The efficiency of the Code is heavily dependent on the efficacy of the adjudicatory bodies and agencies that it establishes for the purposes it seeks to satisfy. The new regime will not only be beneficial for the creditors, employees and the economy in general, it will also boost the confidence of foreign investors significantly increasing the number of foreign investments in India. This Code, if implemented well, will certainly revolutionize the way business is conducted in India.

[17] Vishwanath Nair, *'Pending Cases Pile up at Debt Recovery Tribunals'* Livemint (28 August, 2015) <http://www.livemint.com/Politics/hNLONGGdDhODVNmiRyxHlM/Pending-cases-pile-up-at-debt-recovery-tribunals.html> accessed 18 March 2017.

LEGISLATIONS HIGHLIGHTS

Maharashtra Protection of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016

Atharv Joshi & Tapan Radkar[1]

Preamble: An Act to provide for the prohibition of social boycott of a person or a group of persons including their family members, and for matters connected therewith or incidental thereto.

The Maharashtra Legislature recently passed the Maharashtra Protection of People from Social Boycott Act on 3rd July. This act aims to strip off a huge chunk of the power wielded by the caste panchayats or gaavkis in Maharashtra. Tired of the numerous cases of caste oppression and atrocities, the Maharashtra Andha Shraddha Nirmulan Samiti (MANS) founded the Jaat Panchayat Muthmati Abhiyan (Caste Panchayat Removal Program). It was one of the key forces behind passing a law prohibiting social boycott. Maharashtra's legislature has become the first to pass such an Act.

Sec. 2 of this Act presents a very wide definition of what constitutes a caste panchayat. Any group of people of a certain caste that attempts to or regulates the social and personal behaviour of their caste members would amount to a caste panchayat.

Acts amounting to social boycott are cruel and violate human rights. Sec. 3 encompasses all Acts, which may be deemed as social boycott.They are;

1) Obstruction from performing religious ceremonies or entering religious places
2) Obstruction from performing marriage and funeral ceremonies
3) Social ostracism of one family
4) Cutting social and commercial ties with someone
5) Denying access to school, medicine, etc.
6) Obstruction from enjoying any benefit of the community

[1]II B.A.LL.B.

7) Inciting others to boycott specific members
8) Preventing children from playing with children of another family
9) Denying access to basic amenities like food or water
10) Discriminating on the basis of morality and sexuality
11) Expel any member from the community

Sec. 5 mentions the punishment, whichcan be imprisonment up to three years or fine up to Rs. 1 Lakh or both. Such fine, in part or whole can be given as compensation to the victim as mentioned in Sec. 17.

Sec. 19 provides for offences under this Act to be read with Secs. 34, 120-A,B. 149, 153-A and 383-389.

This Act also has some unique never seen before features such as making a provision for the appointment of a Social Boycott Prohibition Officer under Sec. 15. Sec. 14 gives powers of preventive detention to a Collector/District Magistrate on a group of people who may impose Social Boycott.

Although this act is a historic step, it is by no means adequate. There are various loopholes, which make the Act left wanting.

1) If the society is visualised as a caste pyramid, this Act only prevents social boycott horizontally, i.e. only the offences pertaining to intra caste social boycott are punishable. The Act cannot be applied where the boycott is imposed by the so-called 'upper castes' on the 'lower castes'. The legislature, in all its wisdom has left out this crucial point. Hence, the elitist caste panchayats, that have been practising social boycott on lower castes for centuries would continue to do so.

2) The offences are compoundable and bailable. If bail is granted, accused can pressurise the victim for the withdrawal of charges against him. Although, this is not a unique problem of this Act, one must take into consideration that the victims of social boycott are socially and financially weak in most cases. Thus, not succumbing to pressure from the perpetrators is a task in itself.

This can be a stepping-stone towards a more inclusive anti-discrimination law, but whether any law can cure the problem of mindset, remains to be seen.

Maternity Benefit (Amendment) Act, 2017

Vibha Oswal[1]

The Maternity Amendment Act, 2017 has brought certain notable changesto the Maternity Benefit Act, 1961

The following changes have been introduced by the Amendment Act, 2017:

I. Duration of Maternity Leave

The duration of maternity leave has been increased from 12 weeks to 26 weeks, and now includes 8 weeks of prior leave to the expected date of delivery instead of the earlier period of 6 weeks. But such extension is restricted to women having two children. In all other cases, it will be same as provided under the Act.

II. Adoptive and Commissioning Mother

The Act defines an 'Adoptive mother' as any woman who adopts a child below the age of three months and 'Commissioning mother' as any biological mother whose egg is used to create an embryo implanted in another woman.

The duration of maternity leave for such mothers would be 12 weeks from the date on which the child is handed over to them.

III. Option to work from home

The concept of work from home has been introduced by this Amendment under which any woman whose nature of work is such as to allow her to work from home can avail this option after the completion of her maternity leave.

IV. Crèche facilities

The Amendment also provides for crèche facilities in establishments having more than 50 employees within a stipulated distance with all the common facilities. It also provides that women employee will be allowed at least four visits including her rest of intervals to the crèche. However, the terms 'employee' and 'common facilities' have not been defined.

The Amendment further provides that every establishment will need to intimate a woman of her maternity benefits in writing and through electronic mode at the time of her appointment.

[1]V BSL. LL.B.

JUDICIAL PRONOUNCEMENTS

CONSTITUTUIONAL LAW

Justice K. S. Puttaswamy v. Union of India[1] (Right to Privacy judgement)

Dhruv Tank IVB.A.LL.B

A nine-Judge bench of the Supreme Court created history by proclaiming that the right to privacy forms a fundamental part of the right to life guaranteed under Article 21 of the Constitution. This unanimous decision of far-reaching proportions was delivered in the case of Justice KS Puttaswamy v. Union of India.

The foundational bedrock of this judgement lies upon the apex court's restricted interpretation of "life and personal liberty" in previous landmark cases. The decision of MP Sharma's case[2], insofar as it held that the Constitution did not specifically provide for the right to privacy, was overruled in this judgement.

Similarly, the Supreme Court's decision in Kharak Singh[3] was overruled to the extent that it alienated privacy from the ambit of Article 21 by relying on the myopic view of AK Gopalan[4], which stated that rights must be read separately and not together.

Relying on broader interpretations like the celebrated cases of RC Cooper[5] and Maneka Gandhi[6], the Supreme Court finally read privacy as a part of right to life by explaining that fundamental rights essentially overlap and cannot be read in isolation.

Recognizing human dignity in the form of privacy is an essential sine qua non of the basic idea of life and personal liberty. These rights were not created by the

[1] WRIT PETITION (CIVIL) NO 494 OF 2012
[2] AIR 1954 SC 300
[3] AIR 1963 SC 1295
[4] AIR 1950 SC 27
[5] AIR 1970 SC 564
[6] AIR 1978 SC 597

Constitution, but were merely recognized by it; they always existed as intrinsic natural rights that arise simply by virtue of birth. The very core of privacy preserves personal intimacy, individual choices, sanctity of marriage, procreation, family, and even the right to be left alone.

Apart from standing proudly as one of the greatest achievements of the judiciary, this judgement is going to impact many other glaring questions of law pertaining to, for example, arbitrary state actions, criminalization of homosexuality, bodily autonomy, and the very concept of dignified human existence in general.

Indu Devi v. State of Bihar[1]

Apoorva Shukla, II B.A.LL.B.

A victim of sexual assault, also found to be HIV positive, was not allowed to terminate her pregnancy because of the risk to the life of the victim as well as to the foetus.

A writ application was filed under Article 226 of the Constitution of India to ascertain the possibility of a medical termination of pregnancy of about 20 weeks on the ground that the petitioner was HIV positive. The 35-year old lady was a victim of sexual assault which led to her pregnancy.

The pregnancy was discovered while the woman was in the rehabilitation center called "Shanti Kutir". It was also found out that she was HIV positive. The petitioner expressed her wish for an abortion after which she was examined by Patna Medical College and Hospital. When no final conclusion was reached at, the petitioner was compelled to approach the High Court.

The High Court directed the woman to be examined by Medical Board at Indira Gandhi Institute of Medical Sciences (IGIMS). In its report, the board stated that a major surgical procedure will be required, which was of sufficient risk to the life of the woman and the foetus.

The Counsel for the petitioner relied on *Meera Santosh Pal* v. *Union of India*[2] and *X* v.*Union of India*[3], but unlike these cases, the medical report did not suggest any abnormality in the foetus. The provisions of the Medical Termination of Pregnancy Act, 1971 were also of no help to the victim. The High Court, therefore, refused the termination of pregnancy, reasoning that in the case of a pregnant woman, there is "compelling state interest" in protecting the life of the child.

The matter was then taken up to the Supreme Court. The Court ordered the Medical Board from AIIMS to examine the petitioner and submit its report. It was reaffirmed that the procedure will be unsafe to both the lives. Taking proactive measures, although putting a stay on the order of the High Court, the apex court

[1] 2017 SCC Online SC 560
[2] AIR 2017 SC 461
[3] AIR 2016 SC 3525

ordered the State of Bihar to provide for all the medical facilities as per the treatment graph provided by the examiners at AIIMS.

The Medical Board at AIIMS had also recommended continuing the HAART[4] treatment and antenatal care, to reduce the risk of HIV transmission to the foetus. Hence, the court bid IGIMS to work in coordination with AIIMS so that the health of the victim is not subject to any further risk.

In addition, compensation of rupees 3 lakhs had to be paid by the State of Bihar under Sec. 357-A of the Code of Criminal Procedure to the petitioner, as per the directions of the Supreme Court.

[4] HAART is the acronym for 'Highly Active Antiretroviral Therapy', a term coined in the late 1990s to describe the effectiveness of combination drug therapies used to treat HIV.

Jitendra Arora and Ors. v. Sukriti Arora and Ors.[1]

Sonya Mohan, III B. A. LL. B.

A minor would have complete freedom to decide the course of action she/ he would like to adopt in her life.

The Respondent, a British Permanent Resident, filed a Habeas Corpus writ petition in the High Court of Punjab & Haryana on 25th October, 2010..The Hon'ble court directed the Appellant (Father) to handover the custody of their eldest daughter (Vaishali) to her mother (Respondent).

In November 2009, the couple was granted a decree of divorce from the court of United Kingdom. Since then, the Appellant had moved to India with Vaishali. However, in May 2010, when the petition was allowed, Vaishali was approximately 8½ years of age in the proceedings held on January 31 2013, it was agreed between the parties that the child should stay with the Respondent for one month under monitoring of the Court. The court also interacted with Vaishali to ascertain her viewpoint.

The Court was faced with the pertinent issue as to who should be entrusted with the custody of a 15-year-old minor girl.The Hindu Minority and Guardianship Act, 1956 lays down the principles by which custody disputes are to be decided. Sec. 17 enumerates the matters need to be considered by the Court in appointing a guardian and inter alia, enshrines the principle of welfare of the minor child. This is further very eloquently premised in Section 13, which reads as, "Welfare of minor to be of paramount consideration."

The apex court, when dismissing the judgement of the High court, held that the minor should stay with her father. It reasoned that the minor, being a mature 15 year old, herself expressed her desire to live with her father in India. Moreover, the court also referred to the ratio in *Bandhua Mukti Morcha* v. *Union of India and Ors*[2], which stated, "the child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child."

[1] (2017) 3 SCC 726
[2] (1997) 10 SCC 549

The State of Tamil Nadu Represented by Secretary and Ors. Vs. K. Balu and Ors.[1]

Avni Sharma, VBSL. LL.B.

While affirming the directions regarding ban on presence of liquor vends on national and state highways, certain relaxations issued.

The present judgment addresses the issue of the presence of liquor vends on national and state highways. Previously[2] the Court issued directions under Art. 142 of the Constitution to stop the grant of license for sale of liquor along national and state highways and over a distance of 500 meters from the outer edge of the highways or service lane. About 68 applications were filed against the previous judgment. The present judgment disposes of these civil applications by a common judgment.

The State of Tamil Nadu argued that the Court exceeded the scope of Art. 142 since the said directions interfered with the excise rules framed by different states prescribing distances for location of liquor shops. The previous judgment was also challenged as being in the nature of judicial policy making. Further applications were also filed for extension of time or modification of the guidelines.

The Court held that since there is no way to distinguish between national and state highways and since heavy reliance was placed on advisories and policies formulated by the Union, the Court had neither formulated policy nor assumed legislative function. The directions are issued purely to maintain public interest and health. Further, the Court ruled that the argument based on excise rules was lacking in substance.

To make the judgment more feasible, the Court also issued relaxations in areas with population less than 20,000 people, areas where renewals of license were already granted and to States that moved the Court for the modification of the judgment with respect to hilly terrains.

[1] [2017] 6 SCC 715.
[2] State of Tamil Nadu & Ors. v. K. Balu & Ors., [2017] 2 SCC 281.

Shyam Narayan Chouksey v. Union of India[1]

Kshema Mahuli, II B.A.LL.B.

National Anthem Must Before Movie Screenings in Theatres, Disabled Persons Not Obliged To Stand Up.

A writ petition was filed under Art. 32 of the Constitution of India, referring to the enactment of Prevention of Insults to National Honor Act, 1971. It emphasized that the National Anthem cannot be sung under non-permissible circumstances which in-turn cannot be tolerated by law.

Whilst passing directives, the court directed that, there should be no commercial exploitation of national anthem for financial or any other benefit. The National Anthem shall not be dramatized or included as a part of any variety show. No part of the National Anthem shall be displayed on any object, which may bring disgrace to its status. Furthermore, all the cinema halls across the country were ordered to play the National Anthem with the National flag on the screen. While the National Anthem is being played, all the entry and exit doors were to remain closed, so as to avoid disrespect of the National Anthem. Moreover, it was also directed that no abridged version of the National Anthem should be played or displayed.

In 2017, a three-judge bench of the apex court modified its previous order and effectuated a more considerate interpretation; by ruling that persons who are wheel chaired; persons with autism; people suffering from cerebral palsy; multiple disabilities; leprosy cured; muscular dystrophy; deaf and blind are not to be treated within the ambit of the said order. They are not obliged to stand up to show respect to the National Anthem when played during screenings in cinema halls.

Relying on Art.51 (A) (a) of the Constitution of India, the Supreme Court stated that the citizens need to abide by the constitution, in essence, show respect to the National Anthem and the National Flag, as was enshrined in fundamental duties of citizens towards the state.

[1] 2017 SCCOnline SC 433.

K.Veeramani v. Chairman, Teachers Recruitment Board, Chennai[1]

Shritej S. Surve, II B.A.LL.B.

Madras High Court makes singing of "Vande Mataram" mandatory in all schools as well as private and government offices.

A writ petition was filed under Article 226 of the Indian Constitution to issue a Writ of Mandamus, directing the respondent to award the petitioner one mark for Question No.107 (D Type) (Paper-II of the Teachers' Recruitment Examination), and make necessary changes in the answer key published by the respondent.

The debatable question was "In which language the song Vande Mataram was written first?" While the petitioner affirmed it as Bengali, the respondent contradicted insisting that the answer was Sanskrit. After a rigorous research, it was discovered that the National Song was originally written in Bengali.

In the instant case, besides settling the above issue,the Court realized the necessity of instilling a sense of patriotism among people and came up with guidelines mandatory for everyone to follow. Reiterating the same, the Court ordered:

a) That the National Song "Vande Mataram" shall be sung and played in all the Schools, Colleges, Universities at least once a week (preferably Monday or Friday);

b) That it should be sung in all government offices and Institutions, Private Companies, Factories and Industries at least once a month.

c) Moreover, the Director of Public Information was directed to upload and circulate a translated version of "Vande Mataram" in Tamil and English thereby making it available on the Government websites as well as on social media platforms.

d) Further, this order was marked to The Chief Secretary of the Government of Tamil Nadu, who was directed to issue appropriate instructions to the concerned authorities to implement the issued guidelines.

[1]Writ Petition No. 32316 of 2013. (decided on 26th July, 2017)

e) In the event of any person or organization expressing difficulty in playing or singing the National Song, he or she was not to be compelled or forced to sing it, provided there were valid reasons for not doing so.

This is another instance when courts in India have demanded overt displays of patriotism.

State Bank of India & Ors. v. Kingfisher Airlines & Ors.[1]

Vaibhav Chitlangia, III B.A. LL.B.

Violation of clear and unambiguous orders leads to Contempt of Court; Article 129 confers jurisdiction on the Supreme Court to deal with contempt petitions of all subordinate courts.

The Petitioner- Banks lent a huge sum of money to the Respondents which they failed to repay. Therefore recovery proceedings were initiated before the Debt Recovery Tribunal (DRT), Bangalore. *Pendente lite*, two different orders were passed by the Kerala High Court and the Supreme Court to the effect of restraining the Respondents from transferring any property held by them, and ordering the Respondents to make full disclosure of their assets respectively. Respondent 3 received a sum of US $ 40million which he disbursed in the name of three trusts, the sole beneficiaries of which were his children. Further, in a disclosure statement, Respondent 3 failed to make complete disclosure of his assets.

The Petitioner- Banks filed numerous Contempt Petitions in the Supreme Court against the Respondents alleging contempt of orders passed by both, the Supreme Court and the High Court.

The Court held that by abstaining from making a full disclosure of his assets, Respondent 3 was guilty of Contempt of clear and unambiguous orders passed by the Supreme Court.

Further, the Court placed reliance on Delhi *Judicial Service Association, Tis Hazari Court, Delhi v. State of Gujarat*[2] and ruled that the Court has jurisdiction to hear and decide contempt petitions of all subordinate courts and therefore observed contempt of orders passed by the High Court.

Respondent 3 was accordingly found guilty of contempt of orders of the Supreme Court as well as the High Court. The matter was adjourned for a later date with an opportunity of hearing being given to Respondent 3 and directions to the Ministry of Home Affairs to secure and ensure presence of Respondent 3 before the Court.

[1](2017)6SCC 654.
[2](1991) 4 SCC 406

CORPORATE LAWS

Innoventive Industries Ltd. v. ICICI Bank[1]

Sri Vittal V, II LL.B.

The Maharashtra Relief Undertakings (Special Provisions) Act (MRUA), 1958 is repugnant to the Insolvency and Bankruptcy Code (IBC), 2016.

The Appellant, Innoventive Industries, being a financial defaulter within the meaning of the Insolvency and Bankruptcy Code, 2016, claimed the defence that under MRUA, 1958, all the debts and liabilities are temporarily suspended for a period of one year. It filed an application claiming that the non-repayment of debt was due to the non-release of funds under the Master Restructuring Agreement. In addition, it was delayed for 14 days and hence was dismissed by National Company Law Tribunal, which observed that MRUA is repugnant to the Code and that the latter shall prevail over the former, declaring a moratorium. Although, the appeal to the National Company Law Appellate Tribunal was dismissed, it was held that MRUA, 1958 and IBC, 2016 are not in conflict with each other.

On 7th December 2016, ICICI Bank Ltd. filed an application under Sec. 7 of the Code, 2016 to set in motion the insolvency resolution process and pleaded that the moratorium under MRUA would defeat the purpose of the Code thus raising the plea of dismissal of the appeal.

The court relied on a precedent[2], which had laid down that the Code IBC being a later enactment and a parliamentary law shall have overriding effect notwithstanding any other law for the time being in force.

In furtherance, the court observed that MRUA is repugnant to the Code because Sec. 4 of the former Act gives the State Government directory power to obstruct the Parliamentary enactment i.e.the Code. Furthermore, Sec. 238 of the Code provides an overriding effect to any inconsistent Act; MRUA in this case.

As a result, the doctrine of repugnancy under Art. 254 was clearly established in this case.

[1] 2017 SC Online SC 1025
[2](2016) 3 SCC 183

Bharati Airtel Ltd v. Reliance Industries Ltd. & Reliance Jio Infocomm Ltd[1]

Umang Motiyani, II BA.LL.B.

The instant case was instituted by Bharti Airtel Limited (Informant) alleging predatory pricing in contravention to the provisions of Sec. 4(2) (a) (ii) of the Competition Act 2002[2] against Reliance Industries Limited (RIL), one of the financially strongest company,using its financial strength of in other markets to enter into the telecom market through Reliance Jio Infocomm Limited (RJIL).

Predatory pricing was allegedly the free service being offered since the commencement of their business on 5th September, 2016, by RJIL, which holds approx.18% of total Base Transceiver Stations and largest Optical Fibre Cables. All these statistics were provided by Airtel to prove the dominant status of Reliance Jio in the telecom industry.[3]

RJIL in response stated that there had been no reduction or elimination of any competition since the entry of the company. It was able to convince the Competition Commission of India that being a new entrant in the telecom market, its offers are only in the nature of promotion and penetration to show its existence to the customers. Further regarding the financial investments, the Commission noted that financial strength is relevant but not the sole factor to determine dominance of an enterprise.

Conclusively, the Competition Commission of India dismissed the case on 9th June, 2017, stating that the Bharti Airtel Limited did not provide sufficient explanation about how exactly Jio provided free services by leveraging Reliance Industries Limited's position in the market.

[1]Competition Commission of India Case No. 3 of 2017
[2]There shall be an abuse of dominant position if an enterprise or a group directly or indirectly, imposes unfair or discriminatory price in purchase or sale (including predatory price) of goods or service.
[3] Paragraph 6.2 of Competition Commission of India Report

CRIMINAL LAW

Pawan Kumar v. State of H.P.[1]

Anushka Agarwal, V B.S.L. LL.B.

Conviction under section 306 of the India Penal Code, 1860 based on a dying declaration is valid.

The Appellant- accused, filed a Special Leave Petition in the Supreme Court challenging his conviction by the Division Bench of the High Court of Himachal Pradesh u/Sec. 306 of the Indian Penal Code, 1860.

The Appellant-accused importunately threatened and teased the prosecutrix on the premise that he had been prosecuted due to her in a foregoing case consequent to which the prosecutrix set herself aflame.Before drawing her last breath she wrote a dying declaration in the presence of the doctor and police holding the Appellant accountable for her death.

The Appellant-accused contended that the dying declaration was unreliable as after sustaining 80% burn injuries it was impossible for the prosecutrix to write the same, and no certificate was issued by the doctor stating that she was mentally fit to do so.

The Court considered the question of what constitutes a valid dying declaration and relying on *Mafabhai Raval v. State of Gujarat*[2]observed that even a person suffering from 99% burn injuries could be deemed fit for making a dying declaration without obtaining a fitness certificate from a medical officer.

The Court further relied on *Deputy Inspector General of Police &Anr. v. S. Samuthiram*[3] and held that the persistent threatening and teasing by the Appellant-accused being psychological harassment, constituted eve-teasing, and that such eve-teasing instigated the prosecutrix to commit suicide.

It was further observed that every woman had a right to lead a dignified and safe life and no man can, in the garb of his ego disregard this right guaranteed by the Constitution. Hence, the appeal was dismissed.

[1] AIR 2017 SC 2459.
[2][1992] 4 SCC 69. [3][2013] 1 SCC 598

Asha Ranjan and Ors. v. State of Bihar and Ors.[1]

Anubhav Talloo, V BSL LL.B.

It is the duty of the Court to weigh the balance between the right to fair trial of the accused and that of the victim and the society at large.

The Petitioner's husband, a senior journalist, had written numerous news reports in relation to the heinous crimes committed by Md. Shahabuddin (Respondent No. 3), who then constantly threatened to kill the Petitioner's husband and family members. On 13th May 2016, petitioner's husband was shot dead by a group of persons. An FIR was registered under Police Station Nagar Thana, Siwan for theoffences punishable u/Sec. 302/120B and 34 of the IPC. By its earlier order,[2] the Court had transferred the investigation to the CBI. By the present judgment, the Court dealt with the issue of transfer of Respondent No. 3 from Siwan Jail, Bihar to a Jail in Delhi and conducting of the trial in the pending cases against him through video conferencing.

Respondent No. 3 argued that the transfer would violate his rights under Articles 14 and 21 of the Constitution and that since all the relevant witnesses are in Siwan, the trial after shifting the accused cannot be termed as 'fair trial'.

After analysing a plethora of decisions relating to fair trial, the Court concluded that a balance should be drawn between the interest of the victim and the rights of the accused. The fundamental right to fair trial is available not only to the accused but also to the victim and the society at large.

The Court applied the test of 'paramount collective interest' or 'sustenance of public confidence in the justice dispensation system'and thus directed the State of Bihar to transfer Respondent No. 3 to Tihar Jail, Delhi u/sec. 3 of the Transfer of Prisoners Act, 1950. It was further directed that the pending trials shall be conducted by video conferencing by the concerned trial court.

[1] (2017) 4 SCC 397.
[2] 2016 SCC Online SC 988.

PERSONAL LAWS

Shayara Bano v. Union Of India & Ors[1]

Neha Kumari, IV B.A. LL.B.

This landmark judgment of the Apex Court is also dubbed as the "triple *talaq* case". The constitutional validity of *talaq-i-biddat* or triple *talaq* or instant *talaq*, polygamy and *nikahhalala* was challenged.The Apex Court, in this instance case, however, restricted itself to examine triple *talaq* and not polygamy and *nikahhalala*. *Tripletalaq*, conceptualizes that a Muslim man can divorce his wife by simply pronouncing the word "*talaq*" thrice. Even though *triple talaq* as a concept is frowned upon in Islam, it is often practiced. On the fateful day of 22nd August 2017, a five judge Bench of the Apex Court, set aside the practice of triple *talaq* by the majority of 3:2,

Majority View (Justices Kurian Joseph, R.F. Nariman& U.U. Lalit)

1. Since triple *talaq* is "recognized and enforced" under Sec.2 of the Shariat Act, 1937, it is no longer a personal law but a statutory law which falls under the ambit of Art.13(1) of the Indian Constitution. According to Art. 13,all laws, framed before or after the Constitution, shall not violate Fundamental Rights. However, the practice of triple *talaq* violates Art. 14, which provides for 'Right to Equality',by allowing only Muslim men to divorce their wives.
2. Triple *talaq* allows a Muslim man to "whimsically and capriciously" divorce his wife making it "manifestly arbitrary". Also, it is not fundamental to the practice of Islam, therefore it does not enjoy the protection of Art. 25 (states that protection will be given to only absolute religious practices), which provides for 'Freedom of Religion'.
3. The concept of triple *talaq* does not exist in the Quran, therefore it is not good in law and the practice has been declared "un-Islamic".

[1](2017) 9 SCC 1

Minority View (Chief Justice J. S. Khehar & Justice Abdul Nazeer)

1. Triple *talaq* is an integral part of Article 25. Since, it had been followed for over 1,400 years by the *Hanafis*, it is a part of *religious practice*. It does not violate Articles 14, 19 and 21 of the Constitution.

2. The minority opinion held that while the practice is indeed in violation of constitutional morality, it cannot be set aside through a judicial order but only by way of legislation.

OTHER LAWS

Sanjay Yogi Goel v. Union of India[1]

Surabhi Smita, III BA.LL.B.

In the present case the petitioner, Mr. Sanjay Yogi Goel, was undergoing dialysis and was in a critical condition. He was advised to undergo the transplant and Smt. Suman Goel, recipient's mother-in-law, was the prospective donor. He thus made an application to the authorization committee under the Transplantation of Human Organs and Tissues Act, 1994 (the Act). His application was rejected by an order without any rationale. The petitioner was then permitted to file an appeal.

The Appellate committee by its order disposed off the appeal and gave the grounds of financial motive and political influence for rejection of the application by the authorization committee. The appellate authority in its order observed that there exists a huge socio-economic disparity between the donor and the recipient family, the donor had claimed that they had never taken money from the recipient, which is contrary to the authorization committee's observation, and that non-suitability of the near relatives shall be ascertained by authentic medical reports and not just affidavits.

On the order being presented to the Court, it directed the appellate authority to decide the case instead of remitting the same and pass an order within 2 days. In the second order, the appellate committee observed that the relationship between the donor and recipient is not of near relatives as provided in the Act and the view of authorization committee of existence of financial motive could not be overruled by the appellate committee.

The court noted that the observations provided in the two orders by the appellate committee were contradictory.The court is of the view that in Indian society it is normal for son-in-law to help. In the case of *Praveen*

[1] 2017 SCC Del 8132.

Begum v. Appellate Authority[2] it was held that mere existence of disparity between the parties income cannot be a reason for the rejection of the application. The court was also of the view that though the parties were not within the ambit of near relations as defined in the Act but were close relatives and thus will not involve an angle of financial motive. In view of the above the court directed the authorization committee to grant approval for the transplant.

[2] (2012) 189 DLT 427.

Samir Vidyasagar Bhardwaj v. Nandita Samir Bhardwaj[1]

Tanya Gupta, III B.A. LL.B.

In this case, the Supreme Court upheld an interim order by a family court in Maharashtra, which directed a husband to remove himself from his own home and not to visit there until the divorce petition under challenge is finally decided.

After more than two decades of marital life, the respondent-wife filed a petition under Sec. 27(1)(d) of the Special Marriage Act, 1954 for divorce against the appellant-husband on the grounds of cruelty in the Family Court at Bandra, Mumbai.

The respondent-wife also filed an application under Sec. 19(1)(b) of the Protection of Women from Domestic Violence Act, 2005 praying for issuance of mandatory injunction against the appellant-husband to move out of the matrimonial house and asking for maintenance and the expenses required for marriage of their two daughters.

It was contended by the appellant-husband before the Family court that he being the joint owner of the flat, cannot be deprived of using his own house.

The family court passed an interim order directing the husband to remove himself from the matrimonial house. Aggrieved by the same, the husband approached the Bombay High Court urging that the impugned order is harsher than a temporary injunction. Nonetheless, the Bombay High Court affirmed the interim order passed by the Family Court.

On appealing to the apex court,a bench comprising of Justice Kurian Joseph and Justice Banumathi upheld the family court's decision stating that it had exercised the discretion under Sec. 19(1)(b) of Domestic Violence Act, which provides that the Magistrate on being satisfied that domestic violence has taken place can remove the spouse from the shared household.

Further, the court directed the respondent-wife to secure an alternate accommodation for the husband and pay the rent for the same and restrained the wife from renouncing property rights of the husband.

[1] 2017 SCC On line SC 657

Sudhir Gopi v. Indira Gandhi National Open University[1]

Aditi Khobragade,V BSL LL.B.

Arbitrator does not have the power to lift the corporate veil, so as to bind non-signatory party to arbitration agreement

The Petitioner is the principal shareholder and Chairman & Managing Director of Universal Empire Institute of Technology (UEIT), a Limited Liability Company. The Respondent IGNOU is a statutory university body established under the Indira Gandhi National Open University Act, 1985.

UEIT & IGNOU concluded an Agreement to collaborate for offering & implementing distance educational courses in Dubai. UEIT was to advertise the programmes at its own cost & admit students conforming to the eligibility criteria as prescribed by IGNOU.. The Agreement provided for submission of any dispute to arbitration. IGNOU invoked the clause before the arbitral tribunal & claimed that UEIT defaulted on certain payments relating to admission, re-admission and registration fees to IGNOU. It claimed an aggregate sum of USD 14, 48,046. The tribunal awarded a sum of USD664,070 in favour of IGNOU against UEIT and Mr. Gopi, jointly and severally.

Aggrieved, Mr. Gopi filed a petition u/sec. 34 of the Arbitration andConciliation Act, 1996 for setting aside the arbitral award by the Sole Arbitrator contending that the arbitral tribunal does not have power to proceed against him as he was neither a signatory nor party to the arbitration agreement. The Respondent *inter alia* contended that the arbitrator rightly pierced the corporate veil as Mr. Gopi was running the business under the façade of UEIT and essentially, there was no difference between him and UEIT.

The Court held that an arbitrator does not have the power to pierce the corporate veil so as to bind non-signatory parties to the arbitration agreement and that in any case mere failure of a corporate entity to meet its contractual obligations is no ground for piercing the corporate veil.

Hence, the petition was allowed.

[1] 2017 SCC Online Del 8345.

Dr. T. P. Senkumar, IPS v. Union of India & Ors.[1]

Rishab D. Desai, IV B.A. LL.B

The removal or displacement or transfer of an officer requires serious consideration and good reasons.

The Appellant was appointed the State Police Chief under Sec. 18 of The Kerala Police Act, 2011 on 22 May, 2015. Sec. 97 of the Act ensures a 2 year term to the State Police Chief, with exceptions to the same under Sec. 97(2). The Appellant was transferred out of his post by the State Government, invoking clause (e) of Sec. 97 (2), which reads "serious dissatisfaction in the general public about efficiency of police in his jurisdiction". This order was passed on 1 June 2016.

The State Government reached the conclusion of transfer based on the Puttingal Temple Tragedy on 9th April, 2016, where100 people died due to an illegal fireworks display and murder of Jisha, a Dalit girl on 28th April, 2016.The Additional Chief Secretary marked 2 notes to the Chief Minister on 26th May, 2016, questioning the role of the Appellant, in both cases. Interestingly, the previous note marked to the Chief Minister regarding the temple tragedy on 13th April, 2016, had no reference to the role of the Appellant. The new note was prepared after a change in government.

The Court deduced from the material on record that the reason for the transfer was not the two instances, but the interference of the Appellant in the investigation of the Temple Tragedy case. The Court held that reasons not mentioned in an order could not be used to justify the same later. Rejecting the argument of the State that subjective satisfaction of the Government was enough under Sec. 97(2)(e), the Court held that the satisfaction of the Government must be based on cogent and rational material. The Court also held that the judiciary may not analyse the material, but may look into it. Finding no credible material against the Appellant, the Court reinstated him.

[1](2017) 6 SCC 801

Citizens Cooperative Society Ltd.v. Commissioner of Income Tax[1]

Varun Maniar, II LL.B.

A cooperative society providing credit facilities to persons who are not members of the Society cannot claim income tax benefit u/sec. 80P of the Income Tax Act.

The present case throws light on Sec. 80 P of the Income Tax Act, 1961 ("IT Act") which gives exemption to the whole amount of profits or gains attributable to certain co-operative societies in certain cases mentioned in sub-section 2 of the said provision

The Appellant contended that it is a co-operative society providing banking or credit facilities to its members and therefore it is entitled to the exemption granted u/sec. 80 P of the IT Act.

The Assessing Officer discovered that the Appellant had been catering to two distinct categories of people– ordinary members and a category of "nominal members" who had advanced deposits to the Appellant.These deposits were channeled into Fixed deposits to earn maximum returns. Furthermore, a part of these deposits was given as gold loans etc. and the Appellant advanced loans to the general public there by violating the Mutually Aided Co-operative Societies Act, 1995.

The Court observed the nature of business of the appellant was that of financial nature and could not be categorized as a co-operative society. The Court also held that the three requisites of the doctrine of mutuality were not fulfilled. Since the business of the Appellant is more in the nature of a co-operative credit society, it is not entitled for deduction under Section 80 P(2)(a)(i) of the Act.

[1] 2017 SCC On Line SC 976

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