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# NMIMS STUDENT LAW REVIEW

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# NMIMS STUDENT LAW REVIEW

Volume I  
July 2019

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## FROM THE DEAN'S DESK

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**Dr. Alok Misra**

Our journey to institutionalise research by students begins with this publication. Though students publish quality research in highly acclaimed journals, it was felt that the culmination of ideation can only begin when nurtured from our level. Our attempt is to openly welcome good quality research articles from research scholars objectively. I say with pleasure that when review articles were solicited, we were surprised with the huge response from across the country. After due peer-review process, we selected some original research articles and a book review. I am sure this will generate appreciation and constructive dialogue from the readers.

Kirit P. Mehta School of Law has received worthy endorsements from the industry, academia, judiciary, bar, law firms, MNC's and regulatory bodies like SEBI. We welcome and thank our esteemed Board of Advisors and Peers who have timely guided this edition to become part of a discourse that generates and challenges existing paradigms of legal jurisprudence. I congratulate the Editor-in-Chief and each member of the Editorial Board for their time and contribution to the growth of NMIMS Student Law Review. I urge the readers to give wings to the thoughts presented by our contributors.

## FOREWORD

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It gives us immense pleasure in publishing this inaugural volume of the NMIMS Student Law Review. We hope our sincere endeavour advances legal scholarship and furthers contemporary academic discourse, for many years to come. We begin on a strong note as in this edition, the authors have addressed wide-ranging legal questions with great profundity and critique.

In their article titled *“Are the Amendments to the Specific Relief Act, 1963 in sync with the Expert Committee Report, 2016?”* Anirudh Goyal & Vishal Hablani study the amendments to the Specific Relief Act, 1963 and their impact on litigation and enforcement while drawing a comparative with the recommendations of the Expert Committee of 2016.

Shubhi Goyal in her article titled *“Business Method Patents: A Critical Study”* has analysed the viability and legality of patenting the methods of carrying out business in India as well as the position under TRIPS, US and EU jurisdictions.

Akshay Gudinho, in his lucid article *“Permanent Establishments: The Curious Case of Amalgamated Companies”*, has observed the interesting shift of tax liabilities from the source to the resident country and vice versa under the terms of DTAA by corporate restructuring.

Additionally, in his article *“At the Carrefour – Indian Privacy Policy and Transatlantic Data Models”*, Prashant Joshi analyses the individual & business privacy interests based on the US and European models in effecting data protection with reference to the Personal Data Protection Bill, 2018.

In his paper titled *“Reasonableness in Religion”* Satyam Tandon explores the conception, adherence and shift in the Essential Religious Practices Test in various courts of India when confronted with the constitutional challenges of Article 25 and Article 26.

Varad S Kolhe, in his case comment titled “*Notes from Foreign Fields: Analyzing the Aftereffects of CDC v. Akzo Nobel in Arbitrating Anti-Trust Damages Claims*”, has discussed the ambiguity in the judgment of the CJEU and the subsequent gap in the arbitration of competition tort damages.

Angad Singh Makkar in his case comment titled “*Eco-Centrism in the Juridical Realm: Implications of Mohd. Salim v. State of Uttarakhand*” observes an inconsistency in Indian environmental jurisprudence where result is eco-centric, despite the analysis offered by the court is anthropocentric.

In her book review, Anjali Jain has thoroughly examined and critiqued the ideas regarding the journey, justification and consequences of PIL in India as represented by the book titled *Courting the People* by Anuj Bhurwania.

Having been reviewed by a panel of established professionals and academicians from the legal fraternity, these articles were subject to informed scrutiny. The entire team behind this edition may be lauded for their tireless efforts and dedication to facilitate the publication of quality legal literature.<sup>1</sup>

### **Board of Editors**

At Mumbai, MH

March 2019

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<sup>1</sup> A special thanks to Shri. Aditya Bakshi for his constant *ex gratia* technical support and proactive help.

## ARE AMENDMENTS TO THE SPECIFIC RELIEF ACT, 1963 IN SYNC WITH THE EXPERT COMMITTEE REPORT, 2016?

By Anirudh Goyal & Vishal Hablani\*

*Unlike many other amending acts, the Specific Relief (Amendment) Act, 2018 was passed with no debate in the Lok Sabha and little debate in the Rajya Sabha. The object as stated on the floor of the House was to prevent errant parties from breaking the contracts and to facilitate faster adjudication of disputes. The amendment entirely reversed the earlier position of compensatory damages being the norm and specific performance an exception. The wide and discretionary powers of the court under the old Act has been replaced by specific guidelines which squarely circumvents unnecessary litigation delays. Another hallmark feature is the incorporation of an additional remedy under substituted performance of the contract. Further, the amendment categorically restricts the power of the courts to grant injunction which might obstruct the progress of public infrastructure projects. Certainty and uniformity in enforcement of contracts is a necessary requirement for existence of a commendable and diverse business environment. The eventual purpose of the amendment is to enhance India's position in the Ease of Doing Business Index. The article seeks to evaluate crucial points in the amendment and examine its conformity with the recommendations of the Expert Committee Report.*

Keywords: Specific Relief, amendment, compensation, specific performance, damages, infrastructure

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## [I.] INTRODUCTION

Recognizing the importance of greater certainty in contractual enforcements, in January 2016, the Government of India constituted an 'Expert Committee' under the aegis of Mr. Anand Desai<sup>1</sup> to review the five-decade old Specific Relief Act, 1963 ["Act"]. It was felt that the Act was no more in tune with the rapid economic growth and expansion of commercial activities in the country. The objective was to suggest substantive changes which are required to remove bottlenecks faced in enforcing contractual agreements across various sectors and to make it relevant to the modern commercial sphere.

In furtherance of the Expert Committee's Report<sup>2</sup>, the Parliament passed the Specific Relief (Amendment) Act, 2018, which received the Presidential assent on August 1, 2018. The provisions were notified to be brought into effect from October 1, 2018.<sup>3</sup> The amendments seek to protect contractual rights by reducing the wide discretion previously conferred on courts in ordering specific performance. It makes specific performance the rule and damages the alternate remedy. Further, it introduces provisions for an additional remedy of substituted performance, reduces the category of non-enforceable contracts, grants special treatment to infrastructure projects, encourages taking assistance of experts, fixes time limit of twelve months for case disposal, etc. The amendment thus seeks to bring a substantive change in the regime for contract enforcement.

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<sup>1</sup> Managing Partner, DSK Legal

<sup>2</sup> The Expert Committee recommended amendments to the Specific Relief Act, 1963 in its report which was submitted on 26<sup>th</sup> May, 2016 to Mr. D.V.Sadananda Gowda, Hon'ble Minister of Law & Justice, Government of India.

<sup>3</sup> Notification No. S.O. 4888(E) dated September 19, 2018, Available at <http://egazette.nic.in/WriteReadData/2018/189830.pdf>

This note seeks to discuss and analyze the key amendments to the Specific Relief Act, 1963 and further compare it with the recommendations of the Expert Committee. The author shall also address the issue of prospective applicability of the amendment. Finally, the paper will examine the implication of the amendments on the boiler plate clause relating to specific performance normally included in contracts such as share subscription agreements as well share purchase agreements.

### [III.] SPECIFIC RELIEF ACT – NEED FOR CHANGE?

The Specific Relief Act, 1963 codifies the law in relation to granting the relief of specific performance. Under its provisions, the courts are empowered to admit a prayer for specific performance of contractual obligations when monetary compensation is not an adequate remedy or where the amount of such compensation cannot be measured. Hence, prior to the amendment compensation was the rule and specific performance had been an exception. Further, the Act provided that a contract cannot be specifically enforced if it involves performance of a continuous duty which the court cannot supervise. The discretion given to the courts resulted in uncertainty and non-uniformity in judgments pertaining to enforcement of contracts.

Out of 190 countries, India fared poorly at 164<sup>th</sup> rank in the World Bank's rankings for "Enforcement of Contracts" and at 100 in the rankings for "Ease of Doing Business".<sup>4</sup> The methodology used to measure 'enforcing contracts' takes into account the time and cost for resolving a commercial dispute at the court of first instance, quality of judicial process and the usage of good practices

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<sup>4</sup> World Bank, *Ranking & Distance to Frontier*, Available at <http://www.doingbusiness.org/en/rankings>

to improve quality and efficiency of the court system.<sup>5</sup> In jurisdictions such as United Kingdom and most states of the USA, specific performance is an equitable remedy granted at the court's discretion<sup>6</sup>, whereas in France, Germany and in few other states of the USA, the law allows the contracting parties to choose between the two remedies.<sup>7</sup> Despite the discretion and flexibility, the World Bank rank these economies within the Top 20 on "Ease of Doing Business" frontier.<sup>8</sup> Hence, to improve India's reputation as an investment destination and to further enhance the ease of doing business in India for both domestic and foreign investors, the government has taken the decision to change the existing legal framework for seeking specific relief.

### [III.] KEY AMENDMENTS

In a note highlighting the objectives of the amendment Bill, the Union Minister for Law and Justice, Shri Ravi Shankar Prasad said, "The tremendous economic development since the enactment of the Act have brought in enormous commercial activities in India including foreign direct investments, public-private partnerships, public utilities, infrastructure developments, etc., which have prompted extensive reforms in the related laws to facilitate enforcement of contracts, settlement of disputes in speedy manner."<sup>9</sup> The key amendments to the Act are:

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<sup>5</sup> World Bank, *Enforcing Contracts Methodology*, Available at <http://www.doingbusiness.org/en/methodology/enforcing-contracts>

<sup>6</sup> Wang Li Li, *Comparative Law Study on the Specific Performance in International Commercial Contracts*, IPEDR (Vol. 32, 2012), Available at <http://www.ipedr.com/vol38/020-ICEBI2012-A00038.pdf>

<sup>7</sup> Samatha Cotton, *Remedies for Breach of Contract*, Thomson Reuters (Practical Law), Available at [https://uk.practicallaw.thomsonreuters.com/7-101-0603?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-101-0603?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)

<sup>8</sup> *Supra.*, note 5

<sup>9</sup> Rajya Sabha Debates dated 23 July, 2018, Page 403

*A. Specific performance is the new rule*

‘Specific Performance’ is an order by a court requiring a party to perform a specific act, so as to complete performance of the contractual obligations. On the other hand, ‘Compensation’ is an order to pay in money terms for the loss suffered by the aggrieved party for not completing contractual obligations. Earlier, under Sections 10<sup>10</sup> and 20<sup>11</sup> of the unamended Act, the courts had the discretion of granting the remedy of specific relief while dealing with issues of non-performance or breach of contracts. The Amendment changes the nature of the specific relief from an equitable discretionary remedy to a statutorily mandated remedy. As per Section 10 of the unamended Act, specific performance was to be enforced in the discretion of the court only when:

- (i) actual damage caused by the non-performance of the contractual obligation could not be ascertained<sup>12</sup> ;or
- (ii) monetary compensation would not by itself be adequate relief for the non-performance of the contractual obligation<sup>13</sup>.

However, post the amendment made to Section 10, the words “may in the discretion of the court” have been substituted by “specific performance shall be enforced by the court”.<sup>14</sup> Additionally, the amendment has limited the court’s discretion in not decreeing specific performance of a contract, which shall now be granted except for limited grounds set out in sections 11(2), 14 and 16 of the Act.<sup>15</sup> Further, as per Section 20 of the unamended act,

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<sup>10</sup> “Cases in which Specific Performance of Contract enforceable”

<sup>11</sup> “Discretion as to decreeing specific performance”

<sup>12</sup> Section 10(a) of the unamended Specific Relief Act, 1963

<sup>13</sup> Section 10(b) of the unamended Specific Relief Act, 1963

<sup>14</sup> Section 10, Specific Relief Act, 1963

<sup>15</sup> Section 10, Specific Relief Act, 1963 (Clause 3 of The Specific Relief (Amendment) Act, 2018)

courts would grant specific relief on the basis of the following principles:

- (i) exercise of discretion should not be arbitrary but sound and reasonable and shall be guided by judicial principles<sup>16</sup>;
- (ii) under no circumstances, should the court exercise its discretion where it would be improper to do so<sup>17</sup>; and
- (iii) substantial acts under the contract have been performed by the aggrieved party or it has suffered substantial losses<sup>18</sup>.

After the amendment, Section 10 has repealed section 20, thereby limiting the discretion vested in courts to grant specific performance. The recommendations of the Expert Committee have been substantially incorporated in the amended Act. The change ensures that a party which is not in breach can obtain & enforce the performance he had originally bargained for. With specific performance as the new rule, the possibility of a judicial order mandating specific performance could possibly serve as a deterrent to the parties from defaulting.

#### *B. Contracts not specifically enforceable*

Section 14 of the erstwhile Act contained a list of contracts that could not be specifically enforced. The amendment has narrowed down the range of such contracts. These now include contracts:

- (i) where a party has obtained substituted performance under Section 20 ;

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<sup>16</sup> Section 20(1) of the unamended Specific Relief Act, 1963

<sup>17</sup> Section 20(2) of the unamended Specific Relief Act, 1963: provides unfair advantage to the plaintiff, causes undue hardship to the defendant inequitable to enforce specific performance, etc.

<sup>18</sup> Section 20(3) of the unamended Specific Relief Act, 1963

- (ii) involving performance of a continuous duty which the court cannot supervise;
- (iii) which is dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its the material terms; and
- (iv) which is in its nature determinable.

Additionally, as mentioned above in Paragraph 2 of 'Specific Performance is the rule', Section 20 which provided for certain cases where the court may exercise its discretion not to decree specific performance, has been deleted altogether. Consequently, under the amended Act, the grounds for refusal of specific performance have been narrowed and the grounds on which the court could exercise discretion for not granting specific performance have been completely removed. Therefore, the amended Act further strengthens the sanctity of contracts and is expected to act as a deterrent for those contracting parties who intend to escape performance of their contractual obligations post execution of a contract.

However, in comparison with the report of the Expert Committee, the amendment substantially departs from its recommendations. The Report envisage to balance the interests of the both the parties, for which it had left the decision to refuse specific performance on certain grounds to the court's discretion.<sup>19</sup> On the contrary, the amendment makes it mandatory to refuse specific performance if any of the four grounds listed in Section 14 are satisfied. The Parliament chose not to adopt the elaborate grounds suggested by the Committee. The legislative intent appears to reduce the court's power to exercise discretion on the grounds on which specific performance might be refused and the

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<sup>19</sup> Chapter VIII (Para 18.13), *Report of the Expert Committee on the Specific Relief Act, 1963*, Page 95

rationale behind the drastic departure from the recommendations is to ensure complete certainty and uniformity in decisions for specific performance under the Act.

Further, Section 11 of the Act has been amended to replace the words “contract may, in the discretion of the court” with “contract shall”, thereby providing for specific performance in relation to trusts.<sup>20</sup> Now, it will be mandatory for the courts to grant specific performance of contracts concluded by trusts provided that the requirements of Section 11 are met.<sup>21</sup> The amended provision departs from the suggestions put forward by the Expert Committee, which provided that grant of specific performance in case of trusts should be left to the court’s discretion.

### *C. Substituted performance*

The Amendment introduces the concept of substituted performance.<sup>22</sup> If a contract is breached due to non-performance of a promise by a party, the party suffering from the breach has the option of availing substituted performance through a third party or through its own agency. Further, the latter is entitled to recover the costs and expenses for the substituted performance from the former.<sup>23</sup> However, substituted performance is permitted only after the party affected by the breach has given a notice in writing, of not less than 30 days to the party in breach calling upon him to perform the contract.<sup>24</sup>

The recommendations of the Expert Committee were

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<sup>20</sup> Section 11(1), Specific Relief Act, 1963

<sup>21</sup> Section 11(2), Specific Relief Act, 1963

<sup>22</sup> Section 20, Specific Relief Act, 1963

<sup>23</sup> Section 20(1), Specific Relief Act, 1963

<sup>24</sup> Section 20(2), Specific Relief Act, 1963

substantially incorporated in the amended Act. The committee suggested to add a proviso stating that substituted performance shall be obtained “within a reasonable time after giving notice”<sup>25</sup> and that “the amount of such expense or additional cost is reasonable”<sup>26</sup>. The amended Act does not include the above proviso, thereby creating an unintended burden on the defendant party to pay the whole amount even though it might be disproportionately high in its opinion. Lastly, the amended Act has done away with the recommendation that Specific Performance may be refused if the aggrieved party can reasonably obtain substituted performance from another source on comparable terms.<sup>27</sup>

Earlier, in the event of a breach of contract, the party suffering breach could claim compensation under Section 73 of the Indian Contract Act, 1872<sup>28</sup> (“**Contract Act**”) as the difference between the cost of substitute performance and the contract price. However, any such claim by the plaintiff party is subjected to the principle of foreseeability and cost mitigation measures underlying Section 73. Further, any indirect loss or cost incurred by the plaintiff did not fall within the ambit of damages recoverable under the Contract Act. Hence, uncertainty used to be imminent in the recovery of damages since the courts had wide discretion in deciding plaintiff’s ability to recover the whole amount spent on the substituted performance.

With the enactment of an alternative remedy under Section 20

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<sup>25</sup> Chapter VIII (Para 18.10), *Report of the Expert Committee on the Specific Relief Act, 1963*, Page 102

<sup>26</sup> *ibid*

<sup>27</sup> Chapter VIII, Para 18.13(iii)(b), *Report of the Expert Committee on the Specific Relief Act, 1963*, Page 95

<sup>28</sup> Illustrations (f), (k) and (l), Available at

<https://indiacode.nic.in/acts/4.%20Indian%20Contract%20Act,%201872.pdf>

in the amended Act, the promisee now has the right to receive the whole amount it has spent due to the breach of contract. Further, while availing the remedy of 'Substituted Performance', the aggrieved party can claim damages for the breach of contract. The rationale behind introducing this provision is to satisfy performance of contractual obligations even if there is a breach and the party not in breach should not suffer from inordinate delay of litigation in ensuring performance of the originally intended contractual obligations. Additionally, it intends to undo the intangible harm and injustice that the promisor has caused to the promisee by breaching the contract.

*D. Special provisions for specified infrastructure projects*

The Amendment is aimed at preventing infrastructure projects from getting tangled up in legal disputes, thus ensuring timely completion of projects and instilling confidence in investors. Henceforth, no injunctive relief can be granted for a contract which involves infrastructure projects, if such a relief would cause delay or impediment in the progress of the project.<sup>29</sup> To expedite the judicial process and given the public interest, section 20B has been incorporated to constitute special courts to try suits exclusively related to infrastructure projects.<sup>30</sup> Additionally, for speedy disposal of the disputes, time limit of "12 months from the date of service of summons to the defendant"<sup>31</sup> has been imposed on the courts. This move would provide some certainty and clarity to the investors in terms of the time frame within which the issues can be resolved. An extension of a maximum of six months can be granted for reasons to be recorded in writing, proving the underlying

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<sup>29</sup> Section 20A, Specific Relief Act, 1963

<sup>30</sup> Section 20B, Special Relief Act, 1963

<sup>31</sup> Section 20C, Special Relief Act, 1963

determination to adopt good practices and efficiency in the courts.<sup>32</sup>

The recommendations of the Expert Committee on 'Infrastructure Projects' have been substantially incorporated in the amended Act. However, the government has opted not to define 'Public Works Contract' and instead sub-categorized it into 5 sectors, viz., Transport, Energy, Water & Sanitation, Communication and Social & Commercial Infrastructure.<sup>33</sup> Further, to ensure flexibility, the executive has reserved the power to amend the Schedule as and when the need arises, subject to the Parliamentary approval. Additionally, the Expert Committee recommended that "with respect to enforcement of a Public Works Contract the court shall, as far as practicable, ensure continued provision of the relevant service on such terms as it deems fit"<sup>34</sup>. On a plain reading of the recommendation, it is understood that recommendation provided sufficient room for the courts to exercise discretion and grant injunction, whereas the amended Act has limited the discretion to grant injunction.

The special recognition to infrastructure projects will provide the dual benefit of promoting economic growth and protecting investor sentiment.<sup>35</sup> It can be said that cost escalation due to delay in execution of infrastructure projects is one of the major reasons for incorporating these special provisions in the Act. While the object behind the amendment is larger public interest, the possibility of the courts refusing to entertain an injunction even in bonafide cases raises serious public policy concerns. Nonetheless,

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<sup>32</sup> *ibid*

<sup>33</sup> The Schedule to the Specific Relief Act, 1963

<sup>34</sup> Chapter VIII (Para 18.10), *Report of the Expert Committee on the Specific Relief Act, 1963*, Page 95

<sup>35</sup> FE Bureau, *What Centre is doing to remove a massive infrastructure roadblock*, The Financial Express (23 December, 2017), Available at <https://www.financialexpress.com/industry/what-centre-is-doing-to-remove-a-massive-infrastructure-roadblock/986384/>

the amendment is in line with the government's attempt to usher in sustained reforms in the economy through initiatives such as Insolvency and Bankruptcy Code, 2016, Goods and Services Tax, 2017 and simplification of other regulatory compliances.

### *E. Role of experts*

The amendment addressed the problems around lack of domain knowledge for dealing with contracts on complex technical or scientific issues. Section 14A has been inserted in the Act, which provides that the courts can engage expert assistance on any specific issue in order to effectively and expeditiously decide disputes.<sup>36</sup> However, the amendments partially incorporate the recommendation of the Expert Committee. It had suggested provisions for "parties' right to opt out of Section 14A"<sup>37</sup> and "court's request to parties to nominate an expert"<sup>38</sup>, which was not included in the amendment. Nonetheless, the Section starts with "Without prejudice to the generality of the provisions contained in the Code of Civil Procedure, 1908"<sup>39</sup>, which implies that the parties on their own can engage an expert on a specific issue, under Order 16 Rule 14 of the Civil Procedure Code, 1908.<sup>40</sup>

The incorporation of the specific provision for experts brings the Specific Relief Act on the same footing as the Arbitration and Conciliation Act, 1996<sup>41</sup> which has specific provisions to appoint experts. It also overcomes the difficulties posed by the absence of

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<sup>36</sup> Section 14A, Specific Relief Act, 1963

<sup>37</sup> Chapter VIII (Para 18.14), *Report of the Expert Committee on the Specific Relief Act, 1963*, Page 98

<sup>38</sup> *ibid*

<sup>39</sup> *Supra.*, n. 31

<sup>40</sup> Civil Procedure Code, 1908

<sup>41</sup> Section 26 gives the power to the arbitral tribunal to appoint an expert to report on any specific issue

specific provisions to seek expert opinion on complex technical or scientific issues under the Civil Procedure Code, 1908<sup>42</sup> and Indian Evidence Act, 1872<sup>43</sup>. Subsequent to the amendments, the court on its own can seek assistance on technical issues requiring specific technical or scientific understanding or knowledge for effective redressal of the disputes.<sup>44</sup>

*F. No requirement to specifically aver readiness and willingness to perform*

As per Section 16(c) of the erstwhile Act, an aggrieved party has to 'aver and prove' that it has performed or has always been ready and willing to perform the essential terms of the contract.<sup>45</sup> Further, the explanation states that the aggrieved party must aver performance of, or readiness and willingness to perform.<sup>46</sup> The courts have been strict in enforcing the requirement of Section 16(c) and regarded it as a mandatory requirement without which specific performance cannot be enforced in favour of a person.<sup>47</sup>

Therefore, even if it is established in evidence that the plaintiff aggrieved party has always been ready and willing to perform the contract, in the absence of a specific plea in the plaint, the court can refuse to grant decree for specific performance to the plaintiff

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<sup>42</sup> Order 16 Rule 14 can be broadly interpreted to include court's right to summon an expert witness. However, the provision was used sparingly by the Courts.

<sup>43</sup> Section 45 provides for assistance of an expert upon a point of foreign law, or of science, or art, or as identity of handwriting or finger impressions. However, the evidence is received with great caution.

<sup>44</sup> Chapter V (Para 13.4), *Report of the Expert Committee on the Specific Relief Act, 1963*, Page 67

<sup>45</sup> Specific Relief Act, 1963, Available at

<https://indiacode.nic.in/acts/10.%20Specific%20Relief%20Act,%201963.pdf>

<sup>46</sup> *ibid*

<sup>47</sup> *Ouseph Varghese v. Joseph Aley*, (1969) 2 SCC 539; *Sandhya Rani v. Sudha Rani*, AIR 1978 SC 537.

party.<sup>48</sup> After the amendment, the aggrieved party is now only required to 'prove' readiness and willingness to perform the contract. The specific requirement to 'aver' has been removed and the words 'who fails to aver and proved' in Section 16(c) have been substituted with 'who fails to prove'. Therefore, the courts can infer that a party seeking relief has performed or has been ready and willing to perform its part and can grant specific relief, even if the pleadings do not contain an averment to that effect.

#### [IV.] PROSPECTIVE OR RETROSPECTIVE?

Whenever the Parliament passes an Amendment Bill, it usually discloses its intent to keep it prospective or to make it retrospective. An amendment could be declaratory or clarificatory in nature, when it is enacted to remove doubts existing to the meaning or effect of any statute.<sup>49</sup> Such an amendment is generally regarded as retrospective in nature. On the other hand, if an amendment for the first time creates or changes a substantive provision, it is construed to have a prospective effect.

The Specific Relief (Amendment) Act, 2018 does not provide any guidance on its prospective or retrospective applicability. Ideally, a savings clause should have been inserted to keep any controversy at distance.<sup>50</sup> A controversy arose in the context of the Arbitration and Conciliation (Amendment) Act, 2015, which was

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<sup>48</sup> *Byomkesh v. Nani Gupta*, AIR 1983 SC 876.

<sup>49</sup> PWC Tax & Regulatory Services, Supreme Court provides clarity on retrospective vs prospective operation on tax amendments, Available at <https://www.pwc.in/assets/pdfs/news-alert-tax/2014/pwc-news-alert-26-september-2014-supreme-court-provides-clarity-on-prospective-versus-retrospective-operation-of-tax-amendments.pdf>

<sup>50</sup> The Real Estate (Regulation and Development) Act, 2016 clarified that it is applicable only to on-going projects which have not received the Occupancy Certificate as on May 1, 2017, the date on which the Act came into force.

recently settled by the Supreme Court.<sup>51</sup> Hence, the question arises whether the amendments would apply to contracts entered into prior to the amending Act coming into force.

The ordinary rules of construction, as laid down in various judicial precedents provide that every statute is prospective unless it is expressly or by necessary implication made to have retrospective operation.<sup>52</sup> The nature of the Specific Relief (Amendment) Act, 2018 gives primacy to specific performance over monetary compensation. Further, the amendment brings about a fundamental change in the law by stating that specific performance would no longer be left to the court's discretion, but would be available as a matter of right. This is clearly a substantive change in law which is remedial in nature.<sup>53</sup> Remedial statutes are reasonably derived as prospective unlike declaratory or clarificatory statutes and therefore, it can be said that the amendment is applicable prospectively.

The Specific Relief (Amendment) Act, 2018, repealed and substituted the corresponding provisions of the erstwhile Act. Section 6(c) states<sup>54</sup> that "unless a different intention appears, a repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed". Section 6(b) saves the "previous operation of any enactment so repealed or anything duly done or suffered thereunder"<sup>55</sup>. Therefore, for the contracts entered into before the amendment coming into force, by virtue of Section 6, the specific performance

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<sup>51</sup> Board of Control for Cricket in India v. Kochi Cricket Private Limited AIR 2018 SC 1549

<sup>52</sup> Commissioner of Income Tax, New Delhi v. Vatika Township Private Limited (2015) 1 SCC 1

<sup>53</sup> Union of India v. IndusInd Bank Limited AIR 2016 SC 4374

<sup>54</sup> General Clauses Act, 1897

<sup>55</sup> *ibid*

cannot be granted as a matter of right and that the obligation on the plaintiff to show monetary compensation is not an adequate relief, under the unamended Act stands preserved. This interpretation could be sourced from the plain language of the amendment Act which does not in any way indicate a legislative intent to take away such accrued and vested rights.

However, in the case of *Baroda Cement and Chemical Limited v. CIT*<sup>56</sup>, the tribunal held that a “right accrues or vests only when a breach of the contract occurs”<sup>57</sup>. In the absence of any breach, no right could be said to have accrued under the unamended Act. Hence, even if a contract was entered before October 1, 2018<sup>58</sup>, the applicability of the amendment act would extend to all breaches and disputes that have arisen on or subsequent to this date. In the opinion of the author, this interpretation is in line with the main objective of the Amendment Act, which is to reduce the intervention of the courts in granting specific performance. Although it is preferred that the Parliament comes out with a provision clarifying this curious oversight, the scope of further litigation on the ambiguity around this issue cannot be completely ruled out.

#### [V.] CONCLUSION

As per the latest *Ease of Doing Business* rankings, India jumped 23 places from 100<sup>th</sup> to 77<sup>th</sup> position. However, in terms of enforcing contracts India stands at a lowly 163<sup>rd</sup> position out of 190 countries. It is to be noted that the rankings considered several indicators which are benchmark to May, 2018. Hence, the amendments to the

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<sup>56</sup> (1986) 53 CTR (Guj) 260

<sup>57</sup> Para 16, *ibid*

<sup>58</sup> On this date the Amendment Act came into force vide Notification No. S.O. 4888(E) dated September 19, 2018

Act will improve India's track record on the enforceability of contracts and accelerate the time taken to dispose of pending cases. The onerous obligations on the plaintiff aggrieved party which was essentially enjoyed as a privilege by the defendant have been substantially changed. The changes in its present form will preserve the sanctity of the contracts by protecting contractual expectation and wiping out uncertainties. Even though few clauses such as substituted performance and assistance from experts are usually incorporated in the contractual agreement by the parties, the amendment gives it a statutory backing. With the introduction of substituted performance, the party suffering breach will no more have to wait for the decree of specific performance, and can get the benefit close to the time fixed for performance in the contract. Further, with the provision of timeline for disposal of proceedings, the aggrieved party can now expect faster adjudication of disputes. It is safe to say that the recommendations of the Expert Committee have been substantially incorporated, wherein the motivating force was to significantly curtail down the judicial discretion in specific performance of contracts. Hence, to conclude, it can be said that the changes to the Act would make enforcement of contracts a much more effective and efficient process in India.

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## BUSINESS METHOD PATENTS: A CRITICAL STUDY

By Shubhi Goyal\*

*Business method patents allow their holders an exclusive means of carrying out business. Being a relatively new category of patents, there has been widespread confusion on the appropriateness and legality of such patents. This paper explores the controversy surrounding business method patents and why they are considered problematic. It also investigates the legal framework set by patent laws and the guidelines framed by the patent office as regards business methods in India. Furthermore, the position under TRIPS, and in the jurisdiction of United States and the European Union have been discussed.*

Keywords: Business method patents, software, State Street case

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## INTRODUCTION

Business methods are processes, techniques or means of computing administrative, financial and management data utilized for conducting particular types of commerce. In their most basic form, they are methods employed for the operation of any aspect of an economic enterprise. They were historically, included in the list of subject matter excluded from patenting in nearly all countries.<sup>1</sup> However, the American Supreme Court changed this in 1998, in *State Street Bank and Trust Co. v. Signature Financial Group Inc.*, holding that business methods implemented in software were not excluded from patenting<sup>2</sup>. Since then many countries like Australia, Japan and Singapore have allowed such patents, while others like European Union and Germany, while prohibiting the patenting of such methods or schemes per se, have allowed patents for business methods that satisfy the 'technical character' requirement. India falls under the category of countries that are still suspicious of such patents, specifically excluding them by law<sup>3</sup>. However, the Patent Office in India has allowed these patents to multiple companies, even in the face of express prohibition by the Indian Patents Act, 1970<sup>4</sup>. In addition, the Indian Patent Office's guidelines<sup>5</sup> as regards patenting of software, which form a big part of business method patents, are highly contentious, with some interpreting them as

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<sup>1</sup> Aparajita Lath & Shivam Bhardwaj, *Business Method Patents: An Oxymoron?*, 6 NUJS L. Rev. 124- 125, 121- 146 (2013).

<sup>2</sup> Gregory Rosenblatt, Christina K. Peterson & Jody Lynn DeStefanis, *A Sleeping Tiger? Business Method Patent Protection for Franchise Systems*, 22 Franchise L. J. 9, 9-14 59-60 (2002).

<sup>3</sup> Lath & Bhardwaj, *supra* note 1.

<sup>4</sup> Swaraj Paul Barooah, *Guest Post: Why are Business Method Patents being Granted?*, SPICYIP, (January 22, 2013), <https://spicyip.com/2013/01/guest-post-why-are-business-method.html>.

<sup>5</sup> GUIDELINES FOR EXAMINATION OF COMPUTER RELATED INVENTIONS (OFFICE OF THE CONTROLLER GENERAL OF PATENTS, DESIGNS AND TRADE MARKS, 2017)

allowing a sort of back- door entry to business method and software patents. While these guidelines have no legal backing since the provisions of Patents Act, 1970 override these in case of any conflict, they have muddled up India's policy perspective as regards business method patents.<sup>6</sup>

In this paper, the researcher has tried to answer the following questions:

- I. What are the concerns associated with business method patents that make them so controversial?
- II. How have the Courts in India been allowing business method patents for so long even in the face of an express prohibition in the Patents Act?
- III. What are the implications of the Indian Patent Office's latest guidelines?
- IV. A study of the situation as regards business method patents in USA and the European Union.

## **[I.] WHY ARE BUSINESS METHOD PATENTS SO CONTROVERSIAL?**

### *A. Prevent the entry of small businesses into the market*

Businesses involve the building of enduring relationships, with customer loyalty to the business as well as to its methods and processes being highly crucial.<sup>7</sup> Once customer loyalty towards a method takes hold, making the method a "sticky method"<sup>8</sup>, the invalidation of the patent after the twenty- year period makes no difference. This is clearly illustrated in the case of Amazon.com that

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<sup>6</sup> Swaraj Paul Barooah, *New CRI Guidelines Seem to be Result of Patent Office Overreach*, SPICYIP, (September 23, 2015), <https://spicyip.com/2015/09/new-cri-guidelines-seem-to-be-result-of-patent-office-overreach.html>.

<sup>7</sup> Alina Nastasoiu & Mark Vandenbosch, *Competing with loyalty: How to design successful customer loyalty reward programs*, 62 *Business Horizons* 207-214 (2019).

<sup>8</sup> *Ibid.*

acquired a patent on its one-click technology, enforced against BarnesandNoble.com. This technology stores users shipping and billing information, and on subsequent visits allows them to check out quickly during subsequent visits<sup>9</sup>. Even after the patent expires, buyers will have no incentive to go anywhere else and re-enter their details especially since Amazon now possesses the capability to further analyze the buyers information and offer them useful suggestions about future purchases. Another example of this is American Online Limited's Instant Messenger, which allows users to send and receive short text messages over the Internet<sup>10</sup>. This system is only successful when the people who the user wants to contact are also on the same network. Once a large network is created invalidation will become irrelevant.<sup>11</sup> Competitors would appear, but since they would have to necessarily start small, they would not be able to offer the same value to their customers. This makes it extremely hard for new and small businesses to enter the market, thus unfairly and unduly limiting competition.

### *B. Offends the rationale of Patent Law*

The main objective of patent law is to spur innovation and technological advances in society. However, many argue that competition in itself is a good motivation for the creation of new business methods and that no incentive is needed for the same. Business methods have been in existence for a long time and continue to develop even without the protection of any patent.

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<sup>9</sup> William C. Smith, *PATENT THIS! A landmark 1998 ruling led to a rush of Internet Companies looking to corner the market on business methods adapted to cyberspace. Critics say it also let in a slideshow of eccentric ideas, and now they are trying to close the door*, 87 ABA Journal 49, 48-52 54 56-57 (2001).

<sup>10</sup> Dave Roos, *How AOL Instant Messenger Works*, HOWSTUFFWORKS, <http://computer.howstuffworks.com/e-mail-messaging/aol-instant-messenger.htm>.

<sup>11</sup> Rochelle Cooper Dreyfuss, *Are Business Method Patents Bad for Business*, 16 Santa Clara Computer & High Tech. L. J. 270- 271, 262- 280 (2000).

There are various reasons for the same, with the most important being that they are hard to free-ride on as they as they depend strongly on the social structure within the firms utilizing them, their compensation schemes, lines of reporting, supervising policies and other social, economic and managerial factors. Furthermore, the costs incurred in developing Business Methods are recouped, with substantial profits being earned, eliminating the need for patent protection.<sup>12</sup>

*C. Impose extremely high costs on the society*

Firstly, there is the issue of deadweight loss as those who would have bought the product at the competitive price have probably forgone it at the higher patent price. Secondly, there is the offsets problem- since knowledge is cumulative, a rise in the price of using existing products having intellectual rights over them, will also increase the cost of innovating new products. Without the unfettered ability to access existing products, innovators are not able to push forward to create better and more innovative products. Thirdly, the incidence of spillover benefits is reduced, since the private right over a new technology can be used to stop others from using the technology in a way unanticipated by the rights holder. Forthly, certain patents may impose greater costs than others. These are patents on items that are needed in society to generate other applications and open up new technological opportunities. Business methods fall under this category, not only as stepping-stones to further inventiveness, but also for their usefulness to the economy. The free flow of information among firms can be crucial to the economic success of a country and patents on business methods can pose a serious impediment to this.<sup>13</sup>

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<sup>12</sup> Lath & Bhardwaj, *supra* note 1.

<sup>13</sup> Dreyfuss, *supra* note 8.

#### *D. Wide Scope*

A major concern that critics have with business method patents is their extremely wide scope. Absent the use of computers and software, these inventions seem to encompass definitions of entire businesses. If enforced, they would monopolize entire lines of business activity and not just a particular method for carrying on business. An example of this is Walker Digital's patent on the process of "Reverse-Auction", a bidding process mediated electronically, where an intermediary informs sellers of the price preferred by customers for some good and service, using which sellers can then make successful bids.<sup>14</sup> Another good case in point is the same company's patent on a method that first estimates the fluctuation of a foreign currency for a specified time period and then based on the fluctuation, calculates the cost of insurance<sup>15</sup>.

#### *E. Hard to test for novelty and non-obviousness*

For a product to be granted a patent, it must be useful, non-obvious and novel. The requirements of non-obviousness and novelty are established relative to "prior art", the array of prior solutions to the problem that the invention is purporting to solve. However, this determination becomes very hard in the case of business methods. This is because even though they might be common knowledge or practice in the industry, they are usually neither documented properly, nor dated or disclosed in forms so as to be easily accessible by patent examiners. The concern is that a lot of low quality patents on methods of doing business are being granted.<sup>16</sup>

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<sup>14</sup> U.S. Patent No. 5,794,207

<sup>15</sup> Starling Hunter, *Have Business Method Patents Gotten a Bum Rap? Some Empirical Evidence*, EBUSINESS@MIT, (October 10, 2018), [http://ebusiness.mit.edu/research/papers/182\\_Hunter\\_Method\\_Patents.pdf](http://ebusiness.mit.edu/research/papers/182_Hunter_Method_Patents.pdf).

<sup>16</sup> Wynn W. Coggins, *Prior Art in the Field of Business Method Patents- When is an Electronic Document a Printed Publication for Prior Art Purposes*, UNITED STATES PATENT AND TRADEMARK OFFICE, (2002), <https://www.uspto.gov/patents-getting->

A further concern as regards the specific requirement of novelty is that these patents merely automate well-known and widely used business processes, which were previously performed mechanically. Thus, the patent merely rewards those who have placed the well-known process on the Internet first, rather than invented anything new.<sup>17</sup>

As regards non-obviousness, several prominent legal scholars are of the opinion that courts would find many of business methods obvious if they look at the internet as just one location where the method could have been used before and also look at other concrete locations.<sup>18</sup>

## [II.] BUSINESS METHOD PATENTS IN INDIA

Business method patents are specifically prohibited in India under Section 3(k) of the Indian Patents Act, 1970. In addition, the Intellectual Property Appellate Board in its 2011 judgment in *Yahoo Inc. v. Controller*<sup>19</sup> ruled that pure business methods are not patentable in India. The case in question involved a patent application filed by Yahoo Inc. for 'a method of operating a computer network search apparatus'.<sup>20</sup> To overcome the doubts as regarding the method's novelty, Yahoo had submitted technical subject matter.<sup>21</sup> While eventually able to overcome all other objections as regards novelty and non-obviousness, the patent application was ultimately rejected on the most important ground,

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started/patent-basics/types-patent-applications/utility-patent/business-methods-17.

<sup>17</sup> Lath & Bhardwaj, *supra* note 1.

<sup>18</sup> Lath & Bhardwaj, *supra* note 1.

<sup>19</sup> 2010 (44) PTC 8 (Mad).

<sup>20</sup> *Id.*, ¶ 1.

<sup>21</sup> *Id.*, ¶16, 25

i.e. the test of invention.<sup>22</sup> The IPAB considered the definition of business methods, holding that they include the whole gamut of activities in a commercial or industrial enterprise relating to the transaction of goods and services and held that they were not patentable in India, in lieu of Section 3(k).<sup>23</sup> The Board also considered the status of Business Method Patents in other countries like USA, UK and the EU region and concluded that the situation of these countries was different from India because the law in these countries did not expressly prohibit such patents.<sup>24</sup> Another point that came up in the case was the fact that even though the law in India expressly prohibits business method patents, several such patents have been granted by the Patent Office to Google Inc.<sup>25</sup> A study of patents in India shows that numerous other companies have been granted protection for such patents by the Patent Office.<sup>26</sup> A few illustrative examples are under:-

*A. Huawei Technologies Patent on Method for Call Control*

Operators offering post- paid telephonic services frequently face the problem of excessive arrears, since subscribers make use of this service before paying. To remedy this, Huawei Technologies Co. Ltd. in 2012 designed a method to monitor and manage these arrears. This method includes a Service Control Point (SCP), which receives calls from a switch system and sends out an authentication request with a subscriber identifier of the call, to a Business Operation Supporting System (BOSS). The BOSS then authenticates this according to a subscriber identifier of the call carried in the authentication request and generates an authentication result.

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<sup>22</sup> Id., ¶ 48

<sup>23</sup> Id., ¶ 26

<sup>24</sup> Id., ¶¶ 37, 39

<sup>25</sup> Rajiv Kr. Choudhry, *Yahoo v. Controller, and Rediff: Business Methods are not Patentable*, SPICYIP, (January 12, 2012), <https://spicyip.com/2012/01/yahoo-v-controller-and-rediff-business.html>.

<sup>26</sup> Barooah, *supra* note 4.

Based on this authentication result, the SCP controls the call, saving the operators precious money. In the prior art for such services, BOSS performed the charging according to the call service bill after the service would be finished. Since according to the charging result the subsequent call would be performed, the problem of arrears would remain.

The patent was basically claimed and granted to the method and system for call control, and the Service Control Point (SCP) and Business Operation Processing Systems<sup>27</sup>.

*B. Punjab National Bank Ltd. Patent on Method and Computing System for Evaluating Credit Risk Rating*

Credit risk rating provides an assessment of the risk of a borrower failing to meet his obligations towards the creditor, thus helping the creditor make such decisions as whether to lend to a particular borrower or not, the risk premium to charge from the borrower, the extent of collateral security required and frequency of renewal of the loan facility. The only prior art that existed was a patent filed in USA, whereby the credit risk was determined through an estimation of the volatility in the market value of the borrower's assets, making use of the market value of the borrower's assets as reflected by its share price to assess the worth of the borrower's assets accurately. This method had two problems—firstly, the share price was not necessarily indicative of the accurate value of a borrower's assets in all countries and secondly, it was not usable for those borrowers for whom market data was not available. Punjab National Bank came up with a system of computing the credit risk rating of a borrower using their past transactions. In this system, a financial performance analysis of the client's audited financial data obtained from companies is conducted against peer group relative parameters as well as

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<sup>27</sup>. Indian Patent No. 252951, (issued Jun. 11, 2011)

absolute benchmark parameters to generate scores that are then aggregated to achieve the final rating. The patent was obtained on this computing system and program product, used for calculating the credit risk rating of the borrowers.<sup>28</sup>

*C. Afton Chemical Corporation Patent on Fuel Composition Comprising Fuel and Lubrication Oil Composition*

Afton Corporation came up with a method of enhancing fuel value for a used or waste lubricating oil, taking into consideration the improved combustion and emission characteristics of such oils, and a method for their distribution and usage as primary combustion fuels. The latter involved the leasing out an oil of lubricating viscosity to a user. After use, the oil would be collected from the user and sold as a fuel component. The patent claim explicitly mentioned that it was for a method of doing business, among other things.<sup>29</sup>

*D. Google Inc. Patent on Generating User Information for Use in Targeted Advertising*

In recent times advertisers have developed several strategies in order to maximize the value of their advertising. One such strategy involves targeting ads to narrower niche audiences, increasing the likelihood of a positive response by the audience. There exist several prior patents in this field, such as “serving advertisements using information associated with email” and “advertisements based on content”. However, there was the need for a system that while relevant to the user requested information in general, would be related to the current user interest in particular. Google Inc. came up with a method of determining particularly relevant advertisements to serve user requests by using the user profile

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<sup>28</sup> Indian Patent No. 217341 (issued Mar. 06, 2008)

<sup>29</sup> Indian Patent No. 240258 (issued Apr. 30, 2010)

information, both initial and inferred, by using the users' past search queries.<sup>30</sup>

It is apparent that all these are pure business methods since they seek to achieve business profitability and efficiency, either administratively or by enhancing customer services, using well-known principles of commerce.<sup>31</sup> Most of these supposed "inventions" though executed by computer programs lack a technical application and more often than not produce no tangible or concrete result.<sup>32</sup> Even if it is argued that some of them do produce technical effects, which is a requirement for "inventive step" under the Indian Patents Act, 1970, they are prima facie business methods, which are expressly prohibited under Indian Law.<sup>33</sup> However, "technical effects" is usually the criterion that has been used by the Indian Patent Office to grant patents for business methods, although it has usually shied away from classifying these as business method patents.<sup>34</sup>

### [III.] INDIAN PATENT OFFICE'S GUIDELINES

The Indian Patent Office released the *Guidelines for the Examination of Computer Related Inventions* in 2015<sup>35</sup>. These guidelines, while meant to foster clarity and uniformity in patent office practice, invariably paved the way for software and business

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<sup>30</sup> Indian Patent No. 252220 (issued May 02, 2012)

<sup>31</sup> Lath & Bhardwaj, *supra* note 1.

<sup>32</sup> *Ibid.*

<sup>33</sup> Barooah, *supra* note 4.

<sup>34</sup> Abhimanyu Ghosh, *Business Method Patents: The Road Ahead*, 11 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 175- 184 (2006).

<sup>35</sup> GUIDELINES FOR EXAMINATION OF COMPUTER RELATED INVENTIONS (OFFICE OF THE CONTROLLER GENERAL OF PATENTS, DESIGNS AND TRADE MARKS 2015); Can be accessed at [http://www.rc-iplaw.com/wordpress/wp-content/uploads/2015/10/CRI\\_Guidelines\\_21August2015.pdf](http://www.rc-iplaw.com/wordpress/wp-content/uploads/2015/10/CRI_Guidelines_21August2015.pdf).

method patents to be allowed in India.<sup>36</sup>

Section 3(k) of the Indian Patents Act, 1970 excludes the following from patentability: *a mathematical or business method or a computer program per se or algorithms*". The new guidelines while purporting to treat claims related to business method patents as non-patentable, specified that if the claimed subject matter of the patent application includes an apparatus or a technical process for carrying out the invention even in part, the claim would be examined for novelty, non-obviousness and technical effect as a whole and would not per se be discarded. Furthermore, the mere usage of words like "enterprise", "business", "supply-chain", "sales" and "commerce" in the claim would not render it as a claim for the patenting of a business method. This made the exclusion of business method patent under Section 3(k) merely illusory and provided a way for them to be granted.<sup>37</sup>

With regard to computer programs or software, which form an important part of business methods, the Patent Office stated that as long as the patent is not claimed in itself, but in a manner which establishes industrial applicability, as well as fulfilling the other patent criteria, there would be no grounds for the denial of such a patent. In arriving at this interpretation, the Office had regard to the Report of the Joint Parliamentary Committee on the Patents (Second Amendment) Bill, 1999, where it was stated that the legislative intent behind the words "per se" in Section 3(k) was to allow for the patenting of things considered essential to give effect to a computer program, as well as any technical improvement or advancement achieved by a computer program. However, it failed

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<sup>36</sup> Barooah, *supra* note 5.

<sup>37</sup> *Concerns over the "Guidelines for Examination of Computer Related Inventions (CRI's)" Issued on August 21, 2015*, SFLC, (September 9, 2015), [https://sflc.in/wp-content/uploads/2015/09/Letter\\_CRIGuidelines2015-Prime-Minister.pdf](https://sflc.in/wp-content/uploads/2015/09/Letter_CRIGuidelines2015-Prime-Minister.pdf).

to take into consideration the unsuccessful attempt made by the Patents (Amendment) Bill, 2005 to amend Section 3(k) and extend patentability to computer programs with technical applicability to industry, in lieu of the concern that this would result in the creation of monopolies by multi- nationals.<sup>38</sup>

In 2016 revised guidelines<sup>39</sup> were released by the Patent Office, although the provisions as regarding business methods remained the same, with claims for such patents being examined as a whole, if even a small part is carried out through an apparatus or a technical advancement. However, as regards computer programs or software, a new condition of novel hardware was added, whereby a computer programme if claimed in conjunction with a novel hardware, would be examined for patentability in entirety, but if not, would be unpatentable, without the need for any exception<sup>40</sup>.

2017 saw another set of guidelines<sup>41</sup> being released, which while again consistent on the status of business methods as patents, significantly reversed the position of computer programs/ software. The requirement of being coupled with a novel hardware for a computer program to be considered for patent protection, which

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<sup>38</sup> Barooah, *supra* note 4.

<sup>39</sup> GUIDELINES FOR EXAMINATION OF COMPUTER RELATED INVENTIONS (OFFICE OF THE CONTROLLER GENERAL OF PATENTS, DESIGNS AND TRADE MARKS 2016); Can be accessed at [http://www.sric.iitkgp.ac.in/Patent\\_portal\\_v3/Downloads/cri.pdf](http://www.sric.iitkgp.ac.in/Patent_portal_v3/Downloads/cri.pdf)

<sup>40</sup> Rajiv Kr. Choudhry, *New CRI Examination Guidelines Issued by our Patent Office*, SPICYIP, (February 22, 2016), <https://spicyip.com/2016/02/new-cri-examination-guidelines-issued-by-our-patent-office.html>.

<sup>41</sup> GUIDELINES FOR EXAMINATION OF COMPUTER RELATED INVENTIONS (OFFICE OF THE CONTROLLER GENERAL OF PATENTS, DESIGNS AND TRADE MARKS 2017); Can be accessed at [http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/Revised\\_\\_Guidelines\\_for\\_Examination\\_of\\_Computer-related\\_Inventions\\_CRI\\_\\_.pdf](http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/Revised__Guidelines_for_Examination_of_Computer-related_Inventions_CRI__.pdf)

the 2016 guidelines had introduced, was removed. Thus the term “per se” has now been left open-ended, allowing industry players to circumvent in ways other than the coupling with novel hardware.<sup>42</sup>

While these guidelines have no legal backing, with the Patents Act overriding them in case of conflict between the two, they are used by the Patent Office while examining and awarding patents. Furthermore, these guidelines are meant to provide clarity as regards the interpretation of the Patents Act and are also frequently made use of in Patent prosecution. Hence, they might pave the way for the Patent Office to grant patents in cases in which the legislature expressly sought to exclude them.<sup>43</sup>

#### [IV.] BUSINESS METHOD PATENTS IN OTHER JURISDICTIONS

##### A. Trade Related Intellectual Property Rights Agreement

Article 27.1 of the TRIPS Agreement<sup>44</sup> states that “patents shall be available for any invention, whether products or processes, in all fields of technology”, given that they are new, innovative and capable of industrial application. Business method patents are not expressly excluded under the TRIPS Agreement.<sup>45</sup> However, the lack of a definition for the terms “new”, “innovative” and “capable of industrial innovation”, makes the position of business method patents ambiguous under the Agreement. Proponents of the patentability

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<sup>42</sup> Balaji Subramaniam, *Patent Office Reboots CRI Guidelines yet Again: Removes “Novel Hardware” Requirement*, SPICYIP, (July 25, 2017), <https://spicyip.com/2017/07/patent-office-reboots-cri-guidelines-yet-again-removes-novel-hardware-requirement.html>.

<sup>43</sup> Barooah, *supra* note 4

<sup>44</sup> Can be accessed at [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf)

<sup>45</sup> Lath & Bhardwaj, *supra* note 1.

of such patents argue that the lack of specific exclusion means that they are allowed under the Agreement.<sup>46</sup> The opponents however argue that since most business methods entail the use of computer programs and TRIPS has specifically granted protection to computer programs, the alternative protection indicates the intent to exclude business methods from patent protection.<sup>47</sup>

### B. United States

Business method patents are not expressly prohibited in USA, from the purview of an “invention”. However, in the absence of clear limits, Courts have been largely inconsistent in their judgments as regards these patents.<sup>48</sup>

The history of business method patents in the United States began with *Hotel Security Checking Co. v. Lorraine Co.*<sup>49</sup> where the Court ruled that systems of transacting business, disconnected from the means for carrying out the system cannot be considered to be an art. This became the basis for the business method exception in USA, the idea that business method patents were automatically unpatentable.<sup>50</sup>

With the advent of computers, the distinction between technical

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<sup>46</sup> Tim L. Brackett, Jr. & Robert L. Pilaud, *Views on Business Method Patents Differ Throughout the World*, January 22, 2002, available at <http://www.nixonpeabody.com/116468#Note21>

<sup>47</sup> Rajnish Kumar Rai & Srinath Jagannath, *Do Business Method Patents Encourage Innovation?*, BOSTON COLLEGE INTELLECTUAL PROPERTY AND TECHNOLOGY FORUM, <http://bciptf.org/wp-content/uploads/2012/10/Business-Method-Patents-and-Innovation.pdf>.

<sup>48</sup> James S. Sfekas, *Controlling Business Method Patents: How the Japanese Standard for Patenting Software could bring Reasonable Limitations to Business Method Patents in the United States*, 16 *Pacific Rim Law & Policy Journal* 201- 203, 197- 226 (2007).

<sup>49</sup> 160 F 467 (2 d Cir 1908).

<sup>50</sup> Pol S., Janodia M.D., Jagadeesh P.C., Bhat K.M. & Udupa N., *Business Method Patents: A Primer*, J. YOUNG PHARM., 379- 384 (2009).

processes and business methods began to blur. The Court considered this boundary in *Gottschalk v Benson*<sup>51</sup>, holding that phenomena of nature, whenever discovered, mental processes and abstract intellectual concepts were not patentable since they formed the basis for further scientific and technological work. Patentable subject matter resulted from the application of these to produce new and useful results. This ruling received further ground in *Parker v Flook*<sup>52</sup>, where the Court held that while law of nature or mathematical algorithm did not automatically lead to disqualification of patentability, it was essential for an invention to include some other inventive concept in its application to qualify for patentability. This judgment was interpreted by the United States Patent and Trademark Office (USPTO) to mean that computer related inventions were barred from claiming patents.<sup>53</sup>

This was soon contradicted in the case of *Diamond v Diehr*<sup>54</sup>, where the Supreme Court held that just because one part of the process of curing rubber was computer- controlled did not make it unpatentable. Thus, though mathematical formulas in the abstract could not be patented, the mere presence of a software element did not make an otherwise patentable machine or process patent-ineligible.<sup>55</sup>

At almost the same time, the US Supreme Court in the case of *Diamond v. Chakrabarty*<sup>56</sup> allowed an applicant to patent a type of bacteria, holding that the use of words like “*manufacture*” and “*composition of matter*” indicated that the legislature intended the

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<sup>51</sup> 409 U.S. 63 (1972).

<sup>52</sup> 437 U.S. 584 (1978).

<sup>53</sup> *Id.*

<sup>54</sup> 450 U.S. 175 (1981).

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

<sup>56</sup> 447 U.S. 303 (1980).

patent laws to be given a wide scope. The legislature intended statutory subject matter to include anything under the sun, made by man.<sup>57</sup>

In subsequent years, the Court of Appeals for the Federal Circuit came up with the Freeman- Walter- Abele Test<sup>58</sup>, which requires a physical transformation of the subject matter, to limit the patentability of software inventions. However, with growing momentum for the relaxation of standards as regards patentable subject matters, the District Court in *Re Alappat*<sup>59</sup> held that an invention would not be unpatentable, merely because the claim would read on a general- purpose computer, programmed to carry out an invention.<sup>60</sup>

This was followed by the highly controversial *State Street Bank & Trust Co. v. Signature Financial Group Inc.*<sup>61</sup>, where a patent was sought for a computerized accounting system for the management of mutual funds called a 'Hub & Spoke' configuration. The computer system calculated the daily gains and losses of pooled assets of various mutual funds, called the 'hub', and the proportional gains and losses of each fund, the 'spoke'. The case

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<sup>57</sup> *Id.*

<sup>58</sup> The first step of this test is to determine whether or not the claim directly or indirectly recites a mathematical algorithm. If a mathematical algorithm is found to be present, then the next step is to determine whether or not the algorithm is applied in any manner to physical elements or process steps. The second step of this test was to determine whether the claimed invention as a whole is no more than the algorithm itself, i.e. whether the claim is directed to a mathematical algorithm that is not applied to or limited by physical elements or process steps. Several factors were to be considered as part of this test in performing the second step such as post- solution activity, field of use limitations, data gathering steps, transformation of something physical and structural limitations in process claims.

<sup>59</sup> 33 F.3d 1526.

<sup>60</sup> *Id.*

<sup>61</sup> 149 F.3d 1368.

first went to the District Court that invalidated the patent by relying on the Freeman- Walter- Freeman Abele test. The Federal Court however reversed this decision, holding that there existed no per se exception to the idea of business method patents and they had to be tested on the ground of production of a “*useful, concrete and tangible result*”. This test made a number of business methods amenable to patent protection and the market was flooded with them. A year later, in *AT&T Corp. v. Excel Communications*<sup>62</sup> the Court broadened the scope of test given in the State Street case to include process claims, in addition to the machine claims already allowed for.<sup>63</sup>

*Re Bilski*<sup>64</sup> however saw the scope of business method patents greatly restricted again, with the Court holding the judgment in State Street not good law and reestablishing the machine- or-transformation test. The case involved the patentability of a method of hedging risks in commodities trading and the Court rejected the claim, applying the test given in *Gottschalk v. Benson*. This judgment was again revised in the case of *Bilski v Kappos*<sup>65</sup> where the court held that the machine and transformation test was not the sole test for determining the patentability of a process, but was rather one of the good investigative tools that could be used for such an enquiry<sup>66</sup>.

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<sup>62</sup> 172 F.3d 1352.

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

<sup>64</sup> 545 F.3d 943.

<sup>65</sup> 561 U.S. 593 (2014).

<sup>66</sup> Andrew S. Ehmke & Alan N. Herda, *Keeping Current: Patents: The Supreme Court Launches a Lifeboat for Business Method Patents Bilski for Business Lawyers*, JSTOR, (August 2010), <https://www.jstor.org/stable/pdf/businesslawtoday.2010.08.08.pdf?refreqid=excelsior:8d7712fe472b054e171199c50af852cf>.

### C. European Union

The status of business method patents according to the European Patent Convention (EPC) is uncertain. Article 52(2) of this Convention defines which inventions are patentable and explicitly excludes business methods from this definition in paragraph (c) by excluding, “schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers.” However, Section 52(3) of the same Act says that the provisions of sub- section (2) only exclude inventions from patentability “to the extent to which a European patent application or European patent relates to such subject matter or activities as such”. Reading the two provisions together, the Board of Appeal at the European Patent Office concluded that the intention of the legislator was not to exclude all business methods from patentability and they are allowed at least to some extent. To distinguish between patentable and non- patentable business methods, the Board of Appeal came up with the criterion of ‘technical character’. This means that the patent application must contain technical considerations either in the underlying problem solved by the claimed invention, the means of solving the underlying problem or in the technical effects achieved in the solution of the problem. The Council of Ministers of the European Community also in 2654<sup>th</sup> meeting on the competitiveness of the Council of European Union in 2005, voted in favor of allowing the patenting of both software and business methods, if they are sufficiently technical.<sup>67</sup>

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<sup>67</sup> Stefan Wagner, *Business Method Patents in Europe and their Strategic Use: Evidence from Franking Device Manufacturers*, UNIVERSITY OF MUNICH, (November, 2006), [https://epub.ub.uni-muenchen.de/1265/1/Wagner\\_bmp.pdf](https://epub.ub.uni-muenchen.de/1265/1/Wagner_bmp.pdf).

## [v.] CONCLUSION

In the light of above, it is clear that the concerns associated with allowing the patenting of the business method patents are not unfounded. They have serious implications not only for the smaller companies trying to enter the market, but also the wider economy by their chilling effect on competition. It is thus, understandable why developing countries like India, China and Mexico have to be so hesitant in granting patent protection to such purported “inventions”.

India however needs to rethink the status quo on business method patents as there exists confusion between different authorities- the legislature seems to have explicitly excluded the granting of patent protection to such inventions, while the Patent Office seems to be allowing them and in fact has created a backdoor entry for them through its guidelines. The Courts have ruled in consonance with the legislature’s intent. The result is an inconsistency, with some companies being granted business method patents, while some others being denied such protection.

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## PERMANENT ESTABLISHMENTS: THE CURIOUS CASE OF AMALGAMATED COMPANIES

By Akshay Douglas Gudinho\*

*As Permanent Establishments (“PE”) form a part of the discourse on Double Taxation Avoidance Agreements (“DTAA”) in international taxation jurisprudence. The concept encapsulates an interesting shift of tax liabilities from the source to the resident country and vice versa. Loosely defined, a PE is of such a nature that it would amount to a virtual projection of a foreign enterprise of one country into the soil of another country.<sup>1</sup>*

*According to the OECD Articles of the Model Convention with respect to Taxes on Income and Capital<sup>2</sup> (“the Convention”), a PE takes a plethora of forms.<sup>3</sup> However, the paper shall be restricted to agency PE’s, primarily, amalgamated agency PE’s. Pursuant to a scheme of amalgamation after transacting with the foreign enterprise, the grounds for agency PE and exceptions for the same merit attention. Neither does the OECD convention nor do majority of the DTAA’s provide a comprehensive text for reference to conclusively define an agency PE in this regard.*

**Keywords:** Amalgamation, business connection, commercial independency, Double Taxation Avoidance Agreement, Permanent Establishment.

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<sup>1</sup> CIT v. Visakhapatnam Port Trust, (1983)144 ITR 146.

<sup>2</sup> Organization for Economic Cooperation and Development, *Articles of the Model Convention with respect to Taxes on Income and on Capital*, OECD, (Aug. 08, 2018, 11:20 AM) available at <https://www.oecd.org/tax/treaties/1914467.pdf>

<sup>3</sup> *Id.* at art. 5.

## INTRODUCTION

*Part [I.]* of the paper provides the definition of a PE and its domestic corollary; business connection. *Part [II.]* deals with the jurisdiction of taxation with respect to the taxation of the profits of the foreign enterprise. *Part [III.]* analyses the relationship between the ordinary course of business of amalgamated PEs and the activities it performs on behalf of the foreign enterprise, and the evaluation of commercial independency on the basis of profits and gross receipts. *Part [IV.]* evaluates the implications of the General Anti Avoidance Rules (“GAAR”) which seeks to provide resolve to arrangements of tax evasion and avoidance. *Part [V.]* provides certain points of recommendations for effective implementation of the GAAR.

### [I.] DEFINING AGENCY PERMANENT ESTABLISHMENTS

A joint reading of Article 5 (5)<sup>4</sup> and Article 5 (6)<sup>5</sup> of the convention maintains four primary grounds for establishment of an Agency PE.

*Firstly*, when a person is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts on behalf of the enterprise, excluding the activities mentioned in paragraph 4. The OECD Base Erosion and Profit Shifting (“BEPS”) Action 7<sup>6</sup> extends the aforesaid to “concludes contracts or plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise” as the test of establishing a

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<sup>4</sup> *Supra* note 2 at art. 5 ¶ 5.

<sup>5</sup> *Id.* at art. 5 ¶ 6.

<sup>6</sup> Organization for Economic Cooperation and Development, *Additional Guidance on the Attribution of Profits to Permanent Establishment: BEPS Action 7*, OECD (Sept. 02, 2018, 10:30 AM), [www.oecd.org/tax/beps/additional-guidance-attribution-of-profits-to-a-permanent-establishment-under-bepsaction7.htm](http://www.oecd.org/tax/beps/additional-guidance-attribution-of-profits-to-a-permanent-establishment-under-bepsaction7.htm).

PE.<sup>7</sup> Thus, a country that chooses to be bound by BEPS Action 7, the mere formality of signing of the contract would no longer serve as the sole criterion for the conclusion of contract that establishes a PE.

*Secondly*, Paragraph 4 (f) of Article 5 maintains that the overall activity of the fixed place of business resulting from the combinations enumerated under subparagraphs (a) to (e) must be of a preparatory or auxiliary character. It is well settled in *TVM Ltd. v. Commissioner of Income-Tax*<sup>8</sup> that when an "agent" fails to come up to the standard of independence referred to in paragraph 5, the issue regarding permanent establishment is not closed but has to be resolved in terms of paragraph 4. Thus, the activities of the agent must be proved to be not of a preparatory or auxiliary character. BEPS Action 7 maintains exceptions (Paragraph 4.1) to Paragraph 4 of Article 5 as a new anti-fragmentation paragraph.<sup>9</sup>

*Thirdly*, if Article 5 (4) applies to the activities of an agent too, Article 5 (1)<sup>10</sup> necessitates that the business of an enterprise be carried out wholly or partly by the agent. *Lastly*, a broker, general commission agent, or any other agent of an independent status, must prove to have not acted in its ordinary course of business.<sup>11</sup>

#### A. Agents under the Income Tax Act, 1961

Section 163 of the Act defines the grounds for an "agent" in relation to a non-resident.<sup>12</sup> Section 163 (b) maintains that an agent shall include a person who has a business connection with the non-resident.<sup>13</sup> The term "business connection" under the said section is the attracting provision that brings the agent under liability of the Act for income deemed to accrue or arise through or from a business connection with the foreign enterprise u/s 9 (1) (i) of the

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<sup>7</sup> *Id.* at ¶28.

<sup>8</sup> *TVM Ltd. v. Commissioner of Income-Tax*, (1999) 237 ITR 230 AAR.

<sup>9</sup> *Supra* note 6, at ¶7.

<sup>10</sup> *Supra* note 2, at art. 5 ¶1.

<sup>11</sup> *Id.* at art. 5 ¶6.

<sup>12</sup> Income Tax Act, 1961, No.43, Acts of Parliament, 1961, (India), §163 (1).

<sup>13</sup> *Id.* at Explanation, §163.

Act.<sup>14</sup>

The Act enumerates a list of activities that establish a business connection between the Indian resident and the non-resident under Explanation 2 of Section 9 of the Act.<sup>15</sup> A person is not deemed to be a statutory agent with respect to a business connection if ; (i) he acts in the ordinary course of business,<sup>16</sup> (ii) does not work wholly or mainly on behalf of the non-resident,<sup>17</sup> and (iii) does not have a controlling interest in the principal non-resident.<sup>18</sup>

### *B. Burden of Proof on the Revenue Authorities*

It is settled law that where there is no liability under the Indian law, there is no need for considering the further question, whether the same set of facts could justify the inference of permanent establishment.<sup>19</sup> Thus, the revenue authority first bears the burden of proof for an agent u/s 163 of the Income Tax Act, 1961 (“the Act”) and then under the Articles of the convention or the relevant DTAA’s for the establishment of a PE, if the latter is necessary.

However, in *Deputy Director of Income Tax, International Taxation, Range 2 (1) v. Set Satellite (Singapore) (Pte.) (Ltd.)*<sup>20</sup> it was held that if a dependent agent is itself a PE, one cannot have a PE as a result of having a dependent agent. The commentary on the Articles of the Model Tax Convention<sup>21</sup> (“the commentary”) also maintains that it would not be in the best interest of international economic relations

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<sup>14</sup> *Id.* at § 5 (1) (b) r/w § 9 (1) (i).

<sup>15</sup> *Id.* at Explanation 2, § 9.

<sup>16</sup> *Id.* at Proviso 1, Explanation 2, § 9.

<sup>17</sup> *Id.* at Proviso 2, Explanation 2, § 9.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Western Union Financial Services v. Department Of Income Tax*, TS-5-ITAT-2012 (Del),.

<sup>20</sup> *Deputy Director of Income Tax, International Taxation, Range 2 (1) v. Set Satellite (Singapore) (Pte.) (Ltd.)*, (2007) 106 ITD 175 Mum

<sup>21</sup> Organization for Economic Cooperation and Development, *Commentaries on the Articles of the Model Tax Convention.*, OECD, (Sept. 08, 2018, 09:00 AM) <https://www.oecd.org/tax/treaties/1914467.pdf>.

to deem any dependent person as a PE for the enterprise.<sup>22</sup> A representation of the argument is maintained under Article 5 (7) of the OECD of the convention. It holds *inter alia* that the fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State shall not of itself constitute a permanent establishment of the other.<sup>23</sup> In other words, the mere existence of a principal-agent relationship is not enough to establish a PE.

Thus, the revenue authorities in establishing a business connection with the non-resident u/s 163 of the Act or a degree of dependence<sup>24</sup> illustrating such a connection, also have to satisfy the existence of a PE under the Articles of the convention or the relevant DTAAss. The inference to be drawn here is that an agent dependent on the foreign enterprise is not conclusive enough to prove the existence of a PE. The degree of such dependence is of paramount importance.

## [II.] THE JURISDICTION OF TAXATION

This OECD Convention applies to persons who are residents of one or both of the Contracting States.<sup>25</sup> The terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State respectively.<sup>26</sup> Article 7 (1) of the OECD Convention Reads:

*"The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the*

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<sup>22</sup> *Supra* note 21 at art.5 ¶5, ¶32.

<sup>23</sup> *Supra* note 2, at art 5 ¶ 7.

<sup>24</sup> See, Commissioner of Income Tax v. R.D. Agarwal, (1965) 56 ITR 20, (India).

<sup>25</sup> *Supra* note 2, at art.1.

<sup>26</sup> *Id.* at art. 3 cl (d).

*enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.”<sup>27</sup>*

It is thus through a PE and the profits attributable to such a PE that the profits are taxable to the resident of the other contracting State. When the term “may be taxed” is used in a treaty, there is an automatic exclusion of other State.<sup>28</sup> The exclusion here is the rate of taxation, in the resident or non-resident soil, at which the relevant transactions between the agent and the foreign enterprise are to be taxed.

What is taxable under Article 7 is the profits earned by the foreign enterprise. Under Act, the taxable unit is the foreign enterprise, but the quantum of income taxable is income attributable to the PE of the foreign enterprise in India.<sup>29</sup> The implication here is that if the income is not attributable to the PE, the foreign enterprise is taxed for the said income in its resident soil, and if it is attributable, the foreign enterprise is taxed for the said income in the soil where the PE is established. Explanation 3 of Section 9 of the Act further clarifies that where a business is carried on in India through a person referred to in Explanation 2 of Section 9, only so much of income as is attributable to the operations carried out in India shall be deemed to accrue or arise in India.

Thus, the final burden of taxation always falls upon the foreign enterprise even if a PE exists. In this case, the agent is taxed as a representative assessee and is thus entitled to recover the amount so paid from the foreign enterprise.<sup>30</sup> For the foreign enterprise, the establishment of a PE may be beneficial or detrimental depending on the jurisdiction that provides the most lucrative rate of taxation.

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<sup>27</sup> *Id.* at art. 7 ¶ 1.

<sup>28</sup> *Apollo Hospital Enterprises Ltd. v. Deputy Commissioner of Income Tax*, (2013) 158 TTJ Coch.786, (India) ¶ 16.

<sup>29</sup> *DIT (International Taxation), Mumbai v. Morgan Stanley and Co. Inc.*, [2007] 292 ITR 416 (SC), ¶16.

<sup>30</sup> *Supra* note 12, at § 162 (1).

For the agent, the establishment of a PE could prove to be a detriment as the tax is collected as if the income had accrued or was received by the agent itself.<sup>31</sup> Recovery from the principal could also prove cumbersome if the foreign enterprise is reluctant to pay as it wants the transaction to be taxed on its own soil. For the revenue authorities, it is beneficial to prove a PE and collect tax at a higher rate than disregard the PE and collect tax according to the rate at which the foreign enterprise is subject to. This, however, is subject to the Indian tax rate being higher than that which is applicable abroad.

### [III.] COMMERCIAL INDEPENDENCY IN CASE OF AMALGAMATIONS

The grounds to test the commercial independency of the agent from the foreign enterprise are as follows; (i) the legal and economic independence of the agent, (ii) whether the agent acts in the ordinary course of business when acting on behalf of the enterprise,<sup>32</sup> (iii) the agents commercial activities for the enterprise are subject to instructions or comprehensive control of the enterprise, and (iv) he does not bear the entrepreneur risk of the enterprise.<sup>33</sup>

The commentary indicates a cohesive reading of (i) and (iii) where legal dependence of the agent is tested on the degree of control exercised by the enterprise.<sup>34</sup> In case of (iv), the test is the extent of the use of entrepreneurial skill and knowledge invested by the agent for the enterprise which enables him to bear risk and receive reward.<sup>35</sup> The bone of contention arises in case of economic independence of amalgamated companies and their ordinary course of business.

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<sup>31</sup> *Id.* at § 161 (1).

<sup>32</sup> *Supra* note 21, at art. 5 ¶6, ¶ 37.

<sup>33</sup> *Id.* at ¶ 38.

<sup>34</sup> *Id.* at ¶ 38.1 & ¶38.6.

<sup>35</sup> *Id.* at ¶ 38.6.

A. *Economic Independence of the Agent and their Ordinary Course of Business*

Article 7 (2) of the convention makes it abundantly clear that once a PE is grounded in the resident soil, the profits that the PE would be expected to make would be taxed as if it were a distinct and separate entity engaged in same or similar activities/conditions and wholly independent of the foreign enterprise. The authorized OECD approach is that the profits to be attributed to a PE are the profits that the PE would have earned at arm's length.<sup>36</sup> If transactions are carried out at arm's length<sup>37</sup> between the agent and the enterprise from inception on a principal to principal basis, no profits can be deemed attributable to the PE.<sup>38</sup> However, in absence of the an arm's length arrangement, the profits of the PE are taxed as; (i) a distinct and separate entity, (ii) engaged in same or similar activities/ conditions, and (iii) wholly independent of the enterprise.

1. *Distinct and Separate entity*

Upon amalgamation, the erstwhile company ceases to exist and a separate and distinct entity is formed.<sup>39</sup> The Act maintains that upon amalgamation, the assets, liabilities, and shareholders holding 3/4<sup>th</sup> value in the shares of the amalgamating company become that of the amalgamated company.<sup>40</sup> In case the amalgamating company functioned on behalf of the enterprise as a PE, the question arises whether upon amalgamation, the transactions of the newly formed amalgamated company, as a whole, can be gauged for commercial independency.

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<sup>36</sup> Organization for Economic Cooperation and Development, *Report on the Attribution of Profits to Permanent Establishments*, OECD, (Sept. 15, 2018, 03:30 PM), <http://www.oecd.org/tax/transfer-pricing/45689524.pdf>. ¶8.

<sup>37</sup> See, *Supra* note 12, at § 92.

<sup>38</sup> PSA Legal, *Permanent Establishments: Attribution of Business Profits*, E-NEWSLINE, (Sept. 25, 10:00 AM) <http://psalegal.com/wp-content/uploads/2017/01/ENewslineJuly2013.pdf>.

<sup>39</sup> *Saraswati Industrial Syndicate v. CIT*, AIR 1991 SC 70. See, *supra* note 56, at 856.

<sup>40</sup> *Supra* note 12 at, § 2 (1B).

It is a matter of settled law in *Vodafone International Holdings B.V. v. Union of India & Anr.*<sup>41</sup> (“Vodafone case”) that the Revenue may invoke the “substance over form” principle test only after it is able to establish that the impugned transaction is a sham or tax avoidant. It is the task of the Revenue/Court to ascertain the legal nature of the transaction and look at the entire transaction as a whole and not adopt a dissecting approach.

As far as assessment is concerned, the term “through” with respect to business connection in Section 9 (1) (i) of the Act does not refer to a “look through” provision and that the transaction has to be “looked at” holistically.<sup>42</sup> The implication of a “look at” provision is that the Revenue department is under a mandate to look at the transaction holistically i.e. form over substance, to ascertain commercial independence. This is subject to an absence of a *prima facie* sham or tax avoidant scheme.<sup>43</sup>

In effect, the revenue authorities assessing the agent, after amalgamation, must continue to gauge the commercial independence of the agent as an amalgamated company. In fact, if the agent is assessed for commercial independency only for its transactions pertaining to the amalgamating company, which is non-existent upon amalgamation, the said assessment is deemed void.<sup>44</sup>

## 2. Engaged in Same or Similar Activities/Conditions

Post amalgamation, even if the nature of activities of the agent change to the effect that there is no correlation with the activities conducted on behalf of the enterprise and those independently conducted, the ordinary course of business of the agent is now different. Article 5 (6) of the OECD convention does not mandate that the ordinary course of business of the agent must pertain to the

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<sup>41</sup> *Vodafone International Holdings B.V. v. Union of India & Anr.*, (2012) 6 SCC 613, ¶68.

<sup>42</sup> *Id.* at ¶¶ 73 & 265.

<sup>43</sup> *Id.* at ¶ 152.

<sup>44</sup> *CIT v. Dimension Apparels Pvt. Ltd.*, [2015] 370 ITR 288 (Delhi), ¶14.

activities it conducts on behalf of the enterprise.

The commentary clarifies that if the agent conducts activities that economically belong to the enterprise over his own activities, it cannot be said that he is acting in the ordinary course of business.<sup>45</sup> Effectively, post-amalgamation, the amalgamated company can deviate from the nature of the activities that pertained to the enterprise and enhance its independent operations which have no relation to the enterprise. In this case, it would be deemed to be acting in its ordinary course of business. The amalgamated company would satisfy the exception under Article 5 (6) of the convention and could not be assessed for activities of the erstwhile amalgamating company that are same/ similar to the enterprise, as such an assessment would be void.<sup>46</sup>

### 3. Wholly Independent of the Enterprise

It is well settled that the word 'wholly' means entirely, completely, fully, totally; 'almost wholly' would mean very near to wholly, a little less than whole, In terms of percentage 'almost wholly' would mean anything less than 90 per cent.<sup>47</sup> Again, the question here is whether "wholly independent" is to be seen in terms of activities conducted by the agent on behalf of the enterprise or independent activities of the agent?

It is well settled in *B4U International Holdings Ltd. v. DDIT (IT)*<sup>48</sup> ("B4U case") that wordings of Article 5 (5) in the OECD convention and in case of DTAA's refer to the activities of an agent and its devotion to the foreign enterprise and not the other way round. Thus, the perspective of dependence is from the angle of the agent. However, in the *B4U case*, commercial independency viewed from the agent's perspective was restricted to the activities it carried out

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<sup>45</sup> *Supra* note 21, at art. 5 ¶6, ¶ 38.7.

<sup>46</sup> *Supra* note 44.

<sup>47</sup> In Re: Specialty Magazines (P) ... v. Unknown, (2005) 194 CTR AAR 108, (India), ¶13.

<sup>48</sup> *B4U International Holdings Ltd. v. DDIT (IT)*, I.T.A.No.880/Mum/2005, (India), ¶30.

for the foreign enterprise and the income thereby attributable to the same.

However, upon amalgamation, if the ordinary course of business of the agent has changed to an extent that does not pertain to the activities carried out by the foreign enterprise; then going by the *Vodafone case* profits accruing from such independent operations could be a consideration for commercial independency if the transaction is looked upon holistically.

In essence, in case of amalgamated companies acting as agents, the commercial independence or “wholly independence” of the amalgamating company from the foreign enterprise would not *ipso facto* exclude the revenue/activities of the amalgamated company.

*B. Assessing the Economic Independence of the Agent by Profits or Gross receipts*

The Convention and the DTAA's mandate that the profits of the foreign enterprise are taxable in the resident soil or the non-resident soil depending on the extent of operations carried out by the agent on behalf of the foreign enterprise. The “activities approach” is an evaluation of the activities of the agent carried out on behalf of the foreign enterprise to ascertain commercial independence of the agent. On the other hand, the “revenue approach” evaluates commercial independence of the agent on the revenue accrued to the same by virtue of the activities it conducted on behalf of the foreign enterprise. Here, any revenue accrued to the agent from the foreign enterprise is not to be viewed as the ground for determining commercial dependency, but the extent that such revenue economically binds the agent to the foreign enterprise is to be gauged.

Tough the convention and majority of the DTAA's deemed such revenue as profits; commercial independency of the agent is not necessarily restricted to profits only. In *DIT (International Taxation)*,

*Mumbai v. Morgan Stanley and Co. Inc.*<sup>49</sup>, the term “profits” was held to include income derived from any trade or business including income from the furnishing of services other than included services in Article 12 (Royalties and Fees for Included Services) and including income from the rental of tangible personal property other than property described in paragraph 3 (b) of Article 12. From a taxation perspective, income includes profits which are thereby taxable.<sup>50</sup>

However, commercial independency is an evaluation of the independency of the agent from the foreign enterprise on the basis of its activities and income attributable to such activities. To ascertain commercial independency from profits instead of gross revenue is a commercial fallacy on three counts.

*Firstly*, certain companies acting as agents for a foreign enterprise may be deemed to be dependent on the latter merely due to its capability to break even. Agents that possess the commercial viability of reducing costs would show a higher sum of profits which would not entirely indicate commercial dependency on the foreign enterprise. Further, as it is the extent of profits and not mere profits that determine the commercial independency of the agent, greater the propensity the agent possesses to earn such profits, greater will be the likelihood that it would be deemed as a PE.

*Secondly*, gross revenue is exclusive of cost deductions. Thus, it would represent a higher value than profits. Such a value is more indicative of the dependency of the agent on the foreign enterprise as the revenue thus derived does not pre-suppose that the agent will make profits. Commercial Independency is based on a degree of dependence and not only on the profits that the agent accrues from the foreign enterprise.

*Thirdly*, given that profits are taxed, companies are incentivized to raise costs to show a lower profit, thus purportedly indicating

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<sup>49</sup> *Supra* note 29, at ¶ 7.

<sup>50</sup> *Supra* note 12, at § 2 (24) (i).

commercial independency from the foreign enterprise. Thus, using gross revenue to evaluate commercial independency could prove feasible for revenue collection.

#### [IV.] IMPLICATIONS OF GENERAL ANTI-AVOIDANCE RULES

GAAR under Chapter XA<sup>51</sup> of the Act, effective in respect of any assessment year beginning on or after the 1st day of April, 2018, has a sweeping effect on international taxation jurisprudence as not only does it enhance the powers the assessing authorities but severely hampers any arrangement entered into by the agent for a tax benefit.

##### *A. Tax Avoidance and Tax Evasion*

The Act maintains that in case of DTAA's, in relation to the assessee to whom such agreement applies, the provisions of the Act shall apply to the extent they are more beneficial to that assessee.<sup>52</sup> It is long settled that every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be.<sup>53</sup> This is the basic premise of legality afforded to tax avoidance over tax evasion.

However, section 95 (1) of the Act maintains a non-obstante clause overriding anything contained in the Act. U/s 96, the main purpose of an impermissible avoidance agreement is enumerated as obtaining a tax benefit.<sup>54</sup> A tax benefit is defined to include *inter alia* an avoidance of a tax or another amount payable under this Act as a result of a tax treaty.<sup>55</sup> It is unprecedented in the history of tax jurisprudence that the Act has penalized an arrangement that could have potential tax benefits without enumerating any exceptions.

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<sup>51</sup> *Id.* at § 95 (2).

<sup>52</sup> *Id.* at § 90 cl. 2 & § 90 A cl. 2.

<sup>53</sup> *Inland Revenue Commissioners v. Duke of Westminster*, [1936] A.C. 1.

<sup>54</sup> *Supra* note 12, at § 96 (1).

<sup>55</sup> *Id.* at § 102 (10) (c).

*B. Substance over Form as the Rule*

If an arrangement is deemed as an impermissible avoidance arrangement u/s 96, section 98 (1) (g) of the Act permits the “look through” approach on any arrangement completely disregarding the corporate structure. While a plethora of sections<sup>56</sup> under the Company Act, 2013, serve as exceptions to the corporate veil theory, Section 98 (1) (g) does not elaborate in which manner the authorities may “look through” the impugned arrangement and to what extent the corporate structure can be disregarded.

**[V.] CONCLUSION AND RECOMMENDATIONS**

In summation, there are two major points of commercial independency that are yet to be statutorily and/or judicially addressed; (i) Post amalgamation, do the activities of the amalgamated company have to relate to those carried out by the foreign enterprise or whether the change in the ordinary course of business of the agent can be used as a ground for commercial independency even when the amalgamated business is not same or similar to that of the foreign enterprise, and (ii) whether profits or gross receipts are to be evaluated to ascertain economic independency of the agent taking into account not only tax collection but also commercial feasibility.

In case of (i), GAAR does not view such an arrangement as lacking in commercial substance nor is such an arrangement defined as a tax benefit.<sup>57</sup> In case of (ii), judicial enunciation is required as majority of the judgments on PE deal with legal dependency of the agent i.e. its authority to conclude contracts or play a principal role in the conclusion of contracts on behalf of the foreign enterprise. Further, judgments evaluate economic independency from profits earned by the agent independently from the foreign enterprise and not with respect to gross revenue.

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<sup>56</sup> DR. G.K. KAPOOR & DR. SANJAY DHAMIJA, TAXMANN’S COMPANY LAW & PRACTICE 15-17 (22<sup>nd</sup> ed., 2017).

<sup>57</sup> *Supra* note 12, at § 97 r/w § 102 (10).

As far as GAAR is concerned, the following recommendations are forwarded.-

*Firstly*, GAAR disregards frivolous arrangements formalized with the sheer purpose of obtaining a tax benefit rather than preempting such an arrangement from coming into existence in the first place. At the inception of every arrangement, before convening the meeting with the creditors/ members or any class of them, a copy of a scheme of amalgamation is sent to the Income Tax authorities under Rule 5 (4) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. Under Rule 5 (6), the mandate of the law clearly empowers the said authority to submit its objections to the scheme to the Tribunal (National Company Law Tribunal) within 30 days upon receipt of the scheme. It is at this stage the said authorities can deem the arrangement as a sham for a tax benefit rather than approving the scheme and disregarding the corporate structure thereafter.

*Secondly*, guidelines are required for effective control on the extent to which the revenue authorities can disregard a corporate structure. This may prove to be a serious commercial hindrance as every company that falls under the scanner of the revenue authorities with respect to a PE contention, faces the risk of losing tax benefits<sup>58</sup> provided to amalgamations. This is because GAAR empowers the revenue authorities to treat an arrangement that lacks commercial substance as if it had not been entered into or carried out.<sup>59</sup>

*Lastly*, exceptions need to be statutorily provided with respect to what arrangements are not included as impermissible avoidance arrangements or what is not deemed to be a tax benefit. Clarity on the same may provide commercial guidance for companies who inadvertently obtain a tax benefit and face the consequences under GAAR.

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<sup>58</sup> DR. V. K. SINGHANIA & DR. KAPIL SINGHANIA, TAXMANN'S DIRECT TAXES LAW & PRACTICE, 523-526 (58<sup>th</sup> ed., 2017).

<sup>59</sup> *Supra* note 12, at § 98 (1) (b) r/w § 96 (1) (c).

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## AT THE CARREFOUR: INDIAN PRIVACY POLICY AND TRANSATLANTIC DATA MODELS

By Prashant Joshi\*

*As data sharing becomes a ubiquitous activity, concerns regarding the privacy of the consumer's information demands excogitation. It is imperative for the government to devise a privacy policy along international standards so as to guarantee the fundamental right to privacy. Recently, the Srikrishna Committee submitted the draft Personal Data Protection Bill 2018. There are argueably two chief models of data protection law,- US data protection policy that is more inclined towards the commercial aspect of an individual's information and European Union's General Data Protection Regulation (GDPR) which is based on the principle of data sovereignty. This paper presents the proposition that fecundity of any data protection regulation is in the impeccable amalgamation between conferring greater precedence to rights of the consumers while simultaneously not hindering the business innovation. The paper draws the conclusion that more power to the consumer should not come at the expense of business interests. Assimilation and apt conciliation of the two is the only ground which is sought and detailed down in this paper.*

Keywords: data protection, privacy, GDPR, data regulation, Srikrishna Committee.

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## [I.] INTRODUCTION

With increasing incidents of cyber-attacks and cases of misusing personal data, the need for stringent data protection norms is now being felt more than ever. After various scandals of personal data abuse by major organizations such as Facebook-Cambridge Analytica and Equifax, a new data protection regulation that is strict and more resonant with the modern digital world should be the top priority for everyone. To this problem, the European Union responded by bringing in a strict data protection policy. From 25<sup>th</sup> May 2018, General Data Protection Policy (hereinafter “GDPR”), to which European Parliament sanctioned in April 2016, has come into effect. This new EU regulation is applicable to all the organizations handling or dealing with the data of European residents. Simply put, it affects almost every global organization. The regulation promises privacy for the customers and purports to change the approach of organizations towards individual’s data privacy. Fundamentally, GDPR brought about a change in data privacy law that is planned to provide European citizens better control over their private data. Its object is to simplify the regulative framework for clientele as well as commercial enterprises of Europe so that they can get ample gain from the flourishing digital economy across the globe.

While the new data protection law is in the making in India, it is significant to assess what the transatlantic data protection regulations entail for India and why and how we could borrow from these norms- from the business-friendly US approach or the newly ordained, more consumer-centric GDPR of Europe. To make India’s data protection regulation more effective and advanced, it is advisable to keep a close eye on how these data policies of major countries perform, and try to assimilate the better norms while

keeping distance with the ineffective or redundant regulations.

#### *A. Significant Features of GDPR*

Under GDPR, Personal data is defined as any information relating to an identified or identifiable natural person (data subject); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.<sup>1</sup> So, personal data can be anything ranging from an email address, posts on social networking sites, details of a bank account, IP address of a computer, photograph, medical data of a person etc. Now, collection, storage, and processing of any information by the companies require informed and unambiguous affirmative action freely given by data subjects.<sup>2</sup>

It is mandatory for the organizations to state the specific purpose for which the data has been sought. Moreover, the information cannot be used for any other purpose, and if need be, then again the consent of the data subject is required. Strict adherence to the norms is made sure by imposing steep amercements for any kind of abuse of personal data, breach or non-compliance with the regulations.

Consent terms should be evidently distinguishable. The GDPR

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<sup>1</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 4(1).

<sup>2</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 4(11).

Regulation states:<sup>3</sup>

*“Consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject’s agreement to the processing of personal data relating to him or her, such as by a written statement, including by electronic means, or an oral statement.”*

- Data subjects have right to know who is gathering their personal data and the specific purpose for which data controllers are using it.
- A person can request for the permanent erasure of their personal data, subject to certain conditions.<sup>4</sup>
- Data subjects have the choice to rescind their consent.<sup>5</sup>
- Organizations will need to appoint a Data Protection Officers [“DPO”] to aid them to comply with all the obligations put by GDPR.<sup>6</sup> The DPO is responsible for supervising compliance irrespective of the firm being data controller or data processor.
- Organizations need to notify the supervisory authorities in case of any personal data breach without any undue delay and if possible, within 72 hours. Also, if the breach is likely to cause high risks to rights and freedoms of the data subjects involved, it should be communicated to them without any unreasonable delay.<sup>7</sup>

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<sup>3</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 4(11), recital 32.

<sup>4</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 17, recitals 65 and 66.

<sup>5</sup> Id.

<sup>6</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 37.

<sup>7</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 33 and recital 85.

- To assure the implementation and compliance, those businesses who breach the regulations will face a high amount of monetary penalty, which goes up to 20 million Euros to 4% of the firm's global turnover- whichever is higher.<sup>8</sup>
- Data Portability enables a person to receive his data from the data controller in a commonly used and machine-readable format and to use it for any purpose he likes to. Data subjects have a right to transfer their data to another data controller.<sup>9</sup>

## [II.] WHERE DOES INDIA STAND?

With over 462 million internet users, India is second to only China.<sup>10</sup> Ironically, we still don't have a stand-alone data protection law in place. As IT sector is evolving apace and new with more advanced cyber threats are being discovered every day, the Information Technology Act enacted in 2000 is proving to be primitive and inadequate, to say the least. Current norms are quite minimal and ineffective to monitor today's digital economy of such vast extent. For example, there is no legal recourse available in India for the controversial Facebook-Cambridge Analytica data abuse scandal which sparked affright amongst internet users across the world. The breach, however unrighteous and unethical it may be, is not illegal under current Indian data protection laws. Moreover, Indian data protection laws only consider a breach of

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<sup>8</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 83.

<sup>9</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 20.

<sup>10</sup> Internet World Stats, *Top 20 Countries with Highest Number of Internet Users* (as of December 31, 2017), <https://www.internetworldstats.com/top20.htm/>

sensitive personal data<sup>11</sup>, which includes passwords, medical and biometric information, bank details, as illegal. Nonetheless, it's a basic understanding for even the layman that apart from this sensitive information, there is other basic information like a person's political inclination, his choices, likes, and dislikes which can also be used for ulterior purposes.<sup>12</sup>

It is only recently that the privacy as a fundamental right is acknowledged in India.<sup>13</sup> Justice Chandrachud, while delivering the majority judgement, stated-

*“Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.”*

The government has constituted a committee in July 2017 led by erstwhile Supreme Court Justice B.N Srikrishna, to draft a framework for country's holistic data protection regulation. While the new data protection regulation is in the offing, we have got two

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<sup>11</sup> Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011, Rule 3

<sup>12</sup> Nandagopal Rajan, *Facebook-Cambridge Analytica Scandal- How data can be used to acquire voters* (23 March 2018), <https://indianexpress.com/article/technology/social/this-is-how-cambridge-analytica-could-have-used-facebook-data-to-acquire-voters-5108150/>

<sup>13</sup> Justice KS Puttaswamy v. Union of India, [2017] 10 S.C.C. 1

transatlantic variants of data protection norms to plump for: more innovation and business-friendly model of the US or Europe's GDPR that puts consumer's privacy and rights above everything. The BN Srikrishna Committee, while mentioning both the frameworks in its white paper, states that "factoring in these diverse objectives, a nuanced approach towards data protection will have to be followed in India."<sup>14</sup> On 27<sup>th</sup> July 2018, the Committee had put forward the draft named Personal Data Protection (Draft) Bill, 2018, which included many essential recommendations thus paving the way for a much awaited standalone privacy law in India. While being inspired from the GDPR, this draft also tried to incorporate the laissez-faire character of the US data policies. Comprising some obvious flaws in it, nevertheless the bill itself definitely heralds a strict data protection regulation in India and it is a necessary advancement in the right direction as far as privacy is concerned. Key Recommendations of the Srikrishna Committee Bill are as under.-

- Much like GDPR, the Bill is applicable on the data controllers situated outside India but are using the information of Indian citizens.<sup>15</sup> That means foreign organizations that are using the information of the persons residing in India would come under the ambit of the draft bill. Additionally, the Bill talks about the applicability on government as well as private data controllers.
- The scope of personal data is munificently extended by the committee and it now encompasses any information that is capable of being identified as of a natural person, whether

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<sup>14</sup> Ministry of Electronics and Information Technology- White Paper Of The Committee Of Experts On A Data Protection Framework For India (27 Nov 2017).

<sup>15</sup> Ministry of Electronics and Information Technology- Personal Data Protection (Draft) Bill, 2018, sec. 2(2).

directly or indirectly relatable.<sup>16</sup> Also, data has been categorized as personal data, sensitive personal data, and critical personal data.

- The draft Bill also calls for an autonomous regulatory body.
- The Committee recommends certain rights such as right to data portability, right to be forgotten (though with some aberration from the original GDPR right), right to access, to be given to the data subjects in India.
- One of the most important feature of this draft is that it proposes that consent of the data subjects, which is the primary basis of processing the data, should be informed, specific, and freely given.<sup>17</sup> Moreover, the data principle (data subject) has the right to withdraw his consent.
- Several obligations regarding the processing of the data are purported to be imposed on the data fiduciaries (data controllers) under the said draft Bill. For example, there is a requirement for data localization which requires all the data fiduciaries have to keep at least a single copy of the data here in India. Also, critical personal data can only be stored in India.<sup>18</sup> Furthermore, the Bill also suggests certain prerequisites for cross-border data transfer.<sup>19</sup>
- Inspired from the GDPR, the draft proposes strict penalties in case of non-compliance. The fine starts from Rs. 5 crores

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<sup>16</sup> Ministry of Electronics and Information Technology- Personal Data Protection (Draft) Bill, 2018, sec. 3(29).

<sup>17</sup> Ministry of Electronics and Information Technology- Personal Data Protection (Draft) Bill, 2018, sec. 12(2).

<sup>18</sup> Ministry of Electronics and Information Technology, Personal Data Protection (Draft) Bill, 2018, sec. 40.

<sup>19</sup> Ministry of Electronics and Information Technology- Personal Data Protection (Draft) Bill, 2018, sec. 41(1).

or 2% of the annual revenue and may go well up to 4% or Rs 15 crores or 4% of the global turnover, whichever is higher.<sup>20</sup>

### [III.] COMPARING AMERICAN, EUROPEAN & INDIAN MODELS

#### *A. Approach*

Europe has a holistic approach towards data protection laws. GDPR is the standalone law for the regulation of all of Europe's data business. On the other hand, US have sector-specific laws instead of a single universal regulation. It has Federal Trade Commission (hereinafter "FTC") to act against unfair and deceptive practices of the companies collecting data, Health Insurance Portability and Accountability Act (hereinafter "HIPA Act") for the health sector and The Gramm-Leach-Bliley Act (hereinafter "The GLB Act") for the financial sector, among others. So from India's point of view, it can be inferred that our data protection approach is more close to Europe's approach than that of the US.

#### *B. Consent*

There are six legal grounds provided to process data under GDPR,<sup>21</sup> one of which is consent. It is the most noteworthy aspect of the GDPR as the definition and significance of consent has been expanded remarkably under the new regulation. Consent is required when the data sought doesn't come under the legitimate interest of the controller or of his legal obligations or if the controller wants to use the data for a different purpose. It is clearly defined in the regulation and must be very specific and unambiguous, affirmative action. Furthermore, sensitive

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<sup>20</sup> Ministry of Electronics and Information Technology- Personal Data Protection (Draft) Bill, 2018, sec. 69.

<sup>21</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 6.

information such as ethnicity or biometric data needs explicit consent from the data subjects.<sup>22</sup>

The FTC of US talks about consent in case of behavioral advertising (specific advertising tailored to the person's interest by using his data). It states that an affirmative express consent is required to process sensitive data or in cases where the web operator intends to use information for a purpose other than that for which originally collected.<sup>23</sup> The GLB Act mandates the notification of the financial institutions' privacy policy to its customers and to give them the opt-out option for some selected disclosures.<sup>24</sup> As HIPA Act specifically talks about health sector, by and large, it requires a company to get written consent from a data subject for the purpose of data sharing. Also, both US Laws and GDPR contain special provision for minor's consent. This is not the case in India. Moreover, for using sensitive personal information, written consent is to be taken from data subject<sup>25</sup> though consent is not defined anywhere in the Indian IT Act, which precisely depicts the superficiality of our data protection regulation.

### C. Data

In Europe, personal data has a very broad meaning and covers any kind of information that can be used to identify any individual such as email, IP address, phone number etc. This kind of

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<sup>22</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 9.

<sup>23</sup> Federal Trade Commission Staff Report, *Self Regulatory Principles for Online Behavioural Advertising* available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadreport.pdf> (last accessed November 28, 2018).

<sup>24</sup> Gramm-Leach-Bliley Act, 1999 § 502

<sup>25</sup> Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, Rule 5.

information is also regulated under the GDPR and businesses have to shield this category of personal data as well along with sensitive data. However, in the US, and for that matter, in India also, the definition of personal data is narrow as compared to EU's GDPR. Both US and India provide that only sensitive personal data like password, financial information, biometric data, sexual orientation etc. needs to be protected.<sup>26</sup> Clearly, it is Europe that has a more consumer-centric approach when it comes to defining personal data.

#### *D. Obligations of Data Controller*

EU considers the protection and security of its citizen's data of utmost importance. In this regard, GDPR put exacting obligations on the firms dealing with the data. Data controllers are accountable for the compliance with all the data protection principles<sup>27</sup> given under GDPR.<sup>28</sup> Also, they should be able to demonstrate their compliance. In addition, data controllers need to appoint Data Protection Officer if required. Applying the GDPR's Data Protection by Design and by Default principles is an additional responsibility of the data controller.<sup>29</sup> It means that businesses are advised to apply organisational and technical procedure from the scratch to shield data protection principles. It also mandates that data should be processed with high-quality measures of privacy protection such as encryption and pseudonymisation to safeguard the personal data right from the commencement.

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<sup>26</sup> Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, Rule 3.

<sup>27</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 5(1) and recital 39.

<sup>28</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 5(2).

<sup>29</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 25 and recital 78.

In US, the regulatory authority of FTC has the power to monitor the companies for compliance to their privacy policies. If an organization falls short of compliance to its data protection and privacy policy or fails to aptly protect the collected data, FTC can prosecute it.<sup>30</sup> However, the organizations are not required to disclose their privacy policies, as the FTC does not contain an explicit provision for such. It only supervises the compliance in the case when the privacy policy of a company has been made public. Financial companies in the US can share a customer's personal data to third parties only under certain conditions provided by the GLB Act.<sup>31</sup> It also states that an organization must communicate their data-sharing exercise to the consumers and provide them an opt-out option so they have a choice to refuse to share their personal data to third parties. Furthermore, The GLB Act has the Safeguards Rule which makes it obligatory for the organizations to prepare an information security plan in written in order to give the account of their measures of protecting clientele's information and data. Under it, every organization must insure; the security and confidentiality of customer information, and provide protection against any anticipated threats or hazards to the security and integrity of such information and shield against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.<sup>32</sup> The HIPA Act also has some essential rules like the Privacy Rule and the Security Rule which

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<sup>30</sup> Federal Trade Commission Act, 1914 § 5(a)(2).

<sup>31</sup> Gramm–Leach–Bliley Act, 1999 § 503(a)(1)

<sup>32</sup> Federal Trade Commission, *Standards for Safeguarding Customer Information*, FTC.GOV available at [https://www.ftc.gov/sites/default/files/documents/federal\\_register\\_notices/standards-safeguarding-customer-information-16-cfr-part-314/020523standardsforsafeguardingcustomerinformation.pdf](https://www.ftc.gov/sites/default/files/documents/federal_register_notices/standards-safeguarding-customer-information-16-cfr-part-314/020523standardsforsafeguardingcustomerinformation.pdf) (accessed on November 28, 2018)

provides various guidelines and measures to protect and secure the personal data of the consumers.

As far as India is concerned, a company needs to devise a privacy policy which is easily available for its consumers. It should state the data being obtained, the purpose behind the collection of such information and to give an account of the reasonable security measures that the company follows to keep the information secure.<sup>33</sup> Rule 8 of IT Rules, 2011 provides for the reasonable protection measures that can be adopted by a company, one such being those accepted under international standards (IS / ISO / IEC 27001). One considerable issue under IT Act is that a company cannot be held liable to compensate for any loss arising out of data protection failure if it establishes that it has properly enforced all the necessary security measures given under IT Act.<sup>34</sup> Considering this, it is needless to say that in contrast to the US and Europe's data protection norms, India really has an inadequate data protection framework.

#### *E. Rights of consumers*

Europe provides a comparatively larger set of rights to the individuals regarding their data as compared to other major nations across the world. It gives the data subjects right to take their consent back,<sup>35</sup> right to be informed,<sup>36</sup> right to access their

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<sup>33</sup> Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, Rule 4

<sup>34</sup> Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 rule 8.

<sup>35</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 7.

<sup>36</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 13.

information,<sup>37</sup> right to rectify his/her data,<sup>38</sup> right to erasure,<sup>39</sup> right to restrict the processing of their data,<sup>40</sup> right to data portability,<sup>41</sup> right to object,<sup>42</sup> and right not to be subject to a decision based solely on automated processing.<sup>43</sup>

A US citizen, in case of online behavioral advertising, has a right to know the information-collecting practices of the organizations and also a right to have an opt-out option available.<sup>44</sup> Under the GLB Act, when dealing with a financial organization, a customer has the right to know to the privacy policy of a company. A customer is entitled to opt-out option in particular cases and also has a right to know in what way he can use the given opt-out mechanism.<sup>45</sup> The HIPA Act provides the data subjects the right to access their Protected Health Information<sup>46</sup> (personal health information) and to rectify that information.<sup>47</sup> However, the individual can be denied access to full or some part of his PHI

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<sup>37</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 15.

<sup>38</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 16 and recital 65.

<sup>39</sup> *Supra* note 4

<sup>40</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 18 and recital 67.

<sup>41</sup> *Supra* note 8

<sup>42</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 21, recital 69, 70.

<sup>43</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 22, recital 71, 72.

<sup>44</sup> *Supra* note 16

<sup>45</sup> Gramm-Leach-Bliley Act, 1999 § 502 and § 503.

<sup>46</sup> US Department of Health and Human Services, *Standards for Privacy of Individually Identifiable Health Information*, HHS.GOV available at <https://www.hhs.gov/sites/default/files/introduction.pdf> (accessed on November 28, 2018)

<sup>47</sup> *Id*

under some certain circumstances.<sup>48</sup> Apart from HIPA Act and Children's Online Privacy Protection Rule which grants parents the right to view the information furnished by their child and to correct or delete it,<sup>49</sup> federal privacy laws in the US does not offer individuals the particular right to access their information as well as right to erase their data.

Even though the IT Act in India does not use the word "right" in any provision, some specific rights can be deduced from the given regulations. The data subject is entitled to know the details of the information and purpose of such collection. Also, a person has the right to know the details such as name and address of the data controller.<sup>50</sup> Furthermore, a data subject has the right to request to review the data he has provided to rectify any inaccurate personal information or sensitive personal data.<sup>51</sup> Besides, an individual also has the right to take back the consent which he had previously given to the data controller.<sup>52</sup> But the act does not provide the individuals the right to erase their data so after withdrawing their consent, data subjects will not be able to know what happens to their data that exists with the controller, thus creating an anomaly.

Europe certainly has a remarkable lead over both the US and India when it comes to giving rights to the consumers regarding their data. Also, the IT Act is not a very luxuriant regulation as far

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<sup>48</sup> *Id*

<sup>49</sup> Children's Online Privacy Protection Act, 15 U.S.C. 6501–6505 (1998)

<sup>50</sup> Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, Rule 5(3).

<sup>51</sup> Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 rule 5(6).

<sup>52</sup> Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 rule 5(7).

as rights of the data subjects are concerned thence lagging behind the US let alone Europe.

#### *F. Breach Notification*

The GDPR has a provision which states that when a breach of personal information is likely to harm in any way the rights and freedoms of an individual, it has to be communicated to the supervisory authority without undue delay and within 72 hours of discovery of such breach.<sup>53</sup> If the breach involves sensitive data that can result in high risks to the concerned data subjects, like bank details and password, then such breach needs to be put across to them also without any unreasonable delay. To ensure the adherence, the GDPR also contains regulations of strict penalties if the organizations failed to comply with the stipulations.

Although there is no such federal law in the US, every state in the US, including the Virgin Islands and District of Columbia, have security breach notification laws in place to communicate the breach consisting personally identifiable information to the affected data subjects.<sup>54</sup> The HIPA Act also has a provision which mandates organizations to notify their customers in case of a breach regarding unsecured personal health information.<sup>55</sup> However, there is no provision in the US that stipulates a certain time within which notification of data breach is to be made; hence there is no provision of penalty in case of delay. In India, organizations don't have any kind of requirement to notify the personal data breach to

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<sup>53</sup> *Supra* note 6

<sup>54</sup> National Conference of State Legislatures, *Security Breach Notification Law*, available at <http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx> (accessed on 28 November, 2018)

<sup>55</sup> Health Insurance Portability and Accountability Act Breach Notification Rule, 1996 45 CFR §§ 164.400-414

consumers or to regulatory authorities, never mind a time limit for communication of such data breach as well as a penalty for failure to do so. IT Act is silent on this issue. Acknowledging privacy as a part of fundamental rights while not having any kind of regulation for the notification of breach tells its own tale. Thus, India has a tenuous data protection framework as compared to Europe and US.

### *G. Penalties for Breach*

Europe's new data protection framework provides for rigorous penalties in cases of breach. Two categories of fines have been made. The first category contains fines up to 10 million euro or 2% of the annual worldwide turnover of the preceding year, whichever is higher. The second category consists of fines up to 20 million euro or 4% of the annual worldwide turnover of the previous year, whichever is higher.<sup>56</sup> The first category is usually for breaches of less serious nature such as a data controller's non-compliance with the rules provided under the regulation and the second category is generally for the breaches of serious nature i.e. breaches which pose a threat to consumer's rights and freedom. The amount of penalty is not specified for every particular breach and there are many factors that are needed to be taken into consideration to determine the amount of fine, such as the organization's compliance, the measures taken by them to protect the breach, their negligence, and type and gravity of the breach, among others.<sup>57</sup>

In the US, apart from the Electronic Communications Privacy Act,<sup>58</sup> the Computer Fraud and Abuse Act<sup>59</sup> and some severe

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<sup>56</sup> *Supra* note 7

<sup>57</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, recital 148.

<sup>58</sup> Stored Communications Act, 1986 18 USC § 2701(b).

<sup>59</sup> Computer Fraud and Abuse Act, 1986 18 USC § 1030(c)(1).

violations of the HIPA Act, usually the punishment of data breaches is of civil nature. Under the FTC Act, any sort of non-compliance of a company with the regulations can be punished with up to 10000 dollars for each offence and/or with an injunction.<sup>60</sup> The HIPA Act provides criminal penalty up to 250,000 dollars in addition to/or up to ten years of imprisonment.<sup>61</sup> In India, the IT Act 2008 imposes up to 3 years of imprisonment and/or fine of up to Rs 500000 in the case when the data controller breached a contract by disclosing the personal information of the data subject. However, the data subject is required to demonstrate that the breach was intentionally done without his consent and for the purpose of causing a wrongful gain or loss.<sup>62</sup> It is thus apparent that while the US and Indian data protection regulations include punishments of civil as well as criminal nature, the GDPR only consists of penalties of civil nature. This aspect makes GDPR less effective as compared to US framework as there are many severe data breach cases that require regulations to impose criminal liability.

From the above-mentioned comparative analysis, it can be safely assumed that GDPR is a more consumer-friendly framework. It gives certain rights that are not present in US and Indian data protection norms. Also, the overall motive of GDPR is markedly more inclined towards an individual's data protection. Moreover, the US has compartmentalized data framework which makes it, paradoxically, too metograbolized to be clearly understood by the most of Americans.<sup>63</sup> That being said, the US data protection

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<sup>60</sup> Federal Trade Commission Act, 1914 § 5(i) and § 5(k)(1).

<sup>61</sup> Health Insurance Portability and Accountability Act, 1996 § 217

<sup>62</sup> Information Technology (Amendment) Act, 2008 sec. 72(a)

<sup>63</sup> U.S. Department of Health and Human Services: *Examining Oversight of the Privacy & Security of Health Data Collected by Entities Not Regulated by HIPAA* available at <https://www.healthit.gov/sites/default/files/non->

framework gives businesses more space to work. As it happens, there is a foundational difference in approach between the US and Europe's privacy policy. The EU deems privacy as a foremost and cardinal right of an individual. It has proactive approach regarding the privacy rights. Meanwhile, US privacy principles are more concerned with the commercial aspect of an individual's data. Data protection laws in the US are generally business-friendly. For instance, the US have a Third Party doctrine which says that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.<sup>64</sup>

The constitutionality of this doctrine is being contested before the Supreme Court,<sup>65</sup> but as the judgement is pending, the doctrine holds a value up to this date. As India's new data protection framework is still in the preparation, it is sensible to follow Europe's GDPR as it is more comprehensive, advanced and consumer-centric regulation. The terms of the GDPR are applicable to every company that holds or processes personal information of an EU resident irrespective of the company's location. Consequently, every Indian company that deals with the data of a European citizen has to comply with the regulation. Making the Indian privacy policy along the lines of the GDPR is going to make things easier for the IT companies as maintaining two data security models simultaneously i.e. one for Indian consumers and other for European consumers will only increase the inconvenience. One notable feature of the GDPR is its adequacy principle. It allows European organizations to transmit personal information to a third country if the said country ensures an adequate level of security.<sup>66</sup>

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covered\_entities\_report\_june\_17\_2016.pdf/. (accessed on November 28, 2018)

<sup>64</sup> *Smith v. Maryland* 442 U.S. 735 (1979).

<sup>65</sup> *Carpenter v. United States* 585 U.S. \_\_ (2018)

<sup>66</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 45.

Given the condition of Indian data policy, unsurprisingly India does not fulfill the adequacy requirements.

Other alternatives to share data with a country, not in the adequacy list of the commission consist of Binding Corporate Rules and Model contractual clauses.<sup>67</sup> BCRs are domestic rules and codes of conduct of an organization regarding cross-border data sharing which are approved by the GDPR. Model clauses are standardized contractual clauses that are approved under the GDPR for transferring data to a third country. But these alternatives also have certain downsides. A big company involved in processing personal information up to large extent will need hundreds of such model clauses which are cumbersome and costly. Getting a BCR is a long-drawn-out procedure and requires substantial amount of money.

According to a report,<sup>68</sup> the minimum time required to get a BCR is 11 months. So relying on this alternative may severely cripple business progress. While the GPDR put these stipulations on organizations to comply for doing business, the US data protection framework has no such preconditions for compliance. It is thus advisable for India to pay heed to requirements put forwarded by GDPR to protect its business interests by qualifying for the adequacy requirements. After the US, Europe being the largest marketplace for India's 146 billion dollar IT industry, generates up to 30% of the total revenue.<sup>69</sup> The European market,

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<sup>67</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 46 and 47.

<sup>68</sup> Allen and Overy, *Binding Corporate Rules* available at <http://www.allenoverly.com/SiteCollectionDocuments/BCRs.pdf> (accessed on November 28, 2018)

<sup>69</sup> Itika Sharma Punit, *India's \$146-billion IT industry has no idea what will happen to its European business now* QUARTZ INDIA available on <https://qz.com/716157/indias-146-billion-it-industry-has-no-idea-what-will-happen-to-its-european-business-now/> (accessed on November 29, 2018)

which also has a potential to go up to 45 billion dollars,<sup>70</sup> is currently growing at a faster rate than USA's market lately,<sup>71</sup> making it even more important to Indian IT companies. By not making the Indian privacy policy at par with globally recognized standards, Indian business entities might lose their credibility as a secure place for a digital economy. Taking all the aspects into account, it is advisable for India to revise its privacy policy up to the underlying principles of GDPR.

#### [IV.] ECHOING GDPR IN INDIA- POTENTIAL HURDLES

Undoubtedly, GDPR is the most comprehensive privacy law ever enacted. Its stringent regulations coupled with rigorous punishments certainly played up the indispensability of privacy rights of the consumers. But to say that it is impeccable would be erroneous. While postulating that India should follow the European model for the data protection law, it is also incumbent to advert to the downsides of the GDPR which needs to be emended for effective implementation in India.

##### *A. An Infelicitous Rule for Business*

Considering that the GDPR is a recently-enacted regulation

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<sup>70</sup> BS Reporter, *Europe a \$45 billion potential outsourcing opportunity for Indian IT vendors*, BUSINESS STANDARD available at [https://www.business-standard.com/article/companies/europe-a-45bn-potential-outsourcing-opportunity-for-indian-it-vendors-115051101018\\_1.html/](https://www.business-standard.com/article/companies/europe-a-45bn-potential-outsourcing-opportunity-for-indian-it-vendors-115051101018_1.html/) (accessed on November 20, 2018)

<sup>71</sup> Surabhi Agarwal, *How Europe trumped US for Indian IT companies*, ECONOMIC TIMES available at <https://economictimes.indiatimes.com/tech/ites/how-europe-trumped-us-for-indian-it-companies/articleshow/61633992.cms> (accessed on November 30, 2018)

based on the neoteric needs of the sophisticated European digital market, subjugating Indian data protection law to the rigorous and complex European policy may have counterproductive effects on developing Indian IT sector businesses. Any sort of failure in compliance with the norms of GDPR might attract penalties up to 20 million Euros, which is more than enough to take down many companies that do not rank alongside the major business entities such as Google, Apple, and Amazon etc. Moreover, the GDPR puts many rules on the organizations thus increasing their burden. For instance, businesses have to install expensive machines and software to achieve given data protection standards, and also have to spend time and money on training and educating their employees about the intricacies of the GDPR, besides hiring new employees and appointing DPOs. Approximately, the GDPR compliance could cost over 9 billion dollars to major British companies and Fortune 500 businesses.<sup>72</sup> Various rights given to consumers such as the right to access their information and right to erasure would have an entrapping effect on business as a company stores this information across numerous servers and departments. Providing it to consumers or deleting it permanently at request will take up significant time of the data controllers. Furthermore, cookies are considered as a part of personal information under GDPR. Recital 30 of the GDPR states that-

“Natural persons may be associated with online identifiers provided by their devices, applications, tools, and protocols, such as internet protocol addresses, cookie identifiers or other identifiers such as radio frequency identification tags. This may leave traces which, in particular when combined with unique identifiers and

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<sup>72</sup> Oliver Smith, *The GDPR Racket: Who's Making Money From This \$9bn Shakedown*, FORBES available at <https://www.forbes.com/sites/oliversmith/2018/05/02/the-gdpr-racket-whos-making-money-from-this-9bn-business-shakedown/#313efe5134a2> (accessed on November 30, 2018)

other information received by the servers, may be used to create profiles of the natural persons and identify them.”

Cookies are small pieces of files that contain information about the web user as well as the website. It is stored on an individual's mobile or computer and uses the information it has to make a particular user-oriented environment when the user revisits the website. For example, Amazon uses cookies to track a person's shopping history to suggest more products based on the person's predilection. Cookies are also used to track user's online activity and behaviour for personalized and targeted advertising. Although not every cookie comprises personal information and may not alone be able to be used to identify a person, it contains a part of personal data which, when conjoined with another piece of information, can successfully be used to recognize an individual.<sup>73</sup> Online advertising is vastly depended on cookies. Third-party cookies are used for targeted advertising and also to measure the effectualness of the particular advertising campaign.

Under the GDPR, for a website that uses third-party cookies or cookies that track personal information, an explicit and unambiguous, express consent is required from the user, by providing an opt-in mechanism.<sup>74</sup> By default, a publisher cannot allow cookies or take inactiveness of the user as its consent. But the problem is that cookies are discharged at the moment an individual opens a website. So, before a user makes a choice regarding the permission of cookies, the cookies already have accessed the personal information. This would cause a legal disobedience to the regulation. Under the GDPR, data publishers would have to give

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<sup>73</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, recital 26.

<sup>74</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, recital 32

an opt-in banner before dropping the cookies on the user's device. Additionally, the GDPR also makes it mandatory for the data publisher to display the content and not to restrict the services regardless of whether the user denies or gives the consent. This rule has serious implications for the companies that thrive on advertising revenues. A survey revealed that 79% of the total users, besides the website they are using, don't want to share their personal information on any other website or company.<sup>75</sup>

Most organizations have depended on funding from advertising. By all odds, making an opt-in mechanism for consent as a prerequisite detractively influences the effectiveness of online and targeted advertising by up to 65% which could drop the online advertising revenue from 8 billion dollars to 2.8 billion dollars,<sup>76</sup> hence ineluctably circumscribing the predominant funding apparatus for IT companies. Many websites are solely run by the income they gather from advertising. By restraining the most common type of advertising method, the GDPR directly puts an economic encumbrance on the internet businesses. Also, providing an opt-in policy instead of opt-out approach is more expensive for the companies and may reduce profit.<sup>77</sup> By imposing such stern touchstones and defining the rights of consumers in such inflexible manner would do anything but improve the business condition. Significant parts of the workforce of a company now have to invest a substantial amount of time and resources in figuring out the complexness involved in compliance with the regulation rather

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<sup>75</sup> Page Fair, *Consent Survey key* (2017) available on <https://pagefair.com/wp-content/uploads/2017/09/PAGEFAIR-consent-survey-charts.pdf> (accessed on November 29, 2018)

<sup>76</sup> Avi Goldfarb and Catherine E. Tucker, *Privacy Regulation and Online Advertising* (2010), SSRN <https://dx.doi.org/10.2139/ssrn.1600259>.(accessed on November 29, 2018)

<sup>77</sup> Michael Staten and Fred H. Cate, *The Impact of Opt-In Privacy Rules on Retail Credit Markets: A Case Study of MBNA* 52 DUKE L. J 745-786 (2003)

than investing it to meliorate their business growth. Astronomical monetary penalties under GDPR means that data-centric businesses now have to think twice before using, processing or sharing any sort of personal information and have to do away with using data for any innovative development that may risk their compliance. GDPR shifted the focus of digital economy from creativity to compliance.

*B. Paving the Way for Oligarchical Digital Marketplace*

While the GDPR has a negative impact on almost every organization within EU and across the globe that are handling data of European citizens, it would particularly have a more severe effect on small businesses. According to a survey, until March 2018, only 10% of small businesses in the UK were prepared for the GDPR.<sup>78</sup> With fines as high as 20 million dollars, the cost of non-compliance is already well over that of the cost of compliance. But complying with GDPR is also an expensive operation for small firms. For even the micro business enterprises, cost of compliance would be up to 50 thousand dollars.<sup>79</sup> For companies like Facebook, Google, Apple etc, compliance is quite an easy undertaking. For them, all the tasks that are necessary for conformity with the regulation such as recruiting new employees, buying latest machinery, installing more advanced and modern data security software, appointing DPOs among things, requires far less effort as

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<sup>78</sup> Federation of Small Business, *Data Ready- Mitigating the Impact of Data Protection Regulation on Small Business* available at <https://www.fsb.org.uk/docs/default-source/fsb-org-uk/data-protection-report-final50cf45bd4fa86562a286ff0000dc48fe.pdf?sfvrsn=0>. (accessed on November 30, 2018 )

<sup>79</sup> Robert Abela, *Netsparker Surveyed US Based C-Levels on GDPR Compliance*, NETSPARKER available at <https://www.netsparker.com/blog/web-security/gdpr-compliance-2018-survey-results/#BusinessesSpending> (accessed on November 30, 2018)

compared to their relatively small business competitors. Small and medium businesses do not have such copious resources. Needless to say, they have to retrench their expenditure from other parts which include the fund for improvements in current products as well as for innovation of new products to keep up with the market trends, besides reducing and reallocating resources that are especially reserved for business expansion and growth. This would obviously give the bigger organizations an undue advantage and competitive edge in the market.

The consent mechanism stipulated under GDPR also severely fetters business interests of the small and medium firms. Tech giants such as Facebook, Netflix or Amazon have more advantage as compared to lesser-known and smaller companies when it comes to getting consent as they collect first-party data through their direct relationship with the user. They have more chances of obtaining consent they directly serve the consumers with their services. For instance, a user is likely to give its consent to Gmail or Facebook while using them. On the other hand, it is quite improbable that a user will give its consent to an open source internet service asking for its basic details or to an unknown publisher for receiving emails detailing the products or services offered by that publisher. Some tech giants have already started to consolidate power by conveniently using GDPR. Google has informed the publishers that it wants to be the controller of the data provided by them under GDPR without disclosing how it will use the data.<sup>80</sup> This is the exact opposite of what GDPR intends to do.

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<sup>80</sup> Leonid Bershidsky, *EU Privacy Rules May Give Google More Power*, BLOOMSBURG <https://www.bloomberg.com/view/articles/2018-05-02/eu-data-privacy-regulations-could-give-google-more-power> (accessed on November 30, 2018)

Under the proposal, publishers have to obtain the consent for the collection of the data and then to share this with Google without knowing in what manner it aims to use this information. In this way, Google wants to exploit data publishers through its market power. Another internet giant Facebook also purports to gain more power under GDPR. Facebook, itself being the largest data broker firm, recently announced that it will remove all third-party brokers from its platform,<sup>81</sup> a move which will increase its authority in the advertising market. In a way, the GDPR gave the upper hand to already established organizations creating an oligopolistic situation. Big organizations like Google, Apple, and Facebook etc have the monetary, technological, and human resources that are necessary to fulfill their obligations under GDPR. With consent playing such essential part, these corporations have an appropriate and favorable platform to comfortably acquire consent. To avoid facing data security authorities and to be safe from strict scrutiny by the rival businesses' attorneys while complying with the regulation can only be carried off by affluent business entities. Unsurprisingly, business leaders across Europe accept that this regulation is too complicated for small and middle scale businesses.<sup>82</sup> GDPR creates an untoward situation for the small companies thus making the market oligarchic.

### C. GDPR Undermines User's Online Experience

GDPR, to a greater extent, is concerned about rights of the consumers, particularly regarding their consent. GDPR states that

“Consent should be given by a clear affirmative act establishing

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<sup>81</sup> John Battelle, *Facebook: Tear Down This Wall*, SHIFT NEWS available at <https://shift.newco.co/facebook-tear-down-this-wall-400385b7475d> (accessed on November 30, 2018)

<sup>82</sup> RSM, *92% of European Businesses are Unprepared for GDPR* available at <https://www.rsm.global/news/92-european-businesses-are-unprepared-gdpr> (accessed on November 28, 2018)

a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her, such as by a written statement, including by electronic means, or an oral statement. Silence, pre-ticked boxes or inactivity should not, therefore, constitute consent. When the processing has multiple purposes, consent should be given for all of them. If the data subject's consent is to be given following a request by electronic means, the request must be clear, concise and not unnecessarily disruptive to the use of the service for which it is provided."<sup>83</sup>

GDPR provides for granular consent. This means taking a single all-embracing consent for many different purposes is not legal and the data controller has to seek consent for each specific purpose for collecting data, mostly by providing opt-in choice. For an average internet user, it means that its routine internet surfing could become increasingly annoying. A user could be bombarded with numerous permission requests whenever he uses the internet. For every website an individual visits, he has to unequivocally choose to whether or not to select every opt-in option provided by the website requesting its consent for serving cookies or for the purpose of targeted advertising. While entering every website, a user is forced to see various permission requests clogging their online experience. This could be frustrating for many consumers. With many obligatory choices to be made, an individual is likely to reject or accept everything instead of reviewing every piece of information related to usage of its data, which is more or less contrary to what the regulation purports to do. Advertising is the core revenue generator for many websites and web services. Almost every internet organization uses advertising to fund their workings.

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<sup>83</sup> *Supra* note 67

Under the GDPR, most users would not share their information for advertising and tracking purposes.<sup>84</sup> Consequently, the revenue from advertising would suffer a substantial amount of loss.<sup>85</sup> Many web services and websites are free to use and access as they benefit from using the information of their users for targeted advertising. But after GDPR, collecting and processing consumers' information becomes not only more difficult and expensive but after considering the potential fines related to collecting and using that information, it also becomes quite a risky process. With such immense compliance cost and limitations on targeted advertising coupled with steep penalties, organizations would have to make up this expense from other areas of the business. This could possibly entail that many ad-supported services which have been free to use until now, may become paid. Many websites would start giving access by taking small subscription fees. Our print media currently use this type of business model by charging a subscription fee while using generic advertising. Many web companies may give access to basic services for free; however begin taking charge for the advanced features. Restrictions on behavioural advertising would mean users will be forced to watch more general advertisements. Without revenue from targeted advertising, free and open source internet services will be forced to devise paywalls.

As compliance to GDPR is pricey and non-indulgent, many companies are being forced to close down their services.<sup>86</sup> GDPR is only useful for the consumers who value their privacy more. As

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<sup>84</sup> *Supra* note 68

<sup>85</sup> *Supra* note 69

<sup>86</sup> Steven J. Vaughan-Nichols, *Goodbye Klout: Social media measuring power quietly disappears* available at <https://www.zdnet.com/article/goodbye-klout-social-media-measuring-power-quietly-disappears/> (accessed on November 28, 2018)

many important and popular services may become paid, the users who are less concerned with the privacy and intend to use services without paying and people with low resources will suffer. Moreover, restricting the sharing of data also has a negative exteriority. Apart from commercial and technical aspects, sharing data also benefit the public in the health sector. As more individuals share their data, researchers can utilize this information to track symptoms and causes of various diseases. Large-scale availability of physical data could help doctors and researchers in curing and finding ailments. It also speeds up the innovation process and could open up more opportunities in health care. Governments and non-profit organizations also benefit from data sharing. Thus, from this perspective, the GDPR places individual's good above the community's good. Privacy regulation is more like a case of user vs user. Though giving consumers more control over their data, GDPR certainly has some negative impact as well. Not many users will place these privacy rights over some obvious benefits. Hence, not every user will find the regulation attractive

#### *D. GDPR Views Victim as Guilty*

With the rising technology and digital economy, severe risk of cyber-attacks is also increasing day by day. Not only do these cyber-attacks pose threat to the safety and security of sensitive data, but they also cost the industry enormous amount of money. In 2017 alone, 130 billion pounds have been stolen from the victims of cybercrime globally.<sup>87</sup> With time, these numbers will only be going to increase. According to the latest report,<sup>88</sup> cybercrime

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<sup>87</sup> Alex Hern, *Cybercrime: £130bn stolen from consumers in 2017, a report says*, GUARDIAN available on <https://www.theguardian.com/technology/2018/jan/23/cybercrime-130bn-stolen-consumers-2017-report-victims-phishing-ransomware-online-hacking> (accessed on November 29, 2018)

<sup>88</sup> Cybersecurity Ventures, *2017 Cybercrime Report* (2017) available on

would cost the world well over 6 trillion dollars. This is a matter of serious concern for all the governments and businesses. Among various types of cyber-attacks, ransomware attacks are being used lately. These are attacks using a malicious program that, after being installed in a computer running on windows, encrypts the personal files of the user. It then blocks that individual's access to its computer. The user is required to pay a certain amount of money to take the control back. The world recently has seen major cyber-attacks in the form of ransomware such as Wannacry and Petya. However, unlike other cybercrimes, most ransomware does not steal the information; it merely encrypts it to block the access. So technically it is not a case of a data breach. Under GDPR, however, these types of cyber-attacks are also considered as a data breach and can aptly be used to penalize the data controller.

The definition of a personal breach under the regulation says that *“personal data breach means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed.”*<sup>89</sup> It further states- *“Personal data shall be: processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures (‘integrity and confidentiality’).”*<sup>90</sup> Additionally, the GDPR also states that data controllers and processors are also accountable for the unlawful or accidental destruction or loss of personal

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<https://cybersecurityventures.com/2015-wp/wp-content/uploads/2017/10/2017-Cybercrime-Report.pdf>

<sup>89</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 4(12).

<sup>90</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 5(1)

*data.<sup>91</sup> So, if a firm becomes a victim of a ransomware-like cybercrime, it is responsible for permitting unauthorised or unlawful processing of the personal data. The data herein is lost or supposedly destroyed and according to the definition of data breach provided under GDPR, they are also liable for personal data breach even though no data has been stolen or unlawfully accessed. In case of a cyber attack, a firm is also a victim as it loses a significant amount of money in dealing with it while also facing strong criticism by the consumers. Now it will also be held liable for penalty under GDPR which may go up to 20 million euros. This will gravely impede the business of the concerned company. By inordinately extending the scope of a personal data breach, GDPR would unreasonably punish a victim organization.*

#### [V.] CONCLUSION

As India progresses closer towards making its data protection policy, it is necessary to keep an eye on how GDPR turns out for the EU. As it becomes clear from the propositions of the Srikrishna Committee, the GDPR would be of great influence for the upcoming Indian privacy law, it becomes necessary to realize that GDPR is in its nascent state. Since it is a new regulation, there is not any certainty regarding any drawn illation. That being said, acknowledging GDPR as a perfect and most suitable regulation for India would be a fallacy. In spite of that, the exhaustiveness of GDPR and its outlook on reckoning consumer's privacy above its commercial value is more analogous in principle to India's approach towards data privacy. The privacy law should be dynamic and adaptive in nature. It should be based on the principle of data supremacy. Furthermore, with the new data protection

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<sup>91</sup> European Parliament and the Council of European Union, Regulation (EU) 2016/679, art. 32(4).

policy, efforts should be made to devise an appropriate legal mechanism for the conciliation of all the aspects of privacy violations resulting from the upcoming regulation with the judiciary for effective and better implementation. Apart from business entities, the law should also cover government and public institutions. Unlike the GDPR, India should aim to prepare a law under which consumers interests will go hand in hand with the corporate interest. It is not a prerequisite that privacy should come at the cost of corporate interests. Redundancy in data protection norms will merely affect the very people to which the law is devised to protect. In this respect, India should look to the US, but without compromising with the consumers' privacy. For India's data protection policy, subjectivity is the key.

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## REASONABLENESS IN RELIGION

By Satyam Tandon\*

*This paper aims to take cognizance of the ever-changing interpretation of this Essential Religious Practices Test and ascertain in terms of the cases cited whether these varying interpretations would change the decision in terms of the judgments referred. This shall be done by laying out the fundamentals of each of the different types of interpretations of the ancient test and thereby applying them to certain applicable cases. Thus, highlighting the usage of unrestrictive and unchecked powers of the courts in deciding case law by adopting the 'hit and trial' method of interpretation of the test while making it a mechanism of arbitrariness and further creating judicial anarchy in terms of the test in the process..*

Keywords: Essential Religious Practices Test, Article 25, Article 26, Constitution of India

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## [I.] INTRODUCTION

Religion inherently stems from the roots of our nation and is a part of our thinking, lifestyle and belief. But, defining religion in case law has never been accomplished sufficiently and in the absence of a said definition; courts have passed on and set in motion a distorted '*Chinese whisper*' which keeps on adding to the ambiguity of the word. Attempts such as "*liberty of thought, expression, belief, faith and worship... religion is a matter of belief and doctrine concerning the human spirit expressed overtly in the form of ritual and worship*"<sup>1</sup> have been made. The fundamental right to freedom of religion is guaranteed by the *Constitution of India* under *Articles 25 to 28*. *Article 25* deals with the practice and propagation of a religion while *Article 26* gives the freedom to manage religious affairs. Together, *they* strike a balance between the rigidity of right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs and religious practices and the guaranteed freedom of conscience to commune with his cosmos, creator and realise his spiritual self.<sup>2</sup> The right to religion guaranteed under 25, 26 isn't an absolute, unfettered right to propagate religion but is one that is subject to legislation by the state limiting and regulating every non-religious activity.<sup>3</sup>

The essential religious practice test is adopted by courts to test whether the practice practised by the religion is essential or not and whether it could be limited by the religion itself. This is determined by "*the doctrines of that religion itself.*"<sup>4</sup> This test aimed to ascertain if

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<sup>1</sup> *SP Mittal Etc. v. Union of India*, 1983 SCR 1 729.

<sup>2</sup> *Shri AS Narayana Deekshitulu v. Andhra Pradesh*, 1996 AIR 1765.

<sup>3</sup> *Sri Adi Viisheshwara of Kashi Vishwanath Temple, Varanasi v. State of U.P. and Ors.*, 1997 4 SCC 606.

<sup>4</sup> *Ram Prasad Seth v. State Of U.P. And Ors.*, AIR 1957 All 411.

a practice was essentially religious or not. It meant to check, whether the practice was in the scope of “*the performance of outward acts in pursuance of religious belief, is, as stated above, subject to State regulation imposed to secure order, public health and morals of the people.*”<sup>5</sup> Mukherjee J. said that, “*A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it will not be correct to say that religion is nothing else but a doctrine or belief.*”<sup>6</sup> For example, if we assume *Sati* to be a part of religion, morality would demand its suppression because murder is a grave crime.<sup>7</sup> Another example is untouchability.<sup>8</sup> *Article 17*<sup>9</sup> was enacted with the hope of condemning a grave criminal and yet, common practice that was against public order and morality.

#### A. Different interpretations

##### 1. The Ancient test

The term ‘essentially religious’ was used for the first time in the *Constituent Assembly* by *BR Ambedkar*. He said that religion should be confined to beliefs and rituals that were connected with ceremonials which were ‘essentially religious.’<sup>10</sup>

It was used for the first time in the *Shirur Mutt* case where the

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<sup>5</sup> *Ratilal Panachand Gandhi v. State Of Bombay*, AIR 1954 SC 388, 1954 SCR 1035.

<sup>6</sup> *Commissioner, Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar of Sghirur Mutt*, 1954 AIR 282.

<sup>7</sup> Seervai H.M., *Religious Freedom under Our Constitution and Social Reform*, PUCL BULLETIN (1988).

<sup>8</sup> *Id.*

<sup>9</sup> The Constitution of India, 1950.

<sup>10</sup> Ambedkar BR., *Constituent Assembly Debates*, Volume VII, 2<sup>nd</sup> December 1948.

Court said that, “*what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself; all of them are religious practices and should be regarded as matters of religion within the meaning of article 26(b).*”<sup>11</sup> In the *Ratilal Panachand Gandhi* case, the Court said that, “*no outside authorities has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate.*”<sup>12</sup> This test was later used to determine the content of religion on the evidence of the followers of that religion and also the scriptures<sup>13</sup> which would reveal its tenets excluding superstitions or unessential accretions to that religion.<sup>14</sup>

During this period, the ambit was clearly defined to limit a practice that had been referenced in the doctrines of a religion and also not to be ascertained by a statutory authority. This meant that the court or any statutory authority would not have any say in deciding whether a practice was an essential religious practice or not. They would have their say only if this practice violated the three restrictions of public order, morality and health under *Article 25*.<sup>15</sup> Also, no clarity was given on whether an essential religious practice violated a fundamental right or what would be the consequence of such a violation. As case law evolved, judgments were conditioned to suit the case and the test started with quoting the doctrine, then shifting to scriptures and evidence of followers, which then shifted to excluding superstitions. These shifts seemed minor but the biggest change was yet to come.

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<sup>11</sup> *Supra* note 6.

<sup>12</sup> *Supra* note 5.

<sup>13</sup> *Rana Muneswar v. State*, AIR 1976 Pat 198.

<sup>14</sup> *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan*, 1964 1 SCR 561.

<sup>15</sup> The Constitution of India, 1950.

## 2. From 'essentially religious' to 'essential to the religion'

But then, the interpretation suffered a huge shift as it was changed in the case of *Ram Prasad Seth v. State of Uttar Pradesh*.<sup>16</sup> In this case, the Court substituted the term 'essentially religious' with 'essential part of Hindu religion.' This case changed the interpretation drastically by trying to draw a parallel with 'essentially religious' and 'essential to the religion.' This was absurd as it created a whole new debate as the former meant a secular activity and the latter meant if the activity was required for the religion's continuance.

The ancient test referred to the doctrines, practices, tenets, historical background, etc. of the given religion<sup>17</sup> to decide whether the practice was essential to the religion, but now the judiciary would be the one to decide since the interpretation was changed. Now, this minor mistake meant that the term 'essentially' was changed to 'essential' and that indirectly, the entire discretionary power was now handed to the judiciary on a minor grammatical shift. Moreover, no scope or test was laid out as to who would decide these aspects.

## 3. Adoption of the 'Essential to the religion' test

Not noticing this mistake in interpretation, the Supreme Court adopted the 'essential to the religion' test in the case of *Mohd. Hanif Quareshi v. State of Bihar*, where the slaughter of cows was debated upon from the point of view of the Muslim religion under Article 25. The Court investigated the *Hedaya* book of Islam and said that no affidavit was filed by any person competent to expound the relevant tenets of Islam and it was found in the *Hedaya* Book that a Mussulman had to sacrifice either a goat for one or a cow or camel

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<sup>16</sup> *Supra* note 4.

<sup>17</sup> *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*, AIR 1962 SC 853.

for seven persons.<sup>18</sup>

The same test was adopted in *Ismail Faruqui v. Union of India*, where the Court said that, “A mosque is not an essential part of the practice of the religion of Islam and Namaz (prayer) by Muslims can be offered anywhere, even in open.”<sup>19</sup>

In the case of *Acharya Jagdishwaran and Avadhuta*, the *Anand Margis* community had a practice in their culture of performing the *Tandav* dance on the street which included carrying weapons such as arms, tridents, daggers and human skulls on the street. It was held here that the *Anand Margi* faith could exist without such dance in the public since it offended the moral values of the general public. It was held that “courts have the power to determine whether a particular rite or observance is regarded as essential by the tenets of a particular religion.”<sup>20</sup>

As seen in the three cases mentioned above, a whole new interpretation was formed based on the mistake made in the *Ram Prasad*<sup>21</sup> case. Earlier, the courts didn't have any say in determining whether a practice was essential to a religion or not since it was to be determined by the doctrines of the religion itself. But now, the Courts could judge the said practice's essentiality to the religion by checking whether without the practice, a substantial part of the religion would vanish or not. Even if the practice ticked that box, it still was under the scrutiny of the tests of public order, morality and health. To summarise, the court brought in its own reasonable standard to judge a religion's practices.

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<sup>18</sup> *Mohd. Hanif Quareshi v. State of Bihar and Ors.*, AIR 1958 SC 731.

<sup>19</sup> *Ismail Faruqui v. Union of India*, 1995 AIR 605.

<sup>20</sup> *Commr. Of Police v. Acharya Jagadishwarananda Avadhuta*, (2004) 12 SCC 808.

<sup>21</sup> *Supra* note 4.

*B. Alternate interpretations*

If this confusion wasn't enough, many controversial cases where new methods were adopted came about: -

1. Application of a mixture of both tests

The Courts took the two tests as one and held that, "*the court may have to enquire whether the practice in question is religious in character, and if it is, whether it can be regarded as essential to the religion.*"<sup>22</sup>

Since, the Court already enjoyed the powers of dictating what practice was essential, in the case of *Sastri Yagnapurushadji*<sup>23</sup>, the Court defined what it meant to be a *Hindu* and laid out the features of the *Hindu* religion. The power of the judiciary here was seemingly absolute as they applied both the tests and ultimately held the *Swaminarayan* sect as a part of the *Hindu* religion.

2. Investigative approach

In the case of *Shri AS Narayana Deekshitulu*, the court upheld the abolition of a hereditary right of a religious sect by adopting an investigative approach. The court said that, "*All that is dross will be taken off, no doubt, but the essential parts of religion will emerge triumphant out of this investigation. Not only will it be made scientific-as scientific, at least, as any of the conclusions of physics or chemistry-but will have greater strength, because physics or chemistry has not internal mandate to vouch for its truth, which religion has... It may not be possible, therefore, to devise a precise definition of universal application as to what is religion and what are matters of religious belief or religious practice. That is far from saying that it is not possible to state with reasonable certainty the limits within which the Constitution conferred a right to*

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<sup>22</sup>*Supra* note 14.

<sup>23</sup>*Sastri Yagnapureeshadji v. Muldas Bhurdas Vaishya*, 1966 3 SCR 242.

*profess religion.*"<sup>24</sup> In this case, the Court aimed to decipher whether the hereditary right was reasonable or not. The whole point in this paper aims to bring out this point of reasonableness, and how it cannot be a standard in determining a religious practices' essentiality since all unreasonable parts of a religion would be aimed to be taken off by way of the garb of reasonableness and would not leave a religion to what it truly was.

### 3. Rationality and not superstitions

Apart from applying the two established tests, the Court adopted a third test by saying practices that came out of superstition couldn't be considered religious. They said that, "*Practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other.*"<sup>25</sup>

### 4. Essential v. Non-essential

In the case of *Javed v. State of Haryana* the Court said, "*The protection under Art.25 and 26 of the Constitution of India is with respect to religious practice, which forms an essential and integral part of religion. A practice may be a religious practice but not an essential and integral part of practice of that religion.*"<sup>26</sup> So, it was held that Article 25 permitted legislation in interest of social welfare and reform as part of public order, national morality and collective health of people

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<sup>24</sup>Supra note 2.

<sup>25</sup> *Durgah Committee, Ajmer v. Syed Hussain Ali*, 1962 1 SCR 383.

<sup>26</sup> *Javed v. State of Haryana*, 2003 8 SCC 369.

and that, religions practice that was not an integral part of the practices of the religion was no protected under Article 25.

5. Genuinely and conscientiously held as part of the religion

In *Bijoe Emmanuel v. State of Kerala*<sup>27</sup>, *Chinappa Reddy J.* approved the reasoning of *Davar J. in Jamshedji v. Soonabai*<sup>28</sup>, to hold “the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely or conscientiously held as part of the profession or practice of religion.” However, he had his reservations about the process as he warned the courts that, “The court’s personal views and reactions are irrelevant. If belief is genuinely and conscientiously held it attracts the protection of Article 25, but subject, of course, to the inhibitions contained therein.”

6. Two-step test

In the case of *N. Adithyan v. Travancore Devaswom Board & Ors*<sup>29</sup>, the Court adopted a new two-step test to determine whether people other than *Brahmins* could be ordained as *Priests* in a temple in Kerala. The custom had been in existence for a long time and a lot of evidence had been produced but the court still did not allow the same as they said, “Any custom or usage irrespective of even any proof of their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by courts in the country.”

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<sup>27</sup> *Bijoe Emmanuel v. State of Kerala*, AIR 1987 SC 748.

<sup>28</sup> *Jamshedji v. Soonabhai*, ILR (1909) 33 Bom 122.

<sup>29</sup> *N. Adithyan v. Travancore Devaswom Board*, AIR 2002 SC 3538.

### C. Recent judgments

At first, the Court used to leave the task of determining an essential religious practice to the followers of the religion. Thereafter, it took the task upon itself by adding reasonableness to the picture. But, the recent norm in the judiciary with respect to the test has been controversial as the only commonality seen, seems to be the scope of judicial intervention and judicial supremacy in deciding whether a practice is to be allowed or not, under the unspoken garb of reasonableness.

For instance, in *Vishwa Lochan Madan v. Union of India*, fatwas were denied any form of legal status.<sup>30</sup> Moreover, in the *Santhara* judgment<sup>31</sup>, where the practice of fasting unto death was declared unconstitutional on the ground of public order, morality and health, it was declared that the practice wasn't an essential religious practice since, "It is not an essential part of the philosophy and approach of the Jain religion, nor has been practiced frequently to give up the body for salvation of soul." In *Khursheed Ahmad Khan v. State of Uttar Pradesh*, it was said "What is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted."<sup>32</sup> Then, the question that arises is that whether an uncodified practice that does not violate fundamental rights or the tests and is not an essential religious practice can be banned or not?

Before moving on, it is important to mention that these many interpretations point towards a 'hit and trial' method adopted by the Courts in determining whether a practice is an essential religious practice. The first attempt being, whether the practice is essentially religious (that is to be judged by the roots of the religion) the second being, whether the practice being essential to

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<sup>30</sup> *Vishwa Lochan Madan v. Union of India*, 2014 7 SCC 707.

<sup>31</sup> *Nikhil Soni v. Union of India*, 2016 2 RLW.

<sup>32</sup> *Khursheed Ahmad Khan v. State of Uttar Pradesh*, 2015 SCC 439.

the religion or the third being, to adopt one of the alternate interpretations listed above.

Now, it is important to understand the discretion accorded to the Court by itself in deciding what constitutes a religious practice and the different tests adopted that bring about an anomaly of a secular body determining the religious practice on the basis of what is reasonable. If the religion itself is inherently unreasonable in nature, then reasonableness ought not to be a standard. As *Dhawan* and *Nariman* write, “With a power greater than that of a high priest, *maulvi* or *dharmashastris*, judges have virtually assumed the theological authority to determine which tenets of a faith are ‘essential’ to any faith and emphatically underscored their constitutional power to strike down those essential tenets of a faith that conflict with the dispensation of the Constitution. Few religious pontiffs possess this kind of power and authority.”<sup>33</sup>

### [III.] CASES THAT UNDERSTAND THIS PROBLEM

The whole debate in this paper is about checking whether unfettered powers are conferred to the judiciary in deciding whether a practice in a religion is reasonable or not and whether this reasonableness is required or not? To what extent should there be ameliorative secularism<sup>34</sup> that allows the State to intervene in terms of religion? Will such institutionalisation of a religion takeaway from a religion what a religion is?

*The trend of the intervention by the Courts is very visible because according to Courts, a religion is, “essentially a thing of sentiment. Man*

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<sup>33</sup> DERRETT, *RELIGION, LAW AND THE STATE IN INDIA*, 447, (1999)

<sup>34</sup> GARY JACOBSON, *THE WHEEL OF LAW: INDIA’S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* (2003)

would not need them if he were only a bundle of intellectual and moral senses; but as he has also got sentiment and imagination, without which the former qualities would be inoperative, he cannot do without articulating his ideas and beliefs in some forms appropriate to sentiment."<sup>35</sup>

In *Adi Saiva Sivachariyargal Nala Sangam vs Govt of Tamil Nadu*<sup>36</sup>, the same sentiment of this paper has been echoed, "To determine whether a claim of state action in furtherance thereof overrides the constitutional guarantees under Article 25 and 26 may often involve what has already been referred to as a delicate and unenviable task of identifying essential religious beliefs and practices, sans which the religion itself does not survive. It is in the performance of this task that the absence of any exclusive ecclesiastical jurisdiction of this Court, if not other shortcomings and inadequacies, that can be felt."

Similar cautionary statements were propounded in the case of *Chintamani Khuntia and Ors v. The State of Orissa*<sup>37</sup>, where the Court said that the Court would make religious practices what they wished them to be if they started enquiring on the rationale of a particular religious practice. "It is all the more doubtful when judicial dicta try to lay down the formula that whether a particular religious practice is an essential part of the religion or not is an objective question to be determined by the Court by looking to the tenets of the religion itself. The usual classification of objective and subjective tests is beset with many difficulties in this area."

The question is whether we should we go back to the ancient test or continue with this 'hit and trial' and continue the cyclical process? Will the test keep on changing with respect to the case at hand, or is there a reasonable standard to be applied? What is this

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<sup>35</sup>*Dilawar Singh v. State of Haryana*, 2015 1 SCC 737.

<sup>36</sup>*Adi Saiva Sivachariyargal Nala Sangam v. Govt of Tamil Nadu*, 2016 2 SCC 725.

<sup>37</sup>*Chintamani Khuntia and Ors v. State of Orissa*, AIR 1994 Ori 46.

reasonable standard? Will usage of such a reasonable test destroy the innocence of a religion? Is judicial intervention required? All these questions are just the tip of the iceberg, if and when this issue is raised. The judiciary needs to understand that this area of law is an unanswered grey area that needs to be tended to and resolved at the earliest to prevent further disputable interpretations.

#### [IV.] WOULD JUDGMENTS DIFFER?

##### *A. Cases that adopted the 'essentially religious practice' test*

For the first set of cases, (*NarasuAppa Mali*<sup>38</sup>, *LaksmindraSwamiar*<sup>39</sup>, *RatilalPanchand*<sup>40</sup>, *Ram Seth*<sup>41</sup>) the test used was the first one, 'essentially religious' and the result would've been same with all other tests since those tests had stemmed out of the first test.

##### *B. Cases that adopted the 'essential to the religion practice' test*

In the second set of cases, for instance, *Mohd. Hanif Quareshi*<sup>42</sup>, the Court went on to check if the practice was 'essential to the religion' If they would've applied the first test, the *Mohd. Hanif Quareshi* judgement might have been different. This is because, the *Hedaya* book was judged by the court on whether the slaughter of cows was essential to the religion. The court shouldn't have gone themselves into the text but should've allowed the followers to decide whether the practice was essential to their faith or not. And, in any case, the court could have disallowed the case on the restriction of health or public order but by labelling their practice as inessential to their religion it showed the reasonable criteria applied.

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<sup>38</sup>*State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84.

<sup>39</sup>*Supra* note 6.

<sup>40</sup>*Supra* note 5.

<sup>41</sup>*Supra* note 4.

<sup>42</sup>*Supra* note 18.

Thereafter, in the *Ismail Faruqui*<sup>43</sup> case, the 'essential to the religion' test was applied. Once again, had the first test been applied, the result of whether the State could take over land upon which there is a mosque might have been different. In the *Acharya Jagdishwar*<sup>44</sup> case, the essential to the religion test was applied and it was said that the religion would still continue if the practice was disallowed. This absolutely shows the arbitrary approach of the courts in approaching any problem.

### C. Cases that adopted different interpretations

In the *Tilkayat*<sup>45</sup> and *Sastri Yagnapurushadji*<sup>46</sup> both tests were adopted and the results would be same. The case would be similar in terms of the *AK Deekshitulu*<sup>47</sup> case.

In the *Durgah*<sup>48</sup> committee case, state intervention in management of the affairs of the *Durgah* was allowed and this case was judged on the basis of the *Durgah* never having control of the property. Moreover, the Court added that any practice that was superstitious would not be considered a part of the religion and therefore not be under the ambit of constitutional protection.

This seems preposterous as so many practices of religions are superstitious as religion relies on communitarian conscience.<sup>49</sup> And, many practices will always be superstitious but still need to be allowed because that is the very simplicity of religion, it exists to give people the hope of a higher force of nature, God. It may be the faith of a person offering milk to a *Shiva-Lingam* or the hereditary

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<sup>43</sup>*Supra* note 19.

<sup>44</sup>*Supra* note 20.

<sup>45</sup>*Supra* note 13.

<sup>46</sup>*Supra* note 23.

<sup>47</sup>*Supra* note 2.

<sup>48</sup> *Supra* note 25.

<sup>49</sup> *Sir Venkataramana Devaru v. State of Mysore*, AIR 1958 SC 255.

right of a child succeeding his priest father in a temple. The very point here is that religion exists so that people follow a moral code and aspire to become better human beings. And, it is this moral code on the basis of which the principles of law have been arrived at. So much so that, religion, religious beliefs, law, jurisprudence and judicial activism are deeply interlinked.<sup>50</sup>

In the *Javed*<sup>51</sup> case, the issue was related to bigamy. And, it was held that the practice of having more than one wife or procreating more than one child could be regulated or prohibited in the interest of public order, morality and health. But, a distinction was created by the courts between an essential and an inessential practice, which couldn't be done according to the first test. Since, in the first test, the courts didn't have the power to check the essentiality of a religious practice.

In the *Bijoe*<sup>52</sup> case would only differ in terms of the court having discretionary authority over the case, while the *Adithyan*<sup>53</sup> case, adopted both tests and would be same if applied.

*D. The problem of the judiciary bringing in the unspoken garb of reasonableness while judging the whole essentiality of a practice*

The whole problem is that, when courts try to ascertain the essentiality of a religious practice, they put the said practice under a reasonable microscope, which is certainly not required. If these cases are seen from the ancient test perspective, where one is to look at the practice by the evidence of the followers and of that religion and scriptures<sup>54</sup>, the same might not have been held. But

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<sup>50</sup> Sunil Ambwani J., *Religion and Jurisprudence by Samvada*, September 6-8, 2013.

<sup>51</sup> *Supra* note 26.

<sup>52</sup> *Supra* note 27.

<sup>53</sup> *Supra* note. 29.

<sup>54</sup> *Supra* note 25.

the other side's argument relies on how everything cannot be tolerated and while freedom of religion and exercise is permitted, it is the duty of the courts to not allow anything in the name of religion by imposing its outer limits.<sup>55</sup>

This leads us to another issue, highlighted in the *Javed*<sup>56</sup> case. What is greater, the test itself or the restrictions? In every case discussed above, even if a religious practice is considered as essential or not, the Courts anyways have had restrictions in order to ban the practice. Moreover, with the inclusion of the social reform requirement, courts have even more powers to wield their arbitrariness over a case. So, by applying the restrictions every single judgment would be decided beforehand and ascertaining the essentiality of the religious practice would be deemed unnecessary and inconsequential. This will go a long way in curtailing this process as the whole case would function very smoothly by directly referring to the restrictions of public order, health and morality and avoiding the controversial essential religious practice test by not giving the opportunity to the courts to check the essentiality of a practice but still maintaining their supremacy by allowing them to have checks on the practice by way of the restrictions.

#### [V.] CONCLUSION

After seeing the whirlwind of jurisprudence and ever-changing interpretations on this subject, it seems that it'd be better to follow *Justice Sinha's* dissenting judgment in the *Syedna Saiffudin*<sup>57</sup> case. *Justice Sinha* held that if a practice violated the civil rights of a person then it could not be given constitutional protection.

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<sup>55</sup>*Ramji Lal v. State of U.P.*, 1957 SCR 860; *State of Karnataka v. Dr. Praveen Bhai Thogadia*, AIR 2004 SC 2081.

<sup>56</sup> *Supra* note 26.

<sup>57</sup> *Supra* note 17.

He said to, *“draw a line of demarcation between practices consisting of rites and ceremonies connected with the particular kind of worship, which is of the religious community, and practices in other matters which may touch the religious institutions at several points, but which are not intimately concerned with rites and ceremonies the performance of which is an essential part of the religion.”*<sup>58</sup> Thus, Article 26(b) would only provide constitutional protection to the former right. Thus, by drawing this line of demarcation between rights, he said excommunication was the latter and therefore, wasn't intimately concerned with rites and ceremonies, which was the essential part of a religion.

Alternatively, another solution would be to remove this redundant test completely. In effect, the solution proposed means to say that, once, the followers of the community determine whether the practice is an essential religious practice, the courts could exercise their discretion by applying either of the restrictions of public order, health and morality and in any case banning the said practice. This would also clarify the unspoken area of law on how an uncodified practice would be adjudicated upon if it violated fundamental rights as it would again be judged by the tests itself. This idea is proposed because the whole controversy begins when the court confers the authority of deciding what is an essential and what isn't an essential religion practice in a religion, because they judge a religion under the unspoken garb of reasonableness, as enumerated in the cases above, which is exactly what a religion should not be judged with. The approach and undertone being that, when the restrictions of public order, health and morality exist, there is no need for the court to delve into such controversial matters of what is an essential religious practice and what isn't. This would be beneficial because, the whole opportunity of the courts bringing reasonableness into the matter would fizzle out.

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<sup>58</sup>*Supra* note 55.

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## CDC V. AKZO NOBEL: ANALYZING THE AFTEREFFECTS IN ARBITRATING ANTI-TRUST DAMAGES CLAIMS

By Varad S. Kolhe\*

*In CDC v. Akzo Nobel, the Court of Justice of the European Union (CJEU) held that broadly worded arbitration clauses do not extend to competition related tortious damages claims. Although the judgment did not specifically address arbitration clauses, it is highly likely that consequences of the judgment on interpretation of arbitration clauses may follow. Member States' of the European Union have interpreted broadly worded arbitration clauses with reference to anti-trust damages claims and arrived at conflicting outcomes. The most recent decision on the above question was rendered in September 2017 by the Dortmund Regional Court. This article effectuates an analysis of the judgment in CDC v. Akzo Nobel, resulting uncertainty and interpretive issues and its impact on the interpretation of dispute resolution clauses.*

Keywords: Anti-Trust Damage Claims; Interpretation of Dispute Resolution Clauses; EU Competition Law; Brussels I Regulation; Enforcement of Arbitral Awards

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## [I.] INTRODUCTION

In many jurisdictions across the world, provisions of competition law are construed to fall within the meaning of ‘public policy’ under Article V of the New York Convention.<sup>1</sup> Thus, these anti-trust provisions are sufficient to fuel the refusal for enforcement of arbitral awards by enforcing courts. On the same tangent, under the competition law regime of the European Union, it has been held by the Court of Justice of the European Union [“CJEU”] that provisions of competition law amount to public policy.<sup>2</sup>

With the passage of time, there has been a shift of focus from public to private enforcement under the European Union (hereinafter EU) competition law framework. Competition authorities are now expected to investigate possible competition violations *ex post* and parties affected by anti-competitive behaviour sue infringing undertakings for damages in follow-on and stand-alone actions.<sup>3</sup> This area of follow-on actions has witnessed a flood of activities in recent years, the latest one being

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<sup>1</sup> For an opposite opinion that ‘there is no more room for doubt: the provisions of competition laws, whatever they may be, do not belong to the essential and broadly recognized values which, according to the concepts prevailing in Switzerland, would have to be found in any legal order,’ See e.g. Luca G. Radicati di Brozolo, *Court Review of Competition Law Awards in Setting Aside and Enforcement Proceedings*, in *EU and US Antitrust Arbitration: A Handbook for Practitioners* para. 22-009 et seq. (Gordon Blanke & Phillip Landolt eds, Kluwer Law International 2011); cf. *X. S.p.A. v. Y. S.r.l.*, *Swiss Supreme Court*, 4P.278/2005, 8 March 2006, 24(3) ASA Bull. 550.

<sup>2</sup> Case C-126/97 *Eco Swiss* (CJEU, 1 June 1999), paras 37, 39.

<sup>3</sup> Aren Goldsmith, *Arbitration and EU Antitrust Follow-on Damages Actions*, 34(1) ASA Bull. 10, 16–18 (2016).

the Directive on Anti-Trust Damages Actions.<sup>4</sup> This directive was introduced by the European Commission as a bellwether that will address obstacles which create hurdles in effective enforcement of damages claims and in-turn facilitate private enforcement.

As a natural corollary, the issue of public policy inevitably raises the question of arbitrability of related disputes.<sup>5</sup> In particular, states may impose limitations on the category of disputes that may be subject to arbitration seated within their jurisdiction.<sup>6</sup> In accretion, states may also determine arbitral awards which may be refused recognition and enforcement if they concern a subject matter that is not capable of settlement by arbitration under the law of that jurisdiction.<sup>7</sup> Criminal matters, insolvency, trade sanctions, employment agreements, consumer claims, or certain intellectual property matters are ubiquitously listed as non-arbitrable matters.<sup>8</sup>

With respect to competition law issues, their arbitrability is now generally acknowledged.<sup>9</sup> In-fact, commentators note a move away from the discussion of arbitrability towards the discussion of valid

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<sup>4</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 Nov. 2014 on certain rules governing actions for damages under national law for infringements of the competition law.

<sup>5</sup> See e.g. Nigel Blackaby, et al., *Redfern and Hunter on International Arbitration* para. 2.129 (6th ed., Oxford University Press 2015); Alexis Mourre, *Arbitrability of Antitrust Law from the European and US Perspectives*, in *EU and US Antitrust Arbitration: A Handbook for Practitioners* para. 1-001 (Gordon Blanke, Phillip Landolt eds, Kluwer Law International 2011).

<sup>6</sup> Art. II(1), New York Convention; Art. 34(2)(b)(i), UNCITRAL Model Law.

<sup>7</sup> Art. V(2), New York Convention; Art. 36(b)(i), UNCITRAL Model Law

<sup>8</sup> GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 945(2nd ed., Kluwer Law International 2014).

<sup>9</sup> Gordon Blanke, *The Arbitrability of EU Competition Law: The Status Quo Revisited in the Light of Recent Developments (Part I)*, (2) *Global Competition Litig. Rev.* 85, 85 and 89–100 (2017).

consent to arbitrating EU competition law matters.<sup>10</sup> Furthermore, arbitral tribunals do not even discuss the issue of anti-trust arbitrability in their awards.<sup>11</sup>

The jurisdiction of an arbitral tribunal is generally in parity with that of national courts: a competition-related matter will be arbitrable if it may be litigated in court.<sup>12</sup> There is also an implied obligation on arbitral tribunals to apply EU competition law *ex officio*, otherwise an arbitral award may be subject to the risk of setting aside or non-enforcement for violation of public policy.<sup>13</sup> It is to be kept in mind that any relief ordered by an arbitral tribunal will only produce an *inter partes* effect and may not bind third parties or the public at large.<sup>14</sup>

## [II.] JUDGMENT OF CJEU IN CDC V. AKZO NOBEL

Addressing a request for a preliminary hearing from the Dortmund Regional Court, the CJEU was for the first time asked to consider the interplay between the effective enforcement of competition law and its potential effect on the interpretation of

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<sup>10</sup> Laurence Idot, *Arbitration and Competition Law – Have We Entered a Fourth Phase in Their Relations?*, 3(1) Competition L. & Pol’y Deb. 38, 40 (2017).

<sup>11</sup> Gordon Blanke, *Antitrust Arbitration under the ICC Rules*, in *EU and US Antitrust Arbitration: A Handbook for Practitioners* para. 49-067 (Gordon Blanke & Phillip Landolt eds, Kluwer Law International 2011)

<sup>12</sup> Blanke, *supra* note 7, at 85.

<sup>13</sup> e.g. Blackaby, et al., *supra* note 3, at para. 2.138. Having in mind the fact that arbitrators should make every effort to render an enforceable award (see Born, *supra* note 6, at 1993; Blackaby, et al., *supra* note 3, at para. 9.14 et seq.; ICC Arbitration Rules 2012, Art. 41; SIAC Arbitration Rules 2013, Art. 37.2; LCIA Arbitration Rules 2014, Art. 32.2), it is prudent for arbitrators to examine any EU competition law concerns that may arise in the proceedings.

<sup>14</sup> Phillip Landolt, *Modernised EC Competition Law in International Arbitration* para. 10-03 (Kluwer Law International 2006).

jurisdiction rules<sup>15</sup> within the Brussels I Regulation.<sup>16</sup>

*A. How it all unfolded*

On the premise of claims transferred to it by undertakings that alleged to have suffered losses from the hydrogen peroxide cartel in 1994-2000, Cartel Damage Claims (CDC)<sup>17</sup> initiated a case in which it attempted to bring one joint proceeding before the Dortmund Regional Court notwithstanding that some contracts of sale included jurisdiction and arbitration clauses.

*B. Issues before the Court*

The questions to be decided by the CJEU were two-fold:

- 1) Whether the requirement of effective enforcement of EU competition law allowed the courts to take account of jurisdiction and arbitration clauses when considering actions for damages resulting from an infringement of EU Competition Law?
  
- 2) If the courts were so allowed, would it result in the derogation of jurisdiction the courts would otherwise have under Brussels I regulation?

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<sup>15</sup> The Court interpreted Council Regulation (EC) 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [hereinafter 'Brussels I Regulation']. The Regulation has since been recast by Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>16</sup> Opinion of Advocate General Jääskinen in Case C-352/13 *CDC v. Akzo Nobel*, 11 Dec. 2014, para. 7.

<sup>17</sup> A litigation vehicle specializing on bundling and enforcing antitrust damages claims, see [www.carteldamageclaims.com](http://www.carteldamageclaims.com).

### C. Findings of the Court

Interestingly, the answer provided by the Court did not correspond to the questions as enumerated above. This is because the reasoning of the court was not based on the requirement of effective enforcement of EU competition law. On the contrary, the court observed that substantive law applicable to the dispute, including EU competition rules, should not affect the validity of a jurisdiction clause.

Relying on precedents, it was recognized by the court that it was for national courts to interpret jurisdiction clauses and determine which disputes fall within their scope.<sup>18</sup> The court, introducing a new approach, provided its own interpretation of a broadly worded jurisdiction clause thereby introducing a standard which may be binding on the courts of the Member States.<sup>19</sup>

Citing a requirement that in order to be covered by a jurisdiction clause, a dispute must arise in connection with a particular legal relationship with respect to which the agreement was entered into<sup>20</sup>; the court created an additional requirement of reasonable enforceability:<sup>21</sup> In the court's opinion:

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<sup>18</sup> Case C-214/89 *Powell Duffryn plc v. Wolfgang Petereit* (CJEU, 10 Mar. 1992), para. 37; Case C-269/95 *Francesco Benincasa v. Dentalkit Srl* (CJEU, 3 July 1997), para. 31.

<sup>19</sup> It is recognized that while there are no formal rules of precedent in the EU, the CJEU judgments influence both the referring court and other courts in the Member States. This stems from the line of case law in *Joined Cases C-28-30/62 Da Costa en Schaake NV & Others v. Administratie der Belastingen* (CJEU, 27 Mar. 1963), see e.g. Damian Chalmers, et al., *European Union Law: Text and Materials* 192–195 (3d ed., Cambridge University Press 2014); Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases, and Materials* 471–478 (6th ed., Oxford University Press 2015).

<sup>20</sup> *CDC v. Akzo Nobel*, at para. 69

<sup>21</sup> Gordon Blanke, *The Arbitrability of EU Competition Law: The Status Quo*

*“a clause which abstractly refers to all disputes arising from contractual relationships [does not extend] to a dispute relating to the tortious liability that one party allegedly incurred as a result of the other’s participation in an unlawful cartel.”<sup>22</sup>*

Hence, the CJEU concluded that such a dispute does not stem from a particular legal relationship because:

*“The undertaking which suffered the loss could not reasonably foresee such litigation at the time that it agreed to the jurisdiction clause [and] had no knowledge of the unlawful cartel at that time.”<sup>23</sup>*

A jurisdiction clause would therefore, according to the Court’s findings, need to make a specific reference to disputes concerning liability resulting from an infringement of competition law to catch them within its scope.<sup>24</sup>

### **[III.] INTERPRETIVE ISSUES ARISING OUT OF THE JUDGMENT**

There is enormous dearth of information in two respects which makes it obtuse to comprehend the scope of the judgment. First, what type of damages were claimed by the CDC and second, whether the court has made a distinction between different sources of tortious damages.

At the outset, there is a distinction to be made between different situations in which tortious damages resulting from a violation of competition law may be claimed: (1) transactional situations, and (2) non-transactional situations.<sup>25</sup> The first involve claiming

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*Revisited in the Light of Recent Developments (Part II)*, (3) Global Competition Litig. Rev. 155, 158 (2017)

<sup>22</sup> *CDC v. Akzo Nobel*, *supra* note 21 at para. 69

<sup>23</sup> *Id.*, para. 70.

<sup>24</sup> *Id.*, paras 71, 72, 73(3).

<sup>25</sup> Jürgen Basedow, *Jurisdiction and Choice of Law in the Private Enforcement of EC Competition Law*, in *Private Enforcement of EC Competition Law* 231–234 (Jürgen

damages in tort resulting from anti-competitive behaviour of the defendant where there is a contract containing a broadly worded dispute resolution clause between the claimant and the defendant that is related to such anti-competitive behaviour, e.g. payment of higher prices under the contract as a result of the cartel.<sup>26</sup> The second relates to situations where, for instance, indirect purchasers sue cartel members for higher prices paid on the upstream market as a result of the cartel's existence.<sup>27</sup>

Thus, the findings in *CDC v. Akzo Nobel* can either be interpreted (1) restrictively, i.e. relating only to tortious claims stemming from non-transactional situations, or (2) broadly, i.e. relating to any tortious liability resulting from an infringement of EU competition law.

If the CJEU's judgment was rendered in view of non-transactional tortious claims only, as is suggested by other CDC led cases,<sup>28</sup> it would merely restate the existing practice to only extend the reach of dispute resolution clauses to transactional tortious claims, i.e. related to a particular legal relationship. If, on the other hand, *the judgment* is to apply to all antitrust-related tortious claims, the overhaul of the currently established practice may be substantial. Such broad interpretation would, in particular, go

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Basedow ed., Kluwer Law International 2007).

<sup>26</sup> *Id.*, at 232–234.

<sup>27</sup> *Id.*, at 234.

<sup>28</sup> Case no. C/13/500953/HA ZA 11-2560 *CDC v. Akzo Nobel N.V., Eka Chemicals AB, Kemira Chemicals OY* (District Court of Amsterdam, 4 June 2014), ECLI:NL:RBAMS:2014:3190, para. 2.12; Case no. 11/16750 *CDC HP v. Kemira* (District Court of Helsinki, 4 July 2013) in Hanna Laurila & Toni Kalliokoski, *Developments in Finnish Private Antitrust Litigation: Finland Fast-Forwards into the Future?*, 35(11) Eur. Competition L. Rev. 519, 524 (2014), or Blanke, *supra* n. 30, at 161–163.

For an opposite view, see *Microsoft Mobile Oy (Ltd) v. Sony Europe Ltd*, *supra* note 43, at ¶45.

against the established practice of drafting jurisdiction clauses, since it is accepted that broadly worded jurisdiction clauses clutch tort-related claims<sup>29</sup> and, therefore, also claims resulting from violations of competition law.<sup>30</sup>

The Court's reasoning would also go against the presumption that when parties conclude a dispute resolution agreement, they do not expect or foresee dealing with different types of claims in different courts<sup>31</sup> and intend to provide for the unforeseeable claims by concluding a broadly worded dispute resolution clause.<sup>32</sup> This may also create a disparity between the way tort and contract claims based on the same facts and arising out of the same circumstances are treated, i.e. tort claims would be labeled as 'not foreseeable' while contractual claims remain unaffected. This would again be contradictory to the practice in many jurisdictions that recognizes concurrent tort claims to fall within dispute resolution clauses<sup>33</sup> and enable a party to a jurisdiction clause to avoid it by simply advancing tort claims only.<sup>34</sup>

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<sup>29</sup> Ulrich Magnus, *Jurisdiction*, in *Brussels Ibis Regulation* 660 (Ulrich Magnus, Peter Mankowski eds, 3d ed., Otto Schmidt 2015); Blanke, *supra* n. 7, at 100–101.

<sup>30</sup> See e.g. Basedow, *supra* note 26, at 232–233.

<sup>31</sup> Wolfgang Wurmnest, *International Jurisdiction in Competition Damages Cases under the Brussels I Regulation: CDC Hydrogen Peroxide*, 53(1) Common Mkt. L. Rev. 225, 246 (2016); *Fiona Trust & Holding Corporation v. Privalov* [2007] Bus. L.R. 1719, para. 13

<sup>32</sup> e.g. Thomas Thiede, *Tant que ça marche on ne touche à rien: Allgemeine Schiedsklauseln sind auf Kartellschadensersatzansprüche anwendbar*, NZKart 589, 592–593 (2017).

<sup>33</sup> Rupert Bellinghausen & Julia Grothaus, *The CJEU's Decision in CDC v Akzo Nobel et al: A Blessing or a Curse for Arbitrating Cartel Damage Claims?*, <http://arbitrationblog.kluwerarbitration.com/2015/07/31/the-cjeu-decision-in-cdc-v-akzo-nobel-et-al...>

<sup>34</sup> *Microsoft Mobile Oy (Ltd) v. Sony Europe Ltd* [2017] EWHC 374 (Ch) para. 72(ii).

**[IV.] UNCERTAINTY IN SEVERAL RESPECTS**

The court's findings seem to stem from the lack of knowledge with respect to an unlawful cartel on the part of the injured party at the time of conclusion of the contract.<sup>35</sup> Creative arguments may proliferate that such concerns should apply beyond the competition law context based on the Court's statement that substantive rules applicable in a dispute, including EU competition rules, should not affect the validity of a jurisdiction clause. This gives rise to uncertainty in several respects:

First, is it possible to argue that other tortious claims should also be foreseeable to be covered by a dispute resolution clause? This is even more so because the lack of knowledge about a committed tort is not only true for competition law infringements, but also for e.g. when fraud is committed during the conclusion of a contract, which is not known to the affected party.<sup>36</sup>

Second, would it be possible to argue that contractual claims should also be foreseeable to be covered by a dispute resolution clause? The lack of knowledge is, for instance, the very basis of contractual claims related to non-disclosure of information relevant to the conclusion of the contract under German law.<sup>37</sup>

It is utopian to imagine that the Court intended to have such far-reaching implications on the system of private international law within the EU as such broad interpretation would render dispute resolution clauses plainly meaningless for many standard claims. Based on these concerns, a sensible interpretation of the Court's decision would be that it should only apply to tortious claims related to antitrust liability in purely non-transactional situations.

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<sup>35</sup> *CDC v. Akzo Nobel*, *supra* note 21, at para. 70.

<sup>36</sup> *Bellinghausen & Grothaus*, *supra* note 34

<sup>37</sup> German Civil Code, s. 123; Case no. 8 O 30/16 [Kart] (Dortmund Regional Court, 13 Sept. 2017), para. 36.

**[V.] BRUSSELS I REGULATION (RECAST): CAN IT STEER THE SAIL  
CLEAR?**

The earlier version of Brussels I Regulation, as interpreted in *CDC v. Akzo Nobel*, did not enumerate whether and which national laws may be additionally applicable to jurisdiction clauses.<sup>38</sup> However, a recent version of the regulation incorporates a new provision that specifically refers to the application of national law of the Member States to the determination of substantive validity of a jurisdiction clause.<sup>39</sup> Even assuming that the broad interpretation of *CDC v. Akzo Nobel* is adopted, the recast version of the Brussels I Regulation may influence the findings of the court.

According to the CJEU's earlier practice, the Court's interpretation of the provisions of the Brussels I Regulation will only be applicable to the new provisions of the Brussels I Regulation (recast) in so far as the new wording does not deviate from the earlier wording.<sup>40</sup> Undoubtedly, the interpretation of the effect of a jurisdiction clause differs from the issue of its substantive validity: while the latter refers to whether the jurisdiction agreement was validly concluded, the former addresses the effect that should be given to a valid jurisdiction agreement.<sup>41</sup> Simultaneously, it is open to debate whether the newly introduced

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<sup>38</sup> Article 23(1), Brussels I Regulation

<sup>39</sup> Article 25(1), Brussels I Regulation (Recast)

<sup>40</sup> Ratković & Zgrabljic Rotar, *supra* n. 49, at 246–247 addressing the situation with the Brussels I Regulation and its predecessor, the Brussels Convention, referring, inter alia, to Case C-533/07 *Falco Privatstiftung and Rabitsch* (CJEU, 23 Apr. 2009), paras 48–51.

<sup>41</sup> Trevor C. Hartley, *Choice-of-Court Agreements Under the European and International Instruments* 130–131, para. 7.05 (Oxford University Press 2013); Christian Heinze, *Choice of Court Agreements, Coordination of Proceedings and Provisional Measures in the Reform of the Brussels I Regulation*, 75(3) *Rabel J. COMP. & INT'L PRIV. L.* 581, 585 (2011)

rule on substantive validity could be extended to the interpretation of the scope as well.

Furthermore, the CJEU's earlier approach to the interpretation of the Brussels I Regulation provision on prorogation of jurisdiction supported an autonomous application, i.e. without the involvement of any national law. It remains to be seen how this will be approached by the CJEU in its subsequent case law. However, even if the CJEU does re-evaluate its findings in *CDC v. Akzo Nobel*, either limiting or dismantling the foreseeability requirement, the damage may already be done if the Member States' courts in the meantime change the national interpretation standards in line with the broad interpretation of *CDC v. Akzo Nobel*.

#### [VI.] THE JUDGMENT AND ARBITRATION AGREEMENTS

The CJEU, in *CDC v. Akzo Nobel*, interpreted the Brussels I Regulation to exclude arbitration from the scope of its application.<sup>42</sup> This was also further reaffirmed in the Brussels I Regulation (recast).<sup>43</sup> To revisit the court's opinion in *CDC v. Akzo Nobel*, it stated that it did not have sufficient information to provide a useful answer to the referring court regarding certain terms 'which do not fall within the scope of application of the Brussels I Regulation'.<sup>44</sup>

Notwithstanding the court's choice to not comment on arbitration agreements, the judgment rendered may still influence the interpretation of arbitration agreements by European Courts.<sup>45</sup>

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<sup>42</sup> Brussels I Regulation, Art. 1(2)(d).

<sup>43</sup> Brussels I Regulation (recast), Art. 1(2)(d) and Preamble, para. 12.

<sup>44</sup> *CDC v. Akzo Nobel*, *supra* note 21, at para. 58.

<sup>45</sup> Gordon Blanke, *The CJEU's Ruling in CDC v Akzo Nobel and Its Implications for Arbitrating Cartel Disputes*, 8(3) Global Competition Litig. Rev. R-65, R-65 (2015); Gordon Blanke, *Amsterdam Court Rejects Arbitration Defense for Cartel Damages Actions*, 8(4) GLOBAL COMPETITION LITIG. REV. R-73, R-73 (2015).

To answer why it is so, it is due to the fact that both broadly worded jurisdiction and arbitration clauses are interpreted in a similar manner, i.e. as encompassing tortious claims connected with the contract. The interpretation of the wording of dispute resolution clauses is, after all, related to contractual construction and principles of contractual interpretation.<sup>46</sup> Therefore, as the same words may be interpreted in the same manner irrespective of whether they appear in clauses of jurisdiction or arbitration clauses, the effects of the CJEU's judgment may therefore extend to the established practice of catching tort-related disputes with broadly worded arbitration agreements.<sup>47</sup>

However, even if *CDC v. Akzo Nobel* were to apply to arbitration agreements, such application shall be subject to several limitations even with respect to broadly worded arbitration clauses. Arguably, in situations where parties included a liquidated damages clause for antitrust infringements in their contract, this could be interpreted as intention to include antitrust damages claims within the dispute resolution agreement even under the *CDC v. Akzo Nobel* approach. Even though liquidated damages clauses may, in certain circumstances, be challenged for public policy concerns as excessive and reduced or denied recognition, they may still be used to demonstrate that the parties to the contract considered the possibility of competition-related disputes arising from their legal relationship and, therefore, such disputes were foreseeable to the

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<sup>46</sup> Renato Nazzini, *Are Claims for Tortious Damages for Breach of the Antitrust Rules Arbitrable in the European Union? Some Reflections on the CDC Case in the Court of Justice*, (1) ITALIAN ANTITRUST REV. 70, 76 (2016).

<sup>47</sup> Julian D. M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* 151–153, 168–169 (Kluwer Law International 2003); Phillip Landolt, *Arbitration Clauses and Competition Law*, in *EU and US Antitrust Arbitration: A Handbook for Practitioners* para. 2-001 (Gordon Blanke, Phillip Landolt eds, Kluwer Law International 2011).

parties during the conclusion of the contract.<sup>48</sup> The same is likely to be valid for compliance clauses which allow the injured party to avoid the contract when the other party infringes competition law.

As a result, the potential adverse effects on arbitration will be limited to only those situations where the law of those EU Member States that adopt the *CDC v. Akzo Nobel* interpretation to be applicable to arbitration clauses, since the interpretation of arbitration agreements is subject to the national law applicable to that arbitration agreement.

### [VII.] IS IT TIME FOR NEW ARBITRATION CLAUSES?

Several problems may result from the CJEU's ruling in *CDC v. Akzo Nobel* if it is interpreted broadly. First, other EU jurisdictions may follow the approach of Dutch and Finnish courts extending the requirement of foreseeability to antitrust damages claims under arbitration agreements. Second, due to the unclear scope of the CJEU's judgment, the requirement of foreseeability may potentially be argued to extend to all tortious claims or even contractual claims that were not foreseeable at the time of the conclusion of the contract.

Since arbitration is excluded from the scope of the Brussels I Regulation, the CJEU may not receive a preliminary ruling question which would allow it to clarify the situation. Even if it does, the Court may, once again, refuse to address arbitration agreements.

If it is crucial for the parties that antitrust claims arrive to arbitration, the uncertainty of the possible adverse effects of *CDC v.*

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<sup>48</sup> Stephan Wilske, Christian Steinle & Laura Bräuninger, *The ECJ's Decision in CDC v. Evonik: A Breakthrough for Cartel Arbitrations?*, <http://globalarbitrationreview.com/article/1034650/the-ecj%E2%80%99s-decision-in-cdc-v-evonik-a-brea...>

*Akzo Nobel* may be mitigated by e.g. adopting an appropriate wording in an arbitration clause making a reference to 'unforeseeable' claims generally and/or including a specific reference to liability resulting from competition law infringements, either in the clause itself or through another clause in the contract as discussed above.

Alternatively, parties may opt to subject their arbitration agreements to the law of a jurisdiction which recognizes broadly worded arbitration clauses to include any potential antitrust claims. This could, for instance, be English or German law, which, based on the recent case law, appear to be favourable to arbitration in this respect.

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## MOHD. SALIM V. STATE OF UTTARAKHAND: ECO-CENTRISM IN THE JURIDICAL REALM

By Angad Singh Makkar\*

*The framework of environmental ethics and rights has long been mainly divided into two main schools of thoughts: anthropocentrism and ecocentrism. Anthropocentrism, as the term suggests, is concerned with human interests and views environmental protection and conservation in light of the same; ecocentrism, on the other hand, expounds upon the intrinsic value of all constituents of nature. Though anthropocentric thought is reflected in most environmental legislations and judicial decisions, the past decade has witnessed the nascence of ecocentric environmental jurisprudence. Uttarkhand High Court's decision in the case of Mohd. Salim<sup>1</sup>, granting the Ganga and Yamuna rivers juristic entity status, has been touted as a prime example of ecocentric dictum; drawing parallels with New Zealand's legislation granting legal rights to the Whanganui River<sup>2</sup>. This paper analyses the potential for ecocentric jurisprudence specifically in the Indian legal system, through a review of the judgment in Mohd. Salim, and later on, in Narayan Dutt Bhatt<sup>3</sup>. The question that begs to be asked herein is whether the principles ecocentrism espouses are desirable, achievable and implementable; for only then can one optimistically foresee an ecocentric legal framework in India's future.*

Keywords: Ecocentrism, Anthropocentrism, Judicial Action, Legislative Reform

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<sup>1</sup> Mohd. Salim v. State of Uttarakhand, 2017 (2) RCR (Civil) 636

<sup>2</sup> Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017

<sup>3</sup> Narayan Dutt Bhatt v. Union of India, 2018 (3) RCR (Civil) 544

## [I.] ECOCENTRISM: AN OVERVIEW

Henry David Thoreau, an American writer of the 19<sup>th</sup> century, is considered the pioneer of ecocentric thought, as he deplored urbanism and its vices, and called for a deeper appreciation of wilderness<sup>4</sup>. Since then, there have been numerous approaches towards acknowledging and upholding the rights of non-human entities, be it animal liberationist movements or the notion of 'holism', which correlates respect for non-living natural features such as mountains to the respect for property rights in human society<sup>5</sup>. Nonetheless, ecocentrism, in its most commonly accepted form, entails the removal of humanity from the centre of the universe in order to replace it with nature<sup>6</sup>.

A proponent of ecocentrism would argue that one must not protect the environment merely in the interests of human welfare and well-being, rather environmental protection and conservation must stem from a broader understanding of nature's intrinsic value<sup>7</sup>. Biologist Lewis Thomas articulated this parallel interrelation between nature and human beings expertly by stating, "*Earth is not a planet with life on it; rather it is a living planet*"<sup>8</sup>. Similar sentiments were echoed by Norwegian philosopher Arne Naess while coining the term 'deep ecology'<sup>9</sup>, which calls for egalitarianism among all forms of life and stresses upon the inherent value of nature. For deep ecologists, the underlying

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<sup>4</sup> J.E. DE STIGEUR, *AGE OF ENVIRONMENTALISM*, 1-197 (1997).

<sup>5</sup> LINDA HAJJAR LEIB, *HUMAN RIGHTS AND THE ENVIRONMENT*, 9-40 (2011).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Arne Naess, *The Shallow And The Deep, Long-Range Ecology Movement. A Summary*, 16 *INQUIRY* (1973).

problem is the Western mindset of consumerism, which prioritises material needs and insatiable human greed over ecological concerns.

Unsurprisingly, since the Stockholm Declaration in 1972, the ecocentric-anthropocentric debate has often translated into a tussle between ecological preservation and development on the international stage. However, more often than not, ecocentric principles are shot down as idealist, with the most landmark environmental declarations having predominantly anthropocentric underpinnings<sup>10</sup>. For instance, Rio in 1992, Johannesburg in 2002 and, most recently, the UN Rio +20 Summit all failed to endorse the intrinsic value of nature<sup>11</sup>. Visionary worldviews explicitly upholding ecocentric principles, such as the Earth Charter in 2000, have failed to gain traction and are buried under overwhelmingly anthropocentric academia<sup>12</sup>. Nevertheless, Ecuador's inclusion of the *Rights for Nature* in its Constitution in 2008<sup>13</sup>, as well as Bolivia's *Law of the Rights of Mother Earth* put forth in 2010<sup>14</sup>, are encouraging steps showcasing an increasing assimilation of ecocentrism within legal systems. Questions of implementation and feasibility *inter alia* loom large still, and it is in this light that one must review the Uttarkhand High Court's recent decisions.

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<sup>10</sup> Paul Cryer and Helen Kopnina, *Why Ecocentrism Is The Key Pathway To Sustainability*, MAHB, (2017), <https://mahb.stanford.edu/blog/statement-ecocentrism/>

<sup>11</sup> *Id.*

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

<sup>13</sup> Articles 71-74, Constitution of the Republic of Ecuador

<sup>14</sup> Law 071 of the Plurinational State of Bolivia, "Law of the Rights of Mother Earth", (2010).

**[III] MOHD. SALIM, WHANGANUI AND NARAYAN DUTT BHATT**

The Uttarakhand High Court raised a few eyebrows, to put it lightly, through its judgments in the cases of *Mohd. Salim* in 2017 and *Narayan Dutt Bhatt* in 2018 which granted juristic entity status to the Ganga and Yamuna rivers, and the entire animal kingdom respectively. While the former has been subsequently stayed by the Supreme Court of India, the fate of the latter is still hanging in the air and, as of now, holds binding legal value. Irrespective of the precedential value of these judgments, they are being touted as the flagbearers of ecocentrism in the Indian judicial sphere. It is imperative to evaluate then exactly how ecocentric these judgments are.

Proceeding chronologically, Mohammed Salim had filed a public interest litigation in the Uttarakhand High Court challenging the illicit construction and encroachment along the Ganga, while also bringing up the Government's failure to constitute the Ganga Management Board in accordance with the Uttar Pradesh Reorganization Act, 2000<sup>15</sup>. The High Court noted these concerns and passed an order mandating eviction of private parties from Government land and directing the Central Government to constitute the Ganga Management board *inter alia*<sup>16</sup>. This matter came up again before the High Court in its much-acclaimed judgment in March 2017, where it expressed extreme displeasure at the lack of action taken to implement the aforementioned order.

The Court proceeded to note that *"this situation requires extraordinary measures to be taken to preserve and conserve Rivers Ganga*

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<sup>15</sup> *Mohd. Salim v. State of Uttarakhand*, Writ Petition (PIL) No. 126 of 2014, High Court of Uttarakhand

<sup>16</sup> *Id.*

and Yamuna"<sup>17</sup>. Foreshadowing its ultimate decision, the Court then expounded upon the case of *Yogendra Nath Naskar v. Commission of Income-Tax, Calcutta*<sup>18</sup>, wherein it was held that a Hindu idol is a juristic entity endowed with certain rights. It was also noted, through the case of *Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass & Ors.*<sup>19</sup>, that the recognition of an entity as juristic person is for subserving the needs and faith of society. Having established its ability to declare even an inanimate entity a juristic person, the Court finally stated that "to protect the recognition and the faith of society, Rivers Ganga and Yamuna are required to be declared as the legal persons/living persons"<sup>20</sup>. The constitutional mandate of Articles 48-A and 51A(g) was referred to as well, while the Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand were deemed to be *persons in loco parentis* of the rivers<sup>21</sup>.

Unsurprisingly, the High Court's ruling raised a host of concerns and issues, pertaining to the extent of the rights of these rivers and, as a corollary, their liability in cases of floods et al. The Uttarakhand government specifically challenged the ruling by questioning *inter alia* whether people affected by river floods could sue the Chief Secretary of State and whether there would be a financial burden imposed on the State<sup>22</sup>. Accordingly, the Supreme

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<sup>17</sup> *Supra* note 1

<sup>18</sup> 1969 (1) SCC 555

<sup>19</sup> AIR 2000 SC 1421

<sup>20</sup> *Supra* note 1

<sup>21</sup> *Id.*

<sup>22</sup> *Ganga And Yamuna Lose 'Living Entity' Status As Supreme Court Stays Uttarakhand HC Judgement*, INDIATIMES, (2017).<https://www.indiatimes.com/news/india/ganga-and-yamuna-lose-living-entity-status-as-supreme-court-stays-uttarakhand-hc-judgement-325383.html>

Court of India stayed the operation of the High Court's ruling in July 2017<sup>23</sup>, leaving this matter up in the air for the time being.

The final decision of the High Court is certainly ecocentric, insofar as it expressly places the rivers on the pedestal of living persons, and in doing so, forms a strong legal basis for their protection and conservation. However, it would be fallacious to characterize the High Court's judgment as ecocentric, as the reasoning involved in reaching its final decision is indisputably anthropocentric. The Court even explicitly states that these rivers "support and assist both the life and natural resources and health and well-being of the entire community"<sup>24</sup>. The declaration of the rivers as juristic entities is merely a tool to effectively ensure that the Ganga Management Board carries out its tasks for the purposes of irrigation, rural and urban water supply, hydro power generation and so on. Essentially, even while granting rights to these rivers, the Court cannot separate itself from arguments based on human needs and sustenance; the Ganga and Yamuna rivers aren't living persons because their intrinsic value so demands, rather they are living persons because human needs so require.

It is intriguing to note that on the very day of the Uttarakhand High Court's verdict, New Zealand enacted legislation granting legal rights to the Whanganui river: *Te Awa Tupua*<sup>25</sup>. Naturally, the right to sue and to be sued were officially endowed upon the *Te Awa Tupua*, which is to be represented by a guardian, *Te Pou Tupua*<sup>26</sup>. This Act came into force after eight years of negotiation between

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<sup>23</sup> *State of Uttarakhand v. Mohd. Salim*, Petition(s) for Special Leave to Appeal (C) No(s). 016879/2017

<sup>24</sup> *Id.*

<sup>25</sup> *Supra* note 2

<sup>26</sup> Erin L. O'Donnell and Julia Talbot-Jones, *Creating Legal Rights For Rivers: Lessons From Australia, New Zealand and India*, 23 *ECOLOGY AND SOCIETY* (2018).

the Whanganui Iwi tribe and the Crown, and provides for a strategy group, *TeKopukanaTe Awa Tupua*, to represent stakeholders' interests. Thus, the framework of this Act is extremely inclusive and creates a nested-community governance within the broader legal framework<sup>27</sup>, while providing a feasible strategy for implementation. It is undeniable that there exist numerous differences in the two aforementioned situations, foremost among which are the lengths of these rivers - Whanganui river is merely 290 km, whereas the Ganga's length is recorded to be slightly over 2500 km! - and, consequentially, the number of affected parties. Nevertheless, the Whanganui river legislation could possibly serve as a roadmap to practically accomplish the ecocentric goals set out by the Uttarakhand High Court.

Next in line on the Uttarakhand High Court's ecocentric agenda was the case of *Narayan Dutt Bhatt*<sup>28</sup>, with the Court delivering its final judgment in July 2018. The Court issued a range of specific directions to the Uttarakhand government and other concerned authorities with regards to the prevention of cruelty against domesticated animals, in response to the petitioner's allegations that animals involved in transporting goods across the Indo-Nepal border were being cruelly treated. While doing so, the Court sweepingly declared that "*the entire animal kingdom including avian and aquatic are legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person*"<sup>29</sup>. Moreover, it is notable that the Court declared "*all citizens throughout the State of Uttarakhand (as) persons in loco parentis as the human face for the welfare/protection of animals*"<sup>30</sup>, greatly diluting any potential locus

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<sup>27</sup> *Id.*

<sup>28</sup> *Supra* note 3

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

standi issues in animal protection cases.

Unlike its reasoning in *Mohd. Salim*, wherein the Court primarily advanced human interests while appearing deceptively ecocentric, the Court actually incorporated an ecocentric rationale herein. Particularly, it stated that “*animals breathe like us and have emotions. The animals require food, water, shelter, normal behavior, medical care, self-determination*”<sup>31</sup>. Furthermore, while relying upon the Apex Court’s ruling in *Animal Welfare Board of India v. A. Nagaraja*<sup>32</sup>, the Court propounded that “*animals should be healthy, comfortable, well-nourished, safe, able to express innate behaviour without pain, fear and distress*”<sup>33</sup>, and that animals are “*entitled to justice*”<sup>34</sup>. Given the cognizable difference between an inanimate river and animate animals, it is perhaps easier to reconcile the distinct approach in the aforementioned two cases. The Uttarakhand High Court clearly found it more ‘natural’ to adopt a predominantly ecocentric approach towards entities capable of drawing human empathy, in comparison to inanimate rivers which, despite their ‘holy’ status, are mainly seen as sources to satisfy human needs.

### [III.] AN ECOCENTRIC INDIAN LEGAL FRAMEWORK: DESIRABLE? ACHIEVABLE? IMPLEMENTABLE?

Despite the differing degrees of ‘pure ecocentric’ reasoning adopted in the two cases, *Mohd. Salim* and *Narayan Dutt Bhatt* have brought into focus the scope for ecocentrism in the Indian legal system in the imminent future. First things first, the Uttarakhand High Court must be lauded for its willingness to take charge of a rapidly deteriorating situation, especially vis-à-vis the Ganga and

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<sup>31</sup> *Id.*

<sup>32</sup> (2014) 7 SCC 547

<sup>33</sup> *Supra* note 3

<sup>34</sup> *Id.*

Yamuna rivers. Rather than limiting itself to the unproductive judicial framework for protection of rivers, dating back to the *Kanpur Tanneries* case<sup>35</sup>, the Court attempted to truly give new impetus to this cause through its ecocentric ruling. Similarly, the ruling in *Narayan Dutt Bhatt* also aims to provide a much stronger legal foundation for future animal protection cases, be it merely through its precedential value or, as mentioned earlier, the further relaxation of locus standi to ease the litigation process. Judgments influenced by ecocentric principles are, in this sense, definitely desirable, insofar as their willingness to disrupt the norm<sup>36</sup> draws much-needed attention to these pressing environmental issues and also set the wheels in motion for a gradual shift away from our unsustainable anthropocentric ideals.

The hurdles of achievability and implementation, however, remain inadequately dealt with so far, and the Uttarkhand High Court must be held accountable for exacerbating this task, rather than providing meaningful assistance with it. Firstly, it must be noted that though the judicial channel provides a rapid route for creating legal rights for non-human entities, as it is devoid of legislative red tape, judgments usually end up lacking the institutional depth that can be achieved through well-drafted legislations<sup>37</sup>; a direct comparison of the *Te Awa Tupua* legislation and the case of *Mohd. Salim* blatantly reveals the same. Whereas the former takes comprehensive steps to ensure minimum impediment in its enforcement, the latter serves as merely an idealistic, blanket

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<sup>35</sup> *M.C. Mehta v. Union of India*, 1988 AIR 1115

<sup>36</sup> Urmi Goswami, *Will Granting Legal Rights To Rivers Like The Ganga Change The On-Ground Situation?*, THE ECONOMIC TIMES (2018). <https://economictimes.indiatimes.com/news/politics-and-nation/will-granting-legal-rights-to-rivers-like-the-ganga-change-on-ground-situation/articleshow/57818653.cms>

<sup>37</sup> *Supra* note 26

order without the means to be effectively enforced. Lack of explanation pertaining to what amounts to 'harm' to the rivers, or any mention of the potential transboundary disputes such a judgment could raise (be it intra-State within India, or inter-State between India and Bangladesh, for instance)<sup>38</sup>, are notable lacunae in this specific ad-hoc judicial approach.

Further, judgments from lower courts always run the risk of being undermined by future Court rulings<sup>39</sup>; yet again, look no further than the Supreme Court order staying *Mohd. Salim's* ruling. In this light, it must be asserted that the legislative channel, given its ability to provide for a more meticulous and rigorous process of deliberation and stakeholders' involvement, remains the most productive avenue to plant the seeds for an ecocentric legal framework. In the context of the Ganga and Yamuna rivers particularly, the Indian legislature must take a leaf out of New Zealand's book and provide for clear structures, funding and rules tailored to these specific situations, with the judiciary then tasked with upholding the tenets of said legislation. Thus, it is only once India's legislature is able to lay down an ecocentric bedrock that judgments in the mould of *Mohd. Salim* and *Narayan Dutt Bhatt* can hold practical value.

#### [IV.] CONCLUSION

Despite the well-intentioned efforts made by the Uttarakhand High Court through its rulings in *Mohd. Salim* and *Narayan Dutt Bhatt* to implement a much-needed and desirable ecocentric legal framework, the analysis undertaken above reveals that an overture of this magnitude can only be effectively undertaken by the Indian

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

legislature. Even if the High Court had addressed certain notable concerns arising out its rulings - which it sadly failed to do - it still would've been unable to devise the structured and comprehensive framework that a legislative body can come up with, as was done by the New Zealand Crown. The foundational shift required in the Indian legal system must be achieved through careful negotiation and deliberation, rather than through the judicial channel's impromptu efforts, occurring "*almost overnight*"<sup>40</sup>. One can only hope then that the Uttarakhand High Court's judgments, and the public support they've garnered, jolt the Indian legislature into long-overdue action premised on ecocentric principles.

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<sup>40</sup> Renata Colwell & Savannah Carr-Wilson, *Legal Personality Of Natural Features: Recent International Developments*, ENVIRONMENTAL LAW CLINIC - UNIVERSITY OF VICTORIA, 2017, available at [http://www.elc.uvic.ca/wordpress/wp-content/uploads/2018/05/2017-02-03-LegalPersonalityNatural-Features\\_web-version.pdf](http://www.elc.uvic.ca/wordpress/wp-content/uploads/2018/05/2017-02-03-LegalPersonalityNatural-Features_web-version.pdf)

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**ANUJ BHUWANIA, *COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA (2017)***

BOOK REVIEW

By Anjali Jain\*

The book highlights the Public Interest Litigation [“PIL”] In the post-emergency period in India and the different phases that PIL wanders through along with its chronological phases and their repercussions. The author has based the book on empirical research which represents the Indian model of self-consciously acclaimed version of the new development in the world of PILs.

The book is divided in four chapters and whereafter the conclusion follows. The introduction talks about the journey of PIL and its development in the Post-emergency period, and the innovations that the concept attracted are put to limelight to bring the overall impact of the development as the court rushes to fill the perceived ‘vacuum in governance’<sup>1</sup> through such developments. He argues that the conception of PIL in India was a dangerous mockery of the Indian Judicial System, and justifies this idea through constitutional ethnography.

Chapter I revisits the origins of PIL in India to bring out the reasoning for the response of the court in the form of PIL in the

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<sup>1</sup> Lavanya Rajmani, *Public Interest Environment Litigation in India*, 19 J. OF ENVIRONMENTAL LAW, 293, 294 (2007).

post emergency period. The conventional narrative is that PILs emerged post-emergency whereby Supreme Court assumed a more powerful, activist and interventionist role in response to the suppression of immense powers by the political interference in the judicial decisions. The emergency era which painted the judiciary as anti-socialist and pro-property and cast the need for a “committed judiciary” during the reign of Mrs. Gandhi, sought to have been subsequently shed by the Court by arguing that constitution did not just have a basic structure, ‘*but a distinct socio-economic goal of ameliorating poverty and achieving in egalitarian distributive justice*’<sup>2</sup>. This aim to achieve substantive and distributive justice led to the “birth” of PIL which made the appellate courts participate (and intervene) in policy making through litigation. Soon enough, in the judges transfer case, the rule of *locus standii* went from being ‘representative standing’ to ‘citizen standing’<sup>3</sup> and thus the trajectory of the concept can be traced from participation to procedure<sup>4</sup>.

The desires of a reformative role lead to the birth of PIL through the chief architects of the concept of PIL. Justice Bhagwati and Justice Krishna Iyer were the only ‘*legitimizers of the Emergency*’ as

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<sup>2</sup> Rajeev Dhavan, *The Constitution as The Situs of Struggle*, (L Beers (ed.) Constitutional Systems in Late Twentieth Century Asia 373-461, 1992) 373, 415

<sup>3</sup> *S.P Gupta vs. Union Of India* AIR 1982 SC 149. The court defined ‘representative standing’ thus ‘if a legal duty is caused to a person and such person or the determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief any member of public can maintain an application for an appropriate direction, order or writ in the HC Under article 226..’. Further, the court will readily respond even to a letter addressed by such individual acting pro bono publico.

<sup>4</sup> Dipesh Chakrabarty, *In the Name of Politics*, 40(30) ECONOMIC & POLITICAL WEEKLY, 3293, 3299(2005).

per Baxi<sup>5</sup> and thus the response to emergency with such indigenized system of PIL could be because of ‘Swadeshi jurisprudence’ that these judges call for<sup>6</sup> as the present system seem to be ill suited to non-colonial regime and thus “procedures were relaxed” to make the legal access easier to the common people. The need to bring out the new imagery of the judicial system has been spearheaded by these judges and thereby were responsible for bringing out the new phase of judicial encroachment.

The author talks about this new gateway which was seen as new opportunity by scholars like Baxi who viewed the political realities of the country like India led the court to lead and legislature to follow.<sup>7</sup> But the later developments in the field led Baxi to argue that the court took the suffering seriously and thereby came to be recognized as the “last resort for the oppressed and bewildered”<sup>8</sup>, the cases like Bhopal Gas tragedy act as the eminent floodgates to open up the process.

Tracing backwards the history of PIL, in the post liberalization period, the PIL has gone under transformation as the victims of injustice is now being replaced by the arena of public policy issues and thus this extension of the process which started with Sheela Barse case is what the author criticizes as the courts take up the matter suo-moto and the victim is rendered helpless, unheard and silenced forever. The development is further aggravated by the *amicus curiaes*, which essentially replaces the petitioner. The trend,

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<sup>5</sup> Marc Galanter and J. Krishnan, *Bread for the Poor: Access to Justice and the rights of needy in India*, 55 HASTINGS L. J. 789, 794(2004).

<sup>6</sup> Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUDIES 107, 113 (1985).

<sup>7</sup> Upendra Baxi, *Indian Supreme Court and Politics*, 40 THE JOURNAL OF ASIAN STUDIES 248A (1980)

<sup>8</sup> *supra*, n. 6

therefore, elucidated by the author through the number of cases point out the draconian progression that is reflected in PIL cases where the core issues have been diverted to manifest a multifold layer for transacting a new public policy.

The author has cherry picked the cases like in chapter- 'the case that felled a city' to demonstrate the empirical idea that the transactions that original PIL dealt with are extended to widen its ambit to include even the most remote matters. He has done a study of the cases of Delhi region to point out the absurdity in the change of process being brought by these cases. He analyses the infamous 'sealing case' against commercial units in residential areas, wherein the core issue of the case has been so dynamically shifted that the plea against stone crushing units transversed into diverse fields like pollution, mining issues, hazardousness of industries, to the extent of master plans for environmental issues. The criticism can be made as to the selection of cases from Delhi which have been selectively taken to substantiate arguments.

The central argument by Bhuwania, through Delhi Vehicular Pollution Case,<sup>9</sup> is that the real stakeholders are brushed aside when the amicus curiae peeps in and thus takes the claim in the direction he wishes, while essence is lost. In this case, the appointment of Shri. Harish Salve as *amicus*, the nonspeaking orders of conversion of public transport vehicles into CNG, banning of fresh permits to TSR's which brought harassment to the drivers with no regulation on private vehicular movement, and thus imposing disproportionate environmental costs on the public-private sector is what Amita Baviskar referred to as '*bourgeois*

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<sup>9</sup> Writ Petition (Civil) 13029 of 1985, High Court of Delhi, Order dated 28 July 1998 ["Delhi Vehicular Pollution Case 1998"]

*environmentalism*'<sup>10</sup>. The author argues that a fertile land has been laid by PIL to further bourgeois environmentalism. However, as the stakeholders are eliminated from the process, the process consequently becomes abusive.

Another instance discussed is the Writ Petition<sup>11</sup> relating to industrial pollution in Delhi and the consequent demand for the removal of non-conforming Industries. The SC took the *governance* through the making of master plans for Delhi, emerging as the supreme protector in the eyes of the people through PIL. The filing of interlocutory applications like Yamuna cleansing and the Protection of Ridge forests caused the court to pass non-speaking orders for which no justifications could be sought. The real suffering of the workmen about replacement and retrenchment issues went unheard as the focus on *outcome* subsumed the voices of workmen and amplified the difficulty to their lives<sup>12</sup>. As the responsibility of relocation of workers was imposed solely upon it by the SC, the government was consequently and continually being charged for contempt.

The conversion of the case into the sealing petition brings out further illegalities. This master play of political factors has been highlighted by the author through a detailed study of the case, wherein the reality of the PIL was further elucidated though the rhetorical connection of Justice Sabharwal with the case.

The writer's arguments are expressive and realistic as a result of

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<sup>10</sup> Amita Baviskar, *The politics of the City*, JOURNAL OF SEMANTIC STUDIES, 516 (2002).

<sup>11</sup> Awadhendra Sharan, *In the City, out of the place: Nuisance, pollution and dwelling in Delhi*, OUP Catalogue, 200 (2000)

<sup>12</sup> Amita Baviskar et al., 'Rethinking Indian Environmentalism: Industrial Pollution in Delhi and Fisheries in Kerala' 200 (2006).

visiting the hearings. Furthermore, the analysis and the correlation of the politics with the judgments is justified and well fleshed out. The PIL cases have been selective enough to suit the judges own perceptions. This and other illegalities were tolerated concurrently in the same era and with only a few of them headed under PIL.

The development of labeling PIL as the **Omnibus PIL** has been analyzed in the chapter titled '*PIL as a Slum Demolition Machine*'. Suo moto passing of demolition orders, no reference of the field being demolished brought further absurdity to the process, thus changing the very nature of governance. Sacrifices in the procedural rules- like the non-joinder of necessary parties, non-examination of the question of fact etc.- have been made to remove the technicalities, resultant in chaos leading to the lack of evidentiary principles. The judicial authorities who started the demolition drive in Delhi and the author's close scrutiny of the project presents us with the different phases of the drive. Where initially, the encroachment on public land was the main issue and the comparison of the encroacher with that of the pickpocket<sup>13</sup>, the approach of the court is depicted, with the rehabilitation issue being rarely dealt with. PIL was constantly then used by the courts as the only measure available for such slum clearance.

Omnibus PIL lead to the inclusion of not so significant cases onto the platter of a big issue without caring for the process or the aggravations to the people. The arbitrary proceedings of the court concerning the appointment of committee or the *amicus curiae* could not be supervised and the state as the wrong doer is symbolized by the court to present its populism.

The author argues for the lacunae in the process in which transactions occur and bases his main critique on it. While the

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<sup>13</sup> *Almitra H. Patel vs. Union of India*, CWP 888/1996 (February 15, 2000)

sacrificial content of the procedural variations is remarkable, the very essence of the PIL lies in the removal of technical procedure and thus such procedural variations cannot be standardized too high to decimate the concept completely. The flaw thereby lies in the '*informalism*' that the concept of PIL carries it with itself.

The author even ventures into the critical discourses on PIL in India to bring out the three phases of PIL: poverty, environment and the governance phase wherein a setback in motive is observed. The difference of the ideology among the judges made Baxi classify them as Progressive or Regressive<sup>14</sup>. The different hallmarks of PIL (1980's PIL and post liberalization PIL)<sup>15</sup> can be attributed the different characteristics of their era. The author argues that PIL being used as a means to achieve **social justice** by activist Judges, changing the very outcome-centric process used by judges is what creates nuisance. The justness of the outcome-based approach used in the present system is criticized, with the writer wishing to focus on the justness of the process wherein the outcome will automatically be perfected. Criticism to this states that may be attracted like the justness of the procedure simply cannot allow for the perfection of outcome *as the procedure itself had been creating the obstacle before the growth of PIL in such a form.*

Bhuwania advocates the need to resort to traditional logical process so that fairness of judicial process is not compromised. The

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<sup>14</sup> Upendra Baxi, *The Promise and Peril of Transcendental jurisprudence in Human Rights, Justice and Constitutional Empowerment* (C Raj Kumar and D Chockalingam, 2<sup>nd</sup> Ed., 2010); Progressive judges include judges of 1970 and 1980's wherein the "four musketeers" Krishna Iyer, P. N. Bhagwati, C. Reddy, D. A. Desai and Regressive Judges refer to judges of post liberalization period who has moved the PIL in a new direction.

<sup>15</sup> Aditya Nigam, *Embedded Judiciary or, the Judicial State of Exception?*, 22-38 in *Shifting Scales of Justice* (Mayur Suresh and Siddharth Narrain, eds., 2014)

new phase of PIL has merely provided the judges with the power of policy-making and the ability to operationalize the new policies by governance tactics wherein the bulk of the issue is looked after by judges.

The polycentric disputes are handled by judicial forums which are inherently incapable, injecting anarchy into the system<sup>16</sup>. The author even justified the idea that the various developments that took place in PIL's like the non-adversarial nature of proceedings, epistolary jurisdiction, lack of clarity in terms of procedural investigations, weak standards of proof for evidence collections, no cross-examination of evidences, questions of fact being completely ignored etc. need to be addressed by the courts before the claim of divinity of PIL is made as these issues hit at the bottom of the process and leave no iota of doubt with respect to the ingenuity of the procedure.

The various suggestions by Bhuwania include the change in process wherein judges need to behave in a more responsible and facilitative manner<sup>17</sup>. Also, the argument that the quality of judges is to be varied over the institutional competence falls when understood that the judges have been bestowed the powers through institutional channels itself and thus the concept need to be redefined to expose the limits of the judge to prevent judicial overreach. The rejection of ideas like separation of powers by judges simply are the tools used in the name of public interest to ensure their populism and thus the attempted legislations are being clothed by justifications of international recognitions<sup>18</sup>. The author

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<sup>16</sup> Fuller and Winston, *The Forms And the Limits of Adjudication*, 92(2) HARVARD L. REV., 353(1978) pp. 353-409

<sup>17</sup> Arun K. Thiruvengadam, '*Swallowing a Bitter PIL*', *Seminar on the power of judicial Review: Scope and Dimensions*, (Mayur Suresh and Siddharth Narrain, eds., Orient Blackswan, 2014) 131(2016).

<sup>18</sup> N.W. Barber, *Prelude to the Separation of Powers*, 60 CAMBRIDGE L. J., 59-88

further cites Justice Katju to illustrate that the PIL invests the judges with such huge powers that can transform the whole litigation and bring out a completely new legislation. Such vagueness of the concept requires checks and balances so as to ensure the compliance with rule of law in the country.

In the concluding part, he argues about the height of legal informalism which plaguing the judicial system with tools like PIL. He argues that the influence is not isolated, as other aspects of the system have also been affected by this informalism which include arenas like family matters mediation and conciliation, permanent Lok Adalats etc. The arguments favoring such informalism refer to specificity of the Indian conditions and thus take pride in such autochthonous developments. But such developments have proved to be the vanishing point of Indian Jurisprudence as per the author. The machinery of PIL has made the *plaintiff turn into victims*<sup>19</sup> by the exclusion of the petitioners from the proceedings. Indian legal informalism, which enjoys international recognition, fails to work at the bottom level.

PIL as a concept cannot be thrown away but certain procedural dilutions need to be altered to suit it to Indian conditions and thus such processual modifications will bring out the divinity of PIL.

In an interview with Bhuwania, he remarks that PIL stands on different footing in comparison to normative litigation. While this segregation appears acceptable at first glance. The deviation cannot be taken to exclude PIL completely from the Indian system. Nivedita Menon further points out the ignorance of 'pure' or 'good' informalism in PIL which Bhuwania ignores. *Good informalism* to

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(2001).

<sup>19</sup> Veena Das, *Suffering, Legitimacy and Healing*, 174 *Critical Events* (1995)

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some extent is welcomed as far as the ends of justice are served.

This remarkable work definitely presents the new visionary critique of the PIL and enlightens the concept that has emerged as the safeguard against the transactions of a political society. PIL can be classified as a weapon of civil society as the populism invested in the PIL extends the boundaries of the courts, paving the way for courts to encroach upon the other zone of legislature. It comments upon the stark reality of these litigations being served based on a consequentialist approach with no systematization in the procedure and with justice is ultimately denied at the behest of judicial populism.

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