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NMIMS STUDENT LAW REVIEW

Volume II
June 2020

Cite this Volume as 2 NMIMS L. Rev. (2020)

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Volume II

June 2020

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FROM THE DEAN'S DESK



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 comments. 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.

- **Dr. Alok Misra**

MENTOR'S MESSAGE



It was a moment of pride for us when the Law Review was launched, in 2018, under the guidance of our Dean and Faculty In-Charge. That the Journal has received such an overwhelming response from authors, all budding young professionals, is a sign that we are going in the right direction. I congratulate all the authors whose works have made it here, after a thorough and lengthy process of review. The experience of researching, writing, formatting, and eagerly waiting for a response from the Editorial Team must be worth the wait. The sense elation is incomparable.

To those who missed out, I hope that you keep going with your writing endeavours. The experience of researching and writing on the numerous questions of law is in itself a rewarding and enriching experience, and a skillset of immense value in our industry. Unfortunately, the Editorial Team can choose only a handful of articles from the entries received. I am sure they had a hard time choosing which papers edged out the others by the slightest of margins.

To the Editorial Team, I congratulate you on successfully publishing the Second Volume, the culmination of a year of planning, waiting, reviewing, editing, proofreading, and piecing together a manuscript that will contribute significantly to the literature of our noble industry. I hope each and every one of you found the experience enlightening, and will go on to play a role in developing the research culture in the field of law.

- **Mr. Harshal Shah**

ACKNOWLEDGMENT



This second issue of NMIMS Law Review has been a collective effort right from the moment we conceptualised its theme. We extend our gratitude to our Hon'ble Vice Chancellor, NMIMS University for his constant support and encouragement. The Dean of the NMIMS Kirit P. Mehta School of Law Dr. Alok Misra for entrusting us with this responsibility of editing the second issue of NMIMS Law Review on Contemporary issues. We hope that this issue will be unprecedented in terms of the breadth and depth of the theme being covered. We could not have carried through this project successfully without his encouragement.

We thank the Registrar of NMIMS University for her continued support. We would also thank the administrative department; our Board of peer reviewers for their time and close reading of the articles; our faculty colleagues who have always provided the intellectual space and friendship that help sustain projects like these and make them a happy affair. We must also thank our contributors who so encouragingly responded to our call for papers, were very cooperative with keeping deadlines, and thought of us as a worthy venue for publishing their scholarship. It is your work that makes this special issue special.

Our team also deserves very special mention: Our Student head Mr. Shaarang Anirudh, Co-Editor in-Chief Ms. Garima Agrawal, Student Co-ordinator Ms. Akanksha Panicker along with the whole team of Associate Editors have been absolutely fantastic to work with. Their dedication and professionalism are reasons why we have

been able to pull this issue through to fruition. Last but not the least, thank you to our Mentor Mr. Harshal Shah for his inspiration and provocations that always ensured that we do not compromise on theory, and never suspend criticality. Your intellectual engagement and scholarship forms an essential foundation of this special issue.

- **Prof. Richa Kashyap**
Faculty-In charge and Editor-in-Chief

STUDENT'S MESSAGE



I am glad to learn that NMIMS Law Review is issuing Volume II. It gives me immense satisfaction that all of our efforts since the fall of 2016 are now bearing fruits. I feel honoured and privileged in writing this note.

NMIMS Law Review was founded to provide law students and professionals, a platform to disseminate high quality research on the legislative developments and judicial pronouncements. It also aimed to imbibe a culture of legal research in young law students while aiding them to understand the fast-changing developments in the legal world. I am gratified to see the popularity and the right kind of attention that NMIMS Law Review has garnered since its inception.

During my tenures as the head of NMIMS Law Review, I got the opportunity to work with and learn from an extraordinarily talented bunch of editors. It not only helped me hone my research, writing and editorial skills but also helped me learn managerial skills.

I would like to congratulate the entire executive board of NMIMS Law Review for having made the strenuous efforts to make Volume II possible. The kind of learnings that one gets from being associated with such a prestigious law review definitely goes a long way and helps in professional life as well.

I am sure NMIMS Law Review will continue its glorious journey to promote quality legal research and publishing young creative minds.

- **Aditya Jain**
Head, NMIMS Law Review 2018-2019 (Volume I)

FOREWORD

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

The following broad themes were made available for the authors to choose from:

1. Intellectual Property Rights in Media and Sports Law
2. Resolution Process Under the Insolvency and Bankruptcy Code
3. Cyber Law
4. Law, Tech and Data Privacy/Protection
5. Public Law and Policy
6. Mergers and Acquisitions
7. Arbitration in IP, Commercial and International Laws
8. Environmental Law
9. Law on Communications (Propagation of Fake News Across the World)

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 deserves applause for their tireless efforts and dedication to facilitate the publication of quality legal literature.

Board of Editors

At Mumbai, MH

June 2020

SHORT ARTICLES

COMPARATIVE ANALYSIS OF THE CORPORATE RESTRUCTURING PROCESS IN INDIA, CHINA & JAPAN: REAPING FROM THE BEST IN ASIA

By Dhruv Chhajed & Devarsh Shah*

Successful Corporate Restructuring is unequivocally the very basis of any insolvency law and the fundamental purpose of the insolvency law. India introduced a new insolvency law in the year 2016 with a meticulous and unambiguous resolution process for corporate restructuring. However, many provisions of the law have been subjected to austere criticism for its inefficient functioning.

Two of the biggest trading partners of India- China and Japan have their insolvency laws which are substantially different and diverse. The paper makes a comparative analysis and outlines the differences between the corporate restructuring process (emphasis restricted to restructuring under Insolvency Laws only) of India, Japan and China. Indian insolvency law i.e. IBC 2016 is time and again denigrated for its impotence to intercept the subjugation of restructuring to liquidation. Such criticism is precisely examined, and its validity is appraised in the context of the insolvency laws in China and Japan.

The paper predominantly focuses on making a comparative analysis of the laws and determining the overall impact of the procedural impacts involved. For example, the ultimate outcome of the law which enables the debtor to draft a reorganisation plan (as in China) instead of the creditors (as in India). There are several other procedural aspects which have been

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analysed. Law and Economics succour the policymakers in framing efficient and ideal laws. The final part of the paper scrutinizes the restructuring process in the three countries from an economic perspective which henceforth assists in deducing the efficiency of the laws and establishing the supremacy of one law over the other.

Culminating part of the paper provides a firm conclusion and discerns the better law for corporate restructuring. The conclusion so formed is rooted upon the scrutiny of laws undertaken in the paper.

[I.] INTRODUCTION

It is unfathomable to deliberate upon the financial and corporate laws without the concepts of insolvency¹ & revival, resolution and reorganization², it would be similar to planning for success without a contingency for failure. Having said so, it has been almost 4 years since the enactment of the Insolvency and Bankruptcy Code³ (hereinafter referred to as IBC) in India, a code enacted for a free market economy and formulated for securing the rights of the lenders and the investors. With its coming into force on 28th May 2016, the code has been revised multiple times by the central Government in the years 2017, 2018 2019 & 2020. Preceding IBC, there were scattered laws for the regulation of insolvency

¹ *Insolvency refers to the inability of a person or corporate to pay up his debt /bills as and when they become due. He may be able to pay at a later date some amount or even in full, but at the promised date of payment, he is unable to make the payment- Insolvency, Resolution, Bankruptcy and Liquidation, ARTHAPEDIA, available at http://www.arthapedia.in/index.php?title=Insolvency,_Resolution,_Bankruptcy_and_Liquidation, last seen on 25/11/2019.*

² *In simple words a Resolution Plan is a strategy to clear all the overdues of the defaulter along with restructuring the capital/debt structure so the defaulter can continue as a going concern post repayment.- Insolvency, Resolution, Bankruptcy and Liquidation, ARTHAPEDIA, available at http://www.arthapedia.in/index.php?title=Insolvency,_Resolution,_Bankruptcy_and_Liquidation, last seen on 25/11/2019*

³ The Insolvency and Bankruptcy Code, 2016.

proceedings in the form of Companies Act⁴, RDDB Act⁵, SARFAESI Act⁶ & SICA⁷.

The Enterprise Bankruptcy Law of the year 1986⁸ was the introductory framework for the administration of insolvency proceedings in China. It was eventually replaced in 2007 by the new Enterprise Bankruptcy Law.⁹

Every growing economy checks its financial security and requires an ex-ante solution for more growth and security. India took the aid of the Insolvency and Bankruptcy code 2016, whereas Japan established the Bankruptcy Act 2006. Japan also established the Civil Rehabilitation Act to counter and overcome the previous defects of the Composition Act and provide a solution for the efficient insolvency proceedings for the MSMEs.

India, China and Japan are unequivocally the biggest economies of Asia. Not only that, but these countries also share a very constructive trade bond. To illustrate, India's export to Japan stood at 6.81 USD Billion in the year 2018. Insolvency laws of a country crucially influence the foreign trade since it is the implement through which any creditor/lender can recoup its capital. The current article strives to devise an analysis of the legal regime of these countries with regards to the restructuring of the defaulted entities.

⁴ Companies Act, 1956.

⁵ The Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

⁶ The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

⁷ The Sick Industrial Companies (Special Provisions) Act, 1985.

⁸ Enterprise Bankruptcy Law (For Trial Implementation) 1986, (China).

⁹ Enterprise Bankruptcy Law 2007, (China).

[II.] FRAMEWORK FOR REORGANISATION/REVIVAL OF COMPANIES

The entire Corporate Insolvency Resolution Process is very lengthy. The current study only focusses on restructuring.

A. Laws in India

§ 30 of IBC¹⁰ deals exclusively with the process of preparing, submitting and approving the resolution plan. As per the code, Resolution Plan means a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern in accordance with Part II.¹¹

A resolution plan is submitted by a resolution applicant who is legally any person who submits a resolution plan to the Insolvency Resolution Professional (IRP).¹² A resolution applicant can be one of the creditors of the corporate debtor, promoter or any other important stakeholder or the debtor himself. All resolution plans are presented before the committee of creditors by the IRP and the same needs approval from a minimum of 75% of the committee members.¹³ This procedure has to be completed within 180 days from the filing of an application for insolvency which may be extended to 330 days. Moratorium period is also applicable for 6 months which protects the debtor from any judgment, decree etc. Once the plan is approved it is referred to National Company Law Tribunal (NCLT) for final approval after which the plan becomes binding upon the corporate debtor. Successful implementation of the resolution plan would result in settlement of all debts and restructuring of the ownership of the corporate debtor.

¹⁰ Section 30, The Insolvency and Bankruptcy Code, 2016.

¹¹ Section 4(26), The Insolvency and Bankruptcy Code, 2016.

¹² Section 4(25), The Insolvency and Bankruptcy Code, 2016.

¹³ Section 30(4), The Insolvency and Bankruptcy Code, 2016.

B. Laws in China

As per Article 70 of the Enterprise Bankruptcy Law (EBL)¹⁴ of China, a debtor or creditor may directly apply to the court for having the debtor reorganized. If the creditor applies for putting the debtor under liquidation then the debtor or his capital contributors (having a minimum 10 % share) may apply to the court for reorganization and avoid liquidation. If the court is satisfied with the reorganization application then it may rule that the debtor should be reorganized.¹⁵

When the court accepts the application for bankruptcy or reorganisation it appoints an administrator for managing the assets of the debtor.¹⁶ There is also a provision for moratorium period as in India.

The debtor (or his administrator) is required to submit a draft resolution plan to the court within 6 months from the ruling of the court failing which the court shall order the debtor to liquidate. A draft plan needs to be accepted by at least 50% of the creditors and they should represent two-thirds or more of the total amount of the claims.¹⁷ The court then accepts the draft plan if it deems fit and orders the debtor to get reorganized. The implementation of the reorganisation plan is carried out by the debtor and not the administrator.

C. Laws in Japan

Japan tackles the insolvency rescue and insolvency procedure through four proceedings

Civil Rehabilitation Proceedings (Minji Saisei), Corporate Reorganisation Proceedings (Kaisha kosei), Bankruptcy Proceedings (Hasan), Special Liquidation Proceedings (Tokubetsu Seisan).

Upon the suit of proceedings from the debtor or creditor, the court issues an order. The debtor pays for the proceedings to the

¹⁴ Article 70, Enterprise Bankruptcy Law 2007, (China).

¹⁵ Article 71, Enterprise Bankruptcy Law 2007, (China).

¹⁶ Article 13, Enterprise Bankruptcy Law 2007, (China).

¹⁷ Article 84, Enterprise Bankruptcy Law 2007, (China).

court before its start, and the debtor the requisit court's approval for any borrowing of funds to finance the proceedings.

For resolution and revival of the company, the first two proceedings will be adopted namely Civil Rehabilitation and Corporate Reorganization Proceedings. Civil rehabilitation proceeding is applicable for the rehabilitation of companies of almost any size and type, both debtor and creditor can initiate the proceedings. Whereas, a corporate reorganisation is only applicable on a stock company and can be initiated by a debtor, creditor or shareholder. In civil rehabilitation as per Article 172¹⁸ or corporate Reorganization Proceeding Article 196¹⁹ the rehabilitation plan is approved at a creditor's meeting and the court then looks upon the technicalities of law. If the plan approves, the debtor shall pay the debts according to the plan. In case of an informal work-out, the executive directors of the company continue to manage the company. However, in case of a Civil Rehabilitation Proceeding the executive directors of the company continue to manage the company and control the Civil Reorganization Proceeding under the supervision of the court. Whereas in the case of a Corporate Reorganization Proceeding, a trustee²⁰ is appointed by the court and is given the control of the Proceeding and the management of the company in the place of the executive directors for the limited amount of the Proceeding.²¹ Article 27 of The Civil Rehabilitation Act states about the prohibition of claims on rehabilitation claims.²² In civil proceedings, a stay of proceedings prevents creditors from

¹⁸ Article 172, Civil Rehabilitation Act 1999, (Japan).

¹⁹ Article 196, Corporate Reorganization Act 2002, (Japan).

²⁰ Article 248, Corporate Reorganization Act 2002, (Japan).

²¹ *Corporate Recovery & Insolvency 2018 | Japan | ICLG International Comparative Legal Guides International Business Reports*, ICLJ, available at <https://iclg.com/practice-areas/corporate-recovery-and-insolvency-laws-and-regulations/japan>, last seen on 28/11/2019.

²² Article 27, Corporate Reorganization Act 2002, (Japan).

realizing the assets of the insolvent company.²³ Whereby in corporate Reorganization Proceeding both interim and permanent stays of proceedings are available under article 24.²⁴

[III.] COMPARATIVE ANALYSIS BETWEEN INDIA & CHINA

A. Procedural Aspects

The Indian law seem to be more investor friendly in the sense that they give much power to the creditors. The creditors decide whether to go for liquidation or reorganisation. It is, in most cases, the committee of creditors who draft a reorganisation plan. The debtor does not have any say in the reorganisation process.

In contrast, the Chinese laws is more favourable to a corporate debtor because unlike the scenario in India, the debtor has got the discretion to go for liquidation or not and the debtor himself formulates the plan for reorganisation. The influence of the creditors is relatively lesser and their role is limited to voting upon the proposed plan instead of formulating one.

Further, there are some minor differences in the legal regime of both countries. There is a separate tribunal in India to deal with the insolvency proceedings (NCLT) whereas in China it is the ordinary court who takes care of it. Further in India, the plan has to be approved by 75% of the creditors whereas in China it needs the approval of 50% of the creditors. Given these differences, the procedural aspects of both countries are almost similar.

²³ Shea Patrick & Miyake Kaori, *Insolvency-Related Reorganization Procedures in Japan: The Four Cornerstones*, 14(2) PACIFIC BASIN LAW JOURNAL, (1996), available at <https://escholarship.org/content/qt0wm668fz/qt0wm668fz.pdf>, last seen on 17/11/2019.

²⁴ Article 24, Corporate Reorganization Act 2002, (Japan).

B. Preference to Liquidation over Reorganisation

The Indian regime has adopted a liberalistic approach to favoring reorganization. The courts have gone to the extent of going beyond the literal meaning of the code while interpreting the soul and spirit of the code. Hyderabad bench of NCLT in *K. Sasidhar v. Kamineni Steel & Power India Pvt. Ltd.*²⁵ approved the resolution plan even though it had received the consent of only 66.67% creditors as against 75%. Further, it is to be noted that Indian laws facilitate an additional extension of 90 days for the preparation of draft resolution plan which is not the case with China. Hence if the debtor wants to reorganize, he may get a longer time of 270 days for the preparation of the resolution plan.

Chinese Laws, on the other hand, have been often criticized for being more liquidation preferential. The fact that debtor formulates the reorganisation plan gets subordinated to the following reasons. Firstly, as per the EBL with the beginning of the bankruptcy proceedings, the administrator is appointed and the directors and higher management of the company are made to resign.²⁶ Since the corporate debtor is deprived of all its power, it prefers liquidation over reorganization. Surprisingly, like India, in China there are no separate courts to deal with the insolvency proceedings. The ordinary civil court judges are incompetent to deal with the complexities involved in the reorganization process and they are often reluctant to grant an order for reorganization.²⁷ Due to these reasons' liquidation assumes preference over reorganisation in the

²⁵ *K. Sasidhar v. Kamineni Steel & Power India Pvt. Ltd.*, 2017 SCC OnLine NCLT 12610.

²⁶ Zinian Zhang & Roman Tomasic, *Corporate Reorganization Reform in China: Findings from an Empirical Study in Zhejiang*, 11 Asian Journal of Comparative Law 55, 85 (2016).

²⁷ Zinian Zhang & Roman Tomasic, *Corporate Reorganization Reform in China: Findings from an Empirical Study in Zhejiang*, 11 Asian Journal of Comparative Law 55, 85 (2016).

Chinese jurisdiction.

C. Timeframe for preparation of Resolution Plan

In the current regime of both the countries, the timeframe for the formulation of a reorganisation plan is 180 days. The timeframe of six months is grossly inadequate to prepare a robust revival plan that is agreed upon by a majority of creditors. Even the developed countries like USA provide 18 months for reorganisation. This is one particular aspect at which both the countries lack (even though India has a provision for 90 days extension).

[IV.] COMPARATIVE ANALYSIS BETWEEN INDIA & JAPAN

A. Procedural Aspects

In principle, insolvency law in Japan (herein referred to as 'Japanese law') ensures the due set-off of the claims of the two parties involved in the proceedings. Corporate Reorganization Proceedings is the only procedure out of the four proceedings that provides for a stay on creditors to realise their security.

A striking difference between the resolution process in both the countries is the management of the debtor during the resolution process. In India there is a selection of Insolvency Resolution Professional by the committee of creditors and the powers of board of directors, which manages the affairs of the debtor, are suspended²⁸. On the contrary, in Japan the board of directors continue to manage the process of revival of the company in Civil Rehabilitation Proceedings, whereas a trustee is appointed in case of Corporate Reorganization Proceedings.

Further, Indian companies are only allowed to operate to the extent to maintain and protect the interests of their stakeholders and

²⁸ Section 17, The Insolvency and Bankruptcy Code, 2016.

other interested parties. Whereas, in Japan, under civil rehabilitation proceedings and corporate reorganization proceedings, the debtor will generally remain to run the debtor's business under the supervision of a court appointed supervisor. Normal business activities of the debtor are continued.

Moratorium period imposed under section 14 of IBC provides safeguards against court proceedings to the debtor. Any court proceeding which is pending is stayed and no further suit can be filed against the debtor until the moratorium period is in operation. No such provision against third parties, under the Japanese law, is available. In Japanese Laws we can find in Corporate Reorganization Proceedings, a protection availed from the creditors through an injunction from the court that there remains no enforcement of secured and unsecured claims, whereas in another format of proceedings of Japanese law i.e. Civil Rehabilitation Proceedings the claims can still be enforced outside the proceedings of secured claims for common benefit claims i.e. the employee and tax claims.

B. Preference to Liquidation over Reorganisation

As discussed earlier, India is found to have more of a restructuring centric attitude in comparison to China. Japan also as previously discussed involves 4 kinds of proceedings. Namely Civil Rehabilitation Proceedings, Corporate Reorganisation Proceedings, Bankruptcy Proceedings, Special Liquidation Proceedings. On our detailed analysis of the restructuring process in Japan, we understand that in Japan, an endeavour is made to take all measures for effective revival of the company until there remains no choice but to liquidate it. Nothing but facts speak for themselves. World Bank's *Doing Business* data reveals that insolvency resolution score of Japan is 90.2 as against 62 of India. Recovery rate (cents on dollar) for Japan is 92.1 whereas the same for India is 71.6. Overall, Japan is ranked 3rd on the index. On the

contrary India's overall ranking is 52.²⁹ Also, an element of reorganisation against liquidation involves the procedure to be more debtor friendly. Japan is known for its debtor friendly approach in reorganisation. Enabling the debtor to protect the going concern interest of the company whilst keeping in mind the claims of the lawful creditors and stakeholders is a major factor that enables the debtor in the revival of the company. Further informal financial restructuring is allowed and increasingly used in Japan for small and mid-cap sized companies. They are even encouraged by their legislators with the help of Alternative Dispute Resolution Act (2007) and guiding laws such as Guidelines for Individual Debtor Out-Of-Court Workouts (2013). These are all but few points proving the more reorganizational approach of the Japanese law.

[V.] LAW AND ECONOMICS OF INSOLVENCY LAWS

*“An effective insolvency system is an important element of financial system stability.”*³⁰ There are multiple objectives of insolvency law starting from minimizing the costs of financial distress through the design of a corporate insolvency procedure, to preserve jobs, rehabilitate the troubled firm, protect the interests of the local community depended upon the company or maximize the returns payable to the creditors of the company.

However, the most contentious aspect of any resolution process is division of the assets of the debtor. Every lender wants himself to be paid off completely which is obviously not possible if the assets

²⁹ Resolving Insolvency - Doing Business - World Bank Group, DOINGBUSINESS.ORG (2019), <https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency> (last visited May 29, 2020).

³⁰ *Restructuring and Liquidation Ministry Of Corporate Affairs - Restructuring and Liquidation*, Ministry of Corporate Affairs Govt of India, available at [http://www.mca.gov.in/MinistryV2/restructuring and liquidation.html](http://www.mca.gov.in/MinistryV2/restructuring%20and%20liquidation.html) last seen on November 2, 2019.

of the debtor were to be sold out in full. From an economic angle, the most efficient outcome of corporate resolution of a debtor is revival of the entity along with payment of all dues to all the lenders. It is an ideal outcome where all the stakeholders are better off. In almost all times, complete repayment is not possible, and hence the question of division arises. For an efficient corporate resolution, the law must be centred towards the betterment of all the stakeholders.

A brief law and economic analysis of the insolvency laws of India, China and Japan is undertaken keeping in mind the aforementioned aspects.

A. Law and Economics of Insolvency Laws of India and China

(Discussing all the concepts of Law and Economics would be out of the scope of this paper. Hence selective aspects are only covered)

As Mankiw has rightly pointed out, *"In economics, efficiency refers to the size of the economic pie, and equity refers to how the pie is divided."*³¹ Since the reorganized firm retains all its assets pre-bankruptcy, it is capable of paying the creditors' from its future earnings. It can therefore be asserted that reorganization plan determines the size of the pie and how it is divided among the creditors. Insolvency laws affect this size of pie and its division by setting rules and regulations for bargaining over the terms and adoption of reorganisation plan.

In China, the managers of the business (i.e. corporate debtor) have the exclusive right to propose reorganisation plan. This leads to a reduction in the size of the pie because managers always have the choice of proposing the smallest pie which the creditors would accept.³² Whereas in India, the reorganisation plan is prepared by the creditors of the corporate debtor. It can help avoiding the reduction

³¹ N Gregory Mankiw, *Principles of Economics*, 5(2001).

³² *Economic Analysis of Corporate and Personal Bankruptcy Law* NBER, NBER, available at <http://www.nber.org/papers/w11536>, last seen on November 28, 2019.

in the size of the pie because committee of creditors would reasonably make their claims considering the capability of earnings of the corporate debtor.

Further the less than 100% voting mandate also reduces the size of the pie because the plan does not need to satisfy all the demands of all the creditors. Small creditors do not have equal say in the reorganisation procedure. As a result, they are often neglected or discriminated. There is a larger scope for such discrimination to prevail in the Chinese insolvency regime because the plan needs to be accepted by 50% of total creditors having a minimum share of 67% in the total claims against the debtor. There is always a stronger possibility that the influential creditors in China would dominate the reorganisation process. In case of India, there are relatively thinner possibilities of such unfair domination because the voting % is 75. It however doesn't completely rule out the chances of unfair treatment to some smaller creditors.

B. Law and Economics of Insolvency Laws of India and Japan

Again, going back on the principle of Mankiw, "*In economics, efficiency refers to the size of the economic pie, and equity refers to how the pie is divided.*"³³ Since a lot of control under civil rehabilitation proceedings and corporate reorganization proceedings is given to the debtors, there is a greater chance of the pie being smaller than it should be.

There is a classic problem of prisoner's dilemma while dealing in the civil rehabilitation proceedings. Knowing that secured creditors can go forward by claiming the assets even after the initiation of the proceedings. Economist Thomas Jackson pointed out that insolvency procedure can avoid prisoner's dilemma for creditors.³⁴ For if the

³³ N Gregory Mankiw, *Principles of Economics*, 5(2001).

³⁴ Jackson, Thomas H, *Bankruptcy, Non-Bankruptcy Entitlements, and the*

creditors go forward with non-cooperative resolution, it will lead to necessarily dilution of the company, which is regarded as a highly inefficient outcome, rather if there remains a cooperation than there can be either revival of the company or cooperative dilution and share of the company. In any case whichever creditors enforces the security will receive more share or an upper hand, in such fear the application of the trust dilemma also arises, a compulsory proceeding will disallow the creditors their enforceability and optimize the proceedings, hence making the law efficient. But Japanese laws take care in corporate resolution proceeding, where there can be no claims against the tax and the secured debts, disabling the creditors to enforce their debts.

Further, we find that the problem with the creditors approving the plan is that there can arise a classic hold-out problem, there can be three things that can be damaging the resolution process of the company. First, the going concern value of the company falls. Second, secured creditors may realise their collateral security in case the resolution process is taking too long. Thirdly, the unsecured creditors may request the enforcement of the unsecured property of the company to the court.³⁵

Indian and Japanese laws duly consider this. There are higher debtor friendly laws in Japan than in India, which tries to revive the company then liquidate it. However, in comparison to China, India and Japan takes enough measures to protect the creditors. If it may be necessary, even the claims of the creditors can be stayed for secured and unsecured debts. This only leads to efficiency in the resolution and restructuring of the company rather than initiating a dominos that hits multiple stakeholders and damages more than preserving the scope of interactive economy.

Creditors' Bargain', 91 Yale Law Journal 857, 907 (1982).

³⁵ George G. Triantis, *Mitigating the Collective Action Problem of Debt Enforcement Through Bankruptcy Law: Bill C-22 and Its Shadow*, 20 CAN. Bus. L.J., 246 (1992).

[VI.] CONCLUSION

From the perusal undertaken above it can be deduced that Japanese Insolvency Laws are more effective and efficient when compared to its counterparts of India and China. Similarly, Indian Code of Insolvency and Bankruptcy has an edge over the Chinese Enterprise Bankruptcy Laws. One of the most prominent reason for making such assertion is the practical preference to reorganization over liquidation and such can be seen clearly in the Japanese laws. However, we must not forget that India Insolvency Laws are yet at an evolving stage and has been increasing its weightage towards resolution from the traditional liquidation. Further, we find that the Japanese laws have been successful in striking a balance between the powers granted to the debtor and court/court appointed officer during the pendency of restructuring. Participation of the top-level management of the corporate debtor becomes essential for successful corporate restructuring and supervision by some authority is necessary for protecting the rights of the creditors. Indian and Chinese Laws seem to be overprotective such that they have reduced the participation from the side of debtor. Nevertheless, Chinese law has an edge over its Indian counterpart because it allows the debtor to formulate a reorganization plan.

Japanese Laws, in the long run, provide more clarity and simplicity in matter. In this aspect India too shows promise as it has clear and precisely procedure laid down for governing insolvency procedure. Chinese laws on the other hand gives a lot of discretion to the court and hence has the disadvantage of lagging behind. We must not fail to notice, that giving too much importance to procedural aspects would be futile since successful Corporate Restructuring is unequivocally the very basis of any insolvency law and the fundamental purpose of the insolvency law.

While analysing these laws, we must not forget that Insolvency

is a very contemporary issue and hence all the laws are relatively pristine. India's IBC is nearly 4 years old legislation whereas EBL is 13 years old. Thus, the laws are still in their raw form and hence should be amended time to time with gaining of experience.

To conclude, it can be said that as far as corporate restructuring is concerned, Japan leads the way followed by India. Chinese law does not suit the modern requirement and requires reconsideration.

FLUID TRADEMARKS: ADVERTISING AND MARKETING INNOVATION IN INTELLECTUAL PROPERTY REGIME

By Shambhavi Shekhar*

With the growth of marketing and advertisement, trademarks have adopted a unique course for identification of products. Fluid trademarks invoke an interactive interplay of movements while essentially maintaining the rigidity of the base trademark. Over time, the continuous use of a trademark may cause the appeal of the product to diminish, owing to the redundancy of the mark.

Fluid trademarks have opened excellent gateways for boosting trade and promoting competition in the market. This further helps in strengthening the brand name. There has been a gradual shift from redundant static mark to a more appealing fluid mark. Although the Trade Marks Act, 1999, is silent regarding non-conventional trademarks, the Trade Marks Rules, 2017 embodies provisions for the registration of sound marks and three-dimensional marks. As long as the rigid nature of the base mark is preserved, the fluid interpretation of the same is acceptable. Similarly, another trend which needs to be addressed is the use of slogans for brand advertisement. They can be conferred protection only if they impart distinctiveness to the base mark. If the sole purpose of having a slogan is promotion of the product, it will face objections.

Currently, slogans are protected by exercising Common Law rights. Considering the increasing global trend of adoption of non-conventional fluid marks, it seems pertinent that they should be conferred exclusive protection, both at domestic as well as at international level. This article briefly explains the concept, the scope and importance of fluid trademarks

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and slogans in the advertising sector along with permissibility of comparative advertising, brand strengthening. It also throws a comparative light upon the trends pertaining to fluid marks prevalent globally and in India.

Keywords: Fluid trademarks, fluid slogans, strategic advertising, comparative advertising, advertising code.

[I.] INTRODUCTION

In India, media is the fourth pillar of democracy, growing at an exponential pace. The Indian media and entertainment industry are expected to grow at an annual growth rate of roughly 11.6% by the year 2020. When it comes to tallying global advertisements, India remains the fastest growing market for the same.

With the advent of 'click-technology', mobile phones and allied digital platforms have become pervasive across the subcontinent. Today, Intellectual Property finds a presence in every sector and industry, as they use different methodologies to monetize the same. In this paper, the author will analyse trademark as a vital facet of intellectual property.

According to the World Intellectual Property Organization, A trademark is a distinctive sign that identifies certain goods or services produced or provided by an individual or a company.¹ It is presupposed that the advent of the concept of Trademarks started with the inception of trade in the society and pursuant circulation of

¹ WIPO, *What is Intellectual Property*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (May 29, 2019, 8:14 AM), http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf.

goods in the market. It traces its history back to the ancient Greek and Roman civilizations where the concept of 'branding' and 'marking' existed to claim ownership over works of pottery, vessel-making etc. Over the years, these marks gradually started distinguishing the products of the makers with their distinct traits.

If one shifts focus to Medieval England, these marks were observed to have been predominantly used in sword-making where it was necessary to identify the makers of a defective weapon in case such a situation arose. In the Indian subcontinent, the statutory protection to trademarks was conferred much later. Earlier, these ownership rights existed merely as common law rights. It was after the enactment of the British Trademark Act that India too enacted its own Trademark Act in the year 1999.

Trademark law has evolved tremendously to include a variety of marks capable of distinguishing the goods of one proprietor from another, indicating the origin and source of goods, conferring a unique characteristic to the goods and services involved etc. Statutory protection and rights exist for a lot of Intellectual Properties such as Patents, Trademarks, Copyrights, Geographical Indications, and Industrial Designs as stated by the World Intellectual Property Organization. Apart from these conventional forms of IPs, there exists a whole array of non-traditional intellectual properties which do not have any statutory protection. These include taste marks, sound marks, touch marks and smell marks among others. Fluid marks are one such branch of non-conventional marks which have been in recent trend.

With the rapid advancement of technology and the world succumbing to it, Information Technology has seeped across the globe, including the realms of intellectual property. This is the age of information and evolution is inevitable, be it in any context.

[II.] FLUID TRADEMARKS: INVOKING DYNAMISM IN RIGIDITY

The general notion is that Trademarks are two-dimensional and simple in essence, associated with marks which are constant and static. This is where the concept of Fluid trademarks comes into picture, and opens a gateway of creativity and imagination. They offer a three-dimensional representation of marks. The term 'fluid' means 'capable of flowing'² and trademarks are marks capable of distinction between goods. A combined reading of both the terms indicates that fluid trademarks are those which are non-static. The focus here is on making a regular mark more interactive through incorporating dynamism.

Fluid trademarks make use of an interactive interplay between a number of components as they invoke movements, coupled with ornamentation and design alongside a variety of visual and graphical representations. They retain the basic features of the base mark and play with interactive components. This breaks the barriers between the proprietor and his customers, both actual and potential. It creates an interactive platform between the two which is essential to draw a customer base, making commercial activity smoother.

[III.] WHAT IS THE NEED OF OPTING FOR A FLUID TRADEMARK?

The main question pertains to the need of opting for a fluid trademark. The current world is characterized by heavy competition. Business houses are constantly adopting different techniques to expand their presence and to survive competition, standing out from

² Merriam Webster, *Definition of Fluid*, MERRIAM WEBSTER (May 30, 2019, 9:12 AM), <https://www.merriam-webster.com/dictionary/fluid>.

the crowd is essential. Intellectual Property paves way for asset capitalization and helps in revenue generation; therefore, capitalizing on the monetary benefits of IP is an important agenda for enterprises. Fluid Trademarks help an already existing mark to widen its scope and are heavily relied upon today for effective marketing as they make the existing mark more 'alive'. The significance of having a fluid mark is centred around, the rapidly changing arena of Information Technology which makes use of 'out of the box' techniques. To sustain the overall rise in challenges posed by new marketing tools, an increase in imagination is necessitated. Moreover, retention of the base mark helps customers to relate to the product whilst analysing the new fluidity conferred to it.

As interesting as it sounds, fluid trademarks come with a lot of associated risks. For a fluid mark to be impactful, it is *prima facie* necessary that the base mark be in constant use. This lays down the premise that fluid marks prove more beneficial in cases of marks which are already in existence as it helps strong names garner more reputation and acquire a world-wide consumer base. Therefore, for small businesses, it is important that they start off with commercialization of their static trademarks before adding fluidity to it. Consumer trust, once gained and maintained, would yield better results when applied to fluid trademarks.

However, the existing players must understand that rendition of excessive additional components to their mark may lead to confusion in the minds of their customers about the relation of the fluid mark with the base mark and additionally gives rise to questions of authenticity. Thus, a total shift from the base mark may prove to be detrimental to the proprietor's goodwill. Further, since internet is readily accessible, the chances of works being copied rise exponentially, requiring strict vigilance on the part of the proprietor to deal with the risk of plagiarism.

[IV.] GLOBAL STATUTORY PERSPECTIVE

A. UK, USA, Canada

Countries have varied stances on the recognition and protection of fluid trademarks. The United Kingdom's law of Trademarks allows for the registration of a base mark as a series of marks wherein the original identity of the mark is retained, where it states, *A series of trademarks means a number of trademarks which resemble each other as to their material particulars and differ only as to matters of a non-distinctive character not substantially affecting the identity of the trade mark.*³ The pre-requisite for this Section to come into play is that there must not be substantive variance likely to cause confusion about the identity of the product.

In the United States of America, there is no statutory protection when it comes to fluid trademarks. A proprietor can resort to a mixture of rights such as the common law rights for trademark protection, protection under the copyright regime along with patents for designs. Since the fluid marks change constantly to incorporate new trends, these protections suffice. In Canada, however, an all comprehensive Budget Bill⁴ was passed in 2014 containing amendments for a number of statutes including the Trade-Marks Act, 1985. By virtue of the amendments, the Bill sought to widen the scope of the term 'trademark' and include within its ambit other non-conventional trademarks among others, implying the extension of recognition to fluid trademarks.

³Section 41(2), Trade Marks Act 1994 (United Kingdom).

⁴ Bill C-31, June 19, 2014 (Canada).

B. Status in India

Analysing the trend in India, it is observed the Trademark statute is silent about fluid trademarks or any other non-conventional trademark. However, the Trade Mark Rules of 2017 has provisions for format of application pertaining to the registration of Sound Marks.⁵ Furthermore, Rule 23(c) states that an Application for trademark would be considered to be a three-dimensional trademark if there is a statement to that effect in the application. Rule 26(3) and Rule 27 enshrine the provisions for representation of a three-dimensional mark and Series Mark respectively.

Looking at the current international situation, it would be prudent for countries to confer exclusive protection to non-conventional marks within the domestic trademark statutes and for the WIPO to include provisions for the same at an international level.

[V.] FLUID TRADEMARKS AND ADVERTISING: INTERPLAY OF MEDIA AND INTELLECTUAL PROPERTY

A. To understand this aspect better, let us look at a few examples:

1. The Google Case



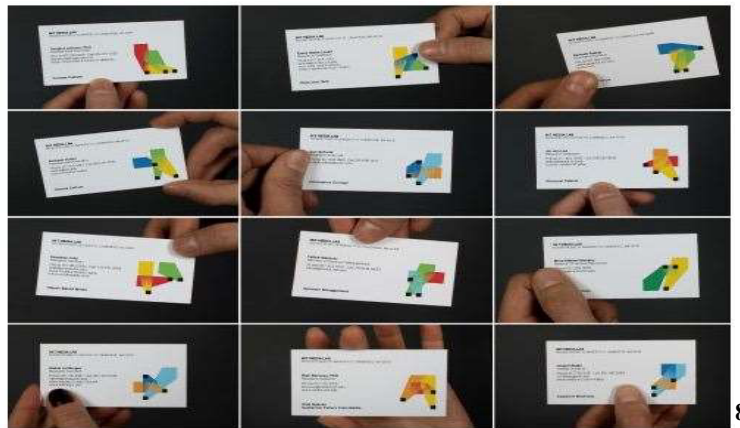
6

⁵ Rule 26(5), Trademark Rules, 2017 (India).

⁶ Time, *Realism*, (Dec. 20, 2019, 10:10 AM), <https://time.com/5187121/gabriel-garcia-marquez-google-doodle/>.

There is a whole array of Google doodles to commemorate important days of history. The first doodle pertains to the 91st birthday of eminent novelist Gabriel Garcia Marquez. Similarly, Google aimed to celebrate Children's Day as well.⁷ It can quite be argued that the Google doodles are the best examples of fluid trademarks with the strong and visually appealing representation of the base GOOGLE mark. The same is protected under the common law rights, copyrights law, design and layouts for patents under the United States regime.

2. MIT Media Labs



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The next example is that of MIT Media Labs, one of the foremost organizations dedicated to academic research purposes and was founded in the year 19859. They work on diverse projects across multiple disciplines including bioengineering, tools for new learning, robotics etc as well as offering research and academic programs emphasizing upon unique industry design skills.

⁷ Google Images, *Google Doodles*, (Dec. 20, 2019, 10:10 AM), <https://mashable.com/2016/11/11/google-doodle-india-2016-childrens-day/>.

⁸ Laughing Squid, *MIT Media Labs Infinitely Customizable Logo*, (Dec. 20, 2019, 10:14 AM), <https://laughingsquid.com/mit-media-labs-customizable-logo/>.

⁹ MIT Media Lab, *About the Lab Overview*, (May 05, 2020, 8:44PM), <https://www.media.mit.edu/about/overview/>.

The MIT logo is intriguing. Where focus is given towards creation of one strong logo, the designers of the Lab's logo have come up with an algorithm which produces unique, albeit interconnected, logos for members of the labs. The MIT Media labs have created something along the lines of 'fluid identity', with the system producing a distinct logo for each member. The designers claim that since the members of the labs are extremely creative, the same applies to their 'visual identities' as well.

3. The case of Snickers



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The Snickers campaign which got worldwide attention during the period between 2006 and 2009 retained the trade dress of Snickers and while also including different terms associated with the chocolate bars. It was a mere variation of the base mark and gained immense popularity.

¹⁰ Theology Mix, *Snickers Mood*, (Dec. 20, 2019, 10:20 AM), <https://theologymix.com/carol-howell-talks-dementia/kind-mood-today/attachment/snickers-moods/>.

4. ABSOLUT-ELY FLUID VODKA!



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Absolut Vodka bottles have made a memorable impression by utilising of the interplay with diverse components. The company has adopted numerous interpretations of the mark in a variety of settings, using different forms of pictorial representations to market the product, the term 'Absolut' being retained in each case.

¹¹ Pinterest, *Discover Ideas About Absolut Vodka*, (Dec. 20, 2019, 10:25 AM), <https://www.pinterest.com.au/pin/433260426621439257/>.

¹² ND, *28 Fantastic Absolut Vodka Ads*, (Dec. 20, 2019, 10:25 AM), <http://neatdesigns.net/28-fantastic-absolut-vodka-ads/>.

5. Nickelodeon



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Nickelodeon is a U.S based television channel network which is dedicated to children. The mark 'Nickelodeon' has been used by the channel on different backgrounds, all having the same orange shade. The visually gripping marks are available on numerous backgrounds which imparts an exclusive association with the cable TV network's base mark.

A. Slogans as a part of fluid trademarks: Fluid Slogans

Slogans have constituted an important part of brand advertising as they have come to be considered of the most crucial aspects when it comes to effective marketing strategies employed by the companies. There is a greater sense of association with slogans, more so, when exhibited in form of jingles.¹⁴ A slogan is often more powerful than the base-mark itself. The components of a successful brand slogan include catchy phrases, witty lines, simplicity to appeal to a layman and brevity. It takes time for a slogan to acquire

¹³ Lisa Pearson, *Fluid Trademarks and Dynamic Brand Identities*, THE TRADEMARK REPORTER (INTA), Pg 1422, (Dec. 20, 2019, 11:30 AM), https://www.inta.org/TMR/Documents/Volume%20104/vol104_no6_a8.pdf.

¹⁴ A few examples of famous slogans can be; Amul- The Taste of India, Maggi-Taste Bhi Health Bhi etc.

distinction while being an indicator or an identifier to the goods and services in the same manner as the base-mark. Once this is achieved, the slogan also falls under the category of a trade mark.

By virtue of general practice, a slogan is protected by exercising common law rights against passing off. Registration of slogan marks can be granted by following the same parameters applicable to trademarks. If the slogan has sufficient characteristics to distinguish goods of one proprietor from those of other and is subsequently successful in indicating the source of origin, it can fall under Section 2 (1) (m) and 2 (1) (zb) of the Trade Marks Act, 1999, and thus be registered.

With respect to the European Union and the United States of America, it may be observed that the prime ground for the registration of a slogan is that it imparts a distinct character to the goods and services it seeks to represent. In no case, should it be totally descriptive and common to other products. Therefore, a mere combination of words which can be used in relation to a lot of products cannot be conferred protection under the trade mark regime. To exemplify, in 2001, the United Kingdom Trade Mark Registry received an application for registration of the phrase 'BAGS OF STYLE'. It was however, not granted registration for being 'normal way of referring to an essential characteristic of the goods'¹⁵. Similarly, registration for another phrase, 'WHERE ALL YOUR FAVOURITES COME TOGETHER'¹⁶ was sought after in respect of chocolates, wherein registration was not granted, citing that the phrase can be associated with any item belonging to confectionary

¹⁵Intellectual Property Department, *Slogans and Phrases*, GOVERNMENT OF HONG KONG, (Jun. 06, 2019, 7:45 PM), https://www.ipd.gov.hk/eng/intellectual_property/trademarks/registry/Slogans_and_phrases.pdf.

¹⁶ Trademark Application No. 2,206,477 (United Kingdom).

and therefore, is not inherently distinct. While disposing of the appeal for registration, it was held that *"I have no doubt at all that a package containing products, some of which differed from the others, the closest example being a box containing two different varieties of products, would be goods of a similar description. Thus, if someone used the expression or strapline, "Where all your favourites come together" in relation to that product, there would be scope for an allegation of infringement.*

Whilst, therefore, the restriction of the category of goods goes some way to identifying a distinction between the use of the trade mark in its natural descriptive sense because it would cease to be descriptive when referring to a single variety of product, I do not believe it goes far enough. This mark has not been the subject of any use and, as an unused mark; I believe that Mr. Redmore was correct in refusing to register it."

In Hong Kong, an application for registration of 'REACH EASY' was dismissed which pertained to massage-related machines. It was said, that the phrase was common to trade and entirely descriptive in nature. Coming to the Indian subcontinent, the 2015 Draft Manual of Trade Marks allows registration of slogan marks only if it is distinctive in nature. Objection will arise, if the slogan is purported to act merely as an agent for promotion, as, the consumers are not thus able to understand the origin of the goods.

The importance that a slogan carries with respect to a product was weighed in the case of *Procter & Gamble Manufacturing (Tianjin) Co. Ltd. & Ors. Vs. Anchor Health & Beauty Care Pvt. Ltd.*¹⁷. The Court affirmed that slogans definitely fall within the ambit of Section 2(m) and 2(zb) of the Trade Marks Act, 1999 and went on to say that slogans play a significant role in the branding of goods, often surpassing know-how of the main product. They 'crisply

¹⁷ 211(2014) DLT 466 (India).

communicate' the natures of goods so endorsed and have a lasting impact on the minds of the consumers.

In *Reebok India Company v. Gomzi Active*,¹⁸ the question revolved around whether or not the slogan "I am what I am" used by Reebok, conferred it distinctiveness, as the same slogan was also used by Gomzi. The Karnataka High Court went on to say that it was imperative for the person claiming distinctiveness to establish that the slogan had acquired goodwill. This is elucidated as seen in the case of an advertisement involving *Horlicks and Pediasure*¹⁹ in which GlaxoSmithKline sought an injunction against Abbott to stop the use of the drink Pediasure's slogan "Sabse tallest, strongest, brightest" claiming that it was similar to the slogan of GSK's Horlicks, "Taller, Stronger, Sharper". Refusing to grant injunction, the Court held that albeit the words are used in the same sense, yet these are the attributes which every nutritional drink aims to showcase and therefore, they are allowed the freedom to "puff".

B. Strategic Advertising and Brand Strengthening

Advertising is decisive of the future goals of any product. In the age where competition and the urge to dominate in domestic as well as global market is at its peak, it becomes imperative for brand owners across the globe to shift from the confines of rigidity and strive to challenge the existing framework of trademarks. Incorporation of dynamic trademarks is one such method which can help owners to monetize and capitalize their brand values and strengthen their presence in the market.

¹⁸ *Reebok India Company v. Gomzi Active*, ILR 2006 KAR 3961 (Karnataka High Court, Jun. 22, 2006)

¹⁹ *GlaxoSmithKline Consumer Healthcare Ltd (GSK) v Abbott Healthcare Pvt Ltd*, CS No. 142/2008 (Cal. High Court, Jul. 31, 2008)

Each brand logo confers distinctiveness to its brand apart from promising a good consumer base. Media plays the most important role when it comes to the far-reaching effects of a product, achieved by the means of advertising. Print media and digital media are equally responsible for dissemination of information. Consumers associate the trademarks, trade dresses etc. with the goodwill of the brand. What fluid trademarks seek to achieve is to give the brand a 'life' and make it more dynamic. Advertisements today build a story around their products to keep potential customers invested in the narrative. The question here pertains to the parameters to be kept in mind before advertisement of fluid trademarks and slogans.

- a. It becomes pertinent to have a strong base mark to which the consumers find it easy to associate. If the base mark itself is inadequate, adding fluidity to it would dilute it further. Therefore, before making it 'alive', the existing trademark must be advertised widely via all possible forms of media.
- b. The base mark should be such which is constantly used and advertised by the brand owner for identification of their goods and the source of their products. This creates a strong impact in the minds of the consumer and helps in easy identification of the products.
- c. It is advisable that the base mark is registered *prima facie*. It gives a strong legal identity to the brand, hence making it easy for the owner to render fluid mobility to it in future.
- d. Rendering fluidity does not mean that there should be total deviation from the existing mark. The basic features of the mark must not be obscured. If that is the case, the whole object of ornamenting the mark would be diluted. Therefore, retaining the base mark is an important requisite before any other modifications are made to it.
- e. The owner can adopt different backgrounds ideas, play with movements, offer different interpretation of the marks,

change styles etc. while retaining the base mark. It is meant to act as a positive additive to the brand value.

- f. The owner must be vigilant and protect their base mark against any infringement or passing off and must always enforce his intellectual property rights.
- g. With respect to advertising on Indian Television Cable Network, strict adherence must be shown to the *Advertising Code*²⁰. Advertisement of the mark must conform to the moral, religious and decency standards of the country and the viewers. It should be not be discriminative, unconstitutional, inciteful, violent, or obscene. It must also not propagate crimes or be exploitative of the emblem of India. Moreover, the products, the sale or production or consumption of which is not permitted, according to Rule 7(2)(viii), include *cigarettes, wine, alcohol, liquor, tobacco products or other intoxicants*. If at all, the brand name of a product is same as that of any other brand dealing in the aforementioned products, steps must be taken to ensure that the former in no manner promotes consumption or sale of the same.²¹

Comparative advertising- An increasingly popular way of 'mainstreaming' one's product is to present it in comparison with that of the rival competitor's. It is defined as "*any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.*"²² This method has been resorted to by the brand owners in consideration of the ever-growing choices available to the customers. Moreover, advertising has been held to be a right of free commercial speech within the constitutional ambit.²³ It has

20 Rule 7, The Cable Television Network Rules, 1994(India)

21 *Ibid.*

22 Article 2(c), Directive 2006/114/EC Of The European Parliament And Of The Council, Dec. 12, 2006

23 *Tata Press v. Mahanagar Telephone Nigam Ltd.*, (1995) 5 SCC 139 (Supreme Court of India)

been made permissible in India as well, under the Advertising Standards Council of India Code.²⁴ It includes limits such as non denigration of others' products, factual comparison, no misleading etc. Although legally permitted, if this form of advertising is not put up for checks, it might lead to the degradation of the product as well as the goodwill of the competitor. To keep a check on infringement cases by way of advertisements, a remedy has been provided for in the Trademarks Act, 1999.²⁵ Comparative advertising is tested on the scales of honest use²⁶. Advertisements must also not be misleading in nature. However, mere failure in advertising the advantageous nature of the competitor's product does not amount to dishonesty.²⁷

[VI.] CONCLUSION

Each day, a new form of technology is witnessed by the world. The base and prospects of Intellectual Property is expanding tremendously. Fluid trademarks are just another development that offers a multitude of benefits to the proprietor, a much-needed requirement in the trade and commerce industry to capitalize on the benefits offered by them.

Competition is inevitable and standing out is the need of the hour. This can be done by identifying and conferring statutory protection to newer forms of intellectual properties. A gradual shift has been witnessed from static to a more dynamic representation of brand marks, which creates new standards for uniqueness, while also freeing up more space for innovation.

24 Chapter IV.

25 S. 29(8)

26 S. 30(1), Trademarks Act, 1999 (India)

27 *Havells India Ltd. & Anr. v. Amritanshu Khaitan & Ors.*, I.A. 850/2015 (Del. High Court, Mar. 17, 2015)

Protection of the underlying mark has been stressed upon, time and again. There is good scope for medium and small enterprises to foray into branding and advertising, thereby securing consumer attention towards their products. Similarly, bigger brands can strive to play with the existing marks and strengthen their brand values even more. However, owners should be vigilant enough to not deviate from the existing mark and diminish their identities.

CONNECTING THE DOTS: DATA, E-COMMERCE, FOREIGN DIRECT INVESTMENT & MSMEs

By Manikanda Prabhu J*

In the past few years, e-commerce sector has seen tremendous growth in terms of market share and revenue generated. Due to India's humongous retail market, many foreign players wish to be part of the Indian e-commerce sector. Till date, there are not many regulations that govern the inflow of FDI in e-commerce sector, though it is quintessential for the country to attract more FDI, it does have its own repercussions. If not rightly channelized this may lead to an economic destruction. Data is the new age capital; but this is possessed in very few hands rather than being aimed at the collective welfare of the people. It is a double-edged sword and the complete potential of enormous data, artificial intelligence, high computing and such others are not yet unleashed by mankind. Though referred to as the backbone of the economy, MSMEs often suffer from issues in credit, advertising, marketing and return on investment. Without the aid of MSMEs, achieving a healthy, sustainable and robust economy is impossible. Recently, the Central Government came up with the Draft National E-commerce policy to impose stricter regulations on the booming e-commerce sector in India. The point is not to judge the efficacy and efficiency of the draft policy but to address some inherent issues with the economy. If this were to be resolved, then the necessity for Government intervention can be reduced drastically, and a robust self-resolving ecosystem could be envisioned. This article aims to not only promote a healthy discussion revolving around this new draft policy but also suggest a

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solution by connecting the dots.

Keywords: Data, E-commerce, Policy, Government, MSMEs

[I.] INTRODUCTION

The 2017 Global Retail Development Index™ published by the Illinois based consultant firm A.T. Kearney ranked India at the top followed by China, both having a narrow margin of difference.¹ The figures and findings given by the report suggest that the cell phone usage in India has grown by 121%, and a total retail sale of \$ 1.07 Trillion, of which the e-commerce transactions are projected with a 30% annual growth to achieve \$ 48 Billion in the year 2020.² Given these figures, it is safe to say that India is moving at a faster pace to become a world leader in e-commerce.

Certainly, it means a lot for the national economy. But what does it mean for the people of the country? There is no straight jacket answer for economic and policy-based questions due to the interplay of many factors together. The benefits of the exponential growth in FDI is evident but it comes with some negative impacts as well, such as degeneration of local enterprises, unfair competitive practices, lack of local linkages, low local processing, environmental issues, socio-cultural effects, privacy and cyber issues, etc.³ Whether we have the cushion to balance these negative effects, whether the loss of control over data could threaten the position of Governments, what are the social effects of the awaited artificial intelligence

¹ Osamu Goto & Greg Portell, *The Age of Focus The 2017 Global Retail Development Index™*, AT KEARNEY (Jun. 2017), <https://www.atkearney.com/global-retail-development-index/article?/a/the-age-of-focus-2017-full-study>.

² *Id.*

³ VINISHI KATHURIA, *FDI IN INDIA ISSUES AND CHALLENGES 1 -2* (Dr. N. Prasanna ed. Regal Publications, 2014).

technologies, and many other questions pop out immediately. By connecting the dots between the recent developments in data, e-commerce, FDI and MSMEs, if not a viable solution at least a productive discussion can be carried forward with the vision of coexistence of the predator and prey.

A. Scope

The scope of the article is limited to Indian cases and scenarios except where an explicit comparison is made with any other jurisdiction. The background being the release of the Draft National E-Commerce Policy 2019 (hereinafter may be referred to as 'draft policy'); the FDI regulations and restrictions on data and such other matters are expected to be drastically changed in the near future. This is referred to by many stakeholders and media as 'Protectionist' or 'India first approach' hurting the growing economy of the country.⁴ But it must be clearly understood that the stakeholders in this approach are not only the market participants. It includes the retailers, wholesale sellers, manufacturers, MSMEs, e-commerce giants like Amazon and Flipkart, e-commerce start-ups, The Government and the consumers. Thus, only one view must not be pursued, or a complete single stance either towards the Government or the e-commerce giants or MSMEs would not be a healthy one, because, at the end of the day, all these players would prefer to if not

⁴Sidhant Kuma, *Protection, or protectionist?*, ECONOMIC TIMES (Jun. 28, 2019), <https://economictimes.indiatimes.com/blogs/et-commentary/protection-or-protectionist/>; Sangeetha Chengappa & Giriprakash KV, *Draft E-Commerce Policy contains strong elements of Protectionism say Players*, THE HINDU BUSINESS LINE (Feb. 25, 2019), <https://www.thehindubusinessline.com/economy/draft-e-commerce-policy-contains-strongelements-of-protectionism-say-players/article26367057.ece>; Trisha Jalan, #PolicyNext: "Jingoism is taking over policy-making"; *Lobbying and interest groups*, MEDIA NAMA (Jul. 22, 2019), <https://www.medianama.com/2019/07/223-policynext-data-localisation-why-policy-is-made-trai-cloud-policy/>.

peacefully coexist, then simply survive in this highly competitive market. A conjoint view of the recent developments in the economy must be pursued, reports of expert panels, recent decisions of judicial bodies and even the recently published Economic Survey of India 2018 – 19 is relevant. This article is not to praise or criticize the Draft National E-Commerce Policy 2019 but to bring out the philosophy behind the draft policy and place on the table the significance of MSMEs and ownership of data in both the context of e-commerce and the bigger picture of the economy.

[II.] THE TRAJECTORY OF FOREIGN DIRECT INVESTMENT POLICIES AND E-COMMERCE IN INDIA

Nowadays, it is no less than a race for developing countries like India to attract foreign investments. This stems from the reality that no country can be economically indigenous and aboriginal. Countries that have abundant natural resources may not have the technology and capital to exploit it, those who have the latter may not have labour to work. This cycle is inevitable. The need for foreign investments for countries like India is one of the aspects of this cycle, which will solve infrastructural issues, unemployment, and balance of payments crisis and provide with valuable foreign exchange.⁵ As the sub-heading suggests, this chapter is aimed at tracing the trajectory *i.e.* the history, development and evolution of FDI in India, consequentially the core issue of this piece of writing e-commerce with the digital economy will be concentrated.

Before the Independence of India, the economy of India was completely colonised and was exploited only to the benefit of the colonial masters. Unlike the British or any other developed European nation at that point of time, India was not industrialized and stood as an agrarian nation. Post-independence, the nascent

⁵ *Supra* note 3, at xi.

Indian Government was very suspicious to foreign investments because the bitter experiences it had because of the Imperialism. Yet, the Government was in dire need to repair and rework its economy as it stood stagnant for more than a century, thus the Industrial policy resolution 1948 was formulated. The attitude towards foreign investments was very speculative in the then prevailing situations, The Foreign Exchange Regulation Act, 1973 did contain a lot of restrictions and a string of procedures to be complied with in connection with the proposals, clearances and approval formalities. However, the Government felt the need to rationalize the controls over foreign exchange transactions in general and foreign collaborations in particular in the context of the commitments under the new WTO regime as well as the inevitability to dismantle all controls in an effort towards establishing a market-driven economy.

Therefore, the FERA was superseded by a more liberal and positive piece of legislation *viz.* The Foreign Exchange Management Act, 1999. The FEMA, more liberal, more pragmatic and less punitive in its approach, addresses *inter alia* investments in India by non-residents in a more realistic manner.⁶ Historically looking back, the foreign collaboration policy was comparatively liberal till 1973 and became more stringent after 1973 under the FERA regime. The then Indian Governments earnestly believed that a congenial and liberal policy framework towards foreign collaboration would, in the long run, lead to the healthy growth of not only indigenous industry but also the development of a vibrant export sector.⁷

⁶ R. KRISHNAN, HANDBOOK ON FOREIGN COLLABORATIONS AND INVESTMENTS IN INDIA: LAW, PRACTICE AND PROCEDURES 696 – 697 (3rd ed. 2001).

⁷ *Id* at 698.

A. *Evolution of FDI Policy in India*

Scholars have categorized the evolution of the FDI policy in India in various phases.⁸ The four phases of evolution are as follows: *firstly*, the period between 1948 and 1969, a very protected and vigilant move of foreign policy was introduced; especially sectors like petroleum, heavy industries, agricultural machinery etc. were targeted.⁹ *Secondly*, the period between 1969 and 1991 – a typical license raj – where the companies had to receive selective licenses from the Government from time to time. This phase also saw major legislation like the FERA 1973 and Monopolies and Restrictive Trade Practices Act, 1969 was enacted. *Thirdly*, the period between 1991 and 2000, were due to the strain in Balance of Payments, India had to open up its markets to the foreign players (notably called as Liberalisation, Privatisation and Globalisation model). The Foreign Direct Investment in the real sense was introduced with 50%, 51%, 74% and 100% caps through automatic entry routes permitted in certain notified industries. Later, however, certain restrictions were put in place by the Central Government.¹⁰

Fourthly, which began in 2000 and continues, is the era of full realisation of India's potential as a host country. But it is interesting to note that many structural reforms in the erstwhile policy were

⁸ S. KANNAN & V. GEETHA, FDI IN INDIA: LAW, POLICY AND PROCEDURE 71 (2nd ed. 2014).

⁹ Industrial Policy Resolution of 1956 (Indian Parliament, Apr. 1956).

¹⁰ PROCEDURES IN RESPECT OF FOREIGN TECHNOLOGY AGREEMENT, PRESS NOTE NO. 12 (1991 SERIES), DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, MINISTRY OF COMMERCE AND INDUSTRY, GOVERNMENT OF INDIA; GUIDELINES PERTAINING TO APPROVAL OF FOREIGN/TECHNICAL COLLABORATIONS UNDER THE AUTOMATIC ROUTE WITH PREVIOUS VENTURES/TIE-UP IN INDIA, PRESS NOTE NO. 18 (1998 SERIES), DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, MINISTRY OF COMMERCE AND INDUSTRY, GOVERNMENT OF INDIA [HEREINAFTER REFERRED AS 'DIPP'].

made to suit the conditions. A huge number of activities were relaxed to automatic route¹¹, removal of dividend balancing¹², cap changes in insurance and defence¹³, telecom¹⁴, single-brand retailing¹⁵, and many other similar reforms easing the entry of FDI in India.¹⁶ The present decade has witnessed number of structural reforms in the FDI regime such as single-window clearances in Government route, scrapping of the Foreign Investment Promotion Board, and many others.¹⁷ The Consolidated FDI Policy Circular of 2017 and Press note no. 1 of 2018 govern almost all areas of FDI in India now. Thus, it is evident from the afore-quoted press notes that the tendency of the Government has been to drastically reduce equity caps, flexibility in entry routes and conditionality. The World Bank's Doing Business Report 2019 has ranked India at 77th position, positions ahead of the previous report¹⁸, and has been placed at 11th

¹¹ Expansion of list of industries/activities eligible for automatic route for Foreign Direct Investment (FDI), Non-Resident Indian (NRI) and Overseas Corporate Body (OCB) investment, Press note no. 2 (2000 series), DIPP.

¹² Review of existing sectoral policy and sectoral equity cap for Foreign Direct Investment (FDI) / Non-Resident Indian (NRI) / Overseas Corporate Bodies (OCB) Investment, Press note no. 7 (2000 series), DIPP.

¹³ Revision of existing sectoral guidelines and equity cap on Foreign Direct Investment (FDI), including investment by Non-Resident Indians (NRIs) and Overseas Corporate Bodies (OCBs), Press note no. 4 (2001 series), DIPP; Guidelines for licensing production of Arms & Ammunitions, Press note no. 2 (2002 series), DIPP.

¹⁴ Enhancement of the Foreign Direct Investment ceiling from 49 per cent to 74 per cent in the Telecom sector, Press note no. 5 (2005 series), DIPP.

¹⁵ Rationalisation of the FDI Policy, Press note no. 4 (2006 series), DIPP.

¹⁶ *Supra* note at 8, 72.

¹⁷ Consolidated FDI Policy, Circular no. 1 & 2 of 2010, DIPP; Review of the policy on Foreign Direct Investment- Allowing FDI in Limited Liability Partnership firms-amendment to paragraphs 2.1, 3.3.5 and 3.3.6 of 'Circular I of 2011-Consolidated FDI Policy, Press Note No. 1 (2011 series), DIPP.

¹⁸ Doing Business Report, 2019, The World Bank Table 1.1 (2019).

position in the AT Kearney FDI Confidence Index 2019¹⁹ are the positives present, without prejudice to the fact that there needs much improvement compared with the growth of counterparts like South Korea, Japan, China and Singapore.

The aforesaid being the trajectory of FDI policy post-independence, the issue at present is with regards to the FDI policy in the e-commerce sector. The model of e-commerce trading in India not very much different to that in many other countries like USA or China, except for the fact that the dominance of brick and mortar shops in India is stronger than these countries. Even in 2019, people buy all the basic day to day goods like vegetables, groceries, confectionaries and stationeries from the shop in the corner of the street. This can illustrate the prevalence of these small retailers, and their livelihood is very much significant for the healthy sustenance of the economy. This is not the case with other counterparts who have a strong e-commerce industry and potential like that of India.

In fact, this makes the flavour of Indian market *Sui generis*. Currently, the FDI policy of the e-commerce sector is two-fold, *i.e.* market place model and inventory-based model, for the former there is 100% approval with the automatic route, and FDI in the latter is prohibited.²⁰ The background of FDI in e-commerce has two prominent issues, anti-trust and taxation. A series of complaints have been filed by various other stakeholders against the market giants Amazon and Flipkart before the Ministry of Commerce and the Competition Commission of India for involving in anti-

¹⁹ Paul A. Laudicina, Erik R. Peterson, & Courtney Rickert McCaffrey, *The 2019 A.T. Kearney Foreign Direct Investment Confidence Index*® (May, 2019), <https://www.atkearney.com/foreign-direct-investment-confidence-index/2019-full-report>.

²⁰ REVIEW OF POLICY OF FDI IN E-COMMERCE, PRESS NOTE NO. 2 (2018 SERIES), DIPP.

competitive practices and involving in the inventory-based model.²¹ Thus, the aforesaid are governed conjointly by the Consolidated FDI policy of 2018; Press note no. 2 of 2018 and Press note no. 3 of 2018. In this context, the Draft National E-Commerce policy is a welcome move for the stakeholders of retailers and MSMEs, to clearly appreciate it the features and contents of the Draft policy are elaborately discussed in the subsequent chapter.

[III.] FEATURES OF THE DRAFT NATIONAL E-COMMERCE POLICY 2019

The Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry in February this year came out with the Draft National E-Commerce Policy. The draft policy was the result of the Justice B.N. Srikrishna Committee report. It is pertinent to note that the potentially humongous Indian e-commerce sector has only been lightly regulated by the Government, except for the Press note no. 3 issued by the Department for Promotion of Industry and Internal Trade²², whereas there has only been a blank space with regard to other related rules and policies on FDI. But with the draft policy being out, even though much of the vacuum remains, the vision of the Indian Government on its data, technology and e-commerce has been strongly resounded throughout; this has also encouraged constructive debates and criticisms on this vision. It is very important for a potential market like India, which the policy itself phases it to be passing through 'Industrial Revolution 4.0'²³, to have a clear and sound vision. This chapter concern briefly enumerating the contents and features of the Draft National E-Commerce Policy in the order of emphasis placed in the report and shall be expository.

²¹ In re All India Online Vendors Association and Flipkart India Pvt. Ltd. and Anr., Case no. 20 of 2018, Competition Commission of India.

²² GUIDELINES FOR FDI ON E-COMMERCE, PRESS NOTE NO. 3 (2016 SERIES), DIPP.

²³ Draft National E-Commerce Policy para 8, Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry (2019).

A. Right to Privacy

Firstly, amidst Right to Privacy being held as a fundamental right, the draft policy has given due recognition to data.²⁴ Data is defined in the Information Technology Act, 2000²⁵ and the proposed Bill on data protection²⁶. Given the level of e-commerce transactions that are taking place in India every moment, an enormous amount of data is being generated through the search bars, every hit that an individual makes, time spent on a single web page, mobile applications, wish lists/carts, payment gateways, feedback forms etc. and are being stored mostly in a cloud-based system. This data is being constantly analysed and processed in the form of statistics to be used to improve the results. At this juncture, the draft policy presses on the issue of monetisation of data and acknowledges the fact that in future, the success of any company (even the Government to some extent) depends on who has control over this data and it will be no less to capital (funds). The stand taken is that *the data generated in India belongs to Indians as do the derivatives there from.....is best thought of collective resources, a national asset that the Government holds in trust*".²⁷ A framework placing restrictions on cross-border data flow, data localisation *i.e.* all data generated from India should be stored in data farms and servers within India, and several compliances are recommended to the entities wishing to store data abroad.²⁸ All of this shall be enforced through a 'data authority'.²⁹

²⁴ Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors., (2017) 10 SCC 1.

²⁵ Section 2 (1) (o), Information Technology Act, Act no. 21 of 2000, Acts of Parliament, 2000.

²⁶ Section 3 (12), Personal Data Protection Bill, Bill of Parliament, 2018.

²⁷ *Supra* note at 23, 14.

²⁸ *Supra* note at 23, 16-17.

²⁹ *Supra* note at 23, 16.

B. E-Commerce Marketplaces

Secondly, a considerable portion of the discussion is on the e-commerce marketplaces. It is a fact that the e-commerce model has provided consumers with a wide variety of choices at competitive prices. Top quality and reputed products are accessible to even remote locations in the country. The policy distinguishes between market-place and inventory-based models, to prohibit FDI in the latter. The rationale given is to protect the interests of the domestic sellers, MSMEs and start-ups by providing them with a level playing field. The policy proposes a plethora of insertions and modifications in the existing system of FDI in e-commerce such as integration of Customs, RBI and India Post, the requirement of a registered business entity for all e-commerce with necessary import permissions, the requirement of MRP (in INR) on all the products sold and many other stipulations. Apart from this, several measures for anti-counterfeiting and anti-piracy have been laid down extensively. But it must also be noted that there already exist regulations in place for FDI in retail trading.

C. Regulatory Concerns

Thirdly, the discussion on regulatory concerns of data and e-commerce poses a dilemma. It mentions that earlier people believed the internet to be the tool to reduce income inequality and provide for greater accessibility but in reality, it proves to be otherwise.³⁰ Due to the anti-competitive practices, the entry into such businesses in India for a newcomer is very difficult. The draft emphasizes specifically on sustaining intentional losses by giving discounts by market players who have a deep purse. This threatens the existence

³⁰ *Supra* note at 23, 24.

of the small brick and mortar retailers in India. This should be conjointly viewed from the perspective of a company who has both the finance and data; it necessarily has all the power to predict the behaviour of the consumers. *Apart from the above*, taxation, surveillance, payment, consumer protection-related concerns were also specifically addressed in the draft policy.

D. Infrastructure Status

Fourthly, the draft policy sets a goal to develop robust infrastructure for the enhancement of the digital economy and local storage of data in India. Currently, the challenges faced by the e-commerce participants is the lack of accessible digital infrastructure to preserve and process data within India. Hence, the best alternative for them is cross-border storage to reduce costs. These issues have been captured in the draft policy with right intent and vigour. The focus is on the promotion of such data storage systems by conferring them an 'infrastructure status', which will stand as an alternative to oft-preferred foreign solutions.³¹

E. Digital Economy

Fifthly, the vision towards a holistic digital economy was engraved. The goals were set for themselves *i.e.* to enable all Government and logistical services online, including the permissions, licenses and services by Department of Posts, Reserve Bank of India and such others. The approach includes encompassing the aforesaid with Government initiatives such as Digital India and Make in India.³²

³¹ *Supra* note at 23, 18.

³² *Supra* note at 23, 34-35.

F. Promotion Exports

Finally, the last leg of the draft policy speaks about promotion of exports, utilizing the potential tool of e-commerce. Very similar to the last portion on the digital economy, this also portrays a broad vision. Several strategies on infrastructure, cost, regulators and schemes are put forth in the draft policy.

But it must be borne in mind that the draft policy on e-commerce is an endeavour and first of its kind in India. This is one of the very few opportunities where the Government, whether strongly or softly, expressed its stance. The downsides and its implications apart, the draft policy is an applauding attempt.

[IV.] THE PHILOSOPHY BEHIND THE POLICY – IS IT A REFLECTION OF PROTECTIONISM?

The draft policy has optimistically shown that in near future India will have a viable 'Tech-policy'. This is much needed to bridge the generational gap between the Governmental machinery and the futuristic tech-e-commerce companies. But there has been scepticism since the talks began regarding the creation of a national policy to govern the state of affairs in e-commerce. Amazon and Walmart have raised concerns and reservations over the draft policy to the US Government and consequently, the US Trade Representative (USTR)'s 2019 National Trade Estimate Report has stated that the Indian draft policy is to be deemed "Barriers of Trade" between the countries.³³ Data localisation and restrictions on cross-border data flows has received much criticism from the USTR report.

³³ 2019 National Trade Estimate Report on Foreign Trade Barriers, United States Trade Representative, Executive Office of the President of the United States.

Data localisation issues must not only be confined to the draft policy but have to be conjointly viewed with RBI's directive on 'Storage of payment system data', in which it had compelled the system providers to strictly ensure that the entire payment data is confined within the bounds of India³⁴ and the Justice B.N. Srikrishna Committee report, which had pressed for a comprehensive law on data protection including confining the cross border flow of data³⁵. Indeed, a measure of localising data in a weak cyber infrastructural environment is really hard. India does not have the required number of cloud systems or data servers and farms for accessible solutions. It may be a manageable problem for Amazon and Flipkart-Walmart because of the huge capital they possess, but any entry by a small foreign company or even for that matter an Indian start-up will have to cough up a huge portion of their resources on securing the place of data storage. This is a valid concern, which the Government may address in subsequent drafts or final policy. But experts have questioned the need for such localisation and its effectiveness in achieving the aim.

Quoting an excerpt from an article in *The Hindu*, "*Storage is not the same as access. People own data. Fiduciaries get access to it by consent. Just because a data centre is located in India may not mean the data belongs to the state. So, the rights to insights generated will stay with fiduciaries as well. If the policy plans to take us to a Digital India, it is unclear how these directives shape the road to it.*"³⁶ The concern

³⁴ Storage of Payment System Data, RBI/2017-18/153, Reserve Bank of India dated Apr. 6, 2018.

³⁵ A Free and Fair Digital Economy Protecting Privacy, Empowering Indians 166, Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, Reserve Bank of India.

³⁶ Rohan Seth, *Reading into India's draft e-commerce policy*, THE HINDU READ (Jul. 19, 2019), <https://www.thehindu.com/thread/politics-and-policy/reading-into-indias-draft-e-commerce-policy/article28513974.ece?homepage=true>.

expressed by the author may be technologically accurate, but legally speaking only if the data is stored within the territory of India, not only can the authorities monitor and target the usage of such data, but it will amount to being within the jurisdiction of Indian law enforcement agencies. Taking an analogy from the USA, the New York times has in many occasions published articles on the growing concerns of the 'frightful five' tech companies' intervention in human life.³⁷ These big companies are powerful enough to compete with the US Government and its anti-competitive laws. It is equivalent to that of the big oil companies, who controlled the globe from football to toppling Governments to religion in the second half of the 20th century.

The EU has far more effective anti-trust and data privacy mechanisms. The standards set by the EU are less than the US to easily get hold of violators at an earlier stage.³⁸ Recently, the tech giant Google was fined by the EU authorities to a count of 50 million Euros.³⁹ The app-based taxi providers Ola and Uber were also accused of anti-competitive practices but, have successfully won the case before the Competition Commission of India.⁴⁰ Thus, the Indian authorities taking a stricter stance on data issues are beneficial in the

³⁷ Farhad Manjoo, *Frightful 5 will dominate digital life for foreseeable future* (Jan. 20, 2016), <https://www.nytimes.com/2016/01/21/technology/techs-frightful-5-will-dominate-digital-life-for-foreseeable-future.html>; Farhad Manjoo, *Why the world is drawing battle lines against American Tech giants* (Jun. 1, 2016), <https://www.nytimes.com/2016/06/02/technology/why-the-world-is-drawing-battle-lines-against-american-tech-giants.html?module=inline>.

³⁸ General Data Protection Regulation, COM/2012/010 final – 2012/0010 (COD), European Parliament and Council of the European Union (2016).

³⁹ Adam Satariano, *Google is fined \$ 57 million under Europe's Data Privacy law* (Jan. 21, 2019), <https://www.nytimes.com/2019/01/21/technology/google-europe-gdpr-fine.html>.

⁴⁰ *In re Meru Travel Solutions Pvt. Ltd. and M/s ANI Technologies and Ors.*, Case no. 25-28 of 2017, Competition Commission of India.

longer run. If for the sake of the economy, we were to compromise on data, then once after acquiring control over it, the companies can change the market behaviour to their sway, and can threaten the competitive existence of those who do not have access to such data.

There is also a license raj or protectionism argument, but that may not hold good. Regulations *per se* should not be equated to protectionism. When the Supreme Court of India held 'Right to Privacy' to be a fundamental right⁴¹, the whole nation heralded the judgement. But the current sense of privacy lies when an individual's data is not being used to change his behaviour to prefer one brand over the other. Rather, it relies on leaving it to his informed decision. Having said that, it does not mean that the Government is incorrect on all counts. It should always not be a glasshouse shattering by a mere pebble. Certain standards and exceptions must indeed be laid out to fairly implement data localisation. It is also the responsibility of the Government to provide with the required infrastructure to localise data. If the change happens from the grass-root level, it is then possible shortly that a new sector of data storage within India can sprout.

[V.] SIGNIFICANCE OF MSMEs - LESSONS FROM COMPARATIVE ECONOMIC JURISDICTIONS

MSME refers to Micro, Small and Medium enterprises, governed by the Micro, Small and Medium Enterprises Development Act, 2006, and a separate ministry functioning for their progress. Contrary to the name, it is a considerably large sector figuring up to 28% of the GDP and half of the production of the manufacturing sector. Unlike many other sectors, this directly

⁴¹ Justice K. S. Puttaswamy (Retd.) and Anr. vs Union of India And Ors., (2017) 10 SCC 1.

involves the lives of crores of people.⁴² The significance and potential of MSMEs are often undermined, especially in the deepening of e-commerce in India.

There is a huge demand for credit in MSMEs, the RBI panel puts it that the overall credit gap in the MSME sector to be ₹20 – 25 trillion. The reorientation of industrial policies in introducing the concept of MSMEs since the 2000s has not served the purpose of making institutional credits available to the MSMEs. The discourse on financial inclusion in India during this phase has been anchored mainly on rearranging the existing banking structure. The large universal banks are increasingly portrayed as inherently incapable of channelling financial resources to small enterprises and businesses in mutually viable ways.⁴³ Such a misconception is ingrained deeply in the financial sectors and banks of the country, the viewpoint towards even a nascent corporate or a sick company is very different from that of MSMEs. Many of the measures taken to improve the sector has 'formalised' the sector.

The report of the committee set up to examine the financial architecture of the MSME sector by the department of financial services of the Ministry of Finance, suggested that the financial architecture for the MSMEs should be built on a system that encourages registration, the opening of bank accounts, equity and receivables financing, and credit guarantee. There have been some warning signals based on the experiences of countries like China, Malaysia and the European Union, that the MSMEs may end up losing their competitive advantage due to increased costs of operation relative to firm size and the lack of adequate cash flow.

⁴² MSME Sector Overview, Sub- Group on Flow of Private Sector Investments for MSME Sector, Planning Commission of India.

⁴³ Tara Nair & Keshab Das, *Financing the Micro and Small Enterprises in India*, 54 EPW No. 3 (Jan. 19, 2019).

A. Technology Facilitated Solutions

In the wake of super technologies, especially digital platforms and artificial intelligence, the expert panel of the Reserve Bank of India has pressed for infusing technology-facilitated solutions to address the wide variety of problems faced by the indispensable sector. The expert panel suggests that the issue of delayed payments must be addressed immediately.⁴⁴ Another valuable comment is to speed up the integration of information on the Government e-Marketplace, a platform with the Trade Receivables Discounting System. The priority is more focused on the infusion of finance (credit) in a huge amount in the industry.⁴⁵ But the cardinal question is whether MSMEs are largely being diluted in the growth of high technologies, and are they being considered as mere identities or symbols or tokens. Thus, rightly remodelling MSMEs is a structural reform to be made, and will be a decisive factor in achieving a 5 trillion-dollar economy in the reasonable future.

B. Economic Takeaways

In the economic sense, there are some key takeaways from other countries which India can consider and learn from. Though there are a plethora of such experiences, the author has chosen Thailand and China for the reasons of being developing economies themselves in different degrees, and ease of materials. The financial crisis in Thailand is often referred to as the beginning of the much discussed Asian financial crisis in 1997. Since the late 1980s, Thailand had

⁴⁴ Report of the Expert Committee on Micro, Small and Medium Enterprises 4.3, Reserve Bank of India (Jun. 25, 2019).

⁴⁵ Report of the Expert Committee on Micro, Small and Medium Enterprises 4.3.7, Reserve Bank of India (Jun. 25, 2019).

witnessed tremendous growth, but due to a series of poor economic decisions including the Government's move to not peg baht (currency) with dollars. The mismanagement of the foreign exchange rate of the local currency to the dollar was the central issue. The FDI investments were also not spread across sectors, but were concentrated mainly on non-capital sectors like real estate. Though the country was able to recover in less than two years and paid back the outstanding loan to IMF much earlier than expected, this crisis taught the world to have extra care towards asset bubbles, to ensure that a varied FDI portfolio and have a check over the infrastructure spending.⁴⁶

Unlike Thailand, China is a contemporary case. Recently, the Chinese National Bureau of Statistics revealed that the growth rate for the last quarter was 6.2% and the previous was 6.4%.⁴⁷ The country is seen to face its first economic hard time in the last two decades. The two major reasons which are quoted are the ongoing sanctions with the USA and the unexpected setback in the construction sector.⁴⁸

Export promotion is indeed healthy for an economy but it must also be with balance. To augment the point made, China, an export-driven economy can be taken as an illustration. It is now reported that China is trying to boost its local economy by giving tax cuts and fewer interest rates. This is something that could have been done much before, or at least parallel to the export-oriented growth.

⁴⁶ Narisa Laplamwanit, *A Good Look at the Thai Financial Crisis in 1997-98*, COLUMBIA UNIVERSITY (1999), http://www.columbia.edu/cu/thai/html/financial97_98.html.

⁴⁷ Q 2, *Annual Data*, NATIONAL BUREAU OF STATISTICS OF CHINA, PEOPLE'S REPUBLIC OF CHINA, <http://www.stats.gov.cn/english/Statisticaldata/AnnualData/>.

⁴⁸ *Chinese check: on economic troubles*, THE HINDU (Jul. 17, 2019), <https://www.thehindu.com/opinion/editorial/chinese-check/article28492963.ece>.

Emeritus Professors of Wharton and Stanford Universities share a similar view, "*the challenges to China's economy are deeper, structural, longer-term, and have been building for years. They include over-investment, high savings and modest if growing, consumer spending, high debt and low industrial productivity.*"⁴⁹ The logic here holds well because with the USA not being a major export partner of China, it is not a big problem for a 14 Trillion Dollar economy to manage. In the race of becoming a superpower, China appears to have ignored certain hard facts, in particular that its workforce is growing older. Naturally, the productivity is bound to fall. Thus, the economic problems which China faces are not an external but a more internal problem which affects the fundamental and structural foundations.

C. International Case Scenario

The two international case scenarios, one of the past and other of the present suggests many lessons to be learnt not only by India, but by all developing nations. The central issues being, the structuring of the FDI regime and balance between export-driven and localised economy. In fact, since independence, India has had a steady and stable growth rate. There are reasons to view both E-commerce and MSMEs as the potential sectors of tremendous growth in India but both suffer from mutually exclusive inherent problems. As discussed earlier in this chapter, credit demand is a long-standing problem for MSMEs and e-commerce is disabled to work in an inventory-based business model. Also, the efficiency of the marketplace model in the true sense has not yet been unleashed. The combination of MSMEs with e-commerce marketplaces, in the opinion of the author, could work wonders.

⁴⁹*What's Really Behind China's Falling GDP*, KNOWLEDGE @WHARTON (Jul. 19, 2019), <https://knowledge.wharton.upenn.edu/article/chinas-gdp-falling/>.

The major problems which exist with both MSMEs and e-commerce can be addressed by integration and synchronization of both, without losing the individual identity. The draft policy and even the RBI panel report on MSMEs had expressed this tone throughout, and will possibly create a level playing field. *“Continuously evolving technologies and volumes of data generated in a consumer-oriented country like India require an enabling regulatory framework for empowering domestic entrepreneurs, leveraging access to data, connecting MSMEs, vendors, traders, etc. to the digital ecosystem as well as empowering consumers to retain control of the data generated and owned by them.”*⁵⁰

[VI.] CONCLUSION

India is a peculiar economy where there is a need for peaceful coexistence of both giant corporates and MSMEs. To achieve this balance necessitates the intervention of the Government via laws and policies. The draft policy is one such attempt by the Government. Notwithstanding the viability and efficacy of such moves by the Government, we must acknowledge the fact that the tech giants of this world are much more powerful than what is portrayed. The policy is still in its nascent stages and needs to be changed in various places in varied degrees. The data localisation as suggested by the draft policy may not be possible in the fullest sense in the present situation but it is still desirable in the future. But for it to be achieved, there needs a huge boost to the technological infrastructure by the Government on a priority basis.

But one cannot take it as lightly as it is propagated by many. Data is going to be a ‘State of the art weapon’ in the new age. Ownership of this data is a decisive factor; it cannot be equated to that of property or even intellectual property. A unique way of

⁵⁰ *Supra* note at 23, 6.

dealing with the proprietary rights over data has to be formulated. The draft policy suggests collective ownership of data *i.e.* data collected from India belongs to Indians and the Government of India shall hold this data in trust for and on behalf of the people. This data must be used for beneficial purposes and well-being of the society. Thus, handing the affairs relating to data must be done with utmost caution and good faith.

Throughout, the point emphasised is that the integration of sophisticated e-commerce platforms and simple yet efficient MSMEs is the need of the hour. MSMEs must be able to access these platforms, and the necessary credit should be infused by institutions. MSMEs cannot stand to compete with the MNCs in e-commerce sector but can very act as a complementing agent. Recently, Union Minister Nitin Gadkari in an International conference on SMEs expressed the centre's plans for a unique e-commerce platform for marketing and selling MSME made products. The views expressed by the Minister are welcoming, and such a platform will definitely help in boosting the economy of MSMEs. But it should not go to the extent of becoming mere tokenism. It is a must to make it more effective, and efficaciously integrate it with the general system necessary. If this is achieved, MSMEs will benefit in getting a platform to promote and propagate their products. For this, initially domestic e-commerce firms must come forward and this could subsequently attract giants like Amazon and Walmart-Flipkart.

E-commerce, FDI, Data and MSMEs all have numerous specific and unique problems of their own designs, and if we were to look for specific and unique solutions, it will lead either nowhere or to various other problems. These problems have to be answered from their fundamentals and a common solution to the issues faced by all four is possible. Thus, by connecting the dots, one is the answer for another.

RECENT TRENDS IN THE GLOBAL PHARMACEUTICAL MERGERS AND ACQUISITIONS SCENARIO: AN ANALYSIS

By Manisha Nanda*

The pharmaceutical industry is an ever-growing sector which adds substantially to the economy of a country. However, in order to keep up with increasing competition prevailing in the market recently, companies have resorted to mergers and acquisitions to speed up their development process. This paper delves into the recent M&A transactions that have been carried out by companies globally, and highlights the key factors due to which such transactions are on the rise. Further, this paper attempts to analyse the effects that such deals have on competition, pricing, research and development, impact on innovation, and highlights the major concerns of stakeholders vis-à-vis such transactions.

Keywords: Pharmaceuticals, Mergers & Acquisitions, Innovations, Competition, Pricing, Research & Development

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[I.] INTRODUCTION

The contributions made by the pharmaceutical industry to economic development and the global health of the market makes the industry amongst the most important ones in the commercial sector. In 2015, the gross total worldwide sales of pharmaceutical products amounted to a rough figure of 1 trillion dollars.¹ However, the value of such contributions to the human race remains unquantifiable. The trend of global mergers and acquisitions by huge pharmaceutical companies is a phenomenon that has been on the rise since the past two decades and shows no signs of slowing down.

With the expense of research and development reaching the sky, the pharmaceutical companies must do the needful in order to stay put in the market, alongside their competitors. Moreover, in the light of facing tremendous pressure from reaching the expiration of their patents, companies view the scenario of acquiring or being acquired by another company as the best and the most feasible option available to them in order to meet the needs of their investors.²

The two complementary factors that drive pharmaceutical mergers and acquisitions globally are the availability of attractive targets in

¹ Elvis Picardo, *How M&A Can Affect a Company*, INVESTOPEDIA (May 19, 2020, 8:30 PM), <https://www.investopedia.com/articles/investing/102914/how-mergers-and-acquisitions-can-affect-company.asp>

² Dr. Makarand Jawadekar, *Mergers and Acquisitions in the Pharma Industry*, ELSEVIER (May 19, 2020, 8:30 PM), <https://pharma.elsevier.com/pharma-rd/mergers-acquisitions-pharma-industry/>.

the market and the cash-in-hand of prospective buyers who seek to buy companies which show signs of having immense potential towards making substantial revenue.³ This is so because the prospective buyers stand in a position of facing an immediate loss in revenue owing to their expiration of patent, as aforementioned.⁴

However, it must be noted that carrying out of proper due diligence and strategic research, which is quintessential for the accurate valuation of a company prior to an acquisition, is lost in this frenzy. Therefore, it becomes extremely important for us to evaluate and scrutinise the factors which push these industries into engaging in such transactions.

The impact of such M&A transactions on Innovation has been separately dealt with in this paper, owing to its crucial role in the market as a determinant for the success or failure of an organisation. This paper is concluded by a series of recommendations and suggestions which seek to balance the interests of the companies with that of the consumers; by attaching the duty of careful scrutiny onto the regulators who play a key role in controlling the outcome and subsequent execution of such transactions.

³ *Managing M&A in the biotech and Pharma Sector*, FINANCIER WORLDWIDE, (May 19, 2020, 9:30 PM), https://www.financierworldwide.com/managing-ma-in-the-biotech-and-pharma-sector/#.XsP3h_kzbIV.

⁴ *Id.*

[III.] THE MOST SUCCESSFUL GLOBAL PHARMACEUTICAL MERGERS AND ACQUISITION

The global pharmaceutical merger and acquisition witnesses the maximum number of M&As compared to any other industry currently existing in the market; both in terms of number and value. These ground-breaking deals beat every other industry when it comes to changing the dimension of the competitive landscape overnight. Even when the transactions are smaller, their impact and significance bring about a wave of novation in the market scenario.⁵ Some of the most successful mergers and acquisitions in this industry are as follows:

A. Pfizer/Warner-Lambert Takeover

The takeover of Warner-Lambert by Pfizer in 1999 takes the top spot among all the successful mergers and acquisitions that have taken place till date in terms of capital expended. The New-York based company, Pfizer, spent around 106.1 billion U.S. Dollars in order to acquire its U.S competitor, Warner-Lambert.⁶

According to a report released by the Wall Street Journal, this merger took months and months of intensified negotiations between the two companies prior to the attempt of acquisition of Warner-Lambert. As a result, the negotiations paved way for the creation of the second largest pharmaceutical company in the world.⁷ The reason for the

⁵ Joanna Shepherd, *Consolidation and Innovation in the Pharmaceutical Industry: The Role of Mergers and Acquisitions in the Current Innovation Ecosystem*, 21 J. HEALTH CARE L. & POL'Y 1 (2018). <https://digitalcommons.law.umaryland.edu/jhclp/vol21/iss1/2>.

⁶ Matthias Back, *The Top 10 Largest Pharmaceutical Mergers in History*, (May 19, 2020, 9:40 PM), <https://www.process-worldwide.com/the-top-10-largest-pharmaceutical-mergers-in-history-a-830800/>.

⁷ Robert Langreth, *Warner-Lambert Agrees to Deal With Pfizer Worth \$90 Billion*, THE

takeover of Warner-Lambert by Pfizer was due to the threat it anticipated from the possible friendly takeover bid by American Home Products of the same company and also to take control of the drug 'Lipitor' in the market. Lipitor is the brand name under which the drug, 'Atorvastatin' is sold. It is used along with a proper diet in order to help reduce bad cholesterol as well as fats (triglycerides and low-density lipoprotein) and help foster good cholesterol (high-density lipoprotein) in the blood.⁸

Owing to this Merger, Warner-Lambert walked away from its earlier merger-pact with American Home Products, later renamed as Wyeth, even though it cost Warner-Lambert the largest breakup fees till date without any compensation as asked for. Even though the negotiation with respect to the purchase price between Pfizer/Warner-Lambert was initially fixed at 84.9 billion dollars, the figure was enhanced later by Pfizer to a whopping sum of 106.1 billion dollars which was approved by its Board on a later stage as well.⁹

B. Glaxo Wellcome/ Smith-Kline Beecham Merger

Glaxo Wellcome and Smith Kline Beecham, two British pharmaceutical companies merged, forming Glaxo-Smith-Kline, i.e., GSK in 2000. This merger was termed as "the mother of all mergers" at the time as it was the largest merger in UK as well as in the world.¹⁰

While Glaxo dominated in combinatorial chemistry, Smith Kline operated extremely well in genomics, and cell and molecular biology. The merger was proposed as it would pool in the respective

WALL STREET JOURNAL (May 19, 2020, 8:30 PM), <http://www.wsj.com/articles/SB949880425106587767>.

⁸ *Lipitor*, WEBMD (May 19, 2020, 6:30 PM), <https://www.webmd.com/drugs/2/drug-3330/lipitor-oral/details>.

⁹ *Supra* note 7.

¹⁰ Anon. *The Mother of all Mergers*, THE ECONOMIST (May 19, 2020, 10:30 PM), <http://www.economist.com/node/112777>.

strengths of the companies which complemented really well with each other as they had similar research strategies. Previous attempts of merging between the two companies had failed and prior to the successful merger in 2000, negotiations between the two groups went on for about eleven months. The final settlement for the merger cost around 90 billion dollars.¹¹

C. Sanofi/Aventis Takeover

The French Pharmaceutical company, Sanofi came into being when Sanofi-Synthélabo and Aventis came together by way of a merger in 2004.¹² As a matter of fact, both the companies were formed on merger and acquisition themselves. Sanofi-Synthélabo was formed as a result of Sanofi merging with Synthélabo in the year 1999 and Aventis was formed when Rhône-Poulenc S.A. merged with Hoechst Marion Roussel, i.e., HMR, in the same year.

The French giant, Aventis, agreed in 2004 to merge with Sanofi-Synthélabo, its smaller competitor for a figure of around 65 billion dollars only after immense pressure and inventions by the French Government and an enhanced offer by Sanofi-Synthélabo.¹³ This merger resulted in the creation of the third largest pharmaceutical company in the world after Pfizer and GlaxoSmithKline.¹⁴

D. Bristol-Myers Squibb/Celgene Acquisition

The Bristol-Myers Squibb and Celgene Acquisition deal was finally completed on 20th of November, 2019 following the receipt

¹¹ *Supra* note 6.

¹² *Id.*

¹³ *Sanofi-Aventis Merger Complete*, OUTSOURCING PHARMA (May 19, 2020, 10:40 PM), <https://www.outsourcing-pharma.com/Article/2004/08/23/Sanofi-Aventis-merger-completes>.

¹⁴ Mak Wen Yao, *Top 5 Pharmaceutical Mergers and Acquisitions* (May 19, 2020, 10:45 PM), <https://today.mims.com/top-5-pharmaceutical-mergers-and-acquisitions->.

of regulatory approvals from the concerned Government authorities as was required by the merger agreement. According to the terms of the agreement, Celgene became a wholly-owned subsidiary of Bristol-Myers Squibb, making the acquisition the 'Deal of the Year'.¹⁵

The burnout was for a whopping 74 billion dollars, which, according to the parent company's CEO, was a defining gamble as post the acquisition, the objective was to bring together the optimal combination of both the companies' products and techniques in forming a lead in the oncology, haematology, immunology and cardiovascular medicines industry.¹⁶

E. Pfizer-Pharmacia Acquisition

Pfizer is the most active company when it comes to being the most successful company in the global pharmaceutical industry. After two successful acquisitions, The Pfizer-Pharmacia acquisition was officially confirmed in April, 2003 adding yet another successful acquisition to Pfizer's list. The Swedish competitor, Pharmacia, was taken over by Pfizer for a purchase price of 68.1 billion dollars.¹⁷

The success of this merger resulted in Pfizer expanding its total market share to 256 billion dollars in toto, ranking third after General Electrics and Microsoft.¹⁸ Moreover, after the purchase, Pfizer owned 12 drugs with an annual turnover of one billion dollars or more on each of the drugs.

¹⁵ Andrew Dunn, *Deal of the Year: Bristol-Myers Squibb buys Celgene*, BIOPHARMADIVE (May 19, 2020, 10:47 PM), <https://www.biopharmadive.com/news/bristol-myers-buys-celgene-deal-dive-awards/566244/>.

¹⁶ Press Release Bristol-Myers Squibb, *Completes Acquisition of Celgene, Creating a Leading Biopharma Company*, BMS (May 19, 2020, 10:50 PM), <https://news.bms.com/press-release/corporatefinancial-news/bristol-myers-squibb-completes-acquisition-celgene-creating-le>.

¹⁷ *Supra* note 6.

¹⁸ *It's official: Pfizer buys Pharmacia*, CNN MONEY (May 19, 2020, 10:55 PM), https://money.cnn.com/2003/04/16/news/companies/pfizer_pharma/.

[II.] KEY FACTORS INVOLVED IN GLOBAL M&A OF PHARMACEUTICAL COMPANIES

A. Cost of Drug Development

The first and the most effective factor that is involved in triggering mergers and acquisitions of pharmaceutical companies on a global scale is the whopping cost of drug development. Most companies find themselves incapable of carrying out any effective R&D, which is of an intrinsic value in this industry. Hence, due to the constant, escalating price of R&D, companies are less likely to find innovative drug compounds by themselves.¹⁹ On an average, the cost of drug development, i.e., a new Active Pharmaceutical Ingredient (API), accounts to almost 1.4 billion dollars, including pipelines failures. Moreover, capital costs account for around 1.2 billion dollars, making the whole process a thoroughly expensive one with a figure of 2.6 billion dollars.²⁰

The major reason for the escalating cost can be attributed simply to the fact that there is a constant advancement of medicine due to which there is constant pressure on the industry to create value by either delivering a new drug which solves an unsolved problem or to improve an existing drug for better results and efficiency.

¹⁹ Mittra, J, *Life Science Innovation and the Restructuring of the Pharmaceutical Industry: Merger, Acquisition and Strategic Alliance Behaviour of Large Firms*, TECHNOLOGY ANALYSIS AND STRATEGIC MANAGEMENT 279, 283 (2007).

²⁰ Dr. Christoph Bieri, *What Drives Mergers & Acquisitions in the Pharma industry*, CONTRACT PHARMA (May 19, 2020, 11:00 PM), https://www.contractpharma.com/issues/2018-01-01/view_features/what-drives-mergers-acquisitions-in-the-pharma-industry/.

B. Increasing Cost of Regulatory Requirements

The second factor that plays a major role is the increasing costs of regulatory requirements. For a company to have an impactful portfolio in the market today, there needs to be an allotment of around 2-4 billion of investment allotted to R&D for drug development. If this is to be considered, then companies earning at least 10 billion dollars as revenue can afford to have such an expensive venture, as the required allotment takes up almost 20% of their revenue.²¹

C. Patent Expiration

Regulators and buyers undertake considerable effort to replace original drugs – whose patents have expired – with generic drugs. The prices of these generic drugs are lowered, forcing these companies to consolidate among each other to have a continued presence in the market.²²

D. Capital Allocation for Research & Development

The factor of efficient capital allocation in terms of Research and Development, as well as manufacturing, is a major driving force for these M&As to take place.²³ It has been observed that large and complex originators do not foster innovation by themselves, for which they rely heavily on entrepreneurs and venture capitalists to

²¹ *Supra* note 20

²² *Price Declines After Branded Medicines Lose Exclusivity In The U.S.*, MS INSTITUTE FOR HEALTHCARE INFORMATICS PHARMA (May 19, 2020, 11:00 PM) <https://www.imshealth.com/files/web/IMSH%20Institute/Healthcare%20Briefs/PhRMA%20Generic%20Price%20Brief%20January%202016.pdf>.

²³ Danzon, P. Epstein, A. Nicholson, *Mergers and Acquisitions in the Pharmaceutical and Biotech Industries*, *MANAGERIAL AND DECISION ECONOMICS* 307-328 (2007).

bring the element of novation in their business. The latter group has proven to be much more efficient in identifying and investing in early-stage development activities, by allotting resources to biomedical research opportunities for pharmaceutical companies.

E. Outsourcing of Manufacturing

For originators, outsourcing of manufacturing, sale of plants to CMOs, i.e., Contract manufacturing organisations in the form of long-term manufacturing-supply agreements has proved to be extremely beneficial in terms of reaping cost benefits. Moreover, such outsourcing also proved to bring about an increased return on capital.²⁴

Therefore, after taking in all these factors that drive pharmaceutical companies into utilising the tool of M&A, it can be understood that M&A plays a fundamental role for these companies especially for implementation of strategy in the market.²⁵ Besides, these transactions help equip pharma companies with innovative ways to face the changing market environment and to adapt to the challenges thrown at them by evolving competitors.

²⁴ *Supra* note 20.

²⁵ Yasin Çilhoroz et al., *Mergers And Acquisitions In Pharmaceutical Industry As A Growth Strategy: An Investigation Upon Practice*, IISES (May 19, 2020, 11:30 PM), <http://www.iises.net/proceedings/24th-international-academic-conference-barcelona/front-page>.

[III.] EFFECTS OF PHARMACEUTICAL M&AS ON R&D, PRICING, AND COMPETITION

Prominent reports regarding the development of a new drug, breakthrough in Research and Development of pharmaceutical research, and other research strategies, are frequent today. This has prompted fears that such disproportionate, concentrated market power will bring about instability and eventually weaken competition. In this scenario, it has become pivotal for us to look into how this affects R&D, pricing and competition- the three major elements related to the pharmaceutical industry in the market.

While the sector's primary concerns were regarding pricing, product development strategies, and marketing, without taking into consideration the M&A aspect exclusively, after renewed criticism from the public and firms alike, the industry had come to the understanding that the reduction of prices is crucial for the betterment of public health and making healthcare affordable. Hence, there was a new sense of hope that proactive scrutiny from anti-trust officials will keep a check on the activities of these companies. This reinforced the importance of mergers and acquisitions in the industry of pharmaceuticals.²⁶

The tool of M&A being utilised by the pharmaceutical industry is not a new story. It has been in use for as long as one can remember. However, the recent trends wherein a giant pharma company acquires another giant company of the same nature, concerns are stirred in the industry, especially in the competition marketplace.²⁷ Over the span of the past twenty years or so,

²⁶ Barak Richman et al., *Pharmaceutical M&A Activity: Effects on Prices, Innovation, and Competition*, 48 LOY. U. CHI. L.J. 787 (2017).

²⁷ Demirbag et al., *Performance of Mergers and Acquisitions in the Pharmaceutical Industry: A Comparative Perspective*, MULTINATIONAL BUSINESS REVIEW 41-61 (2007).

competition concerns have joined hands with pricing concerns, and have solidified for whenever a transaction in the same niche takes place.

There are primarily two major fears that crystallise in the market. Firstly, it is a common concern that when large R&D wings of companies merge, there is a high probability that this combination will lead to a concentration in discovery, monopolise and reduce competition which will inadvertently affect new experimentation, and hence, result in very few discoveries. Secondly, mergers lead to the strengthening of large marketing, distribution and sales of only a handful of players in the market which could decrease competition.

This would affect the pricing as there would be a reduction in pricing pressures and simultaneously increase barriers to entry for new, innovative competitors. These two concerns impelled policymakers to be sceptical about merger activities in the industry as it has reached a tipping point where it poses an apparent threat in the face increasing prices, fewer results in innovation among other concerns.²⁸

However, the same is not applicable as a general notion about the tool of M&A in the pharma industry, as there are many who do not perceive these mergers as a detriment. Instead, they perceive these M&As as beneficial, as they believe that instead of reducing innovativeness, they generate more innovation in the industry as more resources are brought together. This, according to them, will lead to a more product-oriented focus by also increasing economies of scale. Furthermore, it is also put forth by this set of people that instead of posing a threat to competition, these transactions will

²⁸ Peter Young, *Biotech Financial and M&A Trends-Two Steps Forward, One Step Back*, PHARMEXEC.COM (May 19, 2020, 11:15 PM), <http://www.pharmexec.com/biotech-financial-and-ma-trendstwo-steps-forward-one-step-back>.

actually pave way for new entrants to enter the market which will in turn, foster innovation. Owing to this, the tool of M&A can prove to be both advantageous and disadvantageous, based on the understanding that it is associated with by the policy and corporate strategy-makers.²⁹

According to existing literature and theoretical analyses, it has been believed that big pharmaceutical companies use M&A as a tool to potentially acquire commercially viable companies in order to reduce the burden of R&D that they face individually. Biotech companies on the other hand, seek to gain marketing exposure and experience that is strength of big pharma. Moreover, for biotech companies, M&A has proved to be a way with they could join hands with other smaller companies to strengthen their financial footing in the market.³⁰ Nevertheless, even though the literature surrounding M&A deals in the pharma and biotech industry seems extremely optimistic, in reality the effect of the same is not very certain.

[IV.] IMPACT OF M&A ON INNOVATION

According to recent research, antitrust authorities have not been as strict as they ought to, specifically when it comes to mergers pertaining to the drug industry. This is claimed because the regulators have somehow failed to look into the after-effects of such transactions when it comes to the position of innovation. In this regard, it was found that mergers reduce innovation, research, as well as development in the merging firms. Moreover, they also have a weighty, negative impact on the R&D with respect to the combined

²⁹ *Supra* note 26

³⁰ Rafferty M.A., *Managing Change in Biotech: Mergers and Acquisitions*, NATURE BIOTECHNOLOGY, 489-490 (2007).

firm's competitors.³¹

As aforementioned, big pharmaceutical companies merge in order to save expenses occurring out of the R&D industry, as by combining resources and pooling in efforts, costs are cut down exponentially. Even though innovation for merging companies reduces as a result, it was not apparent previously that the competitors' R&D is also affected by the same transaction, which did not concern them; at least not directly. As a result of this, the overall dynamicity and innovation is compromised in the marketplace. On an average, the patenting and R&D activities and expenditures of non-merging competitors fell by more than 20%, within four years of the merger of their merging counterparts. From this data, it can be inferred that pharmaceutical M&A activity has led to an overall fall in innovation in the relevant market as a whole.³²

The reason behind the same can be attributed to many factors. One of the factors, based on the research referred to, is that the patent portfolios of the target companies are relatively similar in most cases. This implies that there is less competition for developing and discovering therapies which are new in the market. If a competitor, not making use of the M&A tool, is also researching on similar therapies, then the outside firm has one less rival and so it experiences a similar natured reduction in terms of competition as the acquiring firm.

Thus, the main concern at this juncture is that if these transactions lead to a dip in competition and by reducing innovation, if they are compromising the prospects of drug development, especially in the area of life-saving and other essential medication,

³¹ Carmine Ornaghi, *Mergers and Innovation in Big Pharma* (2007); See also *infra* note 32.

³² Justus Haucup and Joel Stiebale, *Research: Innovation Suffers When Drug Companies Merge*, HBR (May 19, 2020, 11:25 PM), <https://hbr.org/2016/08/research-innovation-suffers-when-drug-companies-merge>.

then why are the concerned agencies giving assent to these combinations? Further, the authorities are not incapable of acquiring noteworthy, relevant information and as experts, they are not unaware of the effects that these transactions have on the market and on healthcare. To substantiate, when the Glaxo Wellcome-SmithKline Beecham merger took place in 2000, an EU report went as far as recognising that “competitors have also indicated that the operation as notified would discourage any tentative research and development attempts by third parties to develop anti-viral drugs.”³³ However, even after such explicit recognition, not much has been done either to facilitate innovation activities or to hold back a deal from fructifying. Evidently, innovation has not received much importance in playing a decisive role in that of a merger.

The primary reason behind such behaviour is attributed to the fact that innovation effects have been extremely difficult to predict. On one hand, short-term price changes and quantities are far easier to predict in the market which is why the big pharmaceutical merging firms benefit greatly from the incomplete decisions rendered by the regulators in the process. Moreover, the data collected by researchers also indicate that the reduction in innovation is very probable to occur in drug markets which have extremely high levels of pre-merger patenting, research and development. The reason for this could be that acquiring firms target only specific companies so as to reduce competition in the marketplace targeting innovation projects.

Another reason which is lost in the making is that innovation is hampered when comparatively smaller firms are acquired by the acquirer. Regulators do not pay enough attention to such transactions because it is assumed that these will not amount to have any significant, or substantial effect in the short-run prices of the drug worthy enough to be scrutinised. Nevertheless, they still play

³³ *Id.*

a major role in terms of reducing incentive for other companies to research and develop new therapies.

[v.] CONCLUSION

However, even in the midst of these alarming issues, it is a relieving to know that these M&A activities are gathering attention from the regulators recently as more and more awareness is being spread about the same. This is key for the pharmaceutical industry, since innovation plays a significant role for the well-being of a major portion of patients who do not have access to a drug for their ailment/illness because of its non-development yet. In light of these concerns, it is hoped that innovation as a crucial factor is given more attention and importance in transactions concerning mergers and acquisitions of pharma companies.

A primary task for consideration for drug companies is to take notice of such factors which impact the industry negatively. It must be understood that Mergers and Acquisitions are not inexpensive tools in the hands of companies; they are extremely costly even they are not assented to as the process involves steps which require, several money-incentive activities among, *inter alia*, prior to negotiations. Hence, the tool of M&A must be used wisely by a company.

Moreover, leaders and regulators must appropriately consider how a prospective merger/combination will affect innovation at the merged company, along with how it will affect the competitors as well. This will lead to delayed but justified approvals as this would put pressure onto regulators and the concerned authorities to look into and try to analyse the after-effects of the combination in a much better, effective way.

However, in order to balance the interests of all parties involved

in the transaction; directly or indirectly, and to not make these recommendations extremely disadvantageous to the big pharmaceutical companies, one proposal is that if these companies are able to prove that the combination will not lead to any hindrance to innovation and would rather foster innovation, then regulators would also be more likely to assent to the transaction without compromising the same.

SUSTAINABLE DEVELOPMENT IN DEVELOPING NATIONS: AN ETHICAL & ECONOMIC CONUNDRUM

By Gaurav Puri and Raina Mahapatra*

The importance of sustainable development has been reiterated time and again, and yet most countries continue to keep environment and allied topics as a last priority. The current essay dwells upon the concept of sustainable development and its meaning to a developing country such as India, one which continues to be troubled with third world predicaments of poverty and population growth. The essay seeks to examine the viability of sustainable development for any nation. Secondly, it seeks to examine the inter-relation between wildlife conservation and sustainable development.

In light of the same, the essay puts particular emphasis on the problem of migratory birds in the State of Delhi-NCR while analysing the situation of the Okhla Bird Sanctuary caused by developmental projects. The major compartments in the paper have been dealt with in a composite manner to examine the International Scenario related to sustainable development, the Indian adoption of these principles in a specific scenario, and the dilemma of creating a sustainable environment in developing nations.

Keywords: Okhla Bird Sanctuary, Sustainable Development, Wildlife Conservation, Migratory Birds, Environment.

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[I.] SUSTAINABLE DEVELOPMENT: ANALYSIS OF CONCEPT & ALLIED LEGAL PROVISIONS

A. Introduction

With the accelerated pace of urban development, its impact on the environment has changed drastically. It has resulted in both 'natural resources' depletion and 'global environmental concerns.'¹ The 'Caring for the Earth: A strategy for Sustainable Living' document defines "sustainability" as a characteristic or a state of being that can be maintained indefinitely, whereas "development" is defined as the increasing capability to meet human needs and to improve the quality of human life.²

The concept of sustainable development was introduced on the international platform with the release of the report 'Our Common Future' by World Commission on Environment and Development i.e. the Brundtland Report in 1987.³ The Report defines sustainable development as "development that meets the needs of present generation without compromising the ability of the future generations to meet their own needs."⁴ The concept of sustainable development gave a fresh perspective and rejected the notion that was set forth centuries ago, which claimed that development is an anti-thesis to conservation of the environment.⁵ Rather, sustainable development is based on the

¹ Richard E. Bilsborrow & Pamela F. DeLargy, *Land Use, Migration, and Natural Resource Deterioration: The Experience of Guatemala and the Sudan*, 16 POPUL. DEV. REV. 125 (1990).

² World Conservation Union et al., *Caring for Earth: A Strategy for Sustainable Living* 16, (International Union for Conservation of Nature, 1991).

³ Arvind Jasrotia, *Environmental Protection and Sustainable Development: Exploring the Dynamics of Ethics and Law*, 49 JILI 30 (2007).

⁴ Rep. of the World Commission on Environment and Development, *Our Common Future* 43, U.N. Doc. A/42/427 (1987).

⁵ Gurdip Singh & Amrita, *Sustainable Development: International and National*

premise that they are co-extensive or mutually inter-connected.⁶ Economic growth is a necessity to generate resources that will expedite the process of environment protection and protection of our resources is a factor for economic growth.⁷

The Rio Declaration was a reminder to the world about the importance of developing in a manner so as to “*equitably meet the developmental and environmental needs of the present and future generations*”.⁸ In order to achieve sustainable development, the protection of the environment must constitute an integral part of the process of development and it cannot be isolated.⁹ The Rio Declaration was the genesis of Agenda 21 i.e. the agendas for the 21st Century and developed UN Commission on Sustainable development. Often, sustainability is misinterpreted as the goal that everyone strives for, however, sustainability does not represent any achievable final state but a fundamental characteristic of a dynamically developed system which is natural to all ecosystems. Sustainability is a permanent adaptation to changing conditions¹⁰.

The Rio Declaration has given the world certain crucial principles that are important to understand before moving on to the contention that this essay seeks to address. The first of them being ‘*Inter-Generational Equity*’¹¹ and the ‘*Polluter Pays Principle* (hereinafter:

Perspective, 1 RMLNLUJ 31 (2008).

⁶ *Id.*

⁷Gurdip Singh & Amrita, *Sustainable Development: International and National Perspective*, 1 RMLNLUJ 31 (2008).

⁸ U.N. Conference on Environment and Development, Principle 3, *Rio Declaration on Environment and Development*, U.N. Doc. A/C0NF.151/26/Rev. 1 (Vol. I), annex I (Aug. 12, 1992).

⁹ *Supra* note 8, at Principle 4.

¹⁰ Miroslav Rusko & Dana Prochazkova, *Solution to the Problems of the Sustainable Development Management*, 19 SLOVAK UNIVERSITY OF TECHNOLOGY IN BRATISLAVA 77, 78 (2011).

¹¹ *Supra* note 8.

PPP)¹² Like “Sustainable development” and the “Precautionary Principle”, “Polluter Pays Principle” has also acquired the status of customary international law.¹³

B. Wildlife Conservation and Development

Forests have been an integral part of human existence since time immemorial and much has been written about forests and forestry, the way they should have been managed, the reasons for their depletion, the gravity of people’s dependence on them, steps towards their regeneration, their rights, balancing industrial development with wildlife and so on.¹⁴

During the Mauryan period, 85% of land was covered by forests as compared to the present -day situation of only 23% amounting to 75 hectares of forest land.¹⁵ Out of this, only about 19.27% is under forest cover.¹⁶ In India, about 2/3rd of the total forest cover is spread across 137 tribal districts. Most of the marginalized sections of society are primarily dependent on these forests for their sustenance.¹⁷ Therefore, the recognition of the fact that forest resources and survival are inter-related has led to the legal and administrative regimes to aim for judicial utilization of forests and ensuring sustainability of their use.¹⁸

Protecting forests is essential for protecting wildlife.

¹² *Supra* note 8, at Principle 17.

¹³ *Supra* note 5.

¹⁴ Sanjay Upadhyay & Videh Upadhyay, *Forest Laws, Wildlife Laws And The Environment* 3 (1st Ed., Lexisnexis Butterworth, 2002).

¹⁵ WR Bentely, GB Singh & N Chatterjee, *Tenure and Agroforestry Potentials in India* (9 papers presented at the International Workshop on Tenurial Issues in AgroForestry, New Delhi, 1988), *Village Voices, Forest Choices* (Oxford University Press, 1988).

¹⁶ Ministry of Environment and Forest, *Annual Report of Ministry of Environment and Forest of India, 1997-98* (last visited May 05, 2020 14:00 IST), <http://moef.gov.in/wp-content/uploads/report/9798/intro.html>

¹⁷ *Supra* note 14, at 4-5.

¹⁸ *Id.*

Fragmentation and destruction of habitat have been the two most prominent causes that have negatively affected the conservation of wildlife in India.¹⁹ There has been a growing concern globally regarding the threat to the wild species of flora and fauna. Numerous international documents have been signed to protect species worldwide, those ranging from protecting migratory species²⁰ to illicit trade of wildlife, and its products²¹ to protecting specific species.²² Wildlife is one of our basic and natural resources that satisfies the needs or wants of the civilization, and therefore it is essential that it must be conserved and protected for the existence of mankind.²³

The importance of the same has been observed aptly by the Planning Commission in its 6th five-year plan as well.²⁴ In the famous *Silent Valley Case*²⁵, the importance of protection and conservation of rich and unique heritage of rare and valuable flora and fauna for the benefit of the nation and posterity including, endangered species like lion-tailed monkey as they are national assets, was reiterated.

In *Tarun Bharat Sangh, Alwar v. Union of India*²⁶, The Supreme Court emphasized the importance of wildlife and vis-à-vis environment and declared that, "*this litigation should not be treated as the usual adversarial litigation. Petitioners are acting in aid of a purpose on natural agenda.*" Importantly, the court recognized that the concern for wildlife must be shared by the Central Government.

¹⁹Sanjay Upadhyay & Videh Upadhyay, *Forest laws, Wildlife laws and the Environment* 220 (1st ed. Lexisnexis butterworth, 2002).

²⁰ Convention on the Conservation of Migratory Species of Wild Animals, Nov. 6 1979, 1651 UNTS 356.

²¹ Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3 1973, 993 UNTS 243.

²² International Convention for the Regulation of Whaling, Dec. 2 1946, 161 UNTS 74.

²³ SC Shastri, *Environmental Law* 255 (1st ed., Eastern Book Company, 2002).

²⁴ Planning Commission, 6th Five Year plan 1980-85 343 (Govt. of India, 1981).

²⁵*Silent Valley v. Union of India*, (1979) (SC) O.P. Nos. 2949 and 3025 (India).

²⁶ *Tarun Bharat Sangh, Alwar v. Union of India*, 1992 Supp (2) SCC 448 (India).

C. International Laws on Protection of Species

In the backdrop of the Stockholm Declaration, the importance of conservation of wildlife and natural resources was brought to the forefront. It is clear that each nation is sovereign to use its natural resources as it may please and pursuant to its own policies.²⁷ There are two theories on protection of wildlife: protectionist or “locked up” policy; and declaring habitats or eco-systems as reserved.²⁸

The conventions that are going to be discussed adopt a typical methodology while aiming at conservation of species. They identify species and suggest the degree of threat and protection required.

- 1) Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)
- 2) Convention on the Conservation of Migratory Species of Wild Animals, Bonn 1979
- 3) Other International Agreements

UNCLOS III vests sovereign rights in the coastal states for ‘exploring and exploiting, conserving and managing natural resources, whether living or non-living’²⁹ It is pertinent to note that UNCLOS III lists five categories of species with the objective of ensuring conservation.³⁰ The convention calls for active participation and participation of all states in limiting and regulating exploitation of species.³¹

Apart from various conventions with a focus on protection of species, there have been multiple attempts on the global level on

²⁷ *Supra* note 8, at Principle 21.

²⁸ William F. Brady, *Wildlife in the Third World: Current Efforts to Integrate Conservation with Development*, 5 B. C. THIRD WORLD L. J. 83 (1984).

²⁹ United Nations Convention on the Law of the Sea, Art. 56 (1) (a), Dec. 10 1982, 1822 UNTS 397.

³⁰ *Id.*, at Art. 64.

³¹ United Nations Convention on the Law of the Sea, Dec. 10 1982, 1822 UNTS 397.

protection of habitats. The relevant one is Convention on Wetlands of International Importance (especially as waterfowl habitat), Ramsar 1971. The convention seeks to preserve the fundamental ecological functions of wetlands as regulators of water regimes and as habitats supporting a characteristic flora and fauna.³²

D. Indian Provisions On Conservation Of Wildlife

The Constitution of India, under Art. 48-A³³, has provided that “the State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country”. Article 51-A (g)³⁴ further provides that protection and improvement of the natural environment shall be duty of every citizen.

Further, List III of Schedule VII provides entries under which the Centre and State both can make laws, such as forests³⁵ and protection of wildlife³⁶. List II of Schedule VII casts the duty on the state to make laws to ‘preserve, protect and improve the livestock and prevent animal diseases....’³⁷ and on ‘Fisheries’.³⁸

In exercise of the above powers, the Parliament of India has passed the following major acts to protect, preserve and improve wildlife:

- (1) Wildlife Protection Act, 1972³⁹

³² Convention on Wetlands of International Importance (Especially as Waterfowl Habitat), Feb. 2, 1971, 996 UNTS 245.

³³ India Const. art. 48-A, amended by The Constitution (Forty Second Amendment) Act, 1976.

³⁴ India Const. art. 51-A (g), amended by The Constitution (Forty Second Amendment) Act, 1976.

³⁵ India Const. Schedule VII, Entry 17-A, amended by The Constitution (Forty Second Amendment) Act, 1976.

³⁶ India Const. Schedule VII, Entry 17-B, amended by The Constitution (Forty Second Amendment) Act, 1976.

³⁷ India Const. Schedule VII, Entry 15.

³⁸ India Const. Schedule VII, Entry 21.

³⁹ Wildlife Protection Act, 1972, No. 53, Acts of Parliament, 1972 (India).

(2) Prevention of Cruelty to Animals Act, 1960⁴⁰

Before passing the above-mentioned acts, there were other acts in existence that protected wildlife. The Indian Penal Code, 1860 defines animal and declares killing them as a punishable offence.⁴¹ The Cattle Trespass Act, 1871 and the Elephants Preservation Act, 1879 were the earliest laws dealing with wildlife. The India Forest Act, 1927 also included certain provisions restricting hunting and protected forests and national sanctuaries.

**[II.] OKHLA BIRD SANCTUARY: A CASE STUDY OF
SUSTAINABLE DEVELOPMENT IN INDIA AND ITS CHALLENGES**

A. Case Study Area

Delhi, the capital city of India lies between 28.380 N and 77.120 E in latitude and longitude respectively. The River Yamuna, a major tributary of the Ganges, is one of the key natural infrastructures of Delhi city. The total length of the river in the city is 50 km between its entry at Palla and exit at Jaitpur. Its floodplains extend to an area of 94.84 km² comprising forests, agriculture land, settlements and lakes/ponds and can hold about 2 billion cubic meters of water. The maximum width of the active floodplain is observed near 'Okhla' where a large quantum of water is brought through 'Hindun' cut. Despite high urban stress, the floral diversity of the floodplains includes 74 species of macrophytes and 90 species of phytoplankton, whereas the faunal diversity constitutes of 62 species of

⁴⁰ Prevention of Cruelty to Animals Act, 1960, No. 59, Acts of Parliament, 1960 (India).

⁴¹ Indian Penal Code, 1860 S. 429, No. 45, Acts of Parliament 1860 (India).

⁴² Gupta Anil et al., *Urban Resilience and Sustainability Through Peri-urban Ecosystems: Integrating CCA and DRR*, Indian Environmental Portal, <http://www.indiaenvironmentportal.org.in/files/file/UrbanResilienceandSustainabilityPeriurbanEcosystems.pdf>. (last visited May 05, 2020 14:10 IST).

zooplankton, 55 species of benthos, 36 fish species and 131 bird species.⁴³

B. Importance

The Okhla Bird Sanctuary is situated at the Delhi-Uttar Pradesh Border, and is known for its variety of migratory and resident birds (about 324 species of 6000 birds have been listed during winters). Important birds visit the sanctuary, including different species of Cormorants, Herons, Egrets, Darter, Coots, Ducks, etc.⁴⁴ The diversity of birds that it harbours is highly appreciated and preserved by avid bird watchers.⁴⁵ However, in recent times, developmental projects have jeopardised environmental goals and have led to a downfall of migratory birds that used to visit the Okhla Bird Sanctuary.⁴⁶

According to the figures cited by Centre for Environmental Research and Development (CERD):

- 324 bird species are reported from Okhla.
- Out of this, about 50% are migratory birds and 36% are resident birds. Others are vagrant sightings or of unknown category.
- 40% of the total birds are common locally and the rest are uncommon or rare. Out of these, there are 20 common resident water bird species, 44 common resident woodland species, 43 migratory water bird species and 26 migratory woodland bird species.

⁴³ *Id.*

⁴⁴Ministry of Environment, Forests and Climate Change, 2014, Notification S.O. 2499(E) (India).

⁴⁵ Srestha Banerjee, *Okhla bird sanctuary in danger*, DOWN TO EARTH, (July 04, 2015), <https://www.downtoearth.org.in/news/okhla-bird-sanctuary-in-danger-39966> (last visited May 05, 2020 14:30 IST).

⁴⁶ *Id.*

- *The total bird list includes two 'Critically Endangered', nine 'Vulnerable', seven 'Near Threatened' and one 'Conservation Dependent' species.*
- *About 10 species of mammals include Nilgai, Indian mongoose, Black-naped hare, jackals, 8 species of reptiles and 2 species of amphibians."*⁴⁷.

Given the rich diversity, it is necessary to conserve and protect the area around the sanctuary, and to propagate improvement of, and develop the different species of birds therein and its environment.⁴⁸

C. Legal Provisions Involved

- 1) By virtue of a notification issued by the Government of Uttar Pradesh on 8.05.1990, the state has declared Okhla Bird Sanctuary as a "protected area"⁴⁹ under Section 18 and 26(A) of the Wildlife (Protection Act, 1972).⁵⁰
- 2) Ministry of Environment and Forest issued a notification on 9.02.2011, in which the Government declared the area around the national parks and wildlife sanctuaries as "eco-sensitive zone". (An eco-sensitive zone is to be maintained beyond the "protected area" which is to the extent of 10 Km)⁵¹

⁴⁷ Delhi Metro Rail Corporation, *Environmental Impact Assessment and Environment Management Plan Kalindi Kunj - Botanical Garden Corridor*, CENTRE FOR ENVIRONMENT RESEARCH AND DEVELOPMENT 44 (October 2014), <http://www.delhimetrorail.com/otherdocuments/EIAbkcorridor.pdf>. (last visited May 05, 2020 15:00 IST).

⁴⁸ *Supra* note 45.

⁴⁹ *Amit Kumar v. Union of India & Ors.*, (2013) M.A. No. 890/2013, M.A. No. 904/2013, M.A. No. 906/2013 (NGT, Delhi) (India).

⁵⁰ Wildlife Protection Act, 1972 Section 18 & 26(A), No. 53, Acts of Parliament, 1972 (India).

⁵¹ Ministry of Environment, Forests and Climate Change, 2015, Notification S.O. 2262(E) (India).

- 3) Under Section 5C (1) of the Wild Life Protection Act, 1972, it is the duty of the National Board for Wildlife to promote considerable development of wildlife and forest, which includes the protection of the area surrounding the sanctuaries.⁵²
- 4) Wildlife Conservation Strategy of 2002 categorically stated that lands falling within the 10 km radius of the boundaries of the National Park/Wildlife Sanctuaries should be notified as under Eco Fragile Zone under Section 3(v) Environmental Protection Act.⁵³ It is also stated that Addl. Director General of Forest (Wildlife), in a letter dated 06.02.2002, requested all the States to list the areas which fall within 10 Km radius of the boundaries of the National Park/Wildlife Sanctuaries as 'Eco Fragile Zone'.⁵⁴

D. Issues Faced

The Okhla Bird Sanctuary today is faced with multiple issues due to two major reasons:

- i. Unauthorised construction
- ii. Government neglect and inaction

This can be mainly credited to Delhi NCR's hunger for land that is causing disappearance of important natural areas with no steps to restore it.⁵⁵ With each passing year, the number of migratory birds

⁵² Wild Life Protection Act, 1972, Section 5C (1), No. 53, Acts of Parliament, 1972 (India).

⁵³ Environmental Protection Act, 1986, Section 3(v), No. 29, Acts of Parliament, 1986 (India).

⁵⁴ *Supra* note 50.

⁵⁵ K.S. Gopi Sundar, *Enlightened Citizens Move to Restore Okhla Bird Sanctuary*, Panda, WWF-INDIA NEWSLETTER (September, 2005), http://assets.wwfindia.org/downloads/september_newsletter.pdf. (last visited May 6, 2020 16:15 IST).

visiting Okhla Bird Sanctuary is decreasing in number due to construction work in New Okhla Industrial Development Area (NOIDA).⁵⁶ Despite the same, the sanctuary is facing Governmental neglect.⁵⁷

The Government of Uttar Pradesh had notified Okhla Bird Sanctuary as a “eco-sensitive zone”, meaning no construction work should have occurred within 10 kms of the sanctuary.⁵⁸ In an interim order of October, the National Green Tribunal (NGT) said that “all constructions within 10 km radius of the Okhla Bird Sanctuary or within distance of eco-sensitive zone, as may be prescribed by the notification issued by Ministry of Environment and Forests, shall be subject to the decision of the NBWL”.⁵⁹ The Government is now, in an attempt to circumvent its own notification, reducing the 10 km distance to 1.27 km on northern boundary of the sanctuary and 100 m on all other boundaries.⁶⁰

The Centre has now legitimised the construction work for which approval should never have been given at the first instance. It is pertinent to note that there are no projects on the northern side. Hence, the 1km distance is a façade, rather the intent is to let development happen just 100 metres across the sanctuary.

The repercussions of such illegal construction and neglect may be summarised in the following points:

⁵⁶ Shagun Kapil, *Where have the birds gone*, DECCAN HERALD (Jan 17, 2016), <https://www.deccanherald.com/content/523534/where-have-birds-gone.html> (last visited May 6, 2020 02:03 IST).

⁵⁷ *Supra* note 50.

⁵⁸ *Supra* note 52.

⁵⁹ *Supra* note 50.

⁶⁰ Akanksha Jain, *Move on eco-sensitive zone around Okhla Bird Sanctuary irks activists*, THE HINDU (29 March, 2016) <https://www.thehindu.com/news/national/other-states/move-on-ecosensitive-zone-around-okhla-bird-sanctuary-irks-activists/article7559286.ece> (last visited May 6, 2020 10:00 IST).

- i. Interference in navigation by birds flying in and out of the sanctuary due to the high-rise buildings.
- ii. Less hospitable environments for the birds due to such structures, which includes- obstruction of view, flight path, and creation of distractions because of lights.⁶¹
- iii. Risk of 'electromagnetic radiation hazards' due to cellular towers.⁶²
- iv. Construction work leads to pollution, and the developmental projects add to their degrading situation.⁶³

E. Suggestions

In order to deal with the issues that have cropped up in the Okhla Bird Sanctuary at the cost of "development", multiple steps need to be taken to ensure sustainable development is still a reality. Some of the proposed suggestions may be listed as follows:

- 1) The Court must direct an exact area to be left untouched outside "eco-sensitive zone" rather than leave it on the Government.
- 2) An amendment to this effect must be enacted under the Wildlife Protection Act, 1972 (Section 18) .
- 3) The Courts must start fixing liability on Government officials that have provided licenses to unauthorised builders in NOIDA.

⁶¹Real Estate, *Will restricting buffer zone around Okhla Bird Sanctuary destroy the exotic birds?*

, HINDUSTAN TIMES (September 14, 2015), <https://www.hindustantimes.com/real-estate/will-restricting-buffer-zone-around-okhla-bird-sanctuary-destroy-the-exotic-birds/story-QH3mkpAsV8mBhShRem2JYN.html> (last visited May 6, 2020 11:00 IST).

⁶² *Supra* note 46.

⁶³ *Supra* note 62.

- 4) The Courts must fix Corporate Criminal Liability on the human agency of the companies undertaking such work illegally.
- 5) These migratory birds must be given a legal status and their protection be considered of paramount importance.
- 6) Infrastructural developmental projects wherein Environmental Impact Assessment recognises the needs of birds must be done simultaneously.

[III.] SUSTAINABLE DEVELOPMENT VIS-À-VIS ECONOMIC ADVANCEMENT: ROADBLOCKS

In the era of neo-colonialism and shift of the world power epicentre to the third world nations, economic prowess has become more necessary than ever. The world economy has major players in the form of developing nations, who constantly strive to reach a higher growth level, and this inevitably forms roadblocks with our idea of a sustainable environment.

To analyse the matter briefly, the key points⁶⁴ of a forking in the paths of environment-friendly sustainable environment and development are:

- i. Food Security

Despite a dramatic increase in world production of crops today, adoption of methods such as overuse of chemical fertilisers and pesticides, over-irrigation, use of high-yielding variety (HYV) seeds

⁶⁴ Macleod H., *Teaching for Ecologically Sustainable Development*, AUSTRALIAN ASSOCIATION FOR ENVIRONMENTAL EDUCATION (1992), https://archive.org/stream/ERIC_ED380319/ERIC_ED380319_djvu.txt (last visited May 6, 2020 13:00 IST).

have led to soil and water pollution, biological magnification of such chemicals in food chains, salinization and alkalisation of soils respectively.

ii. Urbanisation

With over 50% of the world's population residing in urban communities and city populations quadrupling in the past 30 years, urbanisation has led to poor housing and environment conditions. A low living standard extracted from lower wages and higher expenditure requirements in such cities is a continuous strain on the environment and its resources.

iii. Global Energy Consumption

The increasing dependence on energy consumption has resulted in four major issues: the greenhouse effect, acidification and air pollution, depletion of resources and increased natural calamities.

iv. Industrialisation

Industrialisation, despite being a major factor for economic growth, is a humongous contributor to escalation of pollution levels. Further, the limited ability of developing nations to deal with problems such as disposal of hazardous waste due to factors such as cost and technological inequalities between countries adds to the unsolved conflict.

The major hindrances to achieving a sustainable environment in a developing nation may be summarised as:

i. Lack of adequate financial resources.

- ii. Lack of adequate infrastructure and technological prowess.
- iii. Governmental conflict between short-term profit and long-term investment in sustainable development plans.
- iv. Red-tapism, bureaucracy and Corruption.
- v. Lack of awareness of responsibilities and Sustainable Development Goals.

In the Indian context, the problem comes into picture since India's priorities are to provide housing, food and nutritional security, affordable health services and basic livings standards to its large population. Apart from conventional development programs, India has also undertaken plans to set up smart cities, and other large infrastructure projects.

All these actions will potentially weaken India's global position on responses to climate change. The current political situation in India has allowed it to go down the path of growth without compromising its commitment to global action on climate change and carbon emission. Thus, despite several challenges, India has ratified the Paris Agreement on Climate Action. However, the constant tug of war between developmental actions and environmental concerns remains.

[IV.] CONCLUSION

We stand today at a crossroad. While it is apparent that developed nations are the ones responsible for this situation, developing nations have been left today to act responsibly and find solutions to come out of this dilemma of sustainable development.

India is no exception to this conundrum. While India's immediate priority is to provide livelihoods and employment to its

population, its long-term goals are also to create sustainable economic opportunities at both- micro & macro – levels to keep its promises to take the GDP growth of the country to an ambitious double-digit target of 10 percent.

The realisation of a greater social and environmental responsibility is imperative. Sustainable Development is the safest bet for the world communities to deliver inclusive growth, eliminate poverty and reduce the risk of climate change by not only changing perspectives, but approaches to economic development as well.

Therefore, while well-thought out policies will make growth and climate objectives mutually reinforcing in the short and long term, businesses will be required to make investments in the drive to low carbon economy. And, we as individuals must understand the dire consequences of our actions, choices and expenditure. Global issues, after all, require global solutions.

MEME CULTURE: AN EXAMINATION OF THRESHOLD OF COPYRIGHT PROTECTION IN THE DIGITAL AGE

By Anietia Tom*

The dawn of the digital era brought with it a lot of pros and cons. It helped make the life of man easier by providing one medium for all information as well as a medium of freedom and expression. However, it became a highly unregulated and informal platform with a need for change. One of the biggest issues faced is that the authorship over work on digital platforms is disseminated, and the present law does not provide for the same. The present paper focuses on the ambit of originality of memes and authorship over memes.

In the era of “free culture”, the rights of an author of meme has become redundant. It is difficult for an author to prove the originality and creative labour present in his work. Further, not only is he unable to restrict others from using his work but, he is also not allowed to reap the financial and social benefits of his creative labour. The objective of this paper is to provide an intrinsic view to the issue of copyright protection over memes and to address the issue by suggesting technological fixes to overcome technological struggles. The paper also suggests the need for a comprehensive legislation that regulates originality, authorship and creative works on the internet.

Keywords: Copyright, memes, derivative work, authorship, technology.

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[I.] INTRODUCTION

The advent of the digital age brought with it the need to address several irregularities. Some have been addressed in the recent past and some have not. One of the issues that has not been addressed is the fact that the work of authorship is disseminated in the digital world and the present copyright legislations in the country do not provide any recourse for the same.

The paper intends to discuss one of the most trending ambits of the internet, memes. Richard Dawkins in his book *The Selfish Gene*¹ defined memes as “a unit of cultural transmission”. The purpose of a meme is to provide information through a single picture. On the internet, it usually serves the purpose of humour or sometimes, even hits a nerve. However, a meme is derived out of the work of another as it uses a still or video from an already existing original work, adds meaning to it and thus, changes it in such manner as to become the subject of humour, etc. The present paper analyses the issue of copyright of memes. It answers the question as to whether memes should be liable under copyright law for infringement of the copyright of another or whether it should be protected under copyright law.

The paper is broadly divided into five parts. The first part provides a theoretical base and explains the ambit of original and derivative work in copyright law. The second part seeks to establish that the threshold for originality in present legislations are not well defined and also poses as a hindrance to development of creative work. The third part attempts to prove that memes should come under the ambit of transformative work and, that it faces the issue of proving that memes achieve the

¹ Richard Dawkins, *The Selfish Gene*, N.Y Oxford University Press (1989).

perquisite of originality but is however not copyright protected. The fourth part essentially provides an answer to the lacunae that has been put forward and is then, concluded with the view of valuing and appreciating the creativity of authors on the internet.

[II.] COPYRIGHT LAW AND DERIVATIVE WORK

What should be the actual objective of copyright law has always been a source of constant debate. The first copyright legislation in the world, Statute of Anne was enacted in 1709 for “..... *the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned.*”² Other than encouragement of learning, promotion and regulation of creativity has also remained as one of the principal objectives of copyright law. Copyright protects the creative expression of cultural works in the form of literary, dramatic, musical and artistic work.

However, copyright law faces a continuous friction with two opposing purposes, i.e., promotion of creativity by incentivizing authors, and grant of maximum access to users. Often, users are themselves authors, which gives rise to more complex tussle between first and second authors.³ This friction is most prominently evident in the right to make derivative works. A derivative work is one based on a pre-existing work.⁴ The right to make derivative

² Statute of Anne 8 Ann. c. 21 1710.

³ Here, the wholly original work of authorship is referred to as a ‘first work’. The owner of a first work is referred to as ‘the first author’. Similarly, a derivative work based on a first work is referred to as ‘second work’ and the author of the derivative work will be referred to as ‘second author’

⁴ The term "derivative work" is used in the United States Copyright Act of 1976 and is defined as a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture

works grants the owner of an original work the exclusive right to make works based on the original and thus the right to prevent others from making the derivative works. Therefore, the right to make derivative works provides a good spectrum through which the relationship between law and creativity can be examined.⁵

According to Pamela Samuelson, there are threefold justifications for the grant of derivative work rights.⁶ Firstly, the reason behind creation of derivative works is the expectation that particular derivative markets are important in recovering investments in these works and valuable works may not be created without protection of derivative works. Secondly, the grant of a derivative work right gives authors some time to decide which derivative markets to enter, with whose assistance, on what terms and when. Thirdly, it is advocated that derivative work right will evade unjust enrichment by unlicensed exploiters of foreseeable derivative markets.⁷

However, there are two major issues surrounding the present understanding of derivative work rights. First, it is interpreted too narrowly since it is overshadowed by the reproduction rights. Secondly, it offers the first author full control over derivative second works, making it too much strong.⁸ The derivative works right is an important aspect of the creative process and the creative world as a whole. In order to appreciate this, it is required to understand the significance of the popular saying "standing on the shoulders of

version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

⁵ Rachum-Twaig, O., *Copyright Law and Derivative Works: Regulating Creativity*. ROUTLEDGE (2018).

⁶ Samuelson, P., *The Quest for a Sound Conception of Copyright's Derivative Work Right*. Geo. LJ, 101 1505 (2012).

⁷ *Ibid.*

⁸ Rachum-Twaig, O., *supra*.

giants". It refers to the notion that no work of authorship is created from nothing. A creator has to depend on prior or existing knowledge and creations to create original work.⁹ Using pre-existing knowledge relevant to the creative domain is a central and crucial component of the creative process. Authors take help of the pre-existing expressions as tools to enable their own creativity. Consequently, audience members utilize them as meaning making tools, to help understand and attribute value to creative works. In this way pre-existing expression thus plays an essential part in all creative fields, including cultural creativity. This becomes more pertinent with technological innovations, which enable the development of new creative patterns and new types of culture.

Lawrence Lessig in his book, 'Remix' highlights the importance of development of new types of culture, especially in the digital age.¹⁰ In this book, he explains how the existing copyright laws are limiting and preventing the authors from being creative as the creators cannot incorporate other sources in their creation. He has introduced two types of culture, viz., the '**Read Only Culture**' and '**Read Write Culture**'.¹¹ In the first type of culture, the content, provided from a professional source, is consumed passively without contributing anything to develop the content. For example, buying a book and reading it only. On the other hand, the Read Write Culture involves people who use the content to absorb the underlying idea and then re-use parts of the original content in a creative way to make something original out of it. In this way the users become more active and in addition to that they create and share. This way a more reciprocal relationship is developed between the original creators of

⁹ Goldstein, P., *Derivative rights and derivative works in copyright*, J. Copyright Soc'y USA 30 209 (1982).

¹⁰ Lessig, L., *Remix: Making art and commerce thrive in the hybrid economy*, PENGUIN (2008)

¹¹ *Ibid.*

work of authorship and the users of the works. Such discussion is of paramount importance in the present context so as to enable discussion of copyrightability of internet memes.

Further, it is extremely contextual to refer to the economic analysis of copyright law, done by Landes and Posner, in their seminal article, "An Economic Analysis of Copyright Law".¹² In this paper, the authors have highlighted how creating an original work requires borrowing or building on material from an existing body of works, as well as adding original expression to it. An original work contains not only author's expressive contribution but also elements, originated by prior authors. Therefore, the less extensive the copyright protection remains, the more an author or other creator can borrow from previous works without infringing copyright. The authors further explain that every author is both an earlier author from whom a later author might want to borrow material and the later author himself.¹³

[III.] PRESENT THRESHOLD OF ORIGINALITY AS A HINDRANCE TO THE CREATION OF DERIVATIVE WORK

Intellectual Property law is rapidly evolving in nature. What came under its protection sixty years ago is not what it is constricted to in the present day. It has expanded as human beings continue to create and seek credit for said creations.

It has already been established that the requirement of originality is inseparable from copyright law.¹⁴ However, it is to be determined

¹² Landes, W.M. and Posner, R.A., *An economic analysis of copyright law*, THE JOURNAL OF LEGAL STUDIES, 18(2), 325-363 (1929)

¹³ *Id.*, at 323.

¹⁴ Manoj Isuru Kotigala, *Rethinking Originality in Copyright Law and Exploring the Potential for a Global Threshold*, RESEARCHGATE (Jan. 1, 2020, 1:10 PM), <https://www.researchgate.net/publication/311377345>

as to what extent the originality prerequisite must restrict the ambit of acquiring copyright.

In the case of *Sheldon v. Metro-Goldwyn Pictures Corp.*, the United States Supreme Court held that in the case of an unauthorized adaptation, courts may elect to award only a portion of an infringer's profits to the plaintiff. This portion of the profits is the proportion of the amount of original work used in the adaptation.¹⁵ However, this would inflict an unauthorized penalty to the Defendant.

The most commonly used method to define what is protected under copyright law and what is not, is the property-oriented reasoning. It uses the ambit of property and entitlement to create a link between the author and the work. This reasoning has been imbibed from the Lockean labour acquisition approach.¹⁶ The Lockean approach essentially suggests that one should enjoy only the fruit of one's own labour.¹⁷ It is considered to be the natural right of the author/owner to benefit from his/her own labour for appropriation of certain property.

Based on similar line of reasoning, copyright protection grants the right to the author by allowing him to restrict people from using and taking credit for his creations. However, unlike the case of tangible property, intangible property cannot have unlimited restrictions.

In case of tangible property, it is essential to establish a relationship between the work, the public and the author. The owner's right over the property is restricting the public's use or

¹⁵ *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940).

¹⁶ Carys J. Craig, *Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law*, 28 QUEEN'S L.J. 3 (2002).

¹⁷ *Id.*, at 8.

access to the property.¹⁸ Keeping in mind the doctrine of public interest, the restriction over creations, that is, intangible property cannot be to such extent that it curbs creativity. The right to restrict by an author should be to such extent that he gets significant financial return for his work. However, it should not curb the creative ideas of others, just due to the fact that some components of the idea have already been expressed by a certain author.¹⁹

The case of *Bishop v. Stevens* clearly iterates that the purpose of a copyright legislation is “to protect and reward the intellectual effort of the author”. Intellectual effort by a person can be considered to be the originality or creativity put in by a person to create subject matter that is unique and innovative.

In the case of *University of London v. University Tutorial Press*, it was stated by Peterson, J that the concept of originality means the expression of an innovative or original thought. He suggested that copyright legislations need not involve themselves in the originality of ideas and should restrict themselves to the originality in expression of thought.²⁰

Further in the case of *Designer Guilds v. Russell Williams*, Lord Hoffman was of the view that “The more abstract and simple the copied idea, the less likely it is to constitute a substantial part. Originality, in the sense of the contribution of the author’s skill and labour, tends to lie in the detail with which the basic idea is presented.”²¹

Now that it is established that originality is based on the contribution of one’s work to an idea, the question arises as to

¹⁸ Carys J. Craig, *supra*,3.

¹⁹ Carys J. Craig, *supra*,7.

²⁰ *University of London v. University Tutorial Press*, 2 Ch 601 (1916).

²¹ *Designer Guild Ltd. v. Russell Williams (Textiles) Ltd.*, ECDR 10 (2001).

whether the amount of effort put into the work matters. The question arises as to the quantification of work put into changing the expression of an idea of one person from that of the other.

In the case of *Patrick Cariou v. Richard Prince*,²² Prince, a well-known appropriation artist, altered some photographs taken by Cariou and published in a book called *Yes Rasta*. It was argued by Prince that his work alters another's work into something that is completely different. In the present case, he had added blue lozenges over the eyes of the subject in the photograph and added the picture of a guitar over the subject's body. He believed his works to be transformative in nature and asserted the fair use doctrine.

[IV.] MEMES AS TRANSFORMATIVE WORK

The digital age brought with it the concept of memes. They multiply and spread online like a virus. This maybe because they hit a nerve or is found to be funny. Dawkins used the word "virally" to describe the spreading of memes. The objective of memes are to transmit ideas within a culture through variety of ideas.²³

Memes by their very nature are copied from other sources.²⁴ From the "socially awkward penguin" meme to "grumpy cat" and "derp and derpina", every meme becomes internet humour after changing the circumstantial setting of another's original piece of work, be it a movie still or a photograph. Sometimes, existing memes also undergo modification to reproduce another meme, so radical

²² *Patrick Cariou v. Richard Prince* United States Court of Appeals, Second Circuit., 714 F.3d 694 (2013).

²³ Vicky Ludas Orlofsky, *Memes, Fair Use, and Privacy*, INTELLECTUAL FREEDOM BLOG, AMERICAN LIBRARY ASSOCIATION (Jan. 2, 2019, 8:06 PM) <https://www.oif.ala.org/oif/?p=16873>

²⁴ Aishwarya S Iyer and Raghav Mehrotra, *A Critical Analysis of Memes and Fair Use*, RLR VOLUME IV ISSUE I 1(2016).

from the previous one that it presents a new idea.²⁵

Using the *Cariou* case as context, the author proposes that an internet meme is a transformative work. A work is said to be transformative when the new work has transformed the original work by adding new expression or meaning and has added value to the original work by creating new information, aesthetics, etc.²⁶ As memes change the original picture to such an extent that it gives it a whole new meaning, it should be considered as a transformative work.

There has often arisen an issue as to whether memes should come under the realm of copyright law or not. The question is as to whether they come under the ambit of the fair use doctrine and hence, should be exempted from the liability of copyright infringement or not.

The aim of fair use doctrine is to allow one the freedom of expression. It allows one to use work that has been protected by copyright without actually procuring a license to use such work.²⁷ The fair use doctrine exempts transformative work from being liable for copyright infringement.²⁸

However, as iterated before, the transformative work should be to such extent that it changes the expression as well as value of the original work. If it is only slightly transformative, it shall not be exempted as in the case of *Warner Bros. Entertainment, Inc. v. RDR Books*²⁹, where even though an encyclopaedia consisting of terms

²⁵ *Ibid.*

²⁶ Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163 (2019).

²⁷ Brette Sember, J.D., Understanding the Difference Between Fair Use and Fair Dealing, LEGALZOOM.COM, (Jan. 3 2019, 11:05 PM) <https://www.legalzoom.com/articles/understanding-the-difference-between-fair-use-and-fair-dealing>

²⁸ Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163 (2019).

²⁹ *Warner Bros. Entertainment, Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

used in Harry Potter can be considered to be slightly transformative, it is not enough to be exempted using the fair use doctrine.

On the other hand, in the case of *Leibovitz v. Paramount Pictures Corp*³⁰, the movie company's use of the lighting and positioning to imitate the style of that of a famous photographer for the purpose of comic effect/ ridiculing was considered to be that of transformative use of work and was thus, exempted under the fair use doctrine.

Thus, memes should be exempted under the fair use doctrine. However, the fair use doctrine only provides exemption from being liable for copyright infringement. It does not reward or financially provide for the creative work put in by the meme maker.

[V.] THE WAY FORWARD

Commercialisation of memes, or rather providing an incentive for creation of memes has remained a dream due to the obstacles present in actual execution of the same. There are a few issues that need to be addressed to ensure efficient and transparent commercialisation of memes.

The internet over the years has blurred the thin line that differentiates ownership from propriety. One can download almost any work off the internet at his/her whim and fancy.³¹ Thus, to commercialize memes, it is necessary to, one, define who the author of a meme is and two, regulate and track such authorship. The question as to whether the original work (such as the movie still in a meme) that has been later transformed needs to be acknowledged does not arise as it has already been established that meme is a

³⁰ *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998).

³¹ Jaliz Maldonado, *Blockchain Technology May Help Artists with Copyright Protection in Cybersecurity, Guides for Lawyers, Legal IT*, PRACTICE PANTHER, (Jan 3. 2019, 11:30 PM) <https://www.practicepanther.com/blog/blockchain-copyright-protection/>.

transformative work and therefore, there is no need to provide or seek for license of the original work from the first author.

Previously, defining authorship over intangible property was easier as it was held by dominant, large and sophisticated corporations. However, as iterated earlier, with the advent of the digital age, defining authorship over memes have turned out to be a strenuous task due to the vast informality that exists on the internet.³² In most cases, authorship is based on intent, supervision and control. There is also the requirement of creativity. However, such a test cannot be strictly applied in the case of internet memes. Firstly, there is no formal structure of hierarchy to creation of memes, hence, negating the supervision and control ambit of the test. Secondly, the internet acknowledges the creativity and thus, negating the intent factor of the test.³³ Therefore, the onus of determining authorship over a meme is on the meme maker.

The author suggests that the first owner/ creator of the meme should have authorship over the meme. Section 17 of the Copyright Act, 1957³⁴ provides that an owner of a creative work is one that has paid valuable consideration for a painting made, a picture taken etc., unless there is a contract to the contrary. However, as the commercialization of memes have not taken place as of yet and no consideration is paid by anyone for creation of memes, the creator himself should be considered the author/ first owner. The onus of proving the right of the authorship over the meme is on the creator. He needs to prove that he transformed an original, copyrighted work in such a manner that it can be considered a standalone, original, creative work in itself.

The task of regulating this authorship can be the duty of the medium in which the work is published. In the case of internet

³² Stacey M. Lantagne, *Mutating Internet Memes and the Amplification of Copyright's Authorship Challenges*, 17 VA. SPORTS & ENT. L.J. 221 (2018).

³³ *Ibid.*

³⁴ Indian Copyright Act 1957, Section 17.

memes, this task should be on social media platforms with its ability to make works “viral”. However, to do so, the author has to let go of his right to privacy. It is contended that an entity that wishes to profit from publishing work in a highly unregulated medium such as the internet should be ready to give up his right to remain anonymous. Essentially, the meme maker needs to trade off the right to anonymity if he wishes to financially gain from his creation.³⁵ Indeed, his information need not be accessible to everyone. A comprehensive legislation may be drafted that allows only Government agencies for certain purposes such as national security, public morality, etc. to access said data.

However, then, the question of how social media platforms can keep track of authorship and store such data arises. It is suggested that any data, in this scenario, a meme that has been published on a social media platform should have an author’s details attached to it. These details need to be stored by the social media platform.

At this juncture, the author proposes the concept of blockchain technology. Block chain technology is proposed to balance the “ever changing” needs of both content creators and consumers.³⁶ Blockchain is essentially a digital, decentralized ledger that is cryptographically secure and which can be inspected but not edited and altered.³⁷ The selling point of Blockchain technology is that it is a universal repository.³⁸ Moreover, an author might adopt digital pseudonyms if his data is secured through blockchain technology³⁹. In this way, even though he might not have an absolute access to the right of anonymity, he is still secure from the eyes of the public. Their

³⁵ Tom W. Bell, *Copyrights, Privacy, and the Blockchain*, 42 OHIO N.U. L. REV. 439 (2016).

³⁶ Heather Bennett, *Access Copyright: Blockchain and Smart Contracts for Information Professionals*, 38 TALL Q. 11 (2019).

³⁷ *Ibid.*

³⁸ Melanie Swan, *Blockchain: Blueprint For A New Economy*, 44 TIM MCGOVERN (ed.,2015)

³⁹ Tom W. Bell, *supra*,466.

data shall be stored in blocks/ nodes known as hash.⁴⁰

Clearly, the old techniques ranging from property acquisition approach and labour oriented approach to definite authorship tests are redundant in the case of new challenges or rather, dimensions to copyright such as memes. New techniques are to be adopted.

However, a technological fix even if perfectly implemented cannot provide all fruits of copyright protection to meme makers. The copyright authors' data stored in mediums such as blockchain are far beyond the reach of what the current legislations provide for. Only a combination of technological advances with efficient institutional legal mechanisms can solve the issues that have crept up in the society due to the influx of the digital age.

The controversial Article 13 of the European Union is the best example of new challenges requiring new legal directives to regulate them. The aim of Article 13 is to regulate the mass content that has been created and shared through social media platforms. However, the legislation also takes into account cultural aspects before directing the occurrence of copyright infringement.⁴¹

[VI.] CONCLUSION

The author, through this paper, essentially suggests that meme is a transformative work. Transformative work comes under the exemption of fair use and thus, cannot be liable for copyright infringement. However, it is proposed that internet memes should not only receive exemption under copyright law, but should be

⁴⁰ *Blockchain and the Law: A Critical Evaluation*, 2 STAN. J. BLOCKCHAIN L. & POL'Y 1 (2019).

⁴¹ Giacomo Bonetto, *Internet memes as derivative works: copyright issues under EU law*, 13 JOURNAL OF INTELLECTUAL PROPERTY LAW & PRACTICE 12, 989-997 (2018).

given due credit for work just like any other original work. The author of the meme should be able to reap the financial gain for his creative labour. However, as the internet is a highly unregulated and informal platform, the author concedes that it is not easy to determine authorship.

Thus, throughout the course of the paper, the author has come to the conclusion that unknowns (those authors who wish to remain anonymous) should not have the freedom of speech and expression in a scenario where they are transmitting data/ their creative work for financial gain or recognition. If they do wish to be recognized, they should be required to give their details and proof of authorship to their publishing platform, that is, social media. The author concedes to the fact that providing private data can be dangerous and therefore, suggests a comprehensive legislation that allows only Government agencies and the internet provider to access authors' data in case of specific instances. The author concludes by suggesting combating of irregularities due to technology advancement with the help of technology itself. Blockchain will help maintain a transparent, non-editable storage for data of ownership over memes in a digital space itself.

LONG ARTICLES

INTERACTION OF COMPETITION LAW WITH TRADEMARK AND COPYRIGHT

By Saksham Malik*

The relevance of intellectual property rights and competition law has increased exponentially over the course of the past few decades, leading to development of jurisprudence in the two fields. In addition to a study of the unique features of the two disciplines, the relationship between competition law and intellectual property rights has also been extensively discussed in various jurisdictions around the world. The discussion is primarily centred around two questions. First, whether competition law plays merely a negative role in the sphere of intellectual property rights by preventing and punishing anti-competitive behaviour by IP owners or does it also perform a positive function? Second, whether competition law is in conflict with intellectual property rights or do the two fields complement each other?

The questions have been widely discussed as far as patent rights are concerned. However, there exists a need to discuss the interaction of competition law with trademark and copyright, considering the characteristics unique to these intellectual property rights. The article will discuss the same by analysing a wide pool of subject matters including Collective Management Organizations, rights of broadcasters, parallel imports and more. Jurisprudence from European Union, United States and India has been discussed in consideration of the nature of available literature, relevance in the current economic scenario and an increasing involvement by authorities including the Federal Trade Commission and the Competition Commission of India. This article will therefore analyse literature from these jurisdictions and make suggestions that can help

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achieve a balance between intellectual property rights and competition law.

Keywords: Trademark, copyright, competition law, monopoly power, intellectual property rights.

[I.] INTRODUCTION

The discussion on the interface of intellectual property rights and competition law is centred around achieving a balance between the two systems of law. It can be said that the two systems of law are at odds with each other. Competition law seeks to prevent and punish monopolies in the market while intellectual property rights grant a form of monopoly to the IP holder to use and sell his work to the exclusion of others. While the former lists factors like productive efficiency as well as low-cost, high-quality goods and services as some of the reasons for curtailing monopoly power, the latter makes use of monopoly to incentivise innovation.

However, it can also be said that intellectual property rights are complementary to competition law. Intellectual property rights provide protection to IP owners that is essential to encourage investment and prevent other players in the market from unfairly benefiting from the fruits of the IP owner's labour, which may be shared by the owner in return of reasonable compensation.¹ IPR thus caters to competition concerns by promoting fair market behaviour and preventing exploitation by competitors in the market. Therefore, determining the relationship between the two disciplines and achieving a balance is not straightforward. The article will thus look to study how different jurisdictions have dealt with the relationship between the two systems of law.

¹ *What is intellectual property?*, WIPO (July 1, 2019, 10:00 AM), https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf.

While sufficient literature already exists on the interface of patent rights and competition law, there has been a dearth of articles dealing with interaction of competition law with trademark and copyrights. The article seeks to address this gap by dealing with important case laws from three of the most mature jurisdictions in this regard United States of America, European Union and India. Throughout the article, unique characteristics of the copyright and trademark and issues they raise while interacting with competition law will come to the forefront. The article will analyse these challenges and suggest ways in which the two IP rights can interact with competition law to benefit various stakeholders.

[II.] INTERACTION BETWEEN COPYRIGHT AND COMPETITION LAW

A. Introduction

The financial relevance of copyright-protected works has increased throughout the past few decades, even in developing countries. One of the reasons for this phenomenon is the wide variety of works included in the sphere of copyright: movies, music, cultural content, and software. A feature of most copyrighted works is that its demand increases with an increase in audience. A boom in population, especially in countries like India and China has therefore translated to higher levels of consumption of copyright-protected works. Competition law, by and large, performs a dual role in the realm of copyright law:

- It performs a restraining function, by restricting the exclusivity of copyright
- It supports enforcement of copyright by maintaining efficient distribution channels, a function that is crucial to ensure copyright protected work is accessible to the audience.

The nature of cases in the United States, European Union and India vary when it comes to copyright, a reflection of their disparate cultural priorities. The article will examine literature across these jurisdictions and identify their implications for these regions.

B. Copyright and Antitrust in USA

1. Regulation of Collective Management Organizations

The interface of copyright and antitrust necessitates an important discussion on collective rights management, which involves the exercise of copyright by an organization (CMO). The organization can thereafter handle licensing various rights inherent in the copyright including public performances, performing rights, mechanical reproduction etc.² Some of the most popular CMOs in the United States are American Society of Composers, Authors and Publishers (ASCAP), Copyright Clearance Centre (CCC) and American Society for Collective Rights Licensing Inc (ASCRL). The US has produced considerable literature that provides insights on how these organizations' conduct is controlled through competition law. Considering the monopoly ASCAP enjoys in licensing of copyrights in the country, the US Government entered into a consent decree with the CMO, to ensure the licensing activities are undertaken in a fair and anti-competitive manner.

One of the first cases involving CMOs came up in 1979. CMOs like ASCAP issued blanket licenses for performance of musical compositions. A blanket license grants copyrights on behalf of several IP owners in a single license for a solitary payment. The US Supreme Court discussed the issue in a claim put forth by CBS, a TV network, wherein it was alleged that this system adopted by CMOs was illegal. The question was held in light of the per se rule

² *Collective Management of Copyright and Related Rights*, WIPO (July 2, 2019, 10:00 AM), //www.wipo.int/copyright/en/management/.

regarding price-fixing agreements, an anti-competitive activity prohibited by Sherman Act.³ The per se rule in American antitrust law was laid down in 1898, stating that certain kinds of anti-competitive behaviour is conclusively presumed to be anti-competitive.⁴ However, the Court instead relied on the rule of reason, under which an action is considered anti-competitive only when its effect is to unreasonably restrain trade. The court thereby upheld the rights of the CMOs, stating that their conduct does not amount to price-fixing agreements. A contract would be in the nature of price fixing, the Court said, only if it is in “*naked restraint of trade with no purpose except stifling competition*”.⁵

Issues with regard to CMO came to the fore as recently as in 2013. Pandora was a relatively new company dealing in the internet radio market that entered into a joint licensing agreement with ASCAP for licensing of music works. However, certain publishers of music including Sony and Universal were concerned that they were not receiving market rates for licenses issued by ASCAP to new-age companies like Pandora. Therefore, they sought to “partially withdraw” the right to license works to companies like Pandora. Pandora consequently sued ASCAP for retreating from a joint licensing venture, necessitating individual negotiations between publishers and Pandora.

Initially, a District Court ruled in favour of Pandora, holding that the company is entitled to a blanket license. In appeal, the case went to the Second Circuit in 2015, where the decision was affirmed. The court held that publishers of music cannot partly withdraw from the licensing scheme so that it allows them to enter into direct

³ *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) [hereinafter *Broadcast Music v. CBS Inc.*].

⁴ *Addyston Pipe & Steel Co. v. U.S.*, 175 U.S. 211 (1899)

⁵ *Broadcast Music v. CBS Inc.*, *supra* note 3.

agreements with new media companies.⁶ Individual negotiations by the publishers entailed higher costs for new age companies like Pandora. The Court thereby ensured that competition is not stifled in the market through payment of unfairly high royalties. The same could have also resulted in access to fewer songs for Pandora, ultimately affecting access for the end-consumers.

The author submits that the practice of blanket agreements serves the need of legitimate and efficient licensing of works, thereby ensuring the copyright is sufficiently exploited. Considering the vast number of music publishers, consumers and composition, CMOs serve a practical purpose of providing a dependable method of making money for the copyright owners. Entering into such agreements without the involvement of CMOs would involve high costs and difficulty. On one hand, the practice gives CMOs considerable negotiating power that can result in abusive practices. It must also be noted that individual negotiations can harm the interests of licenses and ultimately the market.

2. Anti-competitive activities by copyright owners: The Apple saga

Competition law can also function in cases where copyright owners themselves attempt to stifle competition. Exclusivity of copyright includes various rights including the right to issue licenses and fix appropriate prices for their work. However, it does not mean that the publishers can increase the sale of their products through anti-competitive practices including price cartelization. The case of *United States v. Apple Inc.* can further elaborate on this.

Amazon's dominance in the e-book market and low prices led to concerns among publishers that they were not being sufficiently compensated. Coincidentally, \ Apple unveiled its iPad which supported e-book reading around the same time. Apple, along with

⁶ Pandora Media v. American Society of Composers, Authors & Publishers, No. 14-1158, 2d Cir. (2015).

the publishers agreed to use a new 'agency model' which gave the publishers the right to set prices on their own, unlike the wholesale model.

Five publishing companies along with Apple were sued for allegedly fixing increased prices for e-books. This conduct was alleged to be in violation of Section 1 of the Sherman Act which states that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."⁷ The suits of publishers were settled and only Apple's claims were taken to trial. In 2010, Apple was deemed guilty of conspiring to increase retail prices by a US District Court.⁸ The decision was affirmed in 2015 by the 2nd Circuit Court of Appeals. However, in 2014 the Company settled the case out of court, agreeing to pay \$450 million in damages.⁹

It is noteworthy that the court, in this case, applied the *per se* rule. American courts, over the course of the past few decades, had drastically reduced the application of this rule, applying the 'rule of reason' instead. The decision sheds light on the strict attitude of antitrust authorities towards markets that might be undergoing a transformation. Despite the fact that the market in issue might be undergoing previously unprecedented change, the courts decide the decision with basic antitrust principles established decades ago. The case is also an appropriate example of the exploitation of intellectual property rights. An instance of this may be the exploitation of

⁷ The Sherman Act, 15 U.S.C. Section 1-38 (1890), s. 1.

⁸ *United States v. Apple Inc., et al.; The State of Texas, et al., v. Penguin Group Inc., et al.*, 952 F. Supp. 2d 638 (2013).

⁹ *Apple to pay \$450m settlement over US ebook price fixing*, THE GUARDIAN (July 2, 2019, 11:00 AM), <https://www.theguardian.com/technology/2016/mar/07/apple-450-million-settlement-e-book-price-fixing-supreme-court>.

copyright by the owner of the rights in a manner that detrimentally affects the market. Regular enforcement of antitrust principles in this context, therefore becomes necessary.

C. *Competition law and Copyright in the European Union*

The European Union grants copyright for 70 years after the death of the right owner, granting economic rights as well as moral rights.¹⁰ In the competition law-IPR debate, it is believed that copyright plays a relatively smaller role than trademarks and patents. The same is true to a certain extent in jurisdictions like the United States, especially due to the amount of literature available. However, the European Union has seen a substantial amount of case laws that fall within the purview of this discussion. European law in this context has developed primarily keeping in mind the importance of innovation.

This does not mean that European courts have completely ignored the economic aspect. The financial backdrop of copyright has received due attention in decisions, ensuring a balance is maintained between creative and economic rights. Specific provisions rarely ever talk about copyright in the context of Competition law, and Europe is no exception to that. Even the European Guidance Paper on Abuse of Market Dominance does not differentiate between copyright and patents.¹¹

¹⁰ *Copyright*, YOUR EUROPE - EUROPEAN UNION (July 2, 2019, 11:00 AM), https://europa.eu/youreurope/business/running-business/intellectual-property/copyright/index_en.htm.

¹¹ *Communication from the Commission: Guidance on its enforcement priorities in applying Article 82 of*

the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ No. C 45/7, EUR LEX (July 2, 2019, 12:00 PM), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29>.

1. The Magill case: anti – competitive exercise of copyright by rights owner

A landmark decision dealing with this quandary was Magill. Irish state Broadcaster, ITV and BBC owned copyrights in their TV program lists in UK and Ireland. There was a conflict over these listings being published in the newspaper by Magill. The publisher refused to cease publication of listings despite newspapers by the broadcasters. The copyright claims of the broadcaster were opposed by Magill, who further alleged that they were violating competition law principles by not allowing the publication of listings.¹²

The European Court of Justice said that the broadcasters enjoyed monopoly in the concerned market since they had the rights to the information required to create listings. The broadcasters were in a position that could prevent television guides to be made. With regard to their abuse of position, the court observed that protection of IP is a concern of national laws. Further, the right of reproduction included is a part of copyright which further provides for the right to grant or refuse license. However, “under exceptional circumstances, a particular exercise within the subject matter of an intellectual property right may be considered abusive conduct.”¹³

There were various reasons, according to the court, to deem their conduct abusive. Firstly, there was no substitute for Magill’s guide, emergence of which was stopped by the broadcasters. The broadcasters themselves did not offer the product either, despite the fact that there was demand for the same. Furthermore, the court rejected the arguments of broadcasters that the license was refused due to concerns for quality control. Lastly, the court observed that

¹² Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities. Joined cases C-241/91 P and C-242/91 P (1995).

¹³ *Id.*

the broadcasters “reserved to themselves the derivative market of weekly television magazines by denying access to information essential to the production of such publications.”¹⁴ The actions of the Broadcasters thus amounted to a violation of Article 86, amounting to abuse of dominant position and affecting the trade between European Member States.

It could be said that the ECJ decision took away the right to exclude third parties from the broadcasters, something that was granted to them by their national laws. At the time, the decision therefore made the compatibility of EU law and national laws more complicated in this specific context. The decision did have an important impact, since the broadcasters started granting licenses to publish weekly TV listings. However, it is to be kept in mind that the case involved an atypical set of circumstances, and therefore its applicability on other decisions is very limited.

2. Regulation of CMOs

As far as CMOs are concerned, the experience in EU has been different than that of the United States. Before 2012, there was no law that would harmonize various national laws within the territory. Partial harmonization happened only in 2012.¹⁵ However, the most significant cases with regards to CMOs came before the ECJ in the 1970s and 80s. The discussion usually revolves around Article 106(2) of the TFEU, which states that “undertakings entrusted with the

¹⁴ *Id.*

¹⁵ *Proposal of the Commission for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in*

musical works for online uses in the internal market, COM (2012) 372, 11 July 2012, EUROPEAN PARLIAMENT (July 5, 2019, 1:00 PM), [http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_eu_ropeenne/com/2012/0372/COM_COM\(2012\)0372_EN.pdf](http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_eu_ropeenne/com/2012/0372/COM_COM(2012)0372_EN.pdf).

operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.”¹⁶

It has to be seen whether CMOs fall under the definition of ‘undertakings’ under this article. The case of SABAM is relevant here. SABAM, in the instant case, was a CMO governed by Belgium’s law. It had entered into contracts with Mr. Davis and Mr. Rosentraten, a composer and a song writer respectively, which assigned and transferred copyrights to the CMO. The BRT entered into a new contract with the composer and song writer, under which BRT was assigned certain copyrights relating to a song. NV Fonior entered into a contract with BIEM, an entity entrusted by SABAM with the task of managing grants of reproduction of copyright protected works, to phonographically exploit works of BIEM, which consisted of the above-mentioned song. However, Fonior proceeded to record the song in question and sold it as its own version. SABAM and BRT were unable to prohibit Fonior from marketing and publishing the song. In 1970, the European Commission suo motu initiated procedure against SABAM. The main concerns were in relation to the CMO’s contracts which gives it global assignment of copyrights and the length of such assignment (5 years after withdrawal).¹⁷

The ECJ had then ruled on abuse of dominance claims over the contractual clauses of SABAM. The Court ruled with regards to

¹⁶ Consolidated Version of the Treaty on the Functioning of the European Union art. 106, May 9, 2008, 2008 O.J. (C 115) 46 (hereinafter TFEU).

¹⁷ BRT v SABAM, C-127-73 (1974).

CMOs, saying that a mere authorisation system and monitoring of business of CMOs in a general method does not make the CMO an 'undertaking' within the meaning of Article 106. The exception is therefore not available. However, the court highlighted the importance of CMOs to protection of copyrights saying that a CMO "does not violate competition law if the assignment of rights by the authors is required for the association to carry out its activity on the necessary scale."¹⁸ The court thus concluded that a CMO is allowed to place only those limitations on right holders with regards to reproduction of works and withdrawal of membership which are totally essential for the enjoyment of a position needed by the management organization to efficiently conduct its business.

The interface between the two disciplines most recently came to the forefront in the famous Pay – TV case. The investigation began in 2014, followed by UK Broadcaster Sky and studios Paramount, Sony, 20th Century Fox, Disney and NBC Universal receiving statement of objections by the EC. It was alleged that Sky had entered into contracts wherein its platforms could not be accessed outside Ireland and the UK. Such practice has been termed as geo-blocking. The Commission stated that the conduct of Sky gave it territorial protection, which amounted to a ban on passive sales, which is prohibited under Article 101 of the TFEU. Further, Sky's contracts with the studios prevented the latter to allow any other broadcaster from providing Pay TV services in the UK and Ireland. Some of the studios offered commitments which stated that they won't follow geo-blocking clauses in licensing contracts.¹⁹

¹⁸ *Id.*

¹⁹ *Pay -TV case finally moves forward*, STEPTOE - ANTITRUST AND COMPETITION BLOG (July 5, 2019, 2:00 PM), <https://www.steptoiantitrustblog.com/2018/12/holiday-reading-pay-tv-case-finally-moves-forward/>.

The whole case faced various issues due to the fact that making passive content available in territories was not covered under the contract; the studios would have to clear copyrights which may drive up the royalty rates. Further, Canal+, a broadcaster that was licensed to broadcast Pay TV in France appealed against the commitments by one of the studios, i.e. Paramount²⁰. The reason for the appeal was that if Paramount committed to not follow geo-blocking in Europe, it would detrimentally affect Canal's broadcasting rights. The French broadcaster stated that territorial protection is crucial for efficient and just protection of copyrights. It would also affect the compensation involved in the transaction, including the royalty prices.

The General Court, hearing the appeal noted:

- It is permissible to grant exclusive licenses by the copyright holder, but not allow territorial blocking. License holders can thus not be stopped from dealing in passive sales outside the contractual territories.
- Contrary to what Canal + believes, it is not crucial to enforce territorial exclusivity clauses for efficient protection of intellectual property rights, including copyright. The holders have the right to be compensated appropriately according to the number of views, but not to receive the maximum possible compensation. The right holders are therefore, also allowed to negotiate licensing fees on the basis of potential number of viewers in states outside the contractual territories.²¹

²⁰ *Antitrust: Commission accepts commitments by Disney, NBCUniversal, Sony Pictures, Warner Bros. and Sky on cross-border pay-TV service*, EUROPEAN COMMISSION (July 5, 2019), http://europa.eu/rapid/press-release_IP-19-1590_en.htm.

A. ²¹ James Webber, *The General Court Upholds the Commission's Decision to Make Paramount's Commitments in the Pay-TV Case Binding*, SHERMAN (July 10,

Article 101 of TFEU prohibits agreements that affect trade between member states or which prevent, restrict or distort competition. However, clause 3 of the Article provides an exception from the prohibition if the agreement “contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.”²² The GC also stated that protection granted under Article 101(3) of TFEU could not be given to Geo-blocking, since those clauses were not necessary to ensure distribution and promotion of diversity.

The GC thus discussed the rights accorded by copyright protection in the larger context of antitrust concerns. The researcher submits that the decision may provide motivation to distributors to take EU wide licenses. It also highlights an opportunity for studios to focus on passive sales outside the geo-blocked territories. The audio-visual market, and the way it looks at protection of copyright may significantly change in light of the GC decision.

D. Copyright and competition law in India

The movie industry in India, which is not limited to Bollywood, is important not only for entertaining the masses but also for the national economy. Being a copyright related market, restraints imposed on it by rights holders themselves or film distributors has threatened the film industry’s growth in a fair and competitive manner. The country has various regional film industries, which have organized themselves in regional chambers of commerce, which controls the market for the specific circuit. In this context, issues of horizontal agreements among competitors arise. Horizontal agreements are agreements between competitors,

2019, 3:00 PM), <https://www.shearman.com/perspectives/2018/12/gc-decision-in-pay-tv-case>.

²² TFEU art. 101.

i.e. entities at the same level of distribution. Section 3 of the Competition Act prevents entities to enter into horizontal agreements that cause an appreciable adverse effect on competition. Numerous cases have come before the CCI, wherein the commission has attempted to ensure that copyright owners are not handicapped in exercising their rights by anti-competitive behaviour of other stakeholders.

The case of *Reliance Big Entertainment Ltd et al. v. Karnataka Film Chamber of Commerce et al.*, was decided by the Commission in 2010. In the case, it was alleged by Bollywood producers that regional chambers were restricting the entry of Bollywood films in regional industries. The same was being done by employing discriminatory terms for entry to the local distribution market on films from outside the region. The chambers required the producers to join the chambers and registering their films with it. The discriminatory terms included limits number of theatres, holdback periods of film release and sale of DVDs in the local market. If any theatre showed unregistered films, they risked getting their memberships revoked. Thus, theatres usually shied away from screening these movies.²³

Section 3 of the Competition Act prohibits anti- competitive agreements while section 4 prohibits abuse of dominant position. It is important to note that while section 4 only prohibits anti-competitive behaviour by enterprises, section 3 prohibits the same by and association of enterprises. Since the chambers did not fall in the category of 'enterprises', they could not be held liable under Section 4 of the Competition Act. However, the Commission applied Section 3, considering the chambers to be an 'association of enterprises'. According to the Commission, "the chambers made anti-competitive decisions on behalf of their members as enterprises.

²³ *Reliance Big Entertainment Ltd et al. v. Karnataka Film Chamber of Commerce et al.*, (2010) Cases No. 25, 41, 45, 47, 48, 50, 58 and 69 of 2010

Obligation imposed on members not to deal with non-members was not considered a vertically agreed refusal to deal in the sense of Section 3(4)(d), but a horizontal agreement that had the effect of limiting supply in the sense of Section 3(3)(b) read with Section 3(1) of the Competition Act.”²⁴

In response to the argument of the chambers that the terms were necessary to protect regional language and culture, the Commission said that the effect of these terms was to deny viewers the option to watch the movies of their liking. The Reliance judgment is significant in consideration of the fact that CCI employed the reasoning on deciding a variety of cases in the following years.²⁵

However, it is not entirely accurate to say that CCI has, at every occasion held the opposite party guilty in cases of local film distribution markets. In the case of *Manoranjan Films v. Eastern India Motion Picture Association and the Censor Board of Film Certification*, the informant, a distributor and a member of Eastern India Motion Picture Association, was refused registration of the film on the ground that he had given false information regarding the status of the producer. As a result, his access to the West Bengal market was restricted. CCI observed that although the distributor had attempted to register the film, the rules of EIMPA did not necessitate the same. Thus, in the instant case, the denial of registration does not amount an entry barrier to the market.

While the Commission observed that registration in the instant case was not compulsory, it did shed some light on EIMPA's rules and bylaws that CCI had discussed in an earlier case. Among other restrictions, the rules prohibited members of EIMPA from

²⁴ *Id.*

²⁵ See *Eros Int'l Media Ltd et v. Central Circuit Cine et al.*, (2010) Cases No. 52 und 56 of 2010, See also *UTV Software Communications Ltd v. Motion Pictures Association*, (2011) Case No. 09 of 2011, *Cinergy Independent Film Services v. Telangana Telugu Film Distributors Association*, (2011) Case No. 56 of 2011.

dealing with non-members and also prevented registration for distribution of dubbed films. The Commission reiterated its stand in an earlier case against the EIMPA, stating that the above rules are anti-competitive and are against the spirit of competition in the market.²⁶ The Commission, therefore, while stating that non-registration is not *per se* anti-competitive, gave a strong caveat to the Association to steer clear of anti-competitive rules and regulations.

The decisions of CCI on the allegations of horizontal agreements thus deserve to be lauded. It has discussed not only the terms of agreements but also the wider relevance of protection of languages and cultures. The *Reliance* judgment is a rare Indian example in the IPR-competition sphere that shows principles being established and being followed in similar cases. Where the CCI has lacked in establishing similar precedents in trademark cases, it has successfully done so in the sphere of copyrights. The CCI has dealt with refusal to license cases, seeking to promote access of copyright-protected works of the market. Dominant facility holders may thwart these works from reaching the audience by denying access to these facilities. In the 2011 case of *Kansan News Pvt. Ltd. v. Fast Way Transmission Pvt. Ltd. et al*, a news channel alleged that Cable TV operators were causing disturbance in transmission due to political motives. The CCI held that the cancellation and disturbance of channels amounts to abuse of dominant power by denying market access to TV channels.²⁷

The author submits that the intervention of CCI to ensure access

²⁶ *Manoranjan Films v. Eastern India Motion Picture Association and The Censor Board of Film Certification*, (2011) Case No. 17 of 2011

²⁷ *Kansan News Pvt. Ltd. v. Fast Way Transmission Pvt. Ltd. et al.*, (2011) Case No. 36/2011.

to copyright related works is also necessary to prevent piracy. If consumers are unable to access movies easily in their local theatres, or the access is not affordable, they are likely to resort to pirating copies of the movie. It is therefore crucial that anti-competitive restraints imposed by players in the film industry are to be appropriately penalized by the Commission.

The link between exclusivity of copyright and the extent of monopoly in a market also needs to be discussed. Within the purview of competition law, the statement that copyrights cause dominance in the market can be dangerous. The researcher submits that copyright alone cannot create dominance in the market. Only under rare circumstances, does the issue of dominance caused by copyright arise. The only manner in which copyright eliminates competition in the market is by preventing imitation. The owner prohibits competitors from selling copies of his work without his authorization, which may be in the form of a license. This does not, however, mean that the competitors cannot make similar work available to the audience under their own copyright.

In this context, cultural and creative products like books, journals etc. can also be subjects of competition law disputes. Take the example of scientific journals, which are necessary for authors to get their copyright work published. Libraries, universities, institutes etc. also depend on these journals for growth of their academic repute. However, holding journals and publishers guilty of abuse of dominance power is not simple.

The difficulty in holding publishers to be dominant in the relevant market was seen in the case of *Prints India v. Springer India*²⁸.

²⁸ *Prints India v. Springer India Private Limited & Ors.*, (2010) Case No. 16/2010.

Print India, a distributor and exporter of scientific journals approached the CCI against Springer, a publishing company. The latter was the primary distributor and publisher for most research institutions. In order to stay in business, the former had to accept terms from Springer that were allegedly anti-competitive.

The Commission ruled in favour of Springer, stating that the entity was not dominant in the market. The reasons for the same were that “online distribution was considered to reduce the role of traditional distributors of printed versions, which has to be reflected in the market definition. Accordingly, the Commission defined the relevant market to include both including print and online. In this regard, Springer was not considered dominant, since online journals and printed journals on a global scale were also included in the relevant market”²⁹

The Commission therefore did not take a narrow approach based solely on the circumstances of the case. While deciding the copyright-related decision, it took a wide view of the relevant market for determining dominance. It is encouraging to see that the Commission analysed the market while keeping in mind recent developments in the field both nationally and internationally.

The chapter has brought to the forefront a few interesting observations. It can be seen that competition related copyright matters have substantially increased in the past few years, especially in a developing economy like India. The credit for this can be accorded to active intervention of CCI, and increased awareness among competitors about their rights in the market. Moreover, recent developments in technology have led to unprecedented dissemination of copyright protected works curated for

²⁹ *Id.*

international, national and regional markets. The chapter also throws light on the restrictive and proactive role of competition law in the world of copyright. The interface thus points towards the broader argument that competition law is necessary for more than merely checking anti-competitive actions of IP right holders. It also promotes creativity in copyrights in particular as well as intellectual property in general, by ensuring right holders and competitors get appropriate remuneration, access to audience and a fairly competitive market.

[III.] INTERFACE OF TRADEMARKS AND COMPETITION LAW

A. Introduction

While discussing the relevance of competition law in the context of trademarks, the key question revolves around ‘market power’, regarding its existence and extent. The dynamics surrounding how this specific IPR functions in the current competitive economy raises further broad policy questions that have by and large, not been sufficiently addressed in even the most mature jurisdictions. As far as judicial interpretation is concerned, the available literature is notably lower than what is accessible with regards to the relationship of patents with competition concerns. Violation of competition law through exploitation of trademarks has often involved questionable practices including using a strong trademark to unlawfully tie a weaker product, engaging in unlawful price discrimination exercised with respect to a trademark, and engaging in other illegal anticompetitive practices³⁰

Scholars have often debated that “trademarks confer monopoly power which permits anti-competitive prices and that a well-

³⁰ Car-Freshener Corp. v. Auto Aid Mfg. Corp., 438 F. Supp. 82, 87 (1977).

received brand image is a form of monopoly power"³¹ However, it is necessary to study and understand the way various courts have dealt with the issue, keeping in mind free market principles and importance of innovation that underline the current economy.

B. Antitrust and Trademark in the USA: From Lemon Juice to Flowers

The tension between the two legal disciplines has existed in the USA since 1970s, a time when antitrust authorities directly started attacking the monopoly power possessed by trademark holders. One of the first instances of this was the ReaLemon case in 1974.³² The Federal Trade Commission licensing of the trademark "ReaLemon", stating that the mark sustained monopoly power of its owner, Borden Inc., in the lemon juice market. The FTC said that a royalty-free compulsory license was necessary to correct the said monopoly.

The Company was directed by the Administrative Law Judge to issue a 10-year compulsory license to its competitors, justifying it by saying, "The heart of the monopoly power preserved and maintained by respondent Borden lies in the ReaLemon trademark and its dominant market position. For competition to enter the processed lemon juice industry, the barrier to entry which is inherent in the ReaLemon trademark must be eliminated."³³ The final order of the FTC, affirmed by the Sixth Circuit held Borden liable for unlawfully monopolizing the market through predatory pricing in certain geographical areas, an act that was enabled by the strong pull of its trademark. The court did not issue a license but said that a compulsory license could be issued in appropriate cases. An

³¹ F.M. Scherer, *The Posnerian Harvest: Separating Wheat from Chaff*, 6 YALE L.J. 974, 995-99 (1977).

³² *Borden, Inc.*, 92 F.T.C. 669, 669-72 (1978)

³³ *Id.*

important line of reasoning made by the judgment was that a popular trademark, if advertised convincingly could amount to differentiation of product, thereby establishing entry barriers. This rationale would prove important for the determination of cases in the next few decades.

The rationale of barrier to entry was also discussed in the case of *Smith v. Chanel*³⁴. Smith manufactured a perfume called 'Second Chance' that was a facsimile of popular designer perfumes at substantially lower prices. The company advertised these fragrances, going as far as challenging consumers to spot the difference between its fragrance and those of Chanel, a luxury perfume brand. Even the packaging of Smith's product mentioned the name of the original fragrance. The court found Smith to be violating Chanel's trademark, making profits out of the popularity of the latter's brand name. However, in appeal it was found that Smith could legally claim in its advertisements that its fragrance was equivalent to that of Chanel, stating that "disapproval of the copyist's opportunism may be an understandable first reaction, but by taking a free ride, the copyist serves an important public interest by offering comparable goods at lower prices."³⁵

The court's decision is important since it made important observations with regards to market power and influence of trademarks. The court said that a trademark that is highly publicized may not be relevant economically but may still create a barrier for competitors. The consumer may behave in an economically irrational manner but is a part of an allegiance that has been built through advertising over the course of years.³⁶ Such allegiances, it is submitted, exist especially in the luxury goods market. Consumers

³⁴ *Smith v. Chanel*, 402 F.2d 562 (1968).

³⁵ *Id.*

³⁶ *Id.*

in this market are influenced heavily by the mark, acting under the impression that the product is of a striking imperial stock. In that manner, the trademark is likely to serve as a barrier to entry.

The issue of tying has also arisen in the context of trademarks and antitrust. An instance case is of *Hudson's Bay v. American Legend*. The two companies were involved in the business of marketing and sale of mink pelts and clothes and owned various trademarks used in the business.³⁷ One of the companies, Legend, limited the use of its trademarks to be by its subsidiaries alone. Allegations of tying arrangements and monopolizing the mink pelt industry were thereby made against Legend. The court decided the case in favour of Legend on both the allegations.

In response to claims of monopolization of power, the court stated that "the Legend members were not in competition among themselves or with Legend, and therefore, competition among the ranchers or Legend...does not run the risk of elimination or even reduction by the restriction on the availability of the trademarks."³⁸ With regards to the second allegation of tying agreement, the Court said that the plaintiff was not able to prove that the defendant has dominant power in the tying product market, i.e. the trademark or that commerce in the market was adversely affected. While the court did not hold that the trademark was being used to exploit the market, it is significant for various reasons. The court recognized that the trademark could be used as a tool for anticompetitive practices, not only through the marketing of a primary product but as a secondary product itself. Trademarks thus can be considered a subject of tying agreements.

³⁷ *Hudson's Bay v. American Legend*, 651 F. Supp. 819, D.N.J. 1986 (1986).

³⁸ *Id.*

The case was one of the first to deliberate whether trademarks could directly cause antitrust problems, an issue that received more attention in the following years. While Hudson gloriously failed in adducing evidence that could establish Legend's anti-competitive behaviour, the court opened the door for future litigations on the issue.³⁹

The tension between antitrust and trademark has taken a new form in the era of internet-based marketing. Online advertising has become critical to the way products are sold, and advertising spots are often booked on search engines. In this context, issues of trademark infringement often arise as companies advertise their products on 'search terms' that resemble registered trademark. The relevance of antitrust concerns also arises, as we will find out in the following case.

In 2014, Edible Arrangements (EA) LLC, a cut fruit retailer sued 1-800flowers.com for trademark infringement to the tune of \$97 million. The plaintiff claimed that the defendant was using similarly named websites for bouquet-themed goods, leading the consumers to believe that they were buying genuine Edible Arrangements product. The companies have long been embroiled in disputes in the US Patent and Trademark Office, seeking claims for various patents and trademarks.⁴⁰

It was alleged that a secret code was employed to display misleading results when consumers searched for Edible Arrangements. EA claimed that the defendant's fruits are clearly for eating purposes, thus, they were using the word 'edible' merely to deceive consumers that the product was associated with the

³⁹ *Id.*

⁴⁰ Edible Arrangements Int'l, LLC v.1-800-Flowers.com, *Inc.*, No. 3:14-cv-01744 (2015).

trademark.⁴¹ In response, 1-800-Flowers sued EA claiming that EA used litigation threats to harass competitors, and thus strengthen its dominant position in the market. It was alleged that EA's conduct amounts to antitrust violations. 1-800-Flowers further alleged that the company attempted to control functional designs and generic terms solely to drive out competition from the market and that some of EA's marks were obtained fraudulently.⁴²

1-800-Flowers said that the threats have 'chilled competition' and that EA has regularly trademarked terms that are generic and ideally belong in the public domain. The saga ended in 2016 when the two companies reached a settlement. However, none of the terms of settlement were disclosed in public.⁴³

The American courts have thus on various occasions been called upon to discuss the antitrust connotations of trademarks. On most of the occasions, the courts have upheld the rights of trademark owners to advertise, market, proceed against infringement and earn profits out of it. While the nature of a trademark does possess hints of monopoly that can prove anti-competitive if exploited, the balance weighs in favour of free market principles. However, it will be erroneous to say that the monopoly power of trademark is not pervasive enough to affect competition in the market. Dominant power can exploit the market, especially in cases of tying agreements. The European jurisprudence will further shed light on instances of trademark's monopoly power.

⁴¹ *Edible Arrangements Delivers \$97M IP Suit To 1-800-Flowers*, LAW360 (July 15, 2019, 3:00 PM), <https://www.law360.com/articles/598383/edible-arrangements-delivers-97m-ip-suit-to-1-800-flowers>.

⁴² *Id.*

⁴³ *Edible Arrangements, 1-800-Flowers End Sprawling TM Fight*, LAW360 (July 15, 2019, 4:00 PM), <https://www.law360.com/articles/813337/edible-arrangements-1-800-flowers-end-sprawling-tm-fight>.

*C. Trademark rights and Competition in the European Union:
Exhaustion of rights, parallel imports and more*

Exercise of IPRs in the EU under exceptional circumstances can constitute anti-competitive behaviour, as we have observed in the previous chapter. While various cases in the past have been investigated under the purview of competition law including Article 82 of the TFEU, certain authors have a different view. Maniatis, for instance, believes that “vis-à-vis other intellectual property rights, trademarks occupy a league of their own, being predominantly pro-competitive, and therefore are non-monopolistic”.⁴⁴ Such views differ from the jurisprudence in the United States where the FTC and small competitors have frequently attacked trademark owners for competition law infringements, only to fail due to weak claims. While the American courts left the door ajar for future litigations in anticipation of stronger claims, European jurisprudence has been more definitive, especially in the realm of exhaustion of trademarks and parallel imports.

The principle of trademark exhaustion states that the right of the producer is limited to the first sale of the product. Resale beyond this point, under the producer’s trademark, will not amount to infringement. Additionally, the same will not amount to unfair competition either.⁴⁵ Exhaustion has also been mentioned in Article 15 of the 2015 Trademark Directive which states “trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Union under that trade mark by the proprietor or with the proprietor's consent.”⁴⁶ In the

⁴⁴ Spyros M. Maniatis, *Competition and the Economics of Trade Marks, in Intellectual Property and Market Freedom*, 2, PERSP. ON INTELL. PROP. 119-20 (1997)

⁴⁵ *Sebastian Int'l v. Longs Drug Stores Corp.*, 53 F.3d 1073 (1995).

⁴⁶ *Directive (EU) 2015/2436 Of The European Parliament And Of The Council, To Approximate The Laws Of The Member States Relating To Trade Marks*, 16 December 2015, EUR-LEX (July 18, 2019, 5:00 PM), <https://Eur-Lex.Europa.Eu/Legal-Content/En/Txt/?Uri=Celex%3a32015l2436>.

European context, the issue has come up within the purview of parallel imports, as we will discuss in this chapter.

Decisions dealing with the interface of competition law and trademarks in the context of exhaustion started with *Consten and Grundig* in 1964⁴⁷. Grundig who was a manufacturer of electronic products, assigned Consten as its exclusive French distributor.⁴⁸ As part of the agreement, the latter was not allowed to sell products of companies making similar products or sell competing products. Moreover, the French company agreed not to sell products of Grundig outside the French territory. Grundig had entered into analogous contracts with exclusive distributors from other parts of Europe, and the German company had also given Consten the right to use its trademark GINT. In due time, other companies started purchasing the goods from Germany and engaging in parallel imports in France.

The agreement held the agreement as well as the use of the trademark in violation of Article 81 of the EC Treaty, which “prevents all agreements that affect trade between states and prevent or restrict competition within the common market.”⁴⁹ The Court also voided the mark GINT, since it was assigned to further the agreement. The case was essential since it held for the first time that companies cannot employ trademarks to manipulate EC competition laws, and adversely impact the common market.

A different view was taken in the case of *EMI Records Ltd. v. CBS United Kingdom Limited*. An American enterprise had transferred its trademark rights to an English company for use in Europe while holding the interest in the USA. The subsidiary company was English. After a while, the mark came into the ownership of EMI Records in various European countries and of

⁴⁷ ES Etablissements Consten, S.A.R.L. v. Comm'n., Joined Cases 56 & 58/64, (1966)

⁴⁸ Grundig-Consten, Commission Decision 64/566 1964 JO. 2545, 2545-53 (1964)

⁴⁹ Treaty establishing the European Community, art. 81, 2002/C 325/01

CBS, an American enterprise in the USA. Goods were sold by the American trademark holder in the EC, bearing the trademark. The sale was made through subsidiaries.⁵⁰

The court decided that the holder of the trademark in the EC may prevent the American mark holder from importing goods into the European countries. The fact that the entity possesses a trademark does not necessarily imply that a dominant position under Article 82 can be established. As far as determination under Article 81 was concerned, the court held that “there is no concerted practice when the effects of the agreement do not exceed those flowing from the mere exercise of the national trade-mark rights.”⁵¹ The decision was, thus, significantly different from the one in *Consten and Grundig*, displaying a more mature and open-minded approach.

The issue of trademark exhaustion began in the 1960s but is still as relevant today. *Schweppes SA v Red Paralela SL, Red Paralela BCN SL* was decided by the CJEU in 2017. The Schweppes trademark was owned by Schweppes International Ltd. in certain geographical areas like the Nordic countries, Central Europe like Spain and also in parallel owned by Coca-Cola Group in UK, Russia, Greece, etc. It was also licensed by numerous entities. Red Paralela imported products with said trademark to Spain based on the principle of exhaustion, upon which Schweppes declared that exhaustion is not valid in this case.⁵²

In earlier cases like *IHT, Internationale GmbH, Uwe Danzinger v. Ideal Standard GmbH*, it had been established that trademark exhaustion is applicable if there exists an economic link between the

⁵⁰ *EMI Records Ltd. v. CBS United Kingdom Ltd.*, Case 51/75, 1976 E.C.R. 811 (1976).

⁵¹ *Id.*

⁵² *Schweppes SA v. Red Paralela SL, Red Paralela BCN SL*, Case C-291/16 (2017) [hereinafter *Schweppes v. Red Paralela*].

companies.⁵³ Red Paralela reasoned that such a connection exists between Coca-Cola and Schweppes based on the promotion of a global trademark.

The court observed that the link can be established between manufacturer and distributor, companies from the same corporate group, etc. Basically, if it was possible for a party to keep an eye on the quality of the goods, a link could be established. Further, the court said that the import could not be lawfully prevented, since “Article 7 of the Directive, read with Article 36 TFEU, precludes the proprietor of a national trade mark from opposing the import of identical goods bearing the same mark from another European State in which that mark, which initially belonged to that proprietor, is now owned by a third party through assignment”⁵⁴ However, the following conditions need to be satisfied:

- The owner of the trademark, either by itself or with a third party, intentionally sought to endorse the image of a global trademark, causing uncertainty among the consumer as to the origins of the mark
- There exist economic links, which amount to joint control over the use of the mark through coordinated policies which might exist to decide the products that will bear the mark and their quality.⁵⁵

It can thus be seen that the issue of trademarks and competition in the EU is primarily concerned with the territorial nature of the IP and its conflict with open movement of products. Elaborating upon

⁵³ IHT, Internationale GmbH, Uwe Danzinger v. Ideal Standard GmbH, Case C-9/93 (1994).

⁵⁴ Schweppes v. Red Paralela, *supra* note 52.

⁵⁵ CJEU gives guidelines on trademark exhaustion in Schweppes judgment, ROSCHIER (July 18, 2019, 5:00 PM), <https://www.roschier.com/news-and-media/cjeu-gives-guidelines-trademark-exhaustion-schweppes-judgment>.

this, it can be said that the courts have constantly tried to balance the rights of 'access' and 'protection'. Concerns like confusion due to arbitrary and generic marks are also kept in mind while deciding the disputes.

D. Trademark and competition law in India

The interface between IPR and Competition Law has been discussed extensively by the Competition Commission of India and the courts. However, most of the literature is limited to cases of patents, providing a dearth of guidance with regards to other IPs. However, there have been a few instances of the said interface which may allow us to predict the future of trademark and competition conflicts in India.

The Delhi High Court decided the *case of Hawkins Cookers Limited v. Murugan Enterprises*⁵⁶ in 2008. The allegation against the defendant was over the use of the HAWKINS trademark in his own pressure cooker gaskets. The defendant claimed that the mark was used solely to communicate to the buyers that the defendant's gaskets, which were compatible with different types of pressure cookers, could be used with Hawkins pressure cookers as well. Further, Murugan accused Hawkins of attempting to dominate the market for gaskets in the country. The case was decided in favour of the defendant, with the judge observing that the sole purpose behind filing the suit was to create a monopoly over the gasket market. Hawkins wanted to ensure that third parties like Murugan were unable to sell gaskets through litigation. Further, the court agreed with Murugan that the intention behind the use of the trademark

⁵⁶ Hawkins Cookers Ltd. vs Murugan Enterprises, (2008) RFA(OS) 09/2008

was not to mislead consumers but merely indicate a certain feature, the same would not amount to infringement.

The decision of the High Court varies from the one in *Edible Arrangements Int'l, LLC v. 1-800-Flowers.com, Inc.*, taken up in the United States. The difference in decisions, the researcher submits, arise from the respective courts' determination of infringement. While the conduct of Murugan was explicitly deemed not to amount to trademark infringement, the conduct of 1-800-flowers raised reasonable suspicions behind its use of the trademark. The issue of market dominance is only ancillary to the primary issue of trademark infringement. This is further evidenced by the fact that the decision was overturned by a division bench in 2012⁵⁷. The court, in appeal decided in favor of Hawkins, stating that the facts of the case did not fall under the exception of Section 30(2) which states that "A registered trademark is not infringed where the use in relation to goods or services indicates the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services or other characteristics of goods or services."⁵⁸ In appeal, the Division Bench did not even discuss the issue of possible abuse of dominance by Hawkins.

In the context of mergers, trademarks have been held to be assets for the purpose of the Competition Act. In 2015, the CCI penalized ITC for not notifying a combination wherein it acquired the marks 'Shower to Shower' and 'Savlon' from Johnson & Johnson.⁵⁹ Item 3 under Schedule I of Competition Commission of India (Procedure in regard to the transaction of business relating to combinations), 2011 (as amended) (**Combination Regulations**)

⁵⁷ *Id.*

⁵⁸ The Trade Marks Act, 1999 Section 30 (2).

⁵⁹ Anshuman Sakle, *The CCI Reinforces Trademarks are Assets*, CYRIL AMARCHAND MANGALDAS (July 20, 2019, 5:00 PM), <https://competition.cyrilamarchandblogs.com/2018/01/cci-reinforces-trademarks-assets/>.

provides an “exemption for acquisition of assets not directly related to business activity of the party acquiring the assets or made solely as an investment or in the ordinary course of business so long as such an acquisition *inter alia* does not lead to acquisition of control of the enterprise whose assets are being acquired.”⁶⁰ While ITC claimed that the trademarks were not related to its business activities and were in the ordinary course of business, CCI disagreed.

The issue of trademarks and IPRs was appropriately summarized in the 1990s by the MRTP Commission in the case of *Dr. Vallal Peruman v. Godfrey Phillips (India) Ltd.* The commission, in this case, observed that the right to use the trademark can be exploited only according to the terms and conditions of the grant of such right. If the trademark is “misused through manipulation, distortion, contrivances, and embellishments”⁶¹ while presenting the good for sale or during its promotion- thereby misleading the customer- an action can be brought. “The suit can thus be brought in case there is an abuse of the right protected.”⁶² The same principle was also applied in the case of *Manju Bharadwaj v. Zee Telefilms Ltd.*⁶³

It is evident that not enough disputes have come to the notice of the Commission and the courts to establish consistent principles. However, with increased reliance by companies on advertising and using distinguished marks, more suits for infringement are likely to arise in the coming years. It can be inferred that the Indian courts will not blindly follow the path laid by American and European courts, but will settle cases through their own unique approaches. It will be interesting to see how courts deal with cases of trademark

⁶⁰ Competition Commission of India (Procedure in regard to the transaction of business relating to combinations), 2011, No. 3 of 2011.

⁶¹ *Vallal Peruman And Dileep Singh Bhuria v. Godfrey Phillips (India) Ltd* (1995) 16 CLA 201.

⁶² *Id.*

⁶³ *Manju Bhardwaj v. Zee Telefilms Ltd. And Others-* (1996) 20 CLA 229.

exhaustion and parallel imports as well as questions of the extent of monopoly power conferred by trademarks.

This chapter has thoroughly examined the various issues that arise out of the interface of Trademark and Competition law. Through American jurisprudence, we discussed how the lack of sufficient market power of trademark can come in the way of holding trademark owners liable for anticompetitive practices. In the European context, we observed the trend of upholding the principle of exhaustion to the detriment of proprietors. Back home, we saw that the conflicts are few and ancillary to issues of infringement. Issues of sub-markets, tying agreements, etc. will be determined as they arise in front of Indian courts.

Irrespective of the geographical context, courts will have to carefully deal with this issue due to the unique place of trademarks in the world of IP. On one hand, trademarks are lauded as vehicles of consumer empowerment, allowing buyers to differentiate and make informed choices. On the other hand, they are maligned as instruments of customer manipulation of power-hungry corporations. Combined with powerful advertising, trademark rights can easily be used to unfairly influence consumers, adversely affecting public good. This dual aspect of trademarks needs to be kept in mind by policymakers and courts if they are to succeed in achieving the utopian balance between competition concerns and IP rights that they seek.

[IV.] CONCLUSION AND SUGGESTIONS

The conversation about the interface of intellectual property rights and competition law is one about liberalized economies, financial growth and rights of IP holders. However, it is also a commentary on the human tendency to innovate and dominate. Intellectual property rights are a dynamic manifestation of our creative capacities. Throughout the course of history, human beings have employed their capability to innovate to make life easier. From the invention of the wheel to the unveiling of the super drone, history of humankind is fraught with brilliant examples of ingenuity. Our quest to find comfort eventually led to accumulation of wealth with the help of private property and not just lands, buildings but our intellect itself became a part of it.

Legal protection grants us ownership of our 'intellectual property', allowing us to make, use, and sell it to the exclusion of others. However, along with originality, greed characterises human nature too. At the most fundamental level, the yearning for accumulation of wealth beyond what a person or a company fairly deserves is what creates the need for competition law. This pursuit of wealth and dominance often involves the use of profitable resources, including intellectual property. Investigation of this phenomenon is one of the major themes that drive the entire intellectual property rights-competition law debate.

A few core discussions undertaken in this article have been summarized below:

A. Need for further development of legal literature in India:

In comparison with the European Union and the United States of America, the literature available in India is considerably low. To a certain extent, this can be attributed to the period of time for which the two disciplines have been around in these regions. For example, the history of intellectual property rights in Europe goes back all the way to medieval Europe, while it was only in 1856 IPRs was first recognized in India. The genesis of competition law in the United States can be traced back to the Sherman Act in 1890 but the Monopolies and Restrictive Trade Practices Act in India was only passed in 1969. However, it cannot be denied that Indian the Indian judicial system, especially the CCI, has been very proactive in the development of the two disciplines.

India needs to take lessons from the European Union where rules and enforcement regulations are regularly published in response to the shifting economical scenarios and technological advancements. In addition to official guidelines by concerned authorities, academic research on the subject will also prove fruitful.

B. Existence of a wide subject matter of decisions:

It can be seen that the subject matter of decisions was substantially wide, dealing with an extensive range of goods and services. From program lists to flowers and from movies to lemon juice, the relevant subject matter shows that the intermingling of competition law and IPR affects a wide variety of markets, and therefore, rights of a diverse selection of competitors. Access of consumers to goods and services necessary for sustenance, entertainment and other purposes is thus an important concern in the discussion.

C. *Concluding remarks: Balancing Competition Law and Intellectual Property Rights*

In preceding chapters, we saw that the interplay of IPR and competition law across the United States, European Union and India involves a wide variety of issues including price fixing, horizontal agreements, parallel imports etc. Therefore, establishing uniform principles to balance competition law and intellectual property rights is not a straightforward task. Further, differences among the nature of trademarks and copyrights, for instance, with regard to the extent of monopoly power inherent in them poses further complications in achieving this balance.

With regard to Indian law, the researcher believes that Section 3(5) of Competition Act, 2002 must be reworked to be more extensive, insofar as it should ideally include conditions under which the exception shall be made available. Furthermore, the meaning of the term "reasonable conditions" should be explained to aid interpretation by the courts. In addition to this, the definitions of 'dominant position' and 'relevant market' in the Act should be modified, wherein the definition of the former needs to take into account the nature of monopoly power inherent in intellectual property rights, which may vary from how dominant position is determined in the market in general.

Consumer welfare is not achieved merely by restricting anti-competitive practices of IP holders. Constant and meaningful innovation in different sectors is also necessary to achieve this purpose. Therefore, it is to be ensured that the limitations on exercise of intellectual property rights do not amount to stifling of innovation. Focus on welfare of the masses, combined with concern for innovation will prove crucial in achieving a holistic balance between competition law and intellectual property rights.

CONCILIATING THE CONUNDRUM OF ARBITRABILITY OF FRAUD IN INDIA

By Amisha Aggarwal & Aarushi Kapoor*

The development of jurisprudence on arbitrability of disputes has been a fascinating point of discussion for all the legal enthusiasts. There is an urgent need to revise and settle certain provisions of the Act to deal with the problems that frequently arise in the arbitral process. The attempts to restructure India's image as pro-arbitration will become futile if the courts continue to evolve baseless tests and methods to undermine the authority of arbitral tribunals. Therefore, for the interest of predictability, the parties to an agreement need to have a clear idea regarding the scope of the application of their autonomous arbitration clause and the effect that it would create on their rights. This paper examines the fundamental idea behind the arbitration law while dealing with the application of arbitration in the event of fraud. It highlights the importance of the doctrine of separability and the interpretation of an arbitration contract in the same light to examine the validity of the alleged fraudulent contracts. Furthermore, it critically examines the grounds for excluding such contracts from the scope of arbitration. The misapplication of the theory of validity and invalidity (existence) of contracts at the discretion of the courts, to the disputes involving fraud, has led to a miscarriage of justice. The paper seeks to solve the conundrum over the treatment of void and voidable contracts in terms of arbitrability and substitutes the 'serious fraud' test laid down by the judiciary with an alternate test on the same lines with an intent to uphold

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the spirit of arbitration which severely gets crushed otherwise.

Keywords: Arbitration, Courts, Void, Voidable, Separability, Fraudulent Contracts

[I.] INTRODUCTION

Arbitration has become one of the most popular alternative dispute resolution modes and is being increasingly utilized in democratic countries.¹ In today's scenario, the business community has been found to be the most arbitration-friendly. Parties to a commercial contract usually include an arbitration clause thereby intending to elude the expensive and time-consuming court proceedings. The importance of arbitration can be gauged from the fact that it has been seemed up to as a method to ensure litigant public's faith in the speedy process of resolving disputes.² Apart from this, party autonomy, equality of treatment, confidentiality, informal procedure, flexibility are some of the advantages of arbitration. Arbitration proceedings in India are governed by the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act of 1996"). This act is modelled on the UNCITRAL Model Law. The current law has a lot of shortcomings and lacunae. Moreover, the interpretation and application of laws subsequent to the Arbitration and Conciliation (Amendment) Act of 2015³ and 2019⁴ have generated a lot of judicial speculation and conflict.

Though arbitration has been identified as an expeditious means to resolve conflicts but the reluctance of the traditional courts to let

¹ O.P.MALHOTRA, LAW AND PRACTICE OF ARBITRATION AND CONCILIATION 81 (3rd ed. 2014).

² State of Jammu Kashmir v. Devdutt Pandit, AIR 1999 SC 3196 (India).

³ The Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2015 (India).

⁴ The Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of Parliament, 2019 (India).

tribunals function independently has led to major problems. The interference of the court in the matters wherein the tribunals have an independent jurisdiction nullifies the object of the implementation of the Act. Section 5⁵ of the Act of 1996, enumerates the extent of a judicial intervention despite which the courts have been found to override their power to intervene in the arbitration proceedings. One such issue where the courts have exceeded their powers is that of 'Fraud'.⁶ The courts have classified fraud under the head of non-arbitrable issues. Some of the recent judgments have made a distinction between serious and non-serious allegations of fraud and the cases falling in the first category have been kept out of the purview of arbitration, one of the reasons stated by the court includes complexity of the matter and evidence which make these issues non-arbitrable. This indicates a lack of trust of the courts in the arbitration system and the desire to not let off the power of adjudication of disputes to another authority.

A. Fraud

Fraud cannot be defined in a single string of words and has a wide connotation. Fraud is a misrepresentation of the truth or concealment of a material fact to induce another to act to his detriment.⁷ Fraud can be of different forms and hues. Its ingredients are an intention to deceive, use of unfair means, deliberate concealment of material facts, or abuse of a position of confidence.⁸ The Black's Law Dictionary defines 'fraud' as concealment or false representation through a statement or conduct that injures another who relies on it.⁹ Fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to

⁵ The Arbitration and Conciliation Act, No. 26 of 1996, Section 5.

⁶ *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd*, AIR 2011 SC 2507 (India).

⁷ *Ramesh Kumar v. Furu Ram*, (2011) 8 SCC 613 (India).

⁸ *A. Ayyasamy v. A. Paramasivam & Ors*, (2016) 10 SCC 386 (India).

⁹ *See id.*

surrender a legal right.¹⁰ The Indian Contract Act, 1872 (Hereinafter referred to as ICA, 1872) considers free consent¹¹ as an essential for determining the validity of any contract. Fraud¹² has been defined by the ICA, 1872 and any agreement vitiated by fraud will be voidable.¹³

The main factor which decelerated the acceptance of arbitration as an alternative to court proceedings whenever the subject matter of the dispute was affected by fraud, could be attributed to the orthodox view, which states that “nothing can come from nothing”, i.e. if the contract was repudiated or was void ab-initio, the arbitration clause contained within would also be held void.¹⁴ The jurisdiction of the arbitral tribunal stems from the arbitration clause contained in the contract and in the event of the latter (contract) being void, the former (clause) would not sustain.¹⁵ Therefore, the courts on such grounds resist the reference of the matter to the arbitral tribunal.¹⁶

Accepting the will of the parties to refer to arbitration, the Legislature has never accepted any ground on which a subject matter could be restrained from being tried under it. Aiming to ensure minimal judicial intervention on the self-interpreted grounds of the court like that of the validity of a contract, the legislature incorporated the principle of Kompetenz-Kompetenz.¹⁷ It entails within itself the principle of separability, as per which, the arbitration clause is treated separately from the rest of the contract.

¹⁰ Shrisht Dhawan v. Shaw Brothers, (1992) 1 SCC 534 (India).

¹¹ The Indian Contract Act, No. 9 of 1872, Section 10.

¹² See *id.* Section 17.

¹³ See *id.* Section 19.

¹⁴ Jureidini v. National British & Irish Millers Insurance Co. Ltd. [1915] AC 499 (U.K.).

¹⁵ See *id.*

¹⁶ Monro v. Bognor Urban District Council (1915) 3 Eng. Rep. 167 (KB).

¹⁷ *Supra* note 5.

Therefore, the arbitration clause would not be affected by defects related to the underlying contract.¹⁸

[II.] DOCTRINE OF SEPARABILITY & FRAUD

*Heyman v. Darwins*¹⁹ came to be cited as a prime authority for upholding the principle of separability which established that “the arbitration clause would be considered ancillary to the main contract.”²⁰ The arbitration agreement existing either as a separate agreement from the main contract or as a clause within the main contract is to be construed separately to the extent that the infection of fraud in the main contract would not *ipso jure* question the validity of the arbitration agreement unless the contract itself was *void ab initio*.²¹

The Arbitration agreement is the foundation of the entire process of arbitration and it is this document that gives the arbitral tribunal the authority to adjudicate upon a dispute comprehended by it. This agreement, in turn, delineates the scope and extent of such jurisdiction. An arbitration agreement and its essentials have been enumerated in Section 7 of the Act of 1996.²²

¹⁸ D. SUTTON, JR. ET AL., RUSSEL ON ARBITRATION 15 (23rd ed. 2007); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 968 (2nd ed.2014).

¹⁹ [1942] AC 356 (HL).

²⁰*Bremer Vulcan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd* (1981) AC 909 (U.K.).

²¹*Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd* (1992) 1 Lloyd's Rep. 81 (KB).

²² *Supra* note 5, Section 9(4).

A. Arbitration Agreement v. Main Agreement

The arbitration agreement may be contained in the main agreement or in the form of a separate agreement.²³ The main agreement refers to the agreement that defines the contractual obligations of the parties, whereas the arbitration agreement refers to either a separate clause contained in the main agreement or a separate agreement to resolve disputes arising out of the primary contract through arbitration.²⁴ The arbitral clause is always distinct from the main contract. It can be a covenant in a separate contract which is referred to in the contract between the parties.²⁵ This principle of autonomy of the arbitration agreement has been recognized in the international law.²⁶

B. Competence-Competence Principle

This principle recognizes the inherent power of the tribunal to decide on its own jurisdiction.²⁷ Once the parties formulate a valid arbitration agreement, the arbitral tribunal derives its power from such an agreement to decide on the issue of arbitrability. The principle empowers the tribunal to limit judicial interference in a matter wherein the parties challenge the validity of the parties' contract or the arbitration clause in such a contract.²⁸

²³ *See id.*, Section 7(2).

²⁴ NIGEL BLACKABY, ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 117 (Oxford University Press, 5th ed. 2009).

²⁵ *Supra* note 21, Section 7(2).

²⁶ The United Nations Commission on International Trade Law [UNCITRAL] Rules, 1976, art. 21.2.

²⁷ *Supra* Note 5, Section 16.

²⁸ The United Nations Commission on International Trade Law [UNCITRAL] Model Law, 1985, art 16(1).

C. Effect of Fraud on Annulment of the Main Contract

Section 16(1) of the Act of 1996, encapsulates both the principles of separability²⁹ and competence-competence³⁰, and thus ensures autonomy and effectiveness of the arbitration law. The detachment of the arbitration agreement from the main contract helps it survive the demise of the main contract. The validity of the arbitration agreement does not depend upon the validity of the main agreement.³¹ The claim of one of the parties of the total breach of contract is not destroyed for all purposes, instead, it survives for the purpose of determining the claims arising out of it and hence, the arbitration clause serves as a mode of settlement.³²

The survival of the arbitration agreement is obvious for it is the mode of settlement and not the purpose of the main agreement.³³ "The arbitration agreement must be treated as a distinct agreement and can be void or voidable only on grounds which relate directly to the arbitration agreement."³⁴ In case of fraud, the agreement will be voidable according to the ICA, 1872.³⁵ Thus, such a contract falls in the category of contracts that though valid at the time of entering into the agreement but becomes invalid at a later stage due to various reasons (such as fraud), better known as voidable contracts.³⁶ According to the power entailed under Section 6 of the Act of 1996, the tribunal enjoys exclusivity in the issue of deciding

²⁹ *Supra* note 5, Section 16 (1)(a).

³⁰ *See id.*

³¹ *Supra* note 24, at 310.

³² *See id.*

³³ *Heyman v. Darwins* (1942) AC 356 (U.K.).

³⁴ *Fiona Trust and Holding Corp v. Privalov* (2008) 1 Lloyd's Rep. 254 (QB).

³⁵ *Supra* note 11, Section 2(j).

³⁶ *Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd.* [2007] UKHL 40.

the existence of the arbitration clause vitiated by fraud.³⁷

*D. Overriding power of Section 16 on Section 8 & Section 11:
Indian Arbitration Act, 1996*

Under Section 8 of the Act of 1996, the court is conferred with a limited power to examine the existence of the arbitration agreement. The court was granted a similar authority prior to the repeal of Section 11 (6A) of the Act of 1996.³⁸ Section 11 of the Act of 1996 enumerates in detail the procedure for the appointment of arbitrators with an intent of empowering the Court to examine and ascertain only the strict existence of an arbitration agreement.³⁹ The Supreme Court exercised this power under the garb of Section 11(6A) of the 2015 Amendment to the Act of 1996, by emphatically pronouncing its ambit which was restricted to holding no other enquiry except from that on the mere existence of arbitration agreement.⁴⁰ However, the instances of ruling out the jurisdiction of arbitral tribunals with regard to the agreements infected by fraud, exhibit the Court's repeated intervention and intrusion.

Hence, in a case where parties take recourse to Section 8 or Section 11 prior to Section 16 then such an action will grant a power to the court to decide the jurisdictional issues stripping of the power of the tribunal under Section 16 of the Act of 1996.⁴¹ Dissenting from the majority judgment, C.K. Thakker J. stated that "*Section 16 is a self-contained code as regards the*

³⁷S.B.P & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618 (India).; Kvarener Cementation India Ltd. v. Bajranglal Agarwal (2012) 5 SCC 214 (India).

³⁸ *Supra* note 4.

³⁹ Duro Felguera S.A. v. Gangavaram Port Limited, (2017) 9 SCC 729 (India).

⁴⁰ Hyundai Engineering and Construction Co. Ltd & Ors, Civil appeal No. 8146 of 2018.

⁴¹ *Supra* note 27.

challenge to the jurisdiction of the arbitral tribunal.” The court is not empowered to enter into the legislative wisdom and thus has a mere power to interpret the provision as it is. Section 16 confers express power on the arbitral tribunal to rule on its own jurisdiction.⁴² Also, the power of the court under Section 8 is in the nature of an obligation to refer the parties to arbitration in the existence of an arbitration agreement.⁴³

However, amendment of 2019 to the Act of 1996, proposes to take away even the residuary powers of the Court in the matters of arbitration by repealing Section 11(6A) of the Act of 1996.⁴⁴ Such a repeal of Section 11(6A) of the Act is unfortunately likely to invite more litigation, thereby defeating the aim of speedy resolution. While it is imperative to minimize overreach of the Courts to achieve expeditious results through arbitration, some amount of judicial interference is certainly important to incorporate a degree of certainty.⁴⁵ However, in *absentia* of apt clarifications, such conundrums are likely to prevail and complicate the ends of arbitration.

⁴² *See id.*

⁴³ P. Anand Gajapathi Raju v. P.V.G. Raju, (2000) 4 SCC 539 (India). ; Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleums, (2003) 6 SCC 503 (India).; Sundaram Finance Ltd. v. T. Thankam, Branch Manager, (2015) 2 SCC 66 (India).; Magma Leasing and Finance Ltd. v. Potluri Madhvilata, (2009) 10 SCC 103 (India).

⁴⁴ *Supra* note 4.

⁴⁵ *Supra* note 42.

[III.] EXCLUSION OF FRAUD FROM ARBITRATION

The arbitrability of certain disputes has always been a conflicted affair. The grounds for exclusion of disputes from the jurisdiction of the arbitral tribunal have been enumerated in various national and international cases. The issue of non-arbitrability of fraud remains unsettled. While dealing with cases where fraud is of such a nature that permeates the entire contract including the agreement to arbitrate thereby in those cases where fraud goes to the validity of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself, should the tribunal exercise the power to arbitrate on such matters?

The term 'arbitrability' encompasses various factors- (i) whether there is an arbitration agreement, (ii) whether the dispute is beyond the scope of the arbitration agreement, and, (iii) whether the subject matter of the dispute is arbitrable.⁴⁶ The conundrum has been solved with respect to (i) the effect of fraud on the arbitration agreement (ii) and the scope of the arbitration agreement (iii), but the third issue that considers 'fraud' as a subject matter outside the scope of arbitration is still disputed. The act does not make any provision regarding the exclusion of any category of disputes from arbitration.⁴⁷

It is important to note that for determining the arbitrability of any matter, the maintainability of such proceedings has to be established. The authority of the *Booz Allen*⁴⁸ case becomes questionable on the ground that while enlisting the exceptions of arbitrations, the Court has not gone into the concept of the procedural aspect of arbitration instead it has analysed the issues from a substantive point of view.

⁴⁶ *Supra* note 6.

⁴⁷ *Supra* note 7.

⁴⁸ *Supra* note 37.

The analysis of the *Booz Allen* case helps us conclude the following exceptions or grounds of exclusion from arbitration, explained below in detail.

A. Public Policy

In accordance with the Indian perspective, public policy in a narrow sense implies⁴⁹ (i) the fundamental policy of Indian Law, (ii) the interests of India, (iii) Justice or Morality, (iv) something that is patently illegal⁵⁰. It does not remain static⁵¹, therefore is a dynamic concept. The courts have made public policy an exception but failed to give the reasoning behind it. The assumption for the decision of excluding public policy matters from arbitration could be the incompetence of the arbitrators to decide on the given issue.

However, this mistrust appears misplaced as an arbitrator is empowered to do all that a civil court can do.⁵² Thus, the arbitrators would be in a better position to analyse whether a particular contract is fraudulent in nature or not. The settled law on the topic of serious allegations of fraud being considered by the court⁵³ and not the tribunal on the ground that the examination of complex evidence of such a dispute is beyond the power of tribunal is flawed. Moreover, arbitrators could be more qualified than the judges deciding a dispute as they may have expertise in the area.⁵⁴

⁴⁹ *Renusagar Power Co. Ltd. v. General Electric Co.*, (1994) 1 SCC 644 (India).

⁵⁰ *Oil and Natural Gas Corporation (ONGC) v. Saw Pipes Ltd.*, (2003) 5 SCC 705 (India).

⁵¹ *Murlidhar Agarwal v. State of Uttar Pradesh*, (1974) 2 SCC 472 (India).

⁵² *Eros International Media Ltd v. Telex India Pvt. Ltd.*, 2016 AIR 54 (Bom.) 2179.

⁵³ *Ivory Properties and Hotels Private Ltd v. Nusli Neville Wadia*, (2011) 2 Arb LR (Bom) 479.; *CS Ravishankar v. CK Ravishankar*, (2011) 6 LJ (Kar) 417.

⁵⁴ MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 2 (2nd ed. 2012).

B. Rights in Rem & Rights in Personam

A right in rem is a right exercisable against the world at large whereas right in personam is an interest protected solely against specific individuals. The *Booz Allen* case classified this as one of the tests to make any dispute amenable to arbitration. The rule of differentiation is faulty for the reason that the 'third party rights' have been mixed with the concept of 'right in rem'. The arbitral tribunal derives its power of adjudication from the arbitration agreement signed by the parties which are presumed to affect the parties to the agreement and no third party.

This differentiation emanates from the public policy test and given the wide amplitude of public policy definition⁵⁵, each and every dispute would be a violation of a right in rem and thus non-arbitrable. The conscious decision of the parties to decide the dispute through arbitration and conferring power upon the tribunal makes it clear that they are seeking relief against the actions of each other and not against the world at large, thus, the dispute is essentially against the right in personam and not right in rem. Therefore, any dispute relating to the fraudulent conduct of the parties whether relating to the arbitration agreement or the main contract is a subject matter of arbitration.

C. Special Legislation

As part of the welfare scheme of the Government, it might create special forums and grant exclusive jurisdiction to a specified court or commission or tribunal other than the ordinary courts for expediting the process of justice or confer extra power on such court/ tribunal/ commission⁵⁶. The *Booz Allen* case lists out the non-arbitrable issues on the above ground but it fails to recognize the distinction between the

⁵⁵ *Renusagar PowerCo. Ltd v. General Electric Co.*, (1994) 1 SCC 644 (India).

⁵⁶ *Supra* note 8.

taking away of a remedy completely and the mere option to select a forum for seeking that remedy⁵⁷. Allegations of fraud are not alien to the ordinary civil courts. Generations of judges have dealt with such allegations in the context of civil and commercial disputes. If an allegation of fraud can be adjudicated upon in the course of a trial before an ordinary civil court, there is no reason or justification to exclude such disputes from the ambit and purview of a claim in arbitration.⁵⁸

Hence, the misapplication of law to exclude fraud from arbitration is a matter of concern. Such a law that snatches away the rights of the individuals appears unjustified. In actual sense, the law that limits the jurisdiction of the arbitral tribunal on such unjustified grounds would itself be opposed to the public policy, and not vice-versa. Thus, the analysis of the court does not hold good, as it does not consider the procedural aspects of arbitration together with its substantive aspects.

[IV.] INTERPLAY OF JUDICIAL INTERPRETATION & LEGISLATIVE INTENTIONS

Owing to the inability to indulge in strenuous fact-finding and lack of allegiance to judicial rules of procedure, arbitration continues to be considered as a compromise, which the Judiciary does not seem to consider as an apt forum for determining the complex questions of a void, voidable and *void ab-initio* dispute. However, this approach of the judiciary in doubting the efficiency of arbitration has given it a dominance over the latter with respect to the determination of

⁵⁷ V.H. Patel & Co. & Ors. v. Hirubhai Himabhai and Ors., (2000) 4 SCC 368 (India).

⁵⁸ *supra* note 8.

complex subject matters.

A. *English Jurisprudence & Fraud*

Despite being an arbitration-friendly jurisdiction, English law has explicitly favoured the courts' discretion while deciding the question of arbitrability. This superiority of the judiciary was very well brought forward in the verdict of first of its kind case of *Wallis v. Hirsch*⁵⁹ wherein the Court narrowly interpreted Section 11 of the Common Law Procedure Act,⁶⁰ to deny the proceedings in support of arbitration on the plea of non-contemplation of fraud. This indicates a lack of faith where the judiciary suspects the arbitrators' ability to adjudge the matters vitiated by fraud. The judiciary has been justifying its expansive interference on the grounds of the gravity and reputational implications of an allegation of fraud that requires stringent evidential and factual findings which it feels should be better tried before an experienced judicial body.

It was the verdict of MR Jessel of the Chancery Division in *Russel v. Russel*⁶¹ (hereinafter referred to as 'Russel') which holds utmost relevance in limiting the scope of the judicial intervention in arbitration wherein the judicial discretion to deny reference to arbitration should be exercised only as a 'matter of course for any sufficient reason'. This means when the party against whom fraud is alleged requires, the same which shall to be subjected to a prima facie satisfaction of the court of the existence of serious allegations of fraud and not just the mere frivolous allegations of fraud used as tactics to avoid arbitration and delay justice.⁶² This

⁵⁹26 L. 72 (1856).

⁶⁰The Common Law Procedure Act 1854, 17 & 18 Vict. Capt. 125 (Eng.) Section 11.

⁶¹ *Russel v. Russel* (1880) 14 Eng.Rep. 471 (Ch.D.).

⁶² *Hoch v. Boor* (1880) 43 LT 425 (U.K.).

'sufficient reason' was interpreted to include public interest in *Cunningham-Reid & Anr. v. Buchanan-Jardine*.⁶³

B. Indian Jurisprudence & Fraud

The Indian Judiciary has never been comfortable with the notion of referring the matters of discord to arbitration in substitution of court proceedings especially if the same was tainted by fraud or illegality. This was the phase of the Indian Judiciary wherein a frivolous apprehension of fraud was enough to oust the jurisdiction of the arbitrator.⁶⁴ The subsequent judicial pronouncements showcased minute improvements, especially wherein the possibility of misuse of such a discretionary power conferred to the courts under Section 34 of Arbitration Act, 1940⁶⁵ to avoid arbitration on grounds of non-arbitrability of fraud for stalling the proceedings was recognized.⁶⁶ Hence, the exercise of such discretion had to be developed in the light of facts and circumstances of each case. Russel was considered an authority in this regard, "*it was only in cases of allegations of fraud of a serious nature that the court refused arbitration.*"⁶⁷

Hence, the courts started recognizing more rational grounds for the exclusion of arbitration of any dispute and ended up concluding that any prima facie case of allegations involving complicated questions of law are held to be serious

⁶³ *Cunningham-Reid and Anr v. Buchanan-Jardine* (1988) 1 W.L.R. 678, 688 (U.K.).

⁶⁴ *Pramada Prasad Mukherjee v. Sagarmal Agarwalla*, AIR 1952 Pat. 352 (India); *Narsingh Prasad Boobna v. Dhanrai Mills*, ILR 21 Pat. 544 (India).

⁶⁵ The Arbitration Act, No. X of 1940, INDIA CODE (1940).

⁶⁶ *Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak and another* (1962) 3 SCR 702 (India).

⁶⁷ *Supra* note 5.

and would attract the jurisdiction of the court.⁶⁸

The coming decade witnessed the enactment of the Act of 1996.⁶⁹ Similar to its counterpart, the objective of this act was to ensure compliance with the UNCITRAL Model Law and the New York Convention.⁷⁰ This act was responsible for bringing dynamism in regard to the acceptance of arbitration by the court irrespective of arbitrability and non-arbitrability since Section 8 of the Act of 1996 snatched away such an opportunity from the court to evaluate if sufficient reasons existed to refuse parties to the arbitration.⁷¹ Despite the scope of discretion of judiciary being substantially narrowed down by the virtue of Section 8, the Madras High Court, kept on bargaining for an examination of the issue in question from the standpoint of shortcomings of arbitration proceedings in regard to their compliance.⁷² But at last, it never could have been capacitated to override the language of the legislature and ultimately held that in light of Section 16 of the Act of 1996, the arbitrator can look into all claims of fraud.⁷³

⁶⁸ *Supra* note 62.

⁶⁹ *Supra* note 54.

⁷⁰ *Konkan Railway Corporation Ltd. &Anr. v. Rani Construction Pvt. Ltd.*, (2002) 1 SCR 728 (India).

⁷¹ *Supra* note 5, Section 8(1).

⁷² *H.G. Oomor Sait & Anr.v. Aslam Sait* (2001) 2 MLJ 672 at para 28 and 29 (India).

⁷³ *M/s GDR Financial Services v. M/S. Allsec Securities Ltd.*, (2003) 115 Mad. 529 (India).

[V.] ARBITRABILITY & NON-ARBITRABILITY OF FRAUD: EVOLUTION TEST

The conundrum as to what constitutes 'serious allegation' accentuated in *N. Radhakrishnan v. Maestro Engineers*⁷⁴ before the Supreme Court of India. It was held that "the case which relates to allegations of fraud and serious malpractices can only be settled in court through furtherance of detailed evidence by either of the parties and such a situation cannot be properly gone into by the Arbitrator."⁷⁵ The verbosity on the part of the judiciary to interpret 'serious' has further convoluted the differentiation between the arbitrability and non-arbitrability of the subject matter of fraud.

However subsequent to the above-mentioned judgment, the High Courts of Delhi⁷⁶, Karnataka⁷⁷, and Bombay⁷⁸ began interpreting the hidden rationale and concluded that by differentiating between a mere allegation of fraud and serious allegations of fraud (which prima facie required an inquiry by the court of law), and held that the former could be subjected to the jurisdiction of the arbitrator while the latter in the light of its complexity could not, Hence, it was apt to be tried by the court. However, the test on which they demarcated the 'mere' and 'serious' allegations is still unknown.

The incorporation of Section 8 and Section 16 in Arbitration Act, 1996 was aimed at the recognition and enforcement of the principle of minimal interference of judiciary which forms the bedrock of

⁷⁴ (2010) 1 SCC 72 (India).

⁷⁵ *Supra* note 5.

⁷⁶ *Maruti Coal & Power Ltd. v. Kolahai Infotech Pvt. Ltd.*, I.L.R. (2010) Supp. (5) Delhi 491 at para 48 (India).

⁷⁷ *Sri C.S. Ravishankar v. Dr. C.K. Ravishankar*, 2011 (6) Kar.L.J.417 at para 7 (India).

⁷⁸ *Bharat Kantilal Bussa & Rita Bharat Bussa v. Sanjana Cryogenic Storage Ltd.*, Arb. Application No. 156/2012, Bom. HC at para 20.

UNCITRAL Model Law and 1958 New York Convention.⁷⁹ Unfortunately, all the judgments till *N. Radhakrishnan v. Maestro Engineers*⁸⁰ are not in consonance with the intention of the legislature which aimed at the question of arbitrability of the subject matter being adjudicated by the arbitral tribunal itself without demarcating any line of distinction between mere and serious allegations of fraud. However, such minimal intervention of the court was worded in the provisions of Section 8 of the Act which related to domestic arbitration, in the event in International Commercial Arbitration being dealt by Section 45 of the Act of 1996, the Court was required to prima facie intervene to check if the agreement is not inoperative or incapable of being performed.⁸¹ This is in line with the rider of Article 8 of UNCITRAL Model Law. Once the court is satisfied that the allegations of fraud and misrepresentation are not rendering the contract inoperative and incapable of being performed, the entire matter could be referred to an arbitrator.⁸²

The interpretation of Section 8 and 16 of the Act of 1996 and the subsequent judgments delivered time and again by the court of law fail to provide an arbitration-friendly jurisdiction in the country. This conundrum found its origin somewhere in the judgment of *Union of India v. Kishorilal Gupta*⁸³ and *Khardah Company v. Raymon & Co.*⁸⁴, wherein it was held that the arbitration agreement though collateral to but it is an integral part of the contract and perishes with the contract if the contract is held to be *non-est* or *void ab initio*.⁸⁵

⁷⁹ *Amr Amin Hamza EL Nasharty v J. Sainsbury Plcm*, [2007] EWHC 2618 (Comm) at 226 (U.K.).

⁸⁰ (2010) 1 SCC 72.

⁸¹ *Supra* note 5, Section 8 & 45.

⁸² *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte.Ltd.* AIR 2014 SC 968 (India).

⁸³ *Union of India v. Kishorilal Gupta*, AIR.1959 SC 1362 (India).

⁸⁴ AIR 1962 SC 1810 (India); ⁸⁴(2000) 2 SCR. 684 (India); AIR.2003 SC 2881 at para16 (India).

⁸⁵ *Union of India v. Kishorilal Gupta*, AIR.1959 SC 1362 (India).

Therefore in violation of the doctrine of separability of the arbitration clause from the main contract, the Indian Courts recognized that if the contract is voided on grounds of fraud or was obtained by fraud, the matter could not be referred to arbitration.⁸⁶

The court noted that a reference under Section 8 was peremptory in nature.⁸⁷ As long as “(1) there is an arbitration agreement; (2) a party to the agreement brings an action in the Court against the other party; (3) subject matter of the action is the same as the subject matter of the arbitration agreement; (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute”, it is obligatory to refer the matter to arbitration and nothing is left to be decided in the original suit.⁸⁸ The Court while deciding the matter with regards to Section 16 held that it is appropriate for “the Arbitral Tribunal to rule on its own jurisdiction including a rule on any objection with respect to the existence or validity of the arbitration agreement.”⁸⁹

These decisions were at par with the legislative intent and it was finally taken note of that in the event of application of doctrine of separability, the serious allegations of fraud and misrepresentation levied against the validity of the main contract would not take away the jurisdiction from the arbitrator to adjudicate the dispute, provided that the fraud does not taint the material validity of the main contract by infecting the arbitration clause as well.⁹⁰ Hence, the event of the main contract being vitiated by fraud would still invite arbitration because the arbitral tribunal derives its authority from the arbitration clause which by the virtue of doctrine of separability is distinct from the main contract and hence the same *ipso jure* is not vitiated by fraud. Therefore, with the jurisdiction of the tribunal

⁸⁶ Champa Pictures v. Md. Ibrahim, 1981 AIR 74 (Cal.) 89 (India).

⁸⁷ *Supra* note 84.

⁸⁸ *See id.*

⁸⁹ *Supra* note 83.

⁹⁰ *See id.*

being valid, all the questions of the validity of the contract could be dealt by the arbitrator. After having discussed the developments with respect to the arbitrability of fraud, the forthcoming subsection discuss its interpretation with respect to modern jurisprudence.

A. *Recommendations of 246th Law Report, 2014*

The 246th Report of the Law Commission of India⁹¹ on Amendments to the Arbitration and Conciliation Act 1996, commented on the working of the 1940 Act and 1996 Act.⁹² This was successful in bringing forth the major concern of the legislature, which was to accomplish the true spirit of arbitration in the country which in the presence of judicial intervention was a distant dream. The Commission recognizes that the judicial machinery provides the required support for the arbitral process. The paradox of arbitration as noted by a leading academician on the subject is that it seeks the co-operation of the public authorities from which it wants to free itself-⁹³ *“There is a need of harmonious relation between the courts and arbitral process wherein the judges undo the injustice inflicted upon a party seeking justice through arbitration, whereas, the arbitral tribunal focuses on its voluntary nature wherein the courts are expected to respect the discretion of the parties to formally withdraw from their ambit and submit themselves before arbitration.”*⁹⁴

⁹¹ AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT 1996, LAW COMMISSION OF INDIA, NO.246 (2014).

⁹² *Guru Nanak Foundation v. Rattan Singh*, (1981) 4 SCC 634.

⁹³ AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT 1996, LAW COMMISSION OF INDIA, NO.246 (2014).

⁹⁴ *Supra* note 1.

1. Addition of Section 11(6A)

The 246th report seeks to propose certain amendments in the Act for upholding the independence of the arbitral tribunal. To limit the judicial intervention under Section 5 of the Act of 1996 and Section 11(6A) would be inserted. Herein the judicial authority's role is just limited to satisfying itself with the 'prima facie existence' of an arbitration agreement. The word 'existence' has been interpreted to suggest factual existence either in express or implied form and compliance of Section 7 in terms of documentation.

For understanding the term 'factual existence' in relation to an arbitration agreement, reliance can be placed on *Khardah Company Ltd. V. Raymon and Co.(India) Pvt. Ltd.*,⁹⁵ in which the Supreme Court held that for ascertaining the terms of arbitration agreement between the parties, the court should look only to its language. However, it does not follow that it is only the language set out expressly which constitutes the terms of the contract between the parties. If on a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the party had agreed on a particular term, there is nothing in the law that prevents them from enforcing it. Therefore, the terms of the contract can be expressed in unambiguous words or implied via the intention and conduct of the parties. The latter proposition calls for the construction of the contract in the light of the surrounding circumstances in the absence of express words."⁹⁶ Therefore, in the event when the existence of the arbitration agreement is implied what becomes essential is that the parties must

⁹⁵ (1963) 3 SCR 183 (India).

⁹⁶ *Supra* note 1.

have consented to the same thing in the same sense and if their conduct is such that shows a pre-arbitration intention then the arbitration agreement should be respected.⁹⁷ Once the court is satisfied with the abovementioned formalities, the subject matter whatsoever should be referred to arbitration.⁹⁸

2. Addition of Section 16(7)

Point number 52 of the report stated that it is important to set the entire controversy about the arbitrability of agreements and contracts vitiated by fraud to rest, and make issues of fraud expressly arbitrable and thus has proposed amendments to Section 16.⁹⁹ This amendment with the insertion of subsection 7 to Section 16 bestowed arbitral tribunal with the power to make an award or give a ruling notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact or mere allegations of fraud, corruption, etc.¹⁰⁰

With the proposed amendments being incorporated via the enactment of the 2015 Amendment Bill, the era marking the commencement of arbitration-friendly judgments came into being, with the 'subject matter' of fraud being expressly declared as arbitrable. As already pointed out above, it has always been the discretion of the court to exclude certain disputes from the ambit of arbitration. Historically, the courts have held that certain disputes like criminal offenses of public nature, disputes

⁹⁷ *Supra* note 5, Section 13.

⁹⁸ Akanksha Tanvi, *Applicability of Section 11 (6A) Of the Arbitration And Conciliation Act, 1996 In Case Of An Conditional Arbitration Clause*, MONDAQ (Dec. 10, 2018, 5:46 AM), <http://www.mondaq.com/india/x/742124/Arbitration+Dispute+Resolution/Applicability+Of+Section+11+6A+Of+The+Arbitration+And+Conciliation+Act+1996+In+Case+Of+An+Conditional+Arbitration+Clause>.

⁹⁹ *Supra* note 5, Section 16.

¹⁰⁰ A. Ayyasamy vs. A. Paramasivam & Ors., (2016) 10 SCC 386 (India).

arising out of illegal agreements and disputes relating to statuses, such as divorce, disputes related to patents, trademarks, and copyright, anti-trust competition laws, insolvency and winding, bribery and fraud, cannot be referred to arbitration.¹⁰¹

B. Current Position of Fraud in the light of the Recent Judgments

The landmark judgment of *A. Ayyasamy vs. A. Paramasivam & Ors.*¹⁰² (Hereinafter referred to as “A. Ayyasamy”), discussed the issue of referring the disputes to arbitration, made under Section 8 of the act, a harmonious and liberal interpretation of Section 8, 16 and 11, led the judicial thinkers to the conclusion that “*a mere allegation of fraud in the pleading by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration. The allegations of fraud should not only be serious but also, such that might taint the material validity of the main contract to the extent affecting the arbitration clause, which by the application of doctrine of separability is separate and distinct from the main contract and nullity of latter does not ipso jure nullify the former.*” This judgment provided the Indian Jurisdiction with a rationale test to include fraud under the ambit of arbitration in all incidences barring few, which includes¹⁰³:

(a) Criminal offense, which is complicated in nature and requires an extensive investigation of evidence before any verdict is arrived at.

(b) Serious allegations of forgery/fabrication of documents supporting the occurrence of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract that includes the agreement to

¹⁰¹ See *Id.*

¹⁰² See *Id.*

¹⁰³ See *Id.*

arbitrate, thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself,¹⁰⁴ for which civil court happens to be appropriate forum than the Arbitral Tribunal.

Otherwise, it may become an easy tool in the hands of parties for avoiding the process of arbitration by simply using the device of making allegations of fraud and pleading that the issue of fraud needs to be decided by the civil court, which would entail delayed and cumbersome proceedings.”¹⁰⁵ The court specifically held that for those matters which involve a serious question of law, it becomes imperative to refer the same to the courts which are public and which are constituted under the laws of the country and not to the arbitral tribunals as they are a private forum chosen voluntarily by the parties to the dispute, therefore, reservation of these subject matters by the legislature for being exclusively referred to court as a matter of public policy stands valid.

This decision of the Court to bring fraud under the ambit of arbitrability was subsequently held to be good in law by the following judgments of *Ameet Lalchand Shah vs. Rishabh Enterprises*¹⁰⁶ and *Ravi Arya vs. Palmview Investments Overseas*¹⁰⁷, the Indian judiciary ultimately upheld the supremacy of the arbitral tribunal over civil courts even in the event of seriousness of fraud permeating the main contract, provided it does not question the material validity of the contract altogether by tainting the arbitration clause within it.¹⁰⁸

This has even been supported by the legislature, and it has consequently enacted the Arbitration and Conciliation Amendment

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶*Civil Appeal No. 4690 of 2018.*

¹⁰⁷AIR 2019 SC 569.

¹⁰⁸*See id.*

Bill, 2019 in furtherance of its stand to mitigate the judicial intervention in arbitration proceedings to the latter's detriment. The new amendment seeks to abolish Section 11(6A), thereby absolving the Court of its responsibility to satisfy itself with the existence of the arbitration agreement leaving it solely to the discretion of the arbitral tribunal. In light of the present amendment,¹⁰⁹ it can be adduced that except for the grounds mentioned in *A. Ayyasamy*, no subject matter tainted with mere or serious allegations of fraud could be excluded from the jurisdiction of arbitration.¹¹⁰

[VI.] ALTERNATE TEST OF ARBITRATION

In light of all the authorities which have been cited and interpreted in this paper so far, it becomes imperative to realise that over the span of time, various amendments to the principle Arbitration Act of 1940 have resulted in the country moving from the otherwise orthodox unfriendly and distrustful arbitration atmosphere, to a more arbitration-friendly and conducive environment in its consideration of fraud as an arbitrable subject matter. These amendments from 1996 to 2019 have limited the scope of the judiciary. While understanding the level of intervention of the judiciary in the arbitration proceedings under Section 8 of the Act of 1996 it is important to understand its development through various amendments that have graced the law dealing with Indian Arbitration.

From a stringent regulatory role conferred by Arbitration Act, 1940 wherein the judiciary took the responsibility to ascertain the material validity of the contract in terms of nullity and its void nature, the 1996 amendment did not materially alter the position

¹⁰⁹ *Supra* note 4.

¹¹⁰ *M/S Swatantra Properties (P)Ltd v. M/S Airplaza Retail Holdings Pvt, 2019(1) ALJ 409 (India).*

until the amendment of 2015 was implemented and the judiciary was confined to satisfying itself with the existence of the arbitration agreement. Prima facie, this seemed as if the role of the judiciary has been alleviated substantially however, practically the liberal interpretation of the word "existence" led to questions of the validity of arbitration agreement. As has been explained before the term existence is to be interpreted in a strict sense that is mere factual existence needs to be proven. The latest development in this stead has been marked by the 2019 Amendment¹¹¹ which has omitted Section 11(6A) of 2015 Amendment, therefore, conferring upon the arbitral tribunal the sole power of adjudicating the subject matter of arbitration by completely doing away with the possibility of judicial intrusion.

Therefore, in the present scenario, the cases show that the judiciary is bound to perform a mere supervisory role as to satisfy itself with mere factual existence of arbitration agreement and compliance of the formalities and documentation given in Section 7 of the Act of 1996 and nothing else.

Section 8 and Section 16 bring to light the inherent power of the arbitral tribunal to ascertain its own jurisdiction and thus limiting the scope of judicial interference. This points out that until and unless parties themselves do not allege allegations of nullity on the grounds of fraud on the arbitration agreement, judiciary itself cannot make a voluntary move in this regard, provided the allegations are not covered under the exceptions of *A. Ayyasamy*, wherein the jurisdiction of the arbitral tribunal will be *ipso facto* ousted.

Coming back to the incompetence of the courts to intervene to determine the validity of the main contract, the situation is relatively settled and decided. The application of the doctrine of separability is brought to being and hence, whenever a party alleges the vitiation

¹¹¹ See *id.*

of the main contract on the grounds of fraud, the decided cases and the pre-emptory law under Section 8 of the Act of 1996 holds utmost importance and with due allegiance towards them, the court finds it apt to apply the principle of separability separating the arbitration clause from the main contract and even if the latter is vitiated by fraud, it does not *ipso jure* taint the validity of the former. Hence, with the arbitration agreement being valid it confers jurisdiction to the arbitral tribunal which decides the issue of fraud in the main contract, provided the allegations of fraud are not covered under the exception propounded in *A. Ayyasamy's* case which *prima facie* excludes the jurisdiction of the arbitral tribunal.

As long as the arbitration agreement is valid, the jurisdiction of the tribunal to decide the fraudulent contracts can never be doubted. The validation of arbitration agreement is of utmost relevance, it is the sole source from where the tribunal derives its authority. However, there can be an allegation of fraud covered by the exceptions of *A. Ayyasamy's* against the arbitration agreement or the arbitration clause contained in the contract thereby, excluding the subject matters from the ambit of arbitration. There can also be a situation wherein despite the fraud allegations against the main contract, it permeates the same to the extent as to question the material validity by tainting the arbitration clause with fraud as well (covering the exceptions of *A. Ayyasamy*). However, in the event where the party alleges fraud which is covered under the exceptions of *A. Ayyasamy*, against the arbitration clause itself, the question of whether the tribunal will have a legitimate jurisdiction to decide such fraudulent dispute is answered differently both by the legislature and judiciary. The law and logic somewhere swing in doldrums amidst the two diametrically opposite views held by the principal organs of governance.

A. 'Flawed Test' Examination

The legislative intent is expressly incorporated in Section 16 of the Act of 1996, wherein the arbitral tribunal has been conferred exclusive power to decide on its own jurisdiction. The literal interpretation of the said provision makes the tribunal competent to determine the validity of the agreement even if it is alleged to be tainted by fraud. However, this view no matter is in complete harmony with the provisions of Section 5 of the Act of 1996 which calls for minimal judicial intervention in the matters of arbitration, yet the same could act to the detriment of judicial principles.

It has been a well-established principle that the tribunal derives its jurisdiction from the arbitration agreement and it is by the virtue of this jurisdiction that it adjudicates all the matters relevant to arbitration, even if it is vitiated by fraud. But, had the arbitration agreement actually been vitiated by fraud or any other sort of illegality, it would have been difficult to imagine the jurisdiction of the tribunal in the event of its parent agreement being void. Conferring the power to adjudicate on the validity of the agreement on the tribunal which owes its origin to a void agreement altogether and then subsequently adjudicating upon the validation of its void parent agreement stands bad in eyes of law.

The test propounded in the judgments cited above decides the arbitrability of the subject matter vitiated by fraud by differentiating between 'Serious' and 'Mere or Frivolous' allegations of fraud, wherein the former will be determined by the courts and the latter could be tried under the jurisdiction of the arbitral tribunal. However, the interpretation of these words has added to the conundrum, as to what constitutes serious and frivolous. There cannot be an airtight definition for the given words and therefore the scope is more likely to be deduced from

the facts and circumstances of each case. Such an uncertain interpretation amounts to vagueness and ambiguity of the propounded test which fails to decide on the matters immediately when they appear before the court.

B. Alternate Test: Void & Voidability

To avoid the above-mentioned complexity and miscarriage of justice, it is imperative to take into consideration the judiciary's opinion in *A. Ayyasamy* conferred itself the power to determine the validity of the arbitration agreement upon the tribunals. The Court opines of considering such cases wherein the foundation of the arbitration agreement is alleged to be seriously fraudulent as held in exceptions of *A. Ayyasamy's* case to be tried under its jurisdiction. As per the 246th Law Commission's Report on proposing the 2015 amendments to the 1940 Act, the judiciary needs to conclusively test the nullity and the void nature of the agreement.

Once it is determined if the matter is to be tried under court, does it by the very fact nullify the existence of arbitral tribunal? The same has to be determined by devising a test to differentiate the treatment of void and voidable contracts after conclusive consideration by the court. Thus, this paper proposes an alternative test that could substitute the already existing test to determine the arbitrability of the fraudulent contracts.

Fraud is both void and voidable as per the ICA, 1872.¹¹² The judiciary should further step in to differentiate between void and voidable agreements. The former remains frustrated

¹¹²*Supra* note 11, Section 23.

on account of illegalities¹¹³ whereas the latter remains vitiated by fraud, coercion, undue influence and the like.¹¹⁴ Justice V. Ramasubramanian, in recognizing the principle of separability¹¹⁵, elaborated that under Section 19 of the ICA, 1872, contracts vitiated were voidable i.e. they could be enforced at the option of the defrauded party and as a result, the premise that fraud vitiates all the contract could not be generalized to all contracts, and it must be left to the discretion of parties to the voidable contract that if they want to go ahead with arbitration. It is based on the premise that the voidable contract remains valid so long as the party whose consent was so obtained does not argue nullity. However, for all the contracts which are *void ab initio* on the grounds of illegality revolving serious questions of lawful determination, the judiciary should place itself above the tribunal and try the matters themselves, in the absence of a valid agreement from where the tribunal could derive its authority from.

However, in the scenario wherein the fraudulent contracts covered under the exceptions of *A. Ayyasamy*, when scrutinized by the court amount to the whole contract being void on grounds mentioned in Section 23 of ICA, 1872, the judiciary should have the power to reject the reference to arbitration in such situation, since no such jurisdiction stands conferred on the said arbitral tribunal.

The above test ensures that the judiciary to exploit every possible opportunity wherein the sanctity of the existence of arbitral tribunal could be valued and it is only in light of fraudulent contracts that are void as covered under *A.*

¹¹³ *Essar Steel India Ltd. v. The New India Assurance Co. Ltd.*, Arbitration Appeal No. 18 of 2013, at para 29 (India).

¹¹⁴ *See id.*

¹¹⁵ *Mohd. Akhtar v. Suman Jain & Ors.*, 2013 VII AD (Del.) 486, at para 13-14 (India).

Ayyasamy's case that it must take a positive stand.

[VII.] CONCLUSION

*“Interminable, time consuming, complex and expensive Court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes, avoiding procedural claptrap and this led them to Arbitration Act, 1940 (“Act” for short).”*¹¹⁶ The present condition of arbitration in India is miserable, the cruel power-struggle between the courts and the arbitral tribunal has ripped off the essence of arbitration. The mistrust of courts with respect to arbitration has led to an increase in the backlog of cases. Courts have evolved various tests to ensure that the parties take recourse to courts at a pre-arbitral stage depriving the parties of legal protection from the tribunals. The inadequacy of these tests¹¹⁷ would lead to India lagging behind in the race to develop new, speedy and better ways of dissolution of disputes. Thus, there is a need to evaluate these tests in light of the motive of giving arbitration a thrust and not otherwise. The alternate test of ‘void and voidable frauds’ would help us in preserving the same. The courts should respect the arbitration agreement between the parties and limit its interference only to the extent as provided in the Act of 1996. The existence of an arbitration agreement separate from that of the main agreement implies the parties’ intention to resolve all the disputes by arbitration, in no circumstances, the parties would wish to have questions of the validity or enforceability of the contract decided by the court and questions about its performance decided by the tribunal.¹¹⁸ “Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a

¹¹⁶ *Guru Nanak Foundation v Rattan Singh*, (1981) 4 SCC 634 (India).

¹¹⁷ *Supra* note 37.

¹¹⁸ *Premium Nafta Products Ltd. v. Fily Shipping Co. Ltd* [2007] UKHL 40.

forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. Minimizing the intervention of courts is again a recognition of the same principle.”¹¹⁹

¹¹⁹ *Supra* note 92.

WEAPONISED NARRATIVE AND ITS IMPLICATIONS ON INTERNATIONAL LAW

By Muskaan Wadhwa*

Wars are not only won by the sheer magnitude of military or economic ability but by the way adversaries manipulate narrative. This manipulation of narrative has the potential of destabilising global political environment and eliminating the need of using kinetic force altogether. Advancement in technology is further giving an impetus to State and Non-State actors to resort to manipulation of narrative to achieve their political goals. The employment of existing practices such as fake news, disinformation, propaganda and psychological operations in conjunction with technological advancement such as the use of automated bots and troll farms and advancement in various cognitive, behavioural and psychological studies makes the threat even more grave.

This Article is influenced by the White Paper, "Weaponised Narrative: A New Battlefield" written by Brad Allenby and Joel Garreau who consider weaponised narrative as a technique to foster falsehood, generate chaos, undermine rationality and to wrestle away popular support from one's opponents. This Article therefore examines weaponised narrative in light of the traditional modes of narrative dissemination relying on the paradigm provided by Walter Fisher. The risks posed by the tactical and strategic employment of weaponised narrative are examined by analysing Russia's annexation of Ukraine and its cyber meddling in the elections of the United States. The Article concludes by assessing the efficacy of the existing international legal framework and argues that there is a need for a

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contemporary interpretation of the extant international legal framework as well as the development of special rules to constrain the use of these techniques.

Keywords: Weaponised Narrative, Narrative Paradigm, Russia, Ukraine, United States, International Legal Framework

[I.] INTRODUCTION

The role of narrative in international relations has always been pronounced with Joseph Nye arguing during the time of cold war that international relations has become a matter of ‘whose story wins’.¹ Stories form a core element of human identity and wield the power to unite people, at the same time, if used strategically, they can be used to divide people and cause chaos. Narrative, a form of storytelling, acts as a power shifter in geo-political conflicts. It is for this reason that narrative forms a power resource in the international arena.

Today, narrative is acquiring a new dimension. Recent trends show an explosion of activity by state and non-state actors who manipulate narrative in order to influence global politics.² This manipulation of narrative seeks to undermine an opponent’s civilization, identity and will by generating complexity, confusion and political and social schisms.³ As a result, adversaries are able to exploit each other’s weaknesses and mitigate their strengths by

¹ Joseph Nye, *Public Diplomacy and Soft Power*, 616 AAPSS 94 (2008).

² Tim Hwang and Lea Rosen, *Harder, Better, Faster, Stronger: International Law and the Future of Online PsyOps* 1-21 (Project on Computational Propaganda, Working Paper No. 1, 2017).

³ BRAD ALLENBY AND JOEL GARREAU, *WEAPONISED NARRATIVE: THE NEW BATTLESPACE* (Centre on the War for Future, 2017).

employing a comprehensive narrative strategy. The ability of state and non-state actors to engage in narrative manipulation or disinformation warfare to destabilize democratic global institutions has in turn led to a shift in the emphasis from the kinetic element to the cognitive domain in war.

Strategical and tactical employment of a comprehensive narrative strategy can eliminate the need of using kinetic force altogether. It would now be considered a fallacious assertion to equate winning of wars to merely the military capacity of a state. Mary Kaldor elucidates upon the concept of “New Wars” and states that ‘victory no longer rests on the ability to inflict massive destruction but on the ability to wrestle popular support away from one’s opponents.’⁴

Therefore, weaponization of narrative or manipulation of narrative acts as a way by which support could be wrestled away from one’s opponents without resorting to kinetic warfare.

This paper is influenced by an initiative started by the Arizona State University and an independent think tank, New America who published a white paper “Weaponised Narrative: A New Battlespace.” Brad Allenby and Joel Garreau⁵ in this white paper introduce the concept of Weaponised Narrative and highlight how distortion of discourse and truth forms a unique kind of soft power in the global geo-politics. Weaponised narrative allows state and non-state actors to employ immense volume of information available to foster falsehood and undermine rational understanding. Such deployment of weaponised narrative by state and non-state actors

⁴ Bart Schuurman, *Clausewitz and the ‘New Wars’ Scholars*, 40 *PARAMETERS* 89 (2010).

⁵ Allenby & Garreau, *supra* note 3.

could destabilise global politics as a whole and have several implications on international law, making this issue pertinent to address.

The present paper is divided into three broad heads to elucidate upon the unique problems associated with weaponisation of narrative. Firstly, the paper would examine how narrative has traditionally been employed in the international arena. The researcher for this purpose will analyse the concept of Narrative Paradigm pioneered by Walter Fisher who asserts that the dissemination of narrative is based on two factors – narrative fidelity and narrative coherence. The researcher examines the paradigm laid out by Walter Fisher and argues that weaponised narrative is not disseminated by such traditional means.

Secondly, the researcher would examine the various risks posed by weaponisation of narrative. The most potent of these risks being the way by which state and non-state actors are able to manipulate the narrative to not only undermine the adversary but also to manufacture conflicts and foster ideological shifts. The researcher seeks to study these risks by examining the various instances where Russia, a state actor, has resorted to manipulation of narrative as a tool to sway the behaviour of the target audiences and to undermine its rival. The article recognizes Russia as its primary stakeholder due to it being the chief propagator of weaponised narrative in its attempt to counter the military capacity of the West.

Thirdly, the paper would seek to analyse the efficacy of international law in addressing the unique problems posed by the widespread use of weaponised narrative.

[II.] NARRATIVE DISSEMINATION: A WEAPONISED NARRATIVE PERSPECTIVE

To understand how narrative is deployed by state and non-state actors to achieve their respective goals, it first becomes pertinent to understand the concept of narrative. There is no single infallible definition of narrative.⁶ However, many scholars agree that narrative in its most basic or nuclear form is characterised by a series of understandable or comprehensible events.⁷ In ordinary sense, narrative is understood to be nothing but storytelling. It is derived from the Latin word *narrare* and is a form of discourse where the narrator directly communicates with the listener and promotes a particular point of view or set of values.⁸ It is influenced by people's experiences, events and other factors of the past. Narratives are not always embedded in truth or facts but the beliefs of individuals. Jack Maguire noted that the reason why story telling has an advantage over other modes of communication is that it 'encourages one human being to reach another human being in a direct and positive manner.'⁹

Narratives form the foundation of our cognitive procedures. Human beings are able to understand an event only when they develop a narrative around it explaining how the event was generated. Narrative therefore forms a lens through which people view the world and ascribe meaning to events and occurrences.

⁶ Joseph C. Marcus, *The Story of your Life on a Single Paper: Assessing the Narrative Coherence of Life Storytelling through Facebook's Timeline Profile Design* (2013) (unpublished Master's Thesis, Liberty University).

⁷ David Rudrum, *From Narrative Representation to Narrative Use: Towards the Limits of Definition*, 13 *NARRATIVE* 195 (2005).

⁸ WEBSTER'S DICTIONARY (Merriam Webster, 11th ed. 2003).

⁹ Jack Macguire, *Sounds and Sensibilities: Storytelling as an Educational Process*, 13 *CHILDREN'S LITERATURE ASSOCIATION QUARTERLY* 6 (1988).

Owen Flanagan, a researcher, believed that human beings were innately story tellers and that stories formed a ubiquitous component of communication. He therefore wrote that narrative becomes a critical component in self-identity and meaning making.¹⁰ Furthermore, narrative can also be used to persuade others to accept a particular world view.¹¹ Narrative allows the narrator to use rhetorical devices which enable him to modify his or her audiences' behaviour.¹² It is further asserted that the reason why narrative is successful in playing a persuasive role is because it forms the core of not only individual's but also group identity.

A prominent communication theory which is assessed in this paper is that of Walter Fisher who pioneered a concept called Narrative Paradigm. The basic precept of Narrative Paradigm is that human beings are inherently story tellers and that all meaningful communication occurs in the form of storytelling.¹³ Fisher therefore proposes that all human communication can be viewed as a narrative or storytelling, a concept he terms as *homo narrans*.

Fisher presents a paradigm shift, a shift from rational world paradigm to narrative paradigm, ascribing a distinct mode in the way people think about the world and its meaning. He argued that the traditional paradigm of the rational world assumes that people are rational and logical.¹⁴ The traditional paradigm proposes that

¹⁰ OWEN FLANAGAN, *CONSCIOUSNESS RECONSIDERED* 198 (MIT Press, 1993).

¹¹ Taylor C Moran, *Why are we Angry: Rearticulating Fisher's Narrative Paradigm with Interactivity and Hypertext* (2016) (Doctoral Dissertation, Virginia Tech University).

¹² Mark West & Chris Carey, *(Re)Enacting Frontier Justice: The Bus Administration Tactical Narration of the Old West Fantasy after September 11*, 92 Q. J. SPEECH 379 (2006).

¹³ Walter Fisher, *Narration as Human Communication Paradigm: The Case of Public Moral Argument*, 51 COMMUNICATION MONOGRAPHS 1 (1984).

¹⁴ Josh Hanan, *The Continued Importance of Walter Fisher's Narrative Paradigm: An Analysis of Fisher's Extant Work*, 1 CONFERENCE PAPERS-NATIONAL

since people are pragmatic and rational, they base their reasoned decisions on evidence and lines of argument. Traditional rational paradigm is therefore characterized by the participation of “qualified persons in public decision making.”¹⁵ He criticises this traditional notion which confines rationality as something which is learned by formal education and therefore extends only to experts. He contends that this has the effect of restricting the rational world paradigm to specialized studies of experts, excluding the public from making decisions of issues of moral and social concern.¹⁶

Such a narrow outlook of the traditional model denies the voices of the general public.¹⁷ He in his paradigm however postulates the concept of narrative rationality. He asserts that individuals are endowed with rationality because they are essentially story-telling beings, and not something that is only exclusively learned. He elucidates that it is through a credible story rather than a logical argument or verified evidence that people explain and justify their behaviour.

Fisher’s narrative paradigm is based on a few key pre-suppositions. Firstly, human beings are *homo narrans*, that is, all forms of human communications consist of stories. Secondly, the paradigm of human decision making and communication is based on “good reasons.” Thirdly, these “good reasons” are derived from an individual’s own culture, history, experiences, character and language. Fourthly, the rationality of the story depends upon on people’s awareness about how consistent the story is with other stories or experiences. Finally, the world is a set of stories, and it is

COMMUNICATION ASSOCIATION 11 (2008).

¹⁵ Fisher, *supra* note 13.

¹⁶ Barbara Warnick, *The Narrative Paradigm: Another Story*, 1 Q. J. SPEECH 72 (1987).

¹⁷ *Id.*

people who choose amongst these stories.¹⁸

Narrative rationality as an integral part of his paradigm provides that rationality is assessed by examining the story's fidelity and coherence.¹⁹ A story's coherence is determined by the structure of the story, the reliability of the characters as well as by comparing it with other stories. A story must therefore comprise of structural coherence, material coherence and characterological coherence.²⁰ Fisher asserts that structural coherence entails examining the story and finding out if the story "hangs together". A logical fallacy would exist when one story does not fall in line with another.

In such a situation, the story would be devoid of structural coherence and it is unlikely that people would believe that narrative. A story would be characterised as a bad story when the argument does not fall in line with narrative context, say, a man loves his wife but he abuses her.²¹ Material coherence seeks to examine whether the narratives have a causal link or there is systematic progression of events. According to Fisher, a story would comprise of material coherence if it has an understandable beginning, middle and end and is substantiated with all pertinent information. Characterological coherence is based on the reliability of characters. Fisher argues that listeners trust the characters to show continuity in their actions, thoughts and motives. If the characters do not act in a predictable or a reliable manner, the listeners will become

¹⁸ WALTER R. FISHER, *HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE, AND ACTION* (University of South Carolina Press, 1987).

¹⁹ Sharon Dowell, *Uncovering the Storytelling Power of Communication: Applying Walter Fisher's Narrative Theory to Three Presidential Crisis Speeches* (2003) (Master's Thesis, University of Nebraska at Omaha).

²⁰ Fisher, *supra* note 18.

²¹ Hanan, *supra* note 14.

suspicious, and there is little trust that can be established.²² The lack of trust ensuing from the unreliability and unpredictability of the characters make it impossible for the narrative to be effective.

Narrative fidelity on the other hand is based on the precept that a story is likely to be accepted if it falls in line with an individual's own beliefs and experiences. Fisher in his book puts forward the idea that people perceive the fidelity of a story on a logic of "good reason".²³ The premise of narrative fidelity is individual's own history, culture, biography and character and therefore decisions based on good reasons arise from the inherent logic of the individual.

Fisher therefore provides a reworking of Aristotelian analysis. His theory is widely applied within the field of communication and is used by several scholars to assess communication in distinct fields such as politics, health, business, and many more.

Weaponised narrative is a form of narrative dissemination distinct from the traditional means of information attack or propaganda. Due to the unique nature of such form of communication, it becomes imperative to study how weaponised narrative fits within Fisher's Narrative Paradigm. Weaponised narrative has gained an impetus in the recent years. It is a form of narrative dissemination and manipulation where state and non-state actors rely upon the already existing practices of fake news, disinformation, propaganda, social media and psychological operations.²⁴

The usage of such pre-existing practices in conjunction with

²² EMORY A. GRIFFIN, *A FIRST LOOK AT COMMUNICATION THEORY* 304 (McGraw-Hill, 2009).

²³ Fisher, *supra* note 18.

²⁴ Braden R. Allenby, *The Age of Weaponised Narrative or, Where Have You Gone Walter Cronkite*, 33 *ISSUES SCI. TECHNOL.* 65 (2017).

advances made in the fields of cognitive neuroscience, communication technology, behavioural economics, psychology makes weaponised narrative a unique and dangerous tool.²⁵ It particularly relies upon the various technological developments such as artificial intelligence and social media. The distinct nature of weaponised narrative in contrast to the traditional modes of information attack can be understood from the abbreviation V3S3, that is, Vulnerability, Vector, Virulence and Scope, Speed and Synergy.²⁶

A. Vulnerability

Vulnerability highlights how state and non-state actors can employ sequential stories to overcome the mental barriers of individuals. Due to the various technological advancements, vast amount of information can now be disseminated at the speed of light. Actors use such advancements to target the audience with sequential stories repeatedly subjecting them to a form of cognitive overload. It is therefore argued, that the target audience in such a situation, believe in the propagated information not because of the coherence of the story or the fidelity but because they are conditioned into believing such a story. State and non-state actors spreading immense volume of false memes or news at lightning speed through botnets on social media is a way to target the vulnerability of individuals making them susceptible to weaponised narrative.

²⁵ Jon Herrmann, *Nine Links in the Chain: The Weaponised Narrative, Sun Tzu, and the Essence of War*, THE STRATEGY BRIDGE, Jul. 27, 2017, <https://thestrategybridge.org/the-bridge/2017/7/27/nine-links-in-the-chain-the-weaponized-narrative-sun-tzu-and-the-essence-of-war>.

²⁶ Allenby, *supra* note 24.

B. Vector

Vector refers to the combined employment of disinformation with various technological advancements such as the internet so that the information has widespread reach. The risks posed by weaponised narrative are more poignant than previous practices such as propaganda because of its ability to have widespread reach. Entities can spread abundant amount of information within seconds across the world. Once this information is spread, it propagates and further multiplies on its own. Thus, there is no way to track this information unlike physical weapons and tools employed by state and non-state actors. Even if the source of the information is tracked and put down, since the information is out in the open even for a few minutes, nothing can stop it from multiplying exponentially.

C. Virulence

Virulence is based on the cognizance or the ability of state and non-state actors to draw upon the various advancements made in distinct fields of study to further disseminate weaponised narrative. These actors rely upon various advancements made in fields such as cognitive neuroscience to understand how to break or supersede the mental barriers of individuals. One such example of studies done to overcome the mental barriers of the individual maybe the nudge theory which is a part of behavioural economics which proposes indirect suggestions to influence decision making and individual or group behaviour.

D. Scope

Scope refers to the quantum of actors spreading such information. Due to the low cost and the easy mechanism for the spread of disinformation, it becomes exceedingly effortless for millions of individuals to engage in such circulation of information. Rising number of individuals involved in the spread of information

make it hard for both, to track such information as well as the individuals spreading the information.

Another difficulty arising from this large scope of actors involved which will be further addressed in this paper is the difficulty of attributing responsibility to the state who require such information to be spread. A factor which makes the weaponised narrative distinct from the traditional forms of narrative is the speed by way of which the disinformation is spread. A study done in 2014 revealed that ever minute 2.5 million posts are shared on Facebook, 300,000 tweets on twitter, 220,000 posts are posted on Instagram and 72 hours of video content is uploaded on YouTube.²⁷

E. Speed

Technological advancements therefore enable individuals to spread information at the rate of fire. The speed at which disinformation is spread is faster than the speed at which it can be tracked and taken down making weaponised narrative such a precarious issue.

F. Synergy

Synergy recognizes how these stories multiply when they come to notice of individuals across the world. The ability of entities to spread sequential stories at the speed and rate of fire makes it hard for people to disregard these stories. People are therefore influenced by these stories, and further go on to multiply the extent of these stories available. This creates a chain of self-propagating stories which is extremely hard to break.

While weaponised narrative falls in line with the ideas promulgated by Walter Fisher to the extent that people are

²⁷ Allenby, *supra* note 24.

influenced by good stories rather than rational arguments, it does not necessarily fit in the paradigm of narrative coherence and narrative fidelity. The author agrees with Walter Fisher to the extent that in a battle of mind and hearts of human beings, stories will outperform rational arguments and evidences to influence human thinking. However, it is argued that narrative coherence which is based on the structure of the story and narrative fidelity which is based on the beliefs of the listener are not the ways by which weaponised narrative is disseminated.

Weaponised Narrative dwells and propagates in chaos, both mental and physical. Weaponised narrative can showcase urgent crisis to distract the public and leaders from more important events thereby creating physical chaos.²⁸

Weaponised narrative can also create mental chaos by subjecting people to cognitive overload. Cognitive capabilities of individuals decline when they are attacked by sequential stories repeatedly thereby breaking their mental barriers. In this way, individuals are influenced and give way to the disinformation transmitted not because the story has structure and thus is coherent but because of the chaos and cognitive overload that the repeated sequential narratives create. Furthermore, people are likely to believe such weaponised narrative not because of linkages or relatability of that information with their own beliefs and experiences, as proposed by the fidelity aspect of Narrative Paradigm but because of the lack of ability of individuals to defend their minds.

²⁸ Herrmann, *supra* note 25.

[III.] RISKS POSED BY WEAPONISED NARRATIVE: A STUDY OF RUSSIA

Narrative is a power shifter. Successful deployment of weaponised narrative can constitute a grave threat to the national and international security. It can be used to intervene in the functioning of the state, distort the faith of citizens in democratic institutions, break down law and order and fuel civil strife. State and non-state actors manipulate narrative to extend their influence, exacerbate pre-existing hostilities and manufacture conflict and ideological shifts in their favour. It aligns with Sun Tzu's assertion that 'the supreme art of war is to subdue the enemy without fighting.'²⁹

The deployment of weaponised narrative manifests at both tactical and strategical level. The primary objective of the usage of weaponised narrative at the tactical level is for a State to achieve its goals without resorting to kinetic warfare characterized by arms and ammunition. Weaponised narrative is also employed at the strategic level to subdue the enemy over time by wresting popular support and sowing dissension amongst the target group.³⁰

To further highlight the risks posed by weaponised narrative, this paper focuses on Russia, a State which has effectively employed weaponised narrative as can be perceived from the Ukrainian invasion as well as Russia's interference in American elections.

A. Russia: Annexation of Crimea and Interference in U.S. Elections

Russia acts as the most poignant example of how wars and elections can be won not by bullets and votes but by information.

²⁹ LIONEL GILES, *SUN TZU ON THE ART OF WAR* (Routledge, 2002).

³⁰ Allenby & Garreau, *supra* note 3.

Russian society has witnessed a historical legacy of media manipulation as a part of its strategy to manipulate public opinion to advance state's interests.³¹ Russia's attempts to exert influence over Eastern Europe, particularly Ukraine highlights its long-standing strategy of spreading its interests through the control of narrative surrounding a conflict.

Propaganda and building a narrative around the conflict are ways by which Russia has managed to exert its influence both at home and abroad. These activities of Russia have led to it being accused of hijacking soft power in its attack against democratic values.³² History of Russia has shown significant amount of control being exercised by the state to regulate media like television and newspapers.³³ In the recent years, Russia has further strengthened its control over information by monitoring the internet and social media. Russia's control and misuse of the media reached its peak and became a global concern in 2014 when Crimea was annexed and conflict broke out in Ukraine's eastern Donbas region.³⁴ This was the year when Russian military intervention was successful in installation of pro-separatist leaders following which a referendum was passed formalizing Crimea's incorporation in Russia.³⁵ While much of the annexation was due to the military force of Russia, the roots of the invasion began with attacking the minds of the Crimeans.

³¹ Harry Stebbins, *Narrative and Information: Russian Cyber Operations*, INTERNATIONAL REVIEW, Apr. 17, 2018, <https://international-review.org/narrative-and-information-analysis-of-russian-cyber-operations/>.

³² Christopher Walker, *The Authoritarian Threat: The Hijacking of "Soft Power"*, 27 JOURNAL OF DEMOCRACY 49 (2016).

³³ Clay Shirky, *The Political Power of Social Media Technology*, 90 FOREIGN AFFAIRS 28 (2011).

³⁴ Joanna Szostek, *The Power and Limits of Russia's Strategic Narrative in Ukraine: The Role of Linkage*, 15 PERSPECTIVE ON POLITICS 379 (2017).

³⁵ Olena Nedozhogina, *A Bitter Divorce: Narratives of Crimean Annexation and their Relation to Larger State Identifications*, 71 EUROPE-ASIA STUDIES 1609 (2019).

Russia's narrative warfare against Ukraine is a part of its broader campaign against NATO and EU countries.³⁶ Since even before the Ukraine invasion, the narrative of Russia has sought to counteract the Western unipolar system narrative which depicted the United States as the sole remaining superpower.³⁷ The objective of Russia instead has been to put forward a narrative of "polycentric world" in which Russia assumes a super power status.³⁸ Narratives opposing the west are put forward with the purpose of diminishing the credibility of western critics of Russia, legitimise Russian behaviour as well as portray Russia as an European great power.³⁹ It is therefore argued by several authors that the conflict in Ukraine is a symptom of the friction between Russia and the West.⁴⁰

Russian media further portrays Kremlin's decision to keep Crimea as a legitimate part of Russia. The narrative built by Russia around the invasion of Ukraine eschewed the fact that the annexation of Crimea was in violation of the Budapest Memorandum of 1994.⁴¹ The memorandum laid down the inviolability of the borders of Ukraine in exchange for elimination of all nuclear arsenals in its territory.⁴² This acts as an evidence as to how narrative employed effectively can be used to subvert international law.

³⁶ Azhar Unwala & Shaheen Ghori, *Brandishing the Cybered Bear: Information War and the Russia-Ukraine Conflict*, 1 MCA 1 (2015).

³⁷ Alister Miskimmon & Ben O'Loughlin, *Russia's Narratives of Global Order: Great Power Legacies in a Polycentric World*, 5 POLITICS AND GOVERNANCE 111 (2017).

³⁸ Matthew Levinger & Laura Roselle, *Narrating Global Order and Disorder*, 5 POLITICS AND GOVERNANCE 94 (2017).

³⁹ Regina Smyth & Irina Soboleva, *Looking Beyond the Economy: Pussy Riot and the Kremlin's Voting Coalition*, 30 POST-SOVIET AFFAIRS 257 (2014).

⁴⁰ Miskimmon & O'Loughlin, *supra* note 37.

⁴¹ Dmitry Strovsky, *The Russian Media Coverage of the Ukrainian Issue: The Priorities of Informing*, 3 STUDIES IN MEDIA AND COMMUNICATION 98 (2015).

⁴² *Id.*

Russian disinformation campaign can be traced back to late 2013 when protests erupted in Kiev at the Maidan Nezalezhnosti (Square of Independence). The Euro-Maidan revolution was characterised by the former Soviet republic tilting towards the West which culminated into the pro-Russian president being disposed of. The revolution in Ukraine posed a threat to Putin. It was believed that the events in Ukraine would give an impetus to those unhappy with the status quo in Russia to protest against the authoritative regime and further seek integration into the EU. Russia therefore initiated a consolidated effort marked by military aggression, proxy war and disinformation to de-legitimise the new Government in Kiev.

One of the primary ways by which Kremlin sought to delegitimise Ukraine's revolution was by starting a campaign of political manipulation to ensure that Russian media portrayed the revolution in a negative light. Calling the post-revolutionary Government as a "fascist junta." Russian media depicted them as flag bearers of xenophobia, racism and anti-Semitism. The Russian audiences had access to the conflict in Ukraine only through medium such as televisions which was strictly regulated by the Government. The state regulated media portrayed only the official view point, which created an impression that the Russians fully supported the events in Crimea. The distortion occurred to such an extent that it was observed that out of 112 news releases about the Ukrainian revolution broadcasted by the main Russian television channels, only five gave an objective view.⁴³ The narrative run by Russia was that the invasion of Crimea was necessary to protect to the native Russian speakers present there.⁴⁴

This narrative was further propagated by the state sponsored

⁴³ *Id.*

⁴⁴ Unwala & Ghorl, *supra* note 36.

television channels such as RT and Channel One who depicted the exaggerated versions of the gory details of the conflict. One such gruesome, and false depiction was a soldier in Ukraine crucifying a baby and killing his mother.⁴⁵ These media reports were further supported by several sociological surveys that were conducted and whose veracity is questionable. One of the reports published in October 2014 recorded that 55% of the Russians favoured the annexation of Crimea by Russia, while 31% were most likely to approve of such Russian actions.⁴⁶

Since television channels and surveys were often under the control of the State, internet emerged as a popular avenue to express dissent in Russia.⁴⁷ To prevent such dissent from manifesting, Russia started investing heavily in manipulating discourse on the internet. The internet was therefore flooded with false narratives giving an inaccurate representation of the events in Ukraine, denying the presence of Russian secret services and blaming the West for conducting information war against Russia.⁴⁸ Russia started funding several pro-Russian trolls, which included online profiles controlled by human beings as well as bots which misled the world who were seeking reliable information of the events in Ukraine.⁴⁹

Another disinformation tactic involved the use of Russian

⁴⁵ Arcady Ostrovsky, *The Crucifixion of a 3-Year Old, The U.S. Helped Kiev Shoot Down Flight 17, and Other Tales the Kremlin Media Tell*, STOP FAKE, Jul. 31, 2014, <http://www.stopfake.org/en/the-crucifixion-of-a-3-year-old-the-us-helped-kiev-shoot-down-flight-17-and-other-tales-the-kremlin-media-tell/>.

⁴⁶ Strovsky, *supra* note 41.

⁴⁷ Sacha Dov Bachmann & Hakan Gunneriusson, *Russia's Hybrid Warfare in the East: The Integral Nature of the Information Sphere*, 16 GEO. J. OF INT'L AFF. 199 (2015).

⁴⁸ *Id.*

⁴⁹ Laura M Herta, *Russia's Hybrid Warfare – Why Narrative and Ideational Factors Play a Role in International Politics*, 1 ONLINE JOURNAL MODELLING THE NEW EUROPE 52 (2016).

soldiers called the 'little green men' who seized Crimea.⁵⁰ Use of such secret service was directly in line with the strategies adopted by the Soviet called 'maskirovka', which literally meant camouflage.⁵¹ Russian officials denied the involvement of secret services in Ukraine until after the annexation of Crimea.⁵² This denial prevented a quick response from the West, highlighting how Russia's disinformation campaign was able to significantly influence the Western decision making.⁵³ This was termed as "next phase of information warfare" by Keir Giles.⁵⁴ Images were doctored and posted on the internet where Ukraine tanks and soldiers were seen bearing the Nazi symbol, with an aim to distance Ukraine from its allied countries and portray the post revolution Ukraine regime as a racist and anti-Semitic one.⁵⁵

Russia's strategy of weaponising narrative was successful in undermining the legitimacy of the Ukrainian state in the eyes of the people of Ukraine and its allies around the world.⁵⁶ Russia's annexation of Crimea raises several issues pertaining to international law. It raises the general conundrum regarding the violation of sovereignty using narrative and non-kinetic techniques. It also poses several questions of international humanitarian law. Ukrainian

⁵⁰ MARIA SNEGOVAYA, *PUTIN'S INFORMATION WARFARE IN UKRAINE, SOVIET ORIGINS OF RUSSIA'S HYBRID WARFARE* (Institute for the Study of War, 2015).

⁵¹ Jill Dougherty, *Everyone Lies: The Ukraine Conflict and Russia's Media Transformation* (2014) (Discussion Paper Series, Shorenstein Center on Media, Politics and Public Policy).

⁵² Unwala & Ghorri, *supra* note 36.

⁵³ DOUGLAS MASTRIANO & DEREK O'MALLEY, *PROJECT 1704: ANALYSIS OF RUSSIAN STRATEGY IN EASTERN EUROPE, AN APPROPRIATE U.S. RESPONSE, AND THE IMPLICATIONS FOR U.S. LANDPOWER 6* (U.S. Army War College, 2015).

⁵⁴ Keir Giles, *Russia's New Tools for Confronting the West*, CHATHAM HOUSE 1 (2016).

⁵⁵ James J. Coyle, *Russian Disinformation Alienates the West from Russian Periphery*, ATLANTIC COUNCIL, Jul. 20, 2015, <https://www.atlanticcouncil.org/blogs/ukrainealert/russian-disinformation-alienates-the-west-from-russian-periphery/>.

⁵⁶ Bachmann & Gunneriusson, *supra* note 47.

invasion tests the extent of the customary international humanitarian law principles of distinction and proportionality. A quandary worth considering is whether the means of propagation of narrative could be considered as the use of force. A significant problem associated with the use of bots and proxy humans to spread information on the internet as well as the little green men bearing no insignia is that of attributing these activities to a particular State.

Russian influence in the U.S. elections showcases how tactical employment of weaponised narrative can be used to undermine and weaken the adversary over time.⁵⁷ One of the key findings of the CIA, FBI and the NSA acting under the auspices of the Office of the Director of National Intelligence was that the Russian President, Vladimir Putin had ordered an influence campaign aimed at U.S. Presidential elections.⁵⁸ The primary goal of launching such influence campaign was to undermine the faith of the people in the Western liberal democratic institutions using modern communication technologies.⁵⁹ Russia has played an important role in the declining political trust and confidence in the United States to such an extent, that the Economic Intelligence Unit classified it as a flawed democracy for the first time in 2016.⁶⁰

As per reports, Russia employed a two-fold attack method, direct and indirect.⁶¹ At one level, it tried and was successful in tainting the

⁵⁷ Allenby & Garreau, *supra* note 3.

⁵⁸ Office of the Director of National Intelligence, Report of the Intelligence Community Assessment on Assessing Russian Activities and Inventions in Recent U.S. Elections (2017) [ODNI Report].

⁵⁹ Michael N. Schmitt, *Virtual Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law*, 19 CHI. J. INT'L L. 30 (2018).

⁶⁰ Democracy Index, *Revenge of the 'Deplorables'*, ECONOMIST INTELLIGENCE UNIT, 2016 <http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy-Index-2016.pdf&mode=wp&campaignid=DemocracyIndex2016>.

⁶¹ Mason Shuya, *Russian Cyber Aggression and The New Cold War*, 11 JSS 1 (2018).

credibility of the Democratic National Committee by releasing sensitive information. At another level, it attempted to influence the voters by disinformation campaigns and division. Russia's cyber operations were carried out primarily by the Russian military intelligence, General Staff Main Intelligence Directorate of "GRU" who hacked into personal accounts of various Democratic Party officials and extracted information from the Democratic National Committee web site in March 2016.⁶² It then used platforms such as Guccifer 2.0 persona, DCLeaks.com and WikiLeaks to disseminate the hacked material.⁶³

Alongside their hacking operations, reports suggest that Russia also employed the strategy of spreading disinformation to influence the US elections. Media outlets such as Russia Today and Sputnik, along with troll farms known as Internet Research Agency were financed to spread an anti-Hilary and pro-Trump campaign on media platforms.⁶⁴ The IRA spent 12 million dollars in pursuit of their influence campaigns.⁶⁵ IRA's social media messages were able to reach a wide spread audience with as many as 126 million people on Facebook, 20 million on Instagram and 1.4 million users on Twitter.⁶⁶ IRA exploited the already existing schisms on the domestic level and further amplified it by ways such as buying advertisements on social media, organising rallies online and spreading hashtags.⁶⁷

⁶² ODNI Report, *supra* note 58.

⁶³ ODNI Report, *supra* note 58.

⁶⁴ ODNI Report, *supra* note 58.

⁶⁵ Lucan Ahmad Way & Adam E. Casey, How Can We Know if Russia is a Threat to Western Democracy? Understanding the Impact of Russia's Second Wave of Election Interference (2019) (Memo for Global Populism and Their International Diffusion, Stanford University).

⁶⁶ *Id.*

⁶⁷ Stephen McCombie, Allon J. Uhlmann & Sarah Morrison, *The US 2016 Presidential Election & Russia's Troll Farms*, 35 INTELLIGENCE AND NATIONAL SECURITY 1 (2019).

Based on these reports, Russia in the 2016 elections successfully deployed a weaponised narrative to exacerbate the extant tensions in the American political system.⁶⁸ The long term or the tactical objective of the weaponised narrative employed in 2016 elections was to discredit the American political system. The aim was to highlight the flaws that existed in the system and further weaken and develop cracks in America's soft power and its hegemonic status.⁶⁹ Russia's combined employment of cyber-attacks and disinformation campaigns has reportedly helped it achieve its objective of undermining the West and making Russia a key player in international politics.

[IV.] IMPLICATIONS ON INTERNATIONAL LAW

Weaponised narrative deployed by State and non-State actors differs from the traditional modes of propaganda dissemination just as nuclear weapons differ from conventional bombs.⁷⁰ Due to the unique and precarious nature of weaponised narrative, it become imperative to examine the implications of weaponised narrative on international legal framework. This paper therefore examines the efficacy of international legal framework to meet the threats posed by weaponised narrative and assess whether there is a need for a policy change to combat these threats.

A. Re-Envisioning the Traditional Notion of Sovereignty

Sovereignty, a principle of customary international law was first conceptualised in the Treaty of Westphalia 1648.⁷¹ It is based on the

⁶⁸ Charles E. Ziegler, *International Dimensions of Electoral Process: Russia, the USA and the 2016 Elections*, 55 INTERNATIONAL POLITICS 557 (2018).

⁶⁹ *Id.*

⁷⁰ Herrmann, *supra* note 25.

⁷¹ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14 at 202, 205, 251 (Jun. 27) [*Nicar v. U.S.*].

premise that each state retains exclusive authority over activities in its territory and has the right to freely govern itself, free from any outside intervention.⁷² The concept of sovereignty therefore involves the right of the state to exercise control over its national territory which further requires other states to respect the sovereignty of the state by not using force either by land, air or sea.⁷³ Sovereignty was defined in the 1928 Island of Palmas arbitration as 'sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.'⁷⁴ This definition therefore implies that a State's sovereignty can be violated either directly by another State or by attributing the act of the non-State actor to the State.⁷⁵ With the employment of weaponised narrative, actors are now able to wreak havoc in the target state without having the need to cross borders or sending armed nationals.⁷⁶ The scope of sovereignty therefore becomes an important question to consider in light of weaponised narrative where acts in one State impact another state without violating the territorial integrity of another State.

The Friendly Relations Declaration,⁷⁷ which codifies customary international law include provisions for violation of territorial integrity.⁷⁸ It lays down the prohibition of 'threat or use of force to

⁷² IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 105 (Oxford University Press, 2008).

⁷³ Christopher C. Joyner & Catherine Lotrionte, *Information Warfare as International Coercion: Elements of Legal Framework*, 12 EJIL 825 (2001).

⁷⁴ Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928).

⁷⁵ ODNI Report, *supra* note 58.

⁷⁶ Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT'L L. 421 (2011).

⁷⁷ G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (Oct. 24, 1970) [Friendly Relations Declaration].

⁷⁸ THOMAS D. GRANT, *AGGRESSION AGAINST UKRAINE: TERRITORY,*

violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.⁷⁹

It also includes the provision for prohibition of 'propaganda for wars and aggression' and 'organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State.'⁸⁰ This is particularly relevant in the context of Ukraine as it prohibits aggressive activity to protect the territorial integrity of the State. However, while the Declaration prohibits only propaganda for wars, other forms of disinformation spread through media and psychological operations employed by States fall out of the ambit of this provision.

Moreover, this provision only includes propaganda for war or instigating civil strife and terrorist acts. Much of the weaponised narrative deployed by actors are to undermine the legitimacy of the State which does not fall in the narrow scope of this provision. The problem posed by weaponised narrative therefore considers whether the traditional notion of sovereignty could be expanded to include the hearts and minds of the people.⁸¹

Sovereignty is the principle from which the primary rule of non-intervention is derived.⁸² It provides that each State has the right to control the activities occurring on their State and the other States are under an obligation to not intervene in these activities.⁸³ Non-

RESPONSIBILITY AND INTERNATIONAL LAW (Palgrave Macmillan, 2015).

⁷⁹ Friendly Relations Declaration, *supra* note 77.

⁸⁰ Friendly Relations Declaration, *supra* note 77.

⁸¹ Peter Smyczek, *Regulating the Battlefield of the Future: The Legal Limitations on the Conduct of Psychological Operations (PSYOP) under International Law*, 57 A.F.L. REV. 209 (2005).

⁸² *Nicar v. U.S.*, *supra* note 71.

⁸³ ODNI Report, *supra* note 58.

intervention is therefore 'the corollary of every State's right to sovereignty, territorial integrity and political independence.'⁸⁴ For an act to constitute as a wrongful intervention, two conditions have to be satisfied.⁸⁵ One, the act must affect a State's *domaine reserve* and secondly that the act must be coercive in nature.⁸⁶

Domaine reserve refers to the internal or the domestic affairs of the State. Each State has the right under the principle of sovereignty to decide freely on the matters that impact their internal and domestic affairs. Weaponised narrative would be tantamount to wrongful intervention so long as it interferes in the domestic affairs of a state, such as interfering in the political system or the elections of a State provided that the interference is coercive.⁸⁷

The ICJ noted in the Nicaragua Case that 'intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.'⁸⁸ An act would thus constitute as coercive if it takes away the free choice of a State and forces it to act in an involuntary manner.⁸⁹ While much of weaponised narrative can be said to violate the *domaine reserve* of a State, it cannot be termed as coercive. Means such as disinformation campaigns through media and psychological operations influence individuals without them being coercive in nature and therefore do not violate

⁸⁴ ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW* 428-51 (Pearson Higher Education, 1992).

⁸⁵ Jens David Ohlin, *Did Russian Cyber interference in the 2016 Election Violate International Law?* 95 *TEX. L. REV.* 1579, 1580 (2017).

⁸⁶ *Nicar v. U.S.*, *supra* note 71.

⁸⁷ G.A. Res. 36/103, annex, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, at 11 (Dec. 9, 1981).

⁸⁸ *Nicar v. U.S.*, *supra* note 71 at 205.

⁸⁹ MICHAEL N. SCHMITT, *TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS* 168 (Cambridge University Press, 2017) [**Tallinn Manual**].

the primary rule of non-intervention.⁹⁰

Thus, deployment of weaponised narrative is not directly coercive in nature. However, this narrow definition of coercion raises an anomaly in the context of weaponised narrative. It is established that weaponised narrative in its direct sense is not coercive, however, it makes individuals take decisions which they otherwise would not have taken, creating a form of indirect coercion. The current international legal framework fails to address the problem whether indirect coercion could violate the obligation of non-intervention.

B. Weaponised Narrative as an Armed Attack

Article 2(4) of the UN Charter prohibits the use of force and reaffirms the principle of territorial sovereignty.⁹¹ Force under Article 2(4) pertains only to armed force. There is a general consensus regarding non-application of the prohibition to economic sanctions.⁹² The increasing use of weaponised narrative therefore will require an expansion of the application of Article 2(4). The need for categorization of weaponised narrative into an act of “armed force,” “war” or “aggression” becomes pertinent to evaluate whether such an act would give rise to the right of self-defence and what would be a proportional response.⁹³ The only justifiable use of force is the right of individual or collective self-defence under Article 51. The United Nations Charter permits the victim of an armed

⁹⁰ ODNI Report, *supra* note 58.

⁹¹ Hwang & Rosen, *supra* note 2.

⁹² Clinton E. Cameron, *Developing a Standard for Economically Related State Economic Action*, 13 MICH. J. INT’L L. 218, 219 (1991).

⁹³ Lawrence T. Greenberg, *Information Warfare and International Law*, NDU 1 (1998).

attack or the allies of an attacked State to use force in its defence.⁹⁴ The right of self-defence is based on the Caroline Standard which allows the State to act in anticipatory self-defence, before the attack actually takes place.⁹⁵

A State can therefore take the benefit of the right of self-defence if it believes it has been a victim of different modes of weaponised narrative by the offender. For this however two things would have to be considered. One, there would be a need to assess whether weaponised narrative can constitute as use of force, aggression or war for which the traditional notions of sovereignty would have to be considered.⁹⁶ Scope of anticipatory self-defence in light of weaponised narrative would also have to be evaluated, to prevent the States from using force in anticipation of imminent threat using disinformation and psychological operations.

The force used in self-defence must be both necessary and proportional.⁹⁷ Absence of established norms as to what would be a proportional and necessary response to misinformation and propaganda campaigns creates a lot of potential for abuse.⁹⁸

C. International Humanitarian Law

The existing framework of international humanitarian law does not directly apply to the deployment of weaponised narrative. Article 36 of Additional Protocol I to the Geneva Convention lays

⁹⁴ Jason Barkham, *Information Warfare and International Law on the Use of Force*, 34 N.Y.U. J. INT'L L. & POL. 57 (2001).

⁹⁵ JOHN BASSET MOORE, *A DIGEST OF INTERNATIONAL LAW* 410 (Government Printing College, 1906).

⁹⁶ Hwang & Rosen, *supra* note 2.

⁹⁷ *Nicar v. U.S.*, *supra* note 71 at 176; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226 at 41 (Jul. 8).

⁹⁸ Hwang & Rosen, *supra* note 2.

down the obligation of High Contracting Parties to ensure that the new weapons adopted should comply with the established principles of IHL.⁹⁹ Cyber operations therefore conducted by State parties could be subject to IHL in some circumstances. In order for IHL to apply, there should be a situation of either International Armed Conflict or Non-International Armed Conflict and the means of weaponised narrative must constitute as resort to armed force. While the cyber operations targeting legitimate military targets could amount to use of armed force, the same cannot be said for misinformation campaigns.¹⁰⁰

States resorting to the use of weaponised narrative must also comply with the customary international humanitarian law principles of distinction, precaution and proportionality.

The principle of distinction provides that the parties to the conflict must at all time distinguish between civilians and combatants. Attacks must only be directed against combatants and military objectives, and there is a general prohibition from carrying out attacks against civilians or civilian objects.¹⁰¹ However, much of the false information is disseminated by civilians on social media, raising the questions regarding their “direct participation in hostilities.”¹⁰²

Another pertinent question raised by the principle of distinction

⁹⁹ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, art. 36, 1125 U.N.T.S. 3 [Additional Protocol I].

¹⁰⁰ Tallinn Manual, *supra* note 89.

¹⁰¹ Additional Protocol I, *supra* note 99, art. 48.

¹⁰² Vishaka Choudhary, *The Truth under Siege: Does International Humanitarian Law Respond Adequately to Information Warfare*, GRO JIL BLOG, Mar. 21, 2019, https://grojil.org/2019/03/21/the-truth-under-siege-does-international-humanitarian-law-respond-adequately-to-informationwarfare/?blogsub=confirming#blog_subscription-2.

is whether media from which misinformation is propagated would tantamount to a military objective. It is suggested that the components of media which are used for military purpose would be considered as military objective and can therefore be attacked.¹⁰³ However, it becomes impossible to contradistinguish individual components of civilian objects from military objects on the internet or other media.

An indiscriminate attack is one which targets both military objectives and civilians and civilian objectives without any distinction.¹⁰⁴ Psychological operations, misinformation and propaganda campaigns fail to distinguish between civilians and combatants and could be considered as indiscriminate attack which raises its own problems.

The customary international law principle of proportionality provides that the damage caused should not be excessive in relation to the direct military advantage that is sought.¹⁰⁵ However, no objective threshold has been fixed by IHL above which collateral damage would be excessive, rather it is based on circumstances. Since there are no established norms regarding the propensity of the use of weaponised narrative, it becomes impossible to discern the excessive nature of damage caused.

D. Efficacy of International Human Rights Law

International Human Rights Conventions as a whole do not adequately meet the threat posed by weaponised narrative. Scholars such as Jens Ohlin argue that the Russian interference in the US

¹⁰³ Tallinn Manual, *supra* note 89.

¹⁰⁴ Additional Protocol I, *supra* note 99, art. 51.

¹⁰⁵ Additional Protocol I, *supra* note 99, art. 51.

elections violated the people's right of self-determination.¹⁰⁶ This assertion can be expanded and evaluated in the context of weaponised narrative as well. Self-Determination is a principle of customary international law as recognized by International Covenant on Civil and Political Rights (ICCPR)¹⁰⁷ and the International Covenant on Economic, Social and Cultural Rights.¹⁰⁸ Self-Determination refers to the right of the people to freely determine their political status and future destiny.¹⁰⁹ Jens Ohlin argues that the notion of sovereignty is confined only to the States.¹¹⁰

In the 2016 Elections, it was the sovereign will of the people which was interfered with and not that of the State. Ohlin argues that since it was the people's sovereign will to determine their political destiny that was interfered with, the right of self-determination had been violated.¹¹¹ However, the problem of applying this principle as noted by Ohlin himself is that self-determination is invoked in those instances where a State is being created such as through secession. Moreover, it is applied in situations such as colonialism, apartheid or alien subjugations and not where people are already citizens of the State.¹¹²

Weaponised Narrative can also be said to violate Article 20 of the ICCPR which provides that 'any propaganda for war shall be prohibited' and further that 'any advocacy of national, racial or religious hatred that constitutes incitement of discrimination,

¹⁰⁶ Jens Ohlin, *supra* note 85.

¹⁰⁷ International Covenant on Civil and Political Rights, art. 1(1), Dec. 16, 1966, 999 U.N.T.S. 171 [ICCPR].

¹⁰⁸ International Covenant on Economic, Social and Cultural Rights, art. 1(1), Dec. 16, 1966, 993 U.N.T.S. 3.

¹⁰⁹ Jens Ohlin, *supra* note 85.

¹¹⁰ Jens Ohlin, *supra* note 85 at 1595.

¹¹¹ Jens Ohlin, *supra* note 85 at 1596.

¹¹² ODNI Report, *supra* note 58.

hostility or violence shall be prohibited by law.¹¹³ This includes all kinds of propaganda resulting in act of aggression or breach of peace.¹¹⁴ The broad interpretation of the article would therefore include acts which are internal or external to the State concerned. Excessive restraint to prevent propaganda for war would however raise the problem of violating freedom of speech and expression.¹¹⁵

There are several practical considerations to be evaluated for the implementation of ICCPR. Article 2 of the ICCPR lays down the obligation of every State Party to ensure and respect the rights under the Covenant 'to all individuals within its territory and subject to its jurisdiction.'¹¹⁶ It is therefore argued that human rights obligations do not apply extraterritorially.¹¹⁷ ICJ in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory however stated that ICCPR applies extraterritorially.¹¹⁸ Therefore the act of the State Party by the authorities of the State in another State Party which violates the provisions of the ICCPR would invoke state responsibility.¹¹⁹

¹¹³ ICCPR, *supra* note 107, art. 20.

¹¹⁴ U.N.H.R.C, *General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred*, 19th Sess., U.N. Doc. 29/07/1983.

¹¹⁵ Hwang & Rosen, *supra* note 2.

¹¹⁶ ICCPR, *supra* note 107, art. 2.

¹¹⁷ U.N.H.R.C, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant* at 469, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005).

¹¹⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136 (Jul. 9).

¹¹⁹ Joseph Sinchak, *The Extraterritorial Application of Human Rights Treaties: Al-Skeini et al. v. United Kingdom* (2011), 3 PACE INT'L L. REV. ONLINE COMPANION 416 (2013).

E. The Problem of Attribution

An act would constitute as an internationally wrongful act if it is attributable to the State under international law, and if it constitutes a breach of an international obligation of the State.¹²⁰ ARSIWA codifies customary international law and lays down the body of law on responsibility of the State.¹²¹ The employment of weaponised narrative would constitute an internationally wrongful act if the conduct breaches the obligation of the State, such as the obligation to not intervene, and the conduct can be attributed to the responsible State. Article 4 to Article 11 of ARSIWA lays down the law for attribution of a conduct to the State.

A State is responsible for the conduct of the organs of the State. Thus, activities of GRU would invoke responsibility of Russia as a State agency.¹²² The conduct of the organs of the State could be attributed to the State even if the act is ultra vires or beyond the responsibility of the organ.¹²³ Provided, that the conduct is not a purely private one. If the organ of a State is acting in its official capacity while conducting psychological operations or disseminating misinformation then the State would be liable.

Difficult arises in the case where the wrongful conduct is carried out by a private actor such as the troll farms of Internet Research Agency. A State would be responsible for the actions of a non-State actor which are taken in pursuance of 'instruction of, or under the

¹²⁰ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Y.B. INT'L. L. COMM'N, 2001, (UN Doc. A/56/10) [ARSIWA].

¹²¹ *Gabcikovo Nagyamoros Project (Hungary v. Slovakia)*, Judgment, 1997, I.C.J. Rep. 7 (Sept. 25).

¹²² ODNI Report, *supra* note 58.

¹²³ ARSIWA, *supra* note 120, art. 4.

direction or control of the State,¹²⁴ or when the State acknowledges and adopts the conduct as its own.¹²⁵ The threshold for the attribution of the conduct of a non-State actor to a State is extremely high, and it must be established that the State had “effective control” as formulated by the ICJ in the Nicaragua Case.¹²⁶

In order to invoke responsibility it must be shown ‘that effective control was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violation occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.’¹²⁷ The effective control test has several ambiguities in its application in the context of cyber operations and by expansion, weaponised narrative as noted by the scholar Michael Schmitt. Particularly problematic is the extent of knowledge that the State must have of the operation. Moreover, if the State funds the operation, but the group develops their own operational design, would the conduct be attributable to the State is another ambiguity that needs to be addressed.¹²⁸ Much of the misinformation and psychological operations are carried out by private entities who act as proxies of the State. In such instance, it becomes extremely hard to attribute these activities to the State providing a safe haven for the State to further these operations.¹²⁹

¹²⁴ ARSIWA, *supra* note 120, art 8.

¹²⁵ ARSIWA, *supra* note 120, art 11.

¹²⁶ *Nicar v. U.S.*, *supra* note 72 at 115.

¹²⁷ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26).

¹²⁸ ODNI Report, *supra* note 58.

¹²⁹ ODNI Report, *supra* note 58 at 62.

F. Due Diligence

A conduct which cannot be directly attributed to a State, can invoke State Responsibility due to the breach of the State's due diligence obligations.¹³⁰ This obligation was recognized in the case of Corfu Channel where the court held that it is 'every State's obligation not to knowingly allow its territory to be used for an act contrary to the rights of other States.'¹³¹ This obligation was also recognized by ICJ in the Pulp Mills Case,¹³² where it was stated that a State must not only adopt appropriate rules and maintain a degree of vigilance in the enforcement of these rules, but also exercise control and monitor the activities of the public and private operators.¹³³

Thus, it is every State's obligation to ensure prevent dissemination of weaponised narrative from their territory which has harmful effects on the territory of another State. However, if a State is successfully able to show that it took all feasible measures to prevent the act the State would not be internationally responsible.¹³⁴

¹³⁰ Michael N. Schmitt, *In Defense of Due Diligence in Cyberspace*, 125 YALE L.J.F. 68 (2015).

¹³¹ Corfu Channel Case (U.K. v. Albania), Judgment, 1949 I.C.J. Rep. 4 at 35 (Apr. 9).

¹³² Case of Pulp Mills on River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. Rep. 14 (Apr. 20).

¹³³ R. Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERMAN YRBK OF INT'L L. 9 (1992).

¹³⁴ ODNI Report, *supra* note 58.

[V.] CONCLUSION

With the evolution of information technology, the use of narrative to influence or manipulate public opinion has become even more sophisticated. Information weapons are now deployed with ease to destabilise a State's defence, political, social, economic and other vital systems. The instances of usage of weaponised narrative continues to manifold with the alleged fake news disseminated on Facebook, causing the persecution of Rohingyas in Myanmar, and non-State actors such as ISIS resorting to twitter operations to recruit members. The problem will only exacerbate in the coming times due to the further improvement in technology giving an impetus to State and non-State actors to further turn to these techniques.

To be relevant today, the rules of modern international law need to be accommodative of the new forms of warfare being employed by the States, and to develop an effective regulation system. It therefore becomes imperative to expand the scope of the existing international legal framework to give a more contemporary interpretation, at the same time special rules must be developed to meet the threats posed by weaponised narrative.

SOCIAL MEDIA – THE MASTER PUPPETEER

By Rajorshi Palit & Pranay Sharma*

Communication in today's world has changed dramatically over the past few decades. The days where telephonic conversations used to be the primary form of communication has been long forgotten. The void left by the old age phone booths and trunk calls has been filled by new-age digital media. Platforms like Facebook, WhatsApp, Twitter, and Instagram have become the tools for communication. Thus, it is unsurprising that social media plays an important part in the lives of every human being. The penetrative extent of these platforms has reached levels where sustenance without them is unfathomable. While such a confluence might look harmless on paper, it brings forth some serious issues to foray. Hidden away from the eye of a layman under the garb of innocent posts and comments, it has the potential to influence opinions made by populace. Such opinions might have ever-lasting effects on a country as a whole.

The issue thus can be said to be of monumental importance at the least. In an attempt to address the problem, it is first imperative to understand the methods of the purported social media influence. An understanding of the workings of social media posts is further needed to unmask the actors behind such manipulation. This research paper touches upon the aforementioned concerns while analysing the various instances and effects of social media influence on people across boundaries, ethnicity, gender and age. It further looks into Government policies and legislations across various countries to curb this menace and finally, at changes in consumer behaviour and amendments, to Government perception, with legislations suggested by authors.

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Keywords: Facebook, Media hype, Advertisements, Cyber warriors, Data privacy

[I.] INTRODUCTION

Social media apps have enveloped the life of common populace to the point where a day without them seems unimaginable. With the apps being inseparable from people's lives, it is quite unsurprising that it is the source of daily dosage of networking, and news for the layman. While these two aspects look isolated on paper, they form a mighty bond that can have the effect of changing a person's views to a great extent. This paper through a series of sections will try to establish a connection between the two and will look into methods and instances where such connection has been exploited for vested interests.

In this regard, **(II.) The opinion of Herd matters- Systematic strangulation of right to form opinion**, discusses how majority opinions influence the privacy and opinions of dissidents. **(III.) Behind the scenes- The people behind Social Media sites**, introduces the characters who derive benefit from what is posted online. While the playmaker behind the survival of social media is discussed in the previous section, the next section namely **(IV.) A peek into propaganda artists and their arsenal**, discusses the mentality of con-artist and the working of their medium for propagation of ideas. **(V.) Spiralling out of control- The mayhem created by Social Media sites**, discusses instances where miscreants, and politicians have used the medium for duping people and inciting violence. Post the discussion on the incidents of abuse of social media, **(VI.) Finding tailor-made solutions to the issue**, looks into a plausible way-out to this crisis keeping in mind the difference in ideologies and the nature of the problem.

[II.] THE OPINION OF HERD MATTERS- SYSTEMATIC STRANGULATION OF RIGHT TO FORM OPINION

New-age digital media platforms have become the go-to place for a substantial portion of our country's population. The fact that India now boasts being the country with most number of Facebook users amounting to a massive 300 million subscribers truly justifies this trend.¹ It thus follows that social media falls under the bracket of primary medium of correspondence.² Social discourse (inclusive of private chats and public posts) can be construed as a form of expression, and thus in-line with right to freedom of speech and expression guaranteed by the constitution.³

While opining on any event whatsoever, the user exposes his identity to a certain set of people on his own discretion. The individual's opinion can under normal circumstances may either appease or offend people. In consonance of the right administered by the constitution, the individual must have immunity from any prosecution irrespective of the content posted online, provided that it is does not run afoul to the restrictions placed under Article 19(1)(2) of the Constitution⁴. But in reality, a controversial post is widely criticized by public at large. It falls under the category of indirect deterrence. A discussion about the same is made in the

¹ *Leading countries based on the number of Facebook users as of January 2019 (in millions)*, STASTIA, www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/.

² Adam D. I. Kramer, Cindy K. Chung, *Dimensions of Self-Expression in Facebook Status Updates*, <https://www.semanticscholar.org/paper/Dimensions-of-Self-Expression-in-Facebook-Status-Kramer-Chung/3d7bd92997bab7dee4ce833c2e5e672fcc5ef728>.

³ The Constitution of India, 1949, Article 19(1) (a).

⁴ The Constitution of India, 1949, Article 19(1)(2).

following subsection.

A. Indirect Deterrence

Social media preferences in India are demarcated on the lines of caste and religion. People are often part of communities relating to a particular class or sect. Hence the opinions expressed via the platform subscribe to a certain narrative and rarely deviates from the predominant notion.⁵ The unsaid rule of expressing only those opinions which are in conformity to the predominant notion is an active deterrence for individuals. On a larger level such a practice leads to conflict among individuals. The reaction of Facebook users nationwide after the dastardly attack of suicide bomber on a CRPF convoy killing 40 soldiers is interesting to note. Flamed with a surge of nationalism, groups like Clean the Nation were flagged for unmasking users who had different views or self-proclaimed anti-nationalistic views about the incident.⁶

The deterrence as has been explained in the above section points out that majority opinion on social media has the effect of silencing differing opinions even going to great lengths like using fear (disclosure of identity) to make their point. This practice curbs free speech and also results in spoon-feeding of recognized opinion to masses. Such an influence surely hurts the freedom guaranteed to every individual and draws focus towards mass-manipulation in social media.

⁵ Shriram Venkatraman, *Conclusion: social media and its continuing complexities*, *Social Media in South India*, UCL PRESS (2017), <https://www.jstor.org/stable/j.ctt1qmw88r.13>.

⁶ Mridula Chari, Vijayta Lalwani, Arunabh Saikia & S Senthilir, *Clean the Nation: Inside the Facebook group that plotted to get 'anti-nationals' sacked, prosecuted*, SCROLL.IN, (Feb. 19, 2019, 9:00 am), <https://scroll.in/article/913666/clean-the-nation-inside-the-facebook-group-plotting-to-get-anti-nationals-sacked-and-prosecuted>.

[III.] BEHIND THE SCENES- PEOPLE BEHIND SOCIAL MEDIA SITES

Social media companies like Facebook, and Twitter have always painted themselves as messiahs with the sole purpose of connecting people worldwide, and providing a platform to express opinions. Reiterating the same, Facebook chief Mark Zuckerberg in a statement stated that, “*Facebook’s mission is about giving people a voice and bringing people closer together. Those are deeply democratic values and we’re proud of them. Advertisers and developers will never take top priority over that as long as I’m running Facebook.*”⁷ The statement despite sounding promising is nothing but a sham. A look at the balance-sheet of the company clearly shows that advertisers are the breadwinner accounting to \$16.64 billion in revenue out of the total \$16.91 billion earnings registered in the fourth quarter of 2018.⁸

While it proves that advertisers have a say in the company, it also means that Facebook provides service to these corporates for their valued investment.⁹ It is interesting to note that the service that is provided by Facebook to these corporate houses is access to user data and preferences. The same has been admitted by Sean Parker, ex-president of Facebook who stated that the company designed its interface with the intention of making the platform addictive to

⁷ Emily Stewart, *Mark Zuckerberg’s Prepared Statement for Congressional Testimony*, VOX, (Apr. 10 2018, 2:33 PM), <https://www.vox.com/policy-and-politics/2018/4/9/17215640/mark-zuckerbergcongress-testimony-facebook>.

⁸ Martina Frasca, Sochurkova, *Facebook’s revenue exceeded \$55 billion in 2018*, NEWSFEED.ORG, (Feb. 07 2019), <https://newsfeed.org/facebooks-revenue-exceeded-55-billion-in-2018/>.

⁹ Douglas Guilbeault, *Digital Marketing in the Disinformation Age*, COLUMBIA JOURNAL OF INTERNATIONAL AFFAIRS, Vol 71, No. 1.5, <https://www.jstor.org/stable/10.2307/26508116>.

maximize the extraction of lucrative data from users.¹⁰ What the bestowal of data means for business houses is a never-ending source of genuine consumer information which can be used to develop products and specifically target them to interested audience. Apart from the sale of data to corporates, for companies like Facebook the vast pool of data is a goldmine which can be used to develop predictive models of consumer behaviour. In addition to sale of these models to enterprises¹¹, it gives social media companies, power to monitor posts and photos of users in real-time.¹²

This underlines the hypocritical nature of social media bigwigs. Established only to fulfil the interests of enterprises, these sites have apparently been limited to being lapdogs of the tycoons. While both the parties have benefitted from the grey transactions, the one who has lost the most is the user whose right to privacy has been scavenged for a big price. The irresponsible acts of Facebook have potentially jeopardized lives of millions of users without whom the company would not have been what it is today. Clearly standing at the lowest rung at the pecking order, the user is looking at what seems to be oblivion.

¹⁰ Julia Glum, *Facebook is Addictive Because it Exploits a Vulnerability in People's Brains, Co-founder Sean Parker Says*, NEWSWEEK, (Oct. 11 2017, 10:03 am), <http://www.newsweek.com/russiafacebook-trump-sean-parker-707964>.

¹¹ Joseph Turow, *The Ailes have Eyes: How Retailers Track your Shopping, Strip your Privacy, and Define your Power*, NEW HAVEN, CT: YALE UNIVERSITY PRESS, 2017.

¹² Darren Davidson, *Facebook targets 'insecure' young people*, THE AUSTRALIAN, (May 1 2017), <http://www.theaustralian.com.au/business/media/digital/facebook-targets-insecure-young-people-to-sell-ads/news-story/a89949ad016eee7d7a61c3c30c909fa6>.

[IV.] A PEEK INTO PROPAGANDA ARTISTS & THEIR ARSENAL

Now that we have discussed about the people behind sites like Facebook, it is imperative to focus on the people and medium used to exploit the system. An analysis of the functioning of modes for propagation of false information is covered below.

A. *The game of trends- Twitter & Facebook at the mercy of Con-artists*

Social media sites like Twitter and Facebook have always tried to gain the attention of the user. In this regard, both these sites try to focus a consumer's attention to the most important or most discussed topics at any point of time. Using their own algorithm, these sites recognize words, phrases and hash tags that have the largest repetition among all the feed, which they then sort out as trending topics at any given moment.¹³ These topics are different from other discussions and garner a larger interest among the audience, partly because such topics are displayed on the portal to be viewed by anyone irrespective of whatever preferences they might have chosen. According to a 2011 study on social media, a trending topic "will capture the attention of a large audience for a short time" and thus "contributes to agenda setting mechanisms."¹⁴

These trends are susceptible to attacks from foreign agents through bots (autonomous program). The success of a bot-initiated fake propaganda depends on four things namely (1) a message that fits an existing, even if obscure, narrative; (2) a group of true

¹³ Jarred Prier, *Social media as information warfare*, STRATEGIC STUDIES QUARTERLY, Vol. 11, No. 4 (Winter 2017), pp. 50-85 AIR UNIVERSITY PRESS, <https://www.jstor.org/stable/10.2307/26271634>.

¹⁴ Sitaram Asur, Bernardo A. Huberman, Gabor Szabo, and Chunyan Wang, *Trends in Social Media: Persistence and Decay*, CORNELL UNIVERSITY LIBRARY AR XIV (forthcoming, Feb. 07, 2011), <https://arxiv.org/abs/1102.1402?context=physics>.

believers predisposed to the message; (3) a relatively small team of agents or cyber warriors; and (4) a network of automated “bot” accounts.¹⁵In the first step the message in question must conform to a narrative even though remotely connected to it. Once such a narrative is set in stone, believers of the notion will subscribe to it and probably retweet it. Depending on the response generated from the narrative, the cyber criminals draft memes, videos and fake news in collusion to the existing narrative. Finally, this is then shared by the believers and bots in hundreds of successions until it becomes a trend. The longevity of the information on the portal further makes it more prominent and makes it look credible in the eyes of common people.

This section has discussed the functioning of bots in conjugation to trends. The simplicity of hijacking a trend by foreign agents raises concerns over the fragility of the social media ecosystem and its high probability of misuse.

[V.] SPIRALLING OUT OF CONTROL- MAYHEM CREATED BY SOCIAL MEDIA SITES

Social media sites like Facebook and Twitter in the quest for earning more money concentrated all their efforts on advertisement distribution. While it paid dividends for the companies, it came to bite them when their own algorithms were used to perpetrate fear, terror and manipulation. The loopholes in their fail-safe mechanism were used expertly by miscreants on more occasions than one to achieve their devilish objectives. While the previous section dealt with the workings of loopholes, this section discusses about such instances in detail. Instances of misinformation are covered below.

¹⁵ *Supra* note 13.

A. Manipulative Ads and Social Media posts in political campaigns

This section looks from a closer perspective, at the use of social media in the supposed manipulation of political campaigns. In this regard, the events leading up to culmination of US Presidential elections, 2016 are discerned due to the allegations of rampant misuse of social media to rig the presidency. Further, legal and ethical issues surfacing from the act is also discussed below.

1. The US Presidential Election, 2016- Twitter, the kingmaker

The presidential election of the USA in 2016 can be considered as one of the most controversial events of the 21st century. With allegations of mischief being raised against Donald Trump's ascent to presidency, the event caught attention of the entire world. In an attempt to discern the veracity of the claims, an in-depth study of the role of twitter is imperative. This micro-blogging site played a huge role in the election and paved the way for Donald Trump to the throne. It all started with the first hiccup for Hillary Clinton in the form of the word "deplorable". While addressing a public rally in September, 2016, she remarked

*"You know, to just be grossly generalistic, you could put half of Trump's supporters into what I call the 'basket of deplorables.' Right? The racist, sexist, homophobic, xenophobic, Islamophobic — you name it. And unfortunately, there are people like that, and he has lifted them up." The other half she shared empathy with and stated were "people who feel that the Government has let them down, the economy has let them down, nobody cares about them, nobody worries about what happens to their lives and their futures, and they're desperate for change."*¹⁶

¹⁶ Dan Balz, *Clinton's deplorable remark sums up a deplorable election season*, THE WASHINGTON POST, (Sept. 10, 2016), <https://www.washingtonpost.com/politics/clintons-deplorables-remark-sums->

But what followed next left the veteran politician short for words. In what was meant to be a comment on half the population, the entire brigade of electorates misread the speech and thought that the word “deplorable” stood for everyone.¹⁷ Thus started a quasi-movement where thousands of accounts changed names and now came prefixed with deplorable. In an attempt to blend with the number of accounts under the deplorable brand, some Russian cyber warriors like FanFan changes their username to Deplorable Lucy.¹⁸ Successfully achieving the purpose of name change, the account got a spike from 1,000 to 11,000 followers within a few days with the help of carefully drafted content focusing on deplorable. The slim chance provided by this fiasco in addition to the pre-existent opposition to the Hillary’s candidacy by Bernie Sanders, and groups like Alt-Right¹⁹, added to the narrative for trolls to build on.

Another orchestrated scandal in which a Trump official by the name Ximena Barreto took part, is popularly known as the Pizzagate scandal. Taking a cue from the stolen emails Clinton campaign chairman John Podesta, the miscreants projected an invitation to a pizza party from Comet Ping Pong for kids, as a code for paedophilic sex party.²⁰ The story got a huge traction and was retweeted and

up-a-deplorable-election-season/2016/09/10/78977694-777b-11e6-be4f-3f42f2e5a49e_story.html?noredirect=on.

¹⁷ Angie Drobnic Holan, *In Context: Hillary Clinton and the basket of deplorables*, POLITIFACT, (Sept. 11, 2016, 2:44 PM), <https://www.politifact.com/truth-o-meter/article/2016/sep/11/context-hillary-clinton-basket-deplorables/>.

¹⁸ Supra Note 13.

¹⁹ Hanna Rosin, *Among the Hillary Haters*, THE ATLANTIC, March 2015 Issue, <https://www.theatlantic.com/magazine/archive/2015/03/among-the-hillary-haters/384976/>.

²⁰ Dan Diamond, *HHS official who spread conspiracy theories forced out*, POLITICO, (Jul. 27, 2018, 9:15 PM), <https://www.politico.com/story/2018/07/27/hhs-official-conspiracy-theories-resigns-ximena-barreto-747461>.

shared a hundred thousand times. With the news spreading like fire, a self-motivated individual by the name Edgar Maddison Welch forced his way into the supposedly child trafficking compound Comet Ping Pong with a revolver and an AR-15. In the process of executing his mission, he fired a couple of rounds, thus scaring away all the employees and customers. But much to his dismay, there was not a sign of the telecasted sex slave dungeon in the pizzeria.²¹ Later he was apprehended by the police and sentenced to four years imprisonment.

Apart from Twitter and Facebook acting as the incubation ground for fake news, the medium that fuelled its import in households and gave credence to it were traditional news outlets. With ever-growing demand for breaking news amidst the ultra-competitive news market, journalists in general were left with no choice other than scavenging social media for new stories. In this process, they cut corners and published news without a thorough investigation. The result of this choice and lax attitude meant that conspiracy theories and fake news easily found their way into prominent newspapers. Moreover, the publication of news in a renowned daily meant a seal of approval to its veracity. Furthermore, given the senior citizen membership and vast circulation of these papers, distorted information reached ears of elderly people (who are not very active on social media) and far-flung areas without a broadband connection. Thus, news outlets became the last prey to succumb to fake news, and with it infected the entire country.

²¹ Andy Kroll, *The former Clinton campaign chairman is among the victims still recovering from a vile conspiracy theory that ended in gunfire*, ROLLING STONE, (Dec. 9 2018), <https://www.rollingstone.com/politics/politics-features/john-podesta-pizzagate-766489/>.

2. Learning from the US fiasco- Legal and Ethical issues

The US example has brought forth an array of issues both legal and ethical that needs to be resolved. Troublemakers by their act have deluded the common populace by scheming outright lies. While these lies were used for supposedly political motives, some orchestrated rumours like the Pizzagate scandal²² lead to farfetched reactions. The act of the schemers may fall under the instigation to a riot.

18 U.S. Code § 2101 provides for punishment for riot and abetment to riot.

a. Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent—

- 1. to incite a riot; or*
- 2. to organize, promote, encourage, participate in, or carry on a riot; or*
- 3. to commit any act of violence in furtherance of a riot; or*
- 4. to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot; and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph (A), (B), (C), or (D) of this paragraph shall be fined under this title, or imprisoned not more than five years, or both.*

In the Pizzagate scandal, the perpetrators used the internet as a medium to deceive people about the pizzeria working a sex racket. This in turn motivated Edgar Maddison Welch to force his way into

²² Supra Note 20.

the pizzeria with a gun²³ and causing unrest among employees. While it may be said that the act of the perpetrators was not to instigate a riot/disturbance but for political gains, but since their act directly led to such odd turn of events, they may be charged with abetment to riot.

Apart from the singular instance of supposed abetment to riot, the act of cyber warriors brings our attention to the root of the cause, i.e. fake posts. In light of grim outcomes of these posts, there needs to be a concrete legislation to tackle the issue. Further, this fiasco also sheds light on a massive ethical issue of press reporting. As has already been mentioned in-depth journalists combed social media platforms for getting a juicy scoop of news. Hence what was served on newspapers was no different than the lies doing rounds in the net. Such an act of journalist goes against the ethics of providing honest news to the reader.

The Code of Ethics published by Society of Professional Ethics (Journalist Representation Organization)²⁴ clearly states that *“journalists must verify the information before releasing it. Further original sources must be used whenever possible.”*

As can be seen, the code lays down the burden of fact-checking on the journalist himself. Hence, the act of journalists during the US elections clearly defied the code. Though the code elaborately lays down the obligations of journalist, given the fact that it is has no statutory authority, it does not have any persuasive value. In presence of such a void, specific legislation must be implemented to enforce accountable journalism and curb the propagation of fake

²³ Supra Note 21.

²⁴ SPJ Code of Ethics, (Sept. 6 2014, 4:49 PM), <https://www.spj.org/ethicscode.asp>.

news.

B. Terrorism via Social Media

This sub-section looks into instances where terrorism has been propagated with aid of trend hijack. Further, a discussion is also done as to the legislation prohibiting such a conduct.

1. Fear in the Islamic State at work

With the loopholes of micro-blogging sites like Twitter being made apparent to the world, even terrorist organizations have started to exploit them to fulfil their devilish designs. The latest to join the fray is the infamous Islamic State (hereinafter referred to as IS). The terrorist organisation extensively used social media accounts to share videos and pictures of beheadings and torture during its heyday. While the photos in general brought a sense of disgust and fear among masses, a select portion of supporters saw it as a sign of strength.²⁵

Thus, with these trial-runs the organisation succeeded in its mission to spread fear as well as draw the attention of believers at the same time. Since the number of supporters for terror was significantly low, the organisation devised a way to gain unwitting Twitterati for making a big splash. Towards this end, it launched a mobile app by the name “Dawn of Glad Tidings”. This portal app developed by cyber warriors provided updates on the activities of IS and spiritual guidance. While the app worked just like any other app, the catch to it was that while creating an account the user was directed to grant the app permission to access his Twitter account.²⁶

²⁵ Supra Note 12.

²⁶ J.M Berger, *How ISIS games Twitter*, THE ATLANTIC, (Jun. 16 2014), <https://www.theatlantic.com/international/archive/2014/06/isis-iraq-twitter-social-media-strategy/372856/>.

Once granted such an access, the organisation used such accounts to retweet their propaganda.²⁷

With the arsenal of true believer, unwitting Twitterati, and bots at the perusal, IS next led down its move to hijack a big social media trend. To this end, the organisation preyed on #WorldCup2014. With the world event underway, almost everyone on Twitter was discussing about it and the advertisers were out there made big money through it. Looking at the popularity of the trend, the terror network took over the hash tag. This resulted in the posting of tweets on terror, and IS propaganda instead of soccer, under the trend.²⁸ The fact that the trend being a source of discussion and marketing to people, Twitter struggled to stop it and thus the propaganda sailed for quite a while without any hiccup. Other trend hijacks that saw the presence of IS cyber terrorists were #StevensHeadInObamasHand with threats to execute American journalist hostage Steven Sotloff²⁹, and #napaquake with threats to assassinate then-President Barack Obama and tweets containing gruesome photos of martyred US soldiers.³⁰

The malice posed by the organisation online has weaned over the years. Reason for the decline of propaganda tweets over Twitter, is

²⁷ Paul Marks, *How is ISIS winning the online war for Iraq*, NEW SCIENTIST, (Jun. 25 2014), <https://www.newscientist.com/article/dn25788-how-isis-is-winning-the-online-war-for-iraq/>.

²⁸ Emerson T. Brooking, P.W. Singer, *War goes Viral*, THE ATLANTIC, November 2016 Issue <https://www.theatlantic.com/magazine/archive/2016/11/war-goes-viral/501125/>.

²⁹ Casey Johnston, *ISIS co-opts Twitter hashtags to spread threats, propaganda*, Ars TECHNICA, (Aug. 27, 2014, 3:35 am), <https://arstechnica.com/information-technology/2014/08/isis-co-opts-twitter-hashtags-to-spread-threats-propaganda/>.

³⁰ Alexander Trowbridge, *ISIS swiping hastags as part of propaganda efforts*, CBS NEWS, (Aug. 26, 2014, 5:32 am), <https://www.cbsnews.com/news/isis-hijacks-unrelated-hashtags-in-attempt-to-spread-message/>.

because of the stern and efficient action taken by the micro blogging site. Learning from the past exploitations of the portal, Twitter has implemented a stricter check on the tweets and has removed 6,00,000 IS-related accounts consisting of bots, cyber warriors, and true believers.³¹

2. Indian Legislations against Online Terror

Terrorism in general is seen as a major threat by any sovereign nation. The propagation of such the act, in case of the IS, is seen quite sternly by the law authorities. Several legislations have been framed to stop the act of terrorism. While propagation of online terror is a new occurrence in the world, especially in India, some Indian laws have been up to the task to check such unlawful activities. The acts of terrorism and its punishments in general are covered by **Unlawful Activities (Prevention) Act, 1967** (hereinafter referred to as **UAP Act**). The relevant provision is mentioned hereunder.

Section 18B³² prescribes punishment for recruiting terrorists

“Whoever recruits or causes to be recruited any person or persons for commission of a terrorist act shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.”

Further, **Section 66F of the Information Technology Act, 2000** (hereinafter referred to as **IT Act**), which defines cyber terrorism, to certain extent regulates online terrorism. In addition to these legislations any act of terrorism infringes provisions of **Indian Penal**

³¹ Carleton English, *Twitter Continues to Wage its Own War against ISIS*, NEW YORK POST, (Mar. 21 2017, 10:05 PM), <http://nypost.com/2017/03/21/twitter-continues-to-wage-its-own-war-against-isis/>.

³²Unlawful Activities (Prevention) Act, 1967, Section 18 A.

Code, 1860 (hereinafter referred to as **IPC**) under the act of sedition and waging a war against the country. The relevant provisions are reproduced hereunder.

Section 124A³³- Sedition

1 *Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards,*

2 *the Government established by law in*

3 *[India]*

4 *shall be punished with*

5 *[imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.*

Section-121³⁴ Waging, or attempting to wage war, or abetting waging of war, against the Government of India—

Whoever wages war against the [Government of India], or attempts to wage such war, or abets the waging of such war, shall be punished with death, or [imprisonment for life] [and shall also be liable to fine].

While, online propagation of terror in India is uncommon, an arrest of an Indian youth named Mehdi Masroor Biswas made for his tweet links with IS. It was alleged that the accused through his Twitter handle @shamiwitness actively retweeted tweets of IS and aided in recruitment of terrorists.³⁵ Charges brought against him

³³ Indian Penal Code, 1860, Section 124A.

³⁴ Indian Penal Code, 1860, Section 121.

³⁵ Jhonson TA, *In a first, West Bengal engineer to stand trial for (IS) terror online*, INDIAN EXPRESS (13 May 2016, 8:28 am),

under the aforementioned legislations. The case is currently *sub judice*.

C. The War of Races- Social Media, a Battleground

Social media platforms have on many occasions in the past been the recipient of division and clashes on racial lines. With the presence of ardent followers on both sides of the races, minor altercations online can turn ugly and can manifest repercussions for individuals in the real life. Profiteering from this tense situation, miscreants have time and again exploited these platforms for inciting violence by spreading rumours and fake news.

1. The Pittsburgh Shootings

The city of Pittsburgh located in Western Pennsylvania was witness to one of the deadliest attacks on the Jewish populace in recent times. Orchestrated by an anti-semitic individual, Robert Gregory Bowers, the mass shooting inside the Tree of Life synagogue claimed eleven lives and wounded half-a-dozen people.³⁶ Following the grave attack, sadly the influx of hate speech directed towards Jews in the form of social media-posts and Google searches reached a 12-month-high.³⁷ Adding fuel to the fire, politicians like

<https://indianexpress.com/article/india/india-news-india/west-bengal-engineer-to-stand-trial-for-isis-terror-online-2798009>.

³⁶ Campbell Robertson, Christopher Mele, Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, NEW YORK TIMES, (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html>.

³⁷ Mallory Simon, Sara Sinder, *A gunman slaughtered 11 Jewish worshippers. Then people hunted for hate online*, CNN, (May 16, 2019, 3:45 am), <https://edition.cnn.com/2019/05/15/us/anti-semitic-searches-pittsburgh-poway-shootings-soh/index.html>.

Louis Farrakhan joined the fray and spewed venom against Jews calling them termites.³⁸ Fuelled by hate comments online and flawed political ideologies, campuses all across US saw a surge in acts of hatred. One such case that came to light within a month of shooting was that of a Jewish psychology teacher at Columbia University walking into her office with walls painted in blood-red swastika and a slur “*yid*”.³⁹ The effect of induced-hatred once again questioned the accountability of social-media platform and raised alarms about the growing differences in the so-called peaceful society.

2. Hate induced Italy

The case of hatred in Italy takes roots from its long-standing hatred towards Roma natives. Animosity and hate induced between the two groups dates back several hundred years, with the Italians being the oppressor and the Roma being the oppressed.⁴⁰ The other party that is oft targeted and religiously hated by Italians are the immigrants. Given the unified hatred towards Roma and immigrants, it is unsurprising that miscreants are presented with an ample opportunity to spread fake news and deceive the populace.

The country witnessed in what was proclaimed as an Ebola

³⁸ Video of Louis Farrakhan comparing Jews to termites removed from Facebook, JEWISH TELEGRAPHIC AGENCY, (Oct. 21 2018, 3:46 PM), <https://www.jta.org/2018/10/21/united-states/farrakhan-termites-video-removed-facebook>.

³⁹ Jeremy Bauer Wolf, *A Surge of Anti-Semitism*, INSIDE HIGHER ED, (Dec. 5, 2018), <https://www.insidehighered.com/news/2018/12/05/anti-semitic-incidents-surge-college-campuses-after-pittsburgh-synagogue-shooting>.

⁴⁰ Emma Graham Harrison, *Italy's treatment of Roma people rooted in centuries-old prejudice*, THE GUARDIAN, (Jun. 20, 2018, 6:51 PM), <https://www.theguardian.com/world/2018/jun/20/italys-treatment-of-roma-people-reflects-a-centuries-old-prejudice>.

outbreak by the misguided commentators and anti-immigrant parties in the year 2014. Truth being said there was no cause of concern with regards to the epidemic, given the assurances given by health coordinators in Lempesuda (a transit point for immigrants). But conspiracy theorists and pages like Catena Umana (anti-immigrant page) did not heed to the officials, and posted made-up stories on how diseased migrants were harbingers of the end of Italians.⁴¹ Misinformation splashed from the online space to the offline sphere, when newspapers like *Il Giornale* published articles stating the epidemic arrived with the immigrants.⁴² Given the widespread dissemination of the flawed information, then-minister of Health, Beatrice Lorenzin had to interject and clear the rumour pertaining to the epidemic and appease the alarmed masses.

In another incident of hate speech, the Roma natives were charged with the accusation of being child kidnappers. With the news being circulated across all social media portals, it reached nook and corners eventually turning into media hype. Investigation on all such news though resulted in it turning out to be fake and unfounded. On the lines of Italy, the rumours of child kidnapping made rounds online in France earlier this year, resulting into an attack on twenty Roma natives. The police arrested the vigilantes and warned people against propagating fake news.⁴³

⁴¹ Leonardo Bianchi, *Italy's False 'Ebola Outbreak' Is Spread by Racists and Conspiracy Nuts*, VICE NEWS, (Apr. 29, 2014, 10:15 PM), https://www.vice.com/en_us/article/59ajzd/italys-false-ebola-outbreak-is-spread-by-racists-and-conspiracy-nuts.

⁴² Claudio Michelizza, *Ebola arrives with immigrants*, BUFALE.NET, (Apr. 22, 2014), <https://www.bufale.net/ebola-sbarca-gli-immigrati-giornale-bufala/>.

⁴³ *French Roma attacked over false 'man in van' kidnap rumours*, BBC NEWS, (Mar. 27 2019), <https://www.bbc.com/news/world-europe-47719257>.

Taking action against flawed content creators, the Italian officials pinned down on a blog known for posting racist content by the name senzacensura.eu in the year 2015. The owner of the blog, a 20-year student from Caltanissetta apparently posted made-up stories picturing immigrants partaking in heinous acts against natives. In a statement given to the police, he admitted of using his blog and posts as a medium to attract reader's attention to succulent news while earning money through advertising. Arresting the individual on the grounds of inciting racial violence, the police were bewildered by the copious amount of hatred spread by the miscreant.⁴⁴

3. The hate infested Indian social media space

India, in the past few years has witnessed a significant rise in the presence of hate speech in the online space. As has been the narrative in the other countries, miscreants have time and again exploited controversial issues to knock off the equilibrium of peace in the country. India scored a dismal 8.7/10 in Social Hostilities Index, 2018 (hereinafter referred to as SHI), indicating a presence of very high hostility.⁴⁵ In the recent times, Assam especially has seen turbulent affairs given the invocation of National Register of Citizens List (hereinafter referred to as NRC List), and the Bodo militant insurgencies. Banking on the prevailing discomfort amongst the people, miscreants spread rumours through a behemoth of text messages and social media posts that the Muslims were likely to

⁴⁴ Marco Consoli, *Closed Senzacensura.eu the site that instigated racism*, LASTAMPA, (Sept. 2015, 00:07 am), <https://www.lastampa.it/tecnologia/2015/09/01/news/chiuso-senzacensura-eu-il-sito-che-istigava-al-razzismo-1.35219989>.

⁴⁵ Dipti Jain, *What does data say about intolerance in India?*, LIVEMINT, (Apr. 26, 2017, 4:34 PM), <https://www.livemint.com/Politics/TS3jZUTVcCzkQHipNA9whK/What-does-data-say-about-intolerance-in-India.html>.

target people in response to Bodo militant insurgencies.⁴⁶ Such rumours were accompanied by gruesome pictures of beheadings and lynching. Alarmed by such rumours, thousands of people working at the metropolis rushed back home, to Assam.⁴⁷ Given the precarious situation, the Government restricted messaging services, blocked about 300 web pages and asked Twitter to suspend a number of accounts.

In another incident of fake news that happened in Assam, rumours of child abduction were spread through online channels. Responding to such rumours, a group of sixteen men killed two men who were out on a picnic. The police arrested the perpetrators⁴⁸ but this incident surely opened people's eyes to the abuse of social media.

4. Key takeaways from the Hate speech trend

A close reading of the hate speech incidents makes it clear that such incidents are region-centric in nature and stem from some deep-rooted prejudices and stereotypes. It is further seen that the reason of the animosity is once again fake posts. Hence, a legislation

⁴⁶ *A New Political Protocol: Much greater thought and debate are needed to understand how democratic polities are to deal with social media*, ECONOMIC AND POLITICAL WEEKLY, Vol. 47, No. 37, 8,15, (September, 2012).

⁴⁷ *Assam violence: Human Rights body claims 50,000 fled to Northeast*, ECONOMIC TIMES, (Aug. 21 2012, 7:28 am), <https://economictimes.indiatimes.com/news/politics-and-nation/assam-violence-human-rights-body-claims-50000-fled-to-northeast/articleshow/15580128.cms?from=mdr>.

⁴⁸ *Rahul Bedi, Social media rumours lead to mob lynching of two men in India*, THE IRISH TIMES, (Jun. 11, 2018, 7:39 PM), <https://www.irishtimes.com/news/world/asia-pacific/social-media-rumours-lead-to-mob-lynching-of-two-men-in-india-1.3527063>.

restricting the propagation of fake posts may curb such instances. While framing such legislations though, care must be taken that it does not end up strangulating the freedom of speech and expression.

This section has brought into light the nefarious use of social media platforms by politically aligned, orthodox religious individuals and terrorist groups to propagate for vested interests. Further, the section dealt with legislations curbing online terrorism. The biggest concerns ensuing from this section were vested political ads, fake news and fake posts. Solutions relating to these issues will be discussed in-depth in the succeeding section.

[VI.] TAILOR MADE SOLUTIONS TO THE ISSUES

The issue posed by the abuse of social media is complex in nature. It presents both global and regional aspects. While the network being global in nature poses issues which cuts across regional lines, the ethnicity, intention of the perpetrator, and place of offence brings to table issues that are truly regional. Thus, while finding a solution to the menace; an approach that inculcates best of both the worlds is the way to go.

A. Putting a leash on unscrupulous political ads

The roguish attitude of political ads broadcasted on social media platforms have come under scrutiny after the fiasco of US Presidential Elections and a series of events that followed it. In a discussion about such ads, it is also imperative to discuss the solution for the privacy which was wilfully breached for gaining consumer data. These concerns have been aptly dealt with below.

1. Honest Ads Act

The US Presidential Election was doctored by political advertisements. These ads scripted what has been named as one of the most controversial elections. In a bid for stopping a repeat of the same tale in future, the Act was passed to save face as well as protect political campaigns from being sabotaged. It in general it prevents foreign influence in the elections by ensuring that political ads sold online are covered by the same rules as ads sold on other mass media.⁴⁹ Section 6⁵⁰ of the Act adds to the definition of ‘electioneering communication’, and the term paid internet and digital advertisements. The inclusion of this term simply brings all the ads displayed on portals like Facebook and Twitter under its ambit.

Furthermore, Section 8⁵¹ requires digital platforms with at least 50,000,000 monthly visitors to maintain a public file of all electioneering communications purchased by a person or group who spends more than \$500 total on ads published on a platform. In lieu of maintaining extensive details, the Act requires the said file to contain a digital copy of the advertisement, a description of the audience the advertisement targets, the number of views generated, the dates and times of publication, the rates charged, and the contact information of the purchaser. Apart from these sections, others provisions delve into prospects that are not of relevance to this paper. On a broader look the provisions of the Act look well-drafted, but only time will tell that whether it can tame the bull.

This Act in itself is a landmark legislation, and can be implemented in India as well. Indian elections have become

⁴⁹ Mark R. Warner, *The Honest Ads Act*, (May 2019), <https://www.warner.senate.gov/public/index.cfm/the-honest-ads-act>.

⁵⁰ Section 6, Honest Ads Act, 2019.

⁵¹ Section 8, Honest Ads Act, 2019.

increasingly digitized over the years. This is supported by the fact that BJP made a humongous investment of \$100 million to promote the Modi campaign and roped in heavyweight advertising companies like Madison World, McCaan Group, and Ogilvy and Mather to do his bidding. The same trend was seen in 2019 with political parties extensively advertising through social media platforms.⁵² In face of such huge investments in advertisement, an act in the lines of Honest Ads Act will do well in promoting accountable advertising campaigns.

2. Draft of Personal Data Bill

India has until now lacked laws that protect the user against misuse of a user's personal information. The transfer of personal data is currently governed by the Sensitive Personal Data and Information Rules, 2011 (hereinafter referred to as SPD Rules), which has increasingly proved to be inadequate.⁵³ In the light of recent events of data breach and predation of data by social media companies, the Government was pressed to introduce a bill to protect the interest of users. The proposed Data Protection Bill 2018 essentially makes individual consent central to data sharing. Expanding on this concept of consent, Section 12⁵⁴ makes it imperative for a user to give free and informed consent before transfer or withdrawal of his data. Keeping a check on the user of data, the Bill mandates that any person processing one's personal

⁵² Dr. Sangeeta Mahapatra, *India online: How social media will impact the 2019 Indian General Election*, (11 January 2019), THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, <https://blogs.lse.ac.uk/southasia/2019/01/11/long-read-india-online-how-social-media-will-impact-the-2019-indian-general-election/>.

⁵³ Radhika Merwin, *All you wanted to know about Personal Data Protection Bill 2018*, THE HINDU, (Aug. 6, 2018), <https://www.thehindubusinessline.com/opinion/columns/slate/all-you-wanted-to-know-about/article24617362.ece>.

⁵⁴ Personal Data Protection Bill, 2018, Section 12.

data is obligated to do so in a fair and reasonable manner which respects the privacy of the data principle.⁵⁵ Apart from the focus on consent, the biggest takeaway from the Bill is the proposal to a Data Protection Authority of India⁵⁶. Formation of such a body would go a long way in ensuring the data privacy of people. Keeping in mind the rationale of deterrence, the Bill introduces penalties under Section 69 which can go up to Rs 15 crore or 4% of the company's total worldwide turnover. The Bill also inculcates much needed special provisions for protection of privacy for children.⁵⁷ Apart from provisions relating to privacy, the legislation also puts an obligation on the platforms to maintain transparency. While the bill does look detailed and introduces several reformative provisions, only time will tell if it gains assent of the parliament and takes shape of a law in the future.

B. Curbing the menace of fake posts & news

Finding a solution for curbing fake news and posts is a monumental task given the conflict that comes with imposition of restriction and infringement with the freedom of expression. This sub-section looks into the steps taken in Malaysia, Singapore, Italy and India to reduce the incidents of fake news.

1. Malaysia

The Malaysian Government has been active in curbing fake news. In this regard, it passed **Anti-Fake News Act, 2018**. Section 2 of the Act defines fake news as-

Section 2- Fake News

"any news, information, data and reports, which is or are wholly or

⁵⁵ Personal Data Protection Bill, 2018, Section 14.

⁵⁶ Personal Data Protection Bill, 2018 Section 49.

⁵⁷ Personal Data Protection Bill, 2018, Section 23.

partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas”.

The Act also provides for extra-terrestrial jurisdiction under Section 3 for apprehending people operating outside the precincts of Malaysia. It further imposes a fine of 500,000 Ringgit or an imprisonment of up to 10 years, or both, for propagating or abetting the propagation of fake news by financial assistance under its Section 5. The imposition of such stringent provisions in the opinion of Malaysian Government would curb the dissemination of fake news.

The Act was protested by human rights groups as it placed a bar on freedom of speech and expression. It was felt by these groups that the Act could be used to silence the dissidents of the Government regimen⁵⁸. Though such a possibility might be a possibility, the Act in all departments seems unbiased and intends to weed out fake news from the country.

2. Singapore

The Singaporean Government is the latest entrant in the group of countries to introduce a bill to stop fake news. The **Protection from Online Falsehoods and Manipulation Bill** was tabled on 1st April 2019. Unlike the Malaysian counterpart, the Singaporean Bill is much more detailed, and introduces key concepts like bots under its Section 2. It must be noted that bot as has been discussed earlier, is an integral part of a fake news chain. Further, the Bill also proposes formation of a specialized authority to deal with cases under Section 6. This authority shall be appointed by the Government. In light of the deterrence fines running up to \$1 million has been imposed for people who fail to follow a direction or remedial order.

⁵⁸ Trinna Leong, Nadirah H. Rozdi, *Malaysia passes anti-fake news Bill*, (Apr. 4 2018, 12:35 PM), STRAIT TIMES, <https://www.straitstimes.com/asia/se-asia/malaysia-votes-in-anti-fake-news-law>.

Although the Bill appears beneficial on paper, it faces a serious flaw on the ground of determination of truth of information being adjudged by a public institution.⁵⁹ Given that such an institution is appointed by Government, there could be instances of political meddling in the future.

3. Italy

In light of the presence of hate speech in both online and offline forms in the country, several provisions have been implemented and dedicated institutions have come into being to keep a check on such incidents. Two equality institutions play an important role in countering 'hate speech' in Italy through monitoring and positive measures which are namely, the National Office Against Racial Discrimination (*hereinafter referred to as* UNAR), and the Observatory for Security Against Acts of Discrimination (*hereinafter referred to as* OSCAD). UNAR's tasks include assisting victims of discrimination, receiving and monitoring complaints, promoting research in the area, running training courses, campaigning, and reporting annually to parliament and the Government. OSCAD also receives discrimination complaints. UNAR and OSCAD exchange information and data on hate crimes and have previously organised joint training activities and awareness-raising campaigns.⁶⁰ Apart from these just like India, legal provisions of the country prohibit the broadcast of programmes that hurt religious sentiments. Furthermore, the 2016 Ethical Code of Journalists places on journalists the responsibility to report news that is authentic and

⁵⁹ Karishma Vaswani, *Concern over Singapore's anti-fake news law*, (Apr. 4, 2019), BBC NEWS, <https://www.bbc.com/news/business-47782470>.

⁶⁰ *Italy: Responding to 'hate speech'*, ARTICLE 19, (Apr. 6 2018), <https://www.article19.org/resources/italy-responding-hate-speech/>.

well-researched.⁶¹ Such an obligation minimalizes the chances of proliferation of fake news at least through traditional media.

4. India

As has already been discussed in detail, India has witnessed a huge spike in hate crimes and hate posts over the past years. Provisions pertaining to hate speech are present under IPC. Section 153A⁶² of the Act condemns promoting enmity between different groups on the grounds of religion, race, place of birth, residence and language among others, and carrying out acts prejudicial to the maintenance of harmony. Furthermore, Section 295A⁶³ of the Act provides for penal sanctions against acts that are intended towards outraging of religious feelings of any class by insulting its religion or religious beliefs. Apart from the IPC, the Cinematograph Act, 1952 lays down provisions that prohibit the telecast of an advertisement that hurts the sentiments of a religion of any community.⁶⁴ While these sections do not explicitly state that they have any bearing with hate speech, but Supreme Court has construed it to include the incidents of hate speech. In the case of *Ramji Lal Modi v State of Uttar Pradesh*⁶⁵, the apex Court while adjudging the validity of Section 295A of IPC, held that the section was valid and imposed reasonable restriction on freedom of speech and expression for maintenance of public order.

⁶¹ 2016 Ethical Code of Journalists, <https://accountablejournalism.org/ethics-codes/europe>.

⁶² Indian Penal Code, 1860, Section 153A.

⁶³ Indian Penal Code, 1860, Section 295A.

⁶⁴ Raghav Pandey, Neelabh Bist, *Hate speech vs free speech*, DAILY PIONEER, (Apr. 4, 2019), <https://www.dailypioneer.com/2019/columnists/hate-speech-vs-free-speech.html>.

⁶⁵ AIR 1957 SC 260.

The movement for curbing hate speech at times appears to err from its path and fall under the ground of invasion of freedom of speech and expression. The suspension of social media accounts of well-distinguished journalists and even then Union Minister Sachin Pilot, on the twilight of Bodo militant fake news scandal appears to be much more than a crusade to stop proliferation of fake news.⁶⁶ An overstepping of fundamental right of speech in the name of meting out justice raises serious questions about the efficacy of present laws and its interpretation. An alternative to such a situation is the blockade only on those users that propagate rumours or have the propensity to do so, as seen from his past history or associations. A blanket ban imposed on all the people irrespective of their actions certainly goes over and above what is meant by law. Selective denial of network access, thus meets the ends of justice.

The denial of network access for curbing the propagation of rumours is simply a stopgap mechanism which does not provide much positive results in stopping fake news. Alternatively, the Indian Government must learn from the examples of Malaysia and Singapore, and pass legislations which specifically prevent fake news. Further, formation of dedicated bodies for redressing the issues pertaining to hate speech can go a long way in mitigating this issue.

This section has summarised the steps that are being taken at a global level to tackle the issues of fake news and political ads. The initiatives taken by different Governments are novel in nature and will aid in bettering the situation.

⁶⁶ *Supra* note 45.

[V.] CONCLUSION

The author through this research paper has tried to highlight the methods by which social media platforms tend to influence opinions of individuals. In this regard, the paper has discussed in great length the effects of such influence in the intimate level as well as on the broader level. In the quest of understanding the reason for such influence, it can be seen that such manipulation stems from the fickle mindset and uninformed choices made by the user. A solution to the abuse of such platforms must thus take into account this elementary flaw into consideration. While changing the psychology of people is not possible overnight, making informed choices sure is possible. For this to happen, people need to be media literate. Literacy in media is the ability to decipher information rationally and making an informed choice. It is inclusive of simple yet important things like checking the relevancy, authority and purpose of any given text. Though it sounds simple, most people do not tend to give any significance to these essentials. In this regard awareness on “social media usage” can be spread through schools and colleges as part of the curriculum. Apart from these, individuals need to share posts on the basis own sense of likeness instead of basing choices on others likeability. Such a rectification in mindset will go a long way to stop the spreading of flawed news and hate posts.

Once the elementary level is in-line with the recommendations, the Government must put their weight in putting a check on the unscrupulous powers of social media giants. While the portals itself must not be restrained, certain tweaks are more than welcome. The Honest Ads Act and Protection of Data Privacy Bill do the needful and have tried to negate the immediate threats posed by the deceptive political ads and privacy. Further, laws in the lines of

Malaysia and Singapore can be framed for achieving a long-term solution to negate concocted news. Apart from legislation, frameworks for ethical journalism like the one in place in EU can be drafted to stop the proliferation of fake news. The authors believe the above recommendations if implemented shall secure the social media space and make it more conducive to community.

UNRAVELLING THE CONSTITUTIONALITY OF THE NUCLEAR DAMAGE ACT, 2010

By Akarsh Kumar & Sagnik Sarkar*

“The history of nuclear energy is filled with too many cases of human failure, and human and environmental harm, to sustain such uncritical trust in expertise or faith in cornucopian progress”¹

India is one of the largest producers of electricity in the world. But when it comes to the consumption of electricity, India is an inefficient user, making our energy demand relatively higher than any developed country. Our energy demand is mostly met by burning fossil fuels, but due to its high depletion rate and harmful effects, the Government has been embracing the idea of nuclear energy. Though it is one of the best alternatives we have, the implementation of the policy has been rushed, and safety and regulatory mechanisms have been highly compromised. This is alarming because the slightest mistake in handling nuclear resources can annihilate the population in just one stroke.

In this paper, the authors shall be first analysing the threat of nuclear energy in the current scenario, with the aid of examples, such as the Three Mile Island case and the recent Fukushima case, and then analysing India's ability to recuperate from such situation by taking into account the socio-environmental aspect of India. Further, this paper shall undertake a cost-benefit analysis of having efficient energy production through nuclear energy, but with the lack of adequate regulatory and safety mechanism.

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¹ James W Feldman, *Notable Quotes*, (Dec. 12, 2019) http://www.notable-quotes.com/n/nuclear_energy_quotes.html.

Furthermore, the authors shall also be analysing the constitutionality of the civil liability aspect of different provisions of the Nuclear Damage Act 2010 through the invocation of the precautionary principle, and the possible violation of the fundamental right of the citizen. Lastly, the paper shall also be focusing on the various recommendations needed in the Act regarding two aspects: Firstly, to ensure fulfilment of the 'absolute liability' principle and Secondly, to ensure that civil liability has some structured and regulated framework.

Keywords: Article 21, Right to Life, Nuclear Damage, Strict Liability, Absolute Liability.

[I.] INTRODUCTION

There were many serious concerns such as the depletion of fossil fuels and its ill-effects such as high greenhouse emission and increase in global warming, due to which a need was felt to shift to renewable sources of energy. Nuclear power is one of the alternatives found in search of a viable renewable source of energy, which could combat the ill-effects of non-renewable sources.²

Although there is no doubt that nuclear energy in itself contains the effect of Damocles' sword, regardless of it, the reasons which still urged the nations to resort to the use of nuclear energy were extinction of non-renewable sources', and the un-ending human needs. However, at the same time, it puts a responsibility on the nations who are using it to take all measures and precautions to prevent or rectify any incidents/disasters that occur.

² Gurmanpreet Kaur, *Nuclear Energy Law in India: An Analysis of Environmental Perspective*, JLJ 39, (2016), <http://docs.manupatra.in/newsline/articles/Upload/A4A3C2EC-3ADC-4524-BCB5-EE0F6350C5A3.pdf>.

A nuclear incident can be defined as “*any occurrence, or any series of occurrences having the same origin, that causes nuclear damage or, but only concerning preventive measures, creates a grave and imminent threat of causing such damage*”.³

The initial legal framework to regulate atomic energy in India can be traced back to 1948. In 1948, the formal legal framework for the regulation of atomic energy was discussed upon in the Constituent Assembly and they came up with the legislation called as Atomic Energy Act, 1948.⁴

Subsequently, the development and growth of the atomic energy sector with time demanded an evolved legislation. It led to the formation of the Atomic Energy Act, 1962 which replaced the previous Act of 1948. The basic functions of the said Act were to restrict the use of the atomic energy for the welfare of the people of India and other peaceful purposes.

Nevertheless, a crucial aspect which the Government fell short on – despite bringing various amendments – was to introduce any compensatory or liability clause in case of nuclear damage resulting out of a nuclear mishap. Accordingly, the Civil Liability for Nuclear Damage Bill was introduced in Parliament⁵ which was passed as an act in 2010 (hereinafter the Act).

Coming to nuclear law, it can be defined as “*the body of special legal norms created to regulate the conduct of legal or natural persons engaged in activities related to fissionable materials, ionizing radiation and*

³ World Nuclear Association, *Nuclear Power in India*, (Dec. 20, 2019), https://www-pub.iaea.org/MTCD/publications/PDF/Pub1160_web.pdf.

⁴ Atomic Energy Act, 1948, No.33, Acts of Parliament, 1962.

⁵ Rajeswari Pillai, *Role of the Indian Political System in Shaping India's Nuclear Policy*, 3 Int'l. J. Nuclear L, 253-256 (2012).

*exposure to natural sources of radiation."*⁶

The main purpose for which nuclear energy is being utilised in India is to generate electricity. Although the amount of electricity that is generated by nuclear energy in India is quite minimal, the potential it holds cannot be doubted. Thus, despite its small contribution currently, the fact cannot be denied that nuclear power holds the potential to lead India to have energy independence, and that is the very reason why its development becomes so critical at present. But it has its own ill-effects as well, which would be dealt with in subsequent parts.

A. Basic Principles of Nuclear Energy

The basic principles of nuclear energy are the principles which ensure that nuclear energy is used to the best of its potential as per the growing global needs. It applies equally to every aspect of the entire nuclear energy system including humans, economical aspects, technical aspects, and so on thus ensuring the safety and security of both the people as well as the environment around. The basic principles in a broader sense are⁷-

- i) Its responsible use- It states that it should be used with such precaution that it does not affect humans or the environment. It should not be used maliciously and the risk of proliferation of nuclear weapons should be taken care of.
- ii) Using for beneficial purposes- The benefits of using nuclear energy should outweigh its cost and risks.

⁶ CARLTON STOIBER, HANDBOOK ON NUCLEAR LAW (2003).

⁷ *Nuclear Power Objectives: Achieving The Nuclear Energy Basic Principles*, IAEA (Dec. 20, 2019) https://www-pub.iaea.org/MTCD/Publications/PDF/Pub1409_web.pdf.

- iii) Its sustainable use- The resource for producing nuclear energy should be used efficiently. There should be continuous advancement in the technology so that its ill-effects can be reduced.

When it concerns nuclear energy in general, International Atomic Energy Agency (IAEA) is the most pertinent organisation at the international level. There are some basic principles laid down by the IAEA that needs to be followed by all the concerned member States, to ensure that nuclear safety and precautions are taken care of.⁸ India has been a member of IAEA since its inception in 1957.⁹ It was established within the United Nations family as the “Atoms for Peace” organisation of the world. Since the IAEA came into the picture, it was entrusted with the responsibility to work with all of its member States and multiple other partners around the world, to advocate safe, secure and peaceful use of nuclear technologies.

The main task that the IAEA is entrusted with is facilitating and encouraging the development and inspection of nuclear power.¹⁰ Further, it has to ensure through non-proliferation safeguards that the use of nuclear energy is restricted to peaceful purposes only.¹¹ It also has the responsibility to set standards to safeguard the health and safety of humanity in consultation with other international organisations and agencies.¹²

Some of the principles which primarily deal with the liability aspects are-

⁸ *Supra* note 6.

⁹ INDIA DEPARTMENT OF ATOMIC ENERGY, UNSTARRED QUESTION NO.471 TO BE ANSWERED ON 04.08.2011 INDIAN MEMBERSHIP IN IAEA (2011).

¹⁰ IAEA Statute, Art III (1)-(4).

¹¹ IAEA Statute, Art III (5).

¹² IAEA Statute, Art III (6).

- i) The responsibility principle- There are many parties which are involved in generating nuclear energy such as operators, regulatory bodies, construction companies, financial institutions, etc. Since all the parties have some control over it, they all undertake a part of the responsibility in ensuring safety. However, the party who is considered to be the most responsible is the operator.
- ii) The compensation principle- Since handling nuclear energy is prone to the risk of causing extensive damage to individuals and mere preventive measures cannot eliminate all possibilities of damage, States should come up with the measures to compensate the victims.

B. International Conventions

While looking at nuclear liability from the international perspective, four instruments govern the same: the 1960 Paris Convention, 1997 Protocol to Amend Vienna Convention, 1963 Vienna Convention, and the 1997 Convention on Supplementary Compensation for Nuclear Damage. The latest addition to it is the Convention on Supplementary Compensation for Nuclear Damage (CSC)¹³, which was formed under the patronage of IAEA and deals with the nuclear liability aspect. The CSC compensates for nuclear damage from the international fund in case any nuclear mishap occurs in any of its signatory countries. It also provides a proper channel to claim the compensation for nuclear incidents.¹⁴ India ratified CSC in the year 2016.

There have been many instances in the past of nuclear debacles

¹³ Convention on Supplementary Compensation for Nuclear Damage, 36 I.L.M 1473 (Dec. 12, 1997) [hereinafter CSC].

¹⁴ G. Balachandran, *The Civil Nuclear Liability Bill*, INSTITUTE FOR DEFENCE STUDIES AND ANALYSES (2010), https://idsa.in/system/files/ib_CivilNuclearLiabilityBill.pdf.

such as the Chernobyl event in 1986. These incidents highlight that nuclear debacles not only affect the region it occurs in, but also affect a broad range of nearby States and their ecosystem as well. Moreover, the after-effects of the nuclear fiascos remain for a long period. Thus, this created a need to come up with a global regime which could offer damages to the victims on a uniform basis irrespective of their nationalities. Although efforts were made to form the same after the Chernobyl debacle, there could not be any universal solidification regarding an international nuclear liability regime.

Focusing on India specifically, there are three primary sources which together constitute the nuclear liability framework of India at the international level, which are firstly, the Indian Nuclear Insurance pool, Secondly, the ratification of CSC, 1997¹⁵ accompanied with certain executive explanations of the Act which has been dealt in the subsequent sections and lastly, rules of the Ministry of External Affairs. Sections below extensively deal with the legislations in India on nuclear liability.

Article 10 of the (CSC)¹⁶ speaks of the 'recourse of operators' under two conditions, which is when it is explicitly provided in the contract, or when it is caused intentionally by an individual. Although section 17(b) of the Nuclear Damage Act, 2010 (the Act) (dealt extensively in the next section) also provides 'recourse for operators' against the suppliers in certain circumstances, it widens the ambit of the recourse.

Interpreting the term 'only' with the term 'may' of Article 10 of

¹⁵ MEA, INDIA SUBMITS THE INSTRUMENT OF RATIFICATION OF THE CONVENTION ON SUPPLEMENTARY COMPENSATION FOR NUCLEAR DAMAGE (CSC), 1997 (2016).

¹⁶ CSC, *supra* note 13.

the CSC, it may be construed that it does not resort to the recourse in any conditions other than the two mentioned above.¹⁷ At the same time, Section 10 of the Act provides for an additional situation, wherein operators can resort to the recourse, which is clearly in contravention to the CSC. Further, the stance of the CSC also becomes clear from its other provisions which specifically talk about the concept of 'Absolute Liability of the operator' that invalidate the scope of any other interpretation.¹⁸

Thus, it is evident that section 17 (b) of the Act does not align with the provisions mentioned in CSC

C. Civil Liability under the Nuclear Damage Act, 2010

The Indo-US Civilian Nuclear Agreement of 2005 paved the way for the Civil Liability for Nuclear Damage Act, 2010¹⁹. The Act was envisaged with certain purposes such as to create a civil liability in the cases of nuclear incidents, making operators of the nuclear plants i.e. the Government of India liable to assist the victims of the said nuclear incidents in providing instance compensation, in place of the suppliers. It also holds them responsible to implement the no-fault liability rule while providing compensation for fatalities caused due to nuclear accidents. The no-fault liability rule as given in section 17 (b) of the Act is a principle wherein the initial liability rests on the operator. However, the operator has a right under the Act to recover the said compensation from the supplier of the nuclear materials for any default in the material or service provided by him.

¹⁷Arghya Sengupta, *Operationalizing India's Nuclear Agreements*, VIDHI LEGAL POLICY (2015), https://vidhilegalpolicy.in/wp-content/uploads/2019/05/150106_NuclearLiabilityReport_Final_Website.pdf.

¹⁸ CSC, Art. 3(3).

¹⁹ The Civil Liability for Nuclear Damage Act, 2010, No.38, Acts of Parliament, 2010, Section 5 [hereinafter Civil Liability Act].

India also became a member of the CSC after the enactment of this Act. This Act was passed in September 2010, and has since managed to be a controversial issue of continuous debate.²⁰ This is because the legitimate effort of the Government to protect rights and to create liabilities on the concerned entity or person has backfired since it infringes the fundamental rights of many, which will be substantiated subsequently.

When it comes to the accountability and liability for any nuclear damages, which may arise, the Act still remains ambiguous on many levels which could be analysed through various sections of the Act.

The sections of the Act which deal with the liability aspect have been dealt herewith-

- i) As per Section 4, the operator of nuclear installation would be liable in case of occurrence of any nuclear damage out of the nuclear installation or involving nuclear installation. Further, it states that when more than one operator is responsible for the said nuclear damage then the operators would not be liable separately, be joint and several.
- ii) According to Section 5, certain exceptions have been meted to the operators such as in case of any civil war, or in cases of armed conflicts, or terrorism, or mutiny, or any hostility, or a natural disaster having an exceptional character. In such cases, the operators are absolved of their liability to compensate for the damages. This very

²⁰ Zina Varelas, *Analyzing the 2005-2008 U.S.-Indo Civil Nuclear Cooperation Deal as a Model for Dealing with Nuclear Rising Powers*, GEORGETOWN UNIVERSITY (2011).

section goes against the principle of absolute liability by providing exceptions to the operators.

- iii) Section 6 which provides the recourse of the supplier, has also been limited since it puts a cap on the damages which can be claimed from the operator and Central Government. Under this section, the liability of operators as well as of central Government in all respects are capped at Rs 15 billion (USD 238 million), or an equivalent of 300 million Special Drawing Rights (SDR).
- iv) Furthermore, as per Section 7 if the liability of a nuclear incident extends to a certain limit then the ultimate liability would be that of the Central Government. Thus, the Government of India would be liable in cases where damage exceeds Rs 500 Crores by virtue of being the operator, since as per the Convention on Supplementary Compensation, the liability lies with the operator. So, it makes the operator of the nuclear installation liable over suppliers in the event of a mishap. Since in this case the operator is either the Government or its entities, all payments would be indirectly coming from the taxpayers.²¹

The above clauses evidently favour the interest of corporate houses and nuclear suppliers, over the interest of the affected population.

²¹ Norbert Pelzer, *The Indian Civil Liability for Nuclear Damage Act, 2010—Legislation with Flaws?* 56 IJNP (2011), https://www.researchgate.net/publication/296836426_The_Indian_civil_liability_f_or_nuclear_damage_act_2010-legislation_with_flaws (last visited Dec.20, 2019).

There have been few amendments in the act to improve the legislation. For instance, Section 3 of the Act earlier used to give 15 days' limit to notify a nuclear incident from the date of its occurrence, except when the threat could be proved to be insignificant. But now, this has been amended, and the nuclear operators are now required to report any "extra-ordinary nuclear event", including leakage of radioactive materials or radiations within 24 hours of the occurrence, and a detailed report would be needed to be filed within 10 days in accordance to an order of the Atomic Energy Regulatory Board (AERB).²²

However, regardless of some of the amendments brought out by the legislation, the Act still falls short of the polluter pays' principle and absolute liability principle which was laid down by the Hon'ble Apex Court while interpreting Article 21 of the Constitution in the case of MC Mehta v. Union of India (Oleum Gas leak case).²³

D. Civil liability under the Civil Liability for Nuclear Damage Rules, 2011

The Civil Liability for Nuclear Damage Rules, 2011 (the Rules) came into force on 11 November 2011 (the same day as the Act).²⁴ The most debatable part of the Rules is Rule 24 that talks about "right to recourse".²⁵ Rule 24 sub-rule 1 limits the amount of damages that can be claimed as a 'right to recourse' against the operator, either to the extent of the operator's liability or the value of the contract, whichever is lesser.

²² Report Nuclear Incident In 24 Hours: Atomic Energy Regulatory Board to Operators, THE ECONOMIC TIMES (Nov.20, 2013), https://economictimes.indiatimes.com/industry/energy/power/report-nuclear-incident-in-24-hours-atomic-energy-regulatory-board-to-operators/articleshow/26103754.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

²³ Pijush Sarkar, *Civil Nuclear Liability in India: An Assessment of The Judicial Intervention*, https://www.academia.edu/27489225/CIVIL_NUCLEAR_LIABILITY_IN_INDIA.

²⁴ DEPARTMENT OF ATOMIC ENERGY, ATOMIC ENERGY ACT, RULES AND NOTIFICATIONS (2011).

²⁵ Civil Liability for Nuclear Damage Rules, 2011, Rule 24.

Rule 24 of the Rules appears to be restricted merely to Section 17 (a) of the Act, and sub-sections 17 (b) and 17 (c) at the same time do not appear to be covered at all. It is so because all three sub-sections naming 17 (a), (b), and (c) are distinctive in nature and only comes into play when any of them is fulfilled. Thus, the restriction of the liability to a specified time period, i.e. the duration of the initial license issued under the Atomic Energy (Radiation Protection) Rules, i.e., the product liability period or about 5 years, would only come into play when the right of recourse is explicitly mentioned in the contract as per Rule 17 (a)²⁶, due to there being a confinement of the liability to a specific time frame. Thus, the Rules seem to raise some questions and are bound to attract more debate and controversy.

[II.] CONSTITUTIONALITY OF THE ACT AND THE RULES

When Article 21 of the Constitution is analysed, it is learnt that it enshrines the right to life and the right to have a decent and healthy environment as one of its components. Any act done which violates a person's enjoyment of a healthy and safe environment shall be deemed to be violative of Article 21.²⁷

While acknowledging the impact a nuclear installation leaves on an area and its vicinity, it is realised that the list of things being affected or disturbed is endless whether be it the environment, marine life, life and property of an individual, flora, fauna, and the

²⁶ Mohit Abraham, *Right of Recourse: Interpretation under Civil Liability for Damage Liability Rules, 2011*

(Nov.19,2011), <https://nuclearlaw.wordpress.com/2011/11/19/right-of-recourse-interpretation-under-civil-liability-for-damage-liability-rules-2011/> (last visited Dec. 22, 2019).

²⁷ Subhash Kumar v. State of Bihar, A.I.R.1991 S.C. 420.

list goes on. It directly infringes the fundamental rights such as Article 14 and 21 of the Constitution of India as well as the environmental laws.

Now, coming to the Act, it lists out various exceptions provided to the operator in cases of a nuclear debacle such as: not making suppliers' liable and capping operator's financial liability.²⁸ By doing so, it violates various principles such as the 'polluter pays' principle and the 'absolute liability' principle which has been a part of Article 21 of the Indian Constitution and thus, these parts of the Act are unconstitutional.

A. Working of International Conventions in Relation to National Legislations in the Light of Liability Factor

International nuclear liability conventions are very pertinent factors when it comes to enforcement of a judgment or to facilitate any action without facing any hindrance from a national legal system. They are regarded as an apt legal means to deal with nuclear incidents. It works in the form of international yardstick to check whether national nuclear liability legislation is risk adequate or not.

Whenever any nuclear incident occurs then only the application of the international nuclear liability regime formulated by various conventions and the corresponding national legislation comes into play.

A State can consider accepting more than one nuclear liability conventions considering the potential of international dimension nuclear damage can affect. When it comes to international conventions, India is a party to the Convention on Supplementary Compensation for Nuclear (CSC), which has the provision of

²⁸ The Civil Liability Act, Section 5.

additional compensation that is given out of international public funds.²⁹ Thus, it is recommended that national legislation align their domestic nuclear legislation with these international conventions.

B. Analysing the Constitutionality of the Act vis-à-vis Fundamental Rights

Fundamental rights are an inviolable part of an individual, which acts as a sole indicator for its existence against the “all-powerful” State. The necessity to impart fundamental right arises to ensure that when a State becomes akin to a rogue Leviathan, then individuals must have some protection against it and also to ensure that State does perform the duties given to it as per the social contract theory.³⁰

The members of the Constituent Assembly with their prior experience envisaged that chances of any democratic State turning autocratic are quite possible. As at the end of the day, the State is run by a certain group of administrators, and as John Dalberg has said that ‘power corrupts and absolute power corrupts absolutely’.³¹ This indicates that without safeguards placed in the exercise of administrative power, the current society could turn into an autocratic dystopian State with no regard for fundamental rights. So, to capulate the spirit of Preamble in the Constitution, fundamental rights were incorporated which proved to be more than a just shield in the coming times. The most crucial and pertinent to the subject matter here are Article 14, 21 & 38 of the constitution.

²⁹ World Nuclear Association, Nuclear Power in India, IAEA (Dec. 20, 2019), https://www-pub.iaea.org/MTCD/publications/PDF/Pub1160_web.pdf.

³⁰ *Contemporary Approaches to the Social Contract*, (Nov. 29, 2019) <https://plato.stanford.edu/entries/contractarianism-contemporary/>.

³¹ *Lord Acton Quote Archive*, (Nov.30, 2019) <https://acton.org/research/lord-acton-quote-archive>.

1. Does Article 21 hold its relevance current times?

The ambit of Article 21 has increased to such a manifold that it has now started to govern every aspect of our life, from right to life to the right to die. Its role in ensuring the protection of the environment is such that it has paved the way for a new discourse called “Environmental Jurisprudence” which shall be the medium for analysing the validity of the Act.

Article 21 of the Constitution provides that “no one shall be deprived of his life or personal liberty except by procedure established by law” which essentially means that there has to be justified legal enactment (as per Article 14) to deprive an individual of their liberty. Now, section 5(1) of the Act³² provides for exemption of liability to the operators in situations such as natural disaster, armed conflict, hostility, civil war. As per section 5(2) of the Act, operators will not be liable in case of damage to nuclear installation and damage to property. And lastly, section 5(3) states that the operator will not be liable if any person suffers any harm due to his own negligence. It is impertinent to mention Section 6 and 7,³³ which limit the liability of the operator to the extent of 300 million SDR, and any further amount shall be borne by the Government. Now, the above-mentioned sections are inconsistent with the Supreme Court judgements with respect to the “polluter pays” principle.

The court held in Council for Environ-Legal Action³⁴ case that the cost of preventing and remedying the damage caused by the pollution shall be on the company or the undertaking which have caused such pollution. And the Government shall in no way be liable to pay any such amount as compensation. So, it essentially means

³² The Civil Liability Act, Section 5(2).

³³ Id. at Section 6 & 7.

³⁴ Council for Environ-Legal Action v. Union of India, (1996) 3 SCC 212.

that the Act has transferred the liability to the Government, and the Government shall be using tax-payers' money to pay the claims. In essence, it means is that taxpayers would have to bear the burden of the claim based on the law, which in its foundations, is in contravention to Supreme Court judgements.

Another aspect of these sections is that they provide for the strict liability principle, which is again in violation with the Supreme Court principle as held in the case of *MC Mehta v. Union of India*.³⁵ In this case, the court formulated the principle of "absolute liability" and held that the undertaking which is dealing with the inherently dangerous materials shall be absolutely liable, which means that they shall be not be given the exceptions provided in the strict liability principle. Now, if any such incident occurs, as the one occurred in Fukushima, then under the present Act the operator will not only not be held liable, but he will also not have to a pay a dime for compensation.

However, in contrast, the Government of Japan has started to prosecute culprits for both civil and criminal liability because of the magnitude of destruction Fukushima incident caused to life and property.³⁶ Therefore, no justification can be found behind the enactment of these particular sections.

In the case of *Vellore Citizen Welfare Forum v. Union of India*³⁷, the court stated that irrespective of the act the person is carrying on, if the hazardous activity has taken place then the defence of reasonable

³⁵ *MC Mehta v. Union of India* AIR 1987 SC 965.

³⁶ Ben Dooley, *Fukushima Nuclear Disaster Trial Ends With Acquittals of 3 Executives*, N.Y. Times, (Dec. 15, 2019), <https://www.nytimes.com/2019/09/19/business/japan-tepco-fukushima-nuclear-acquitted.html>.

³⁷ *Vellore Citizens Welfare Forum v. Union of India* (1996) 5 SCC 647.

care will not be accepted and he will have to make good of any claim arising out of such transactions. So, the act not only went overboard with the idea of saving the corporate giants but also against the judicial pronouncements. Further, to clear any confusion regarding the ambit of the operator's liability, section 4(4)³⁸ explicitly mentions that the operator shall only have strict liability.

Another aspect of Article 21 which is sacrosanct to "good life" is the right to clean, healthy and safe environment³⁹. Now, as per the Act, one may not sue the operator for the environmental damage caused by faulty designs during construction, or any radioactive leak occurring during transportation.⁴⁰ It means that the operator has been given complete immunity from any environmental damage taking place due to the use of substandard materials or faulty design.

Before the implementation of this provision, a retrospective analysis of the ghastly incident of Bhopal Gas tragedy is required because of two reasons: firstly, such disastrous level of loss of life took place because of lack of stricter implementations of rules and secondly, the court has clearly stated that Union Carbide shall be liable to pay damages amounting to 470 million dollars as a settlement for all the civil liabilities as held in the case of *Union Carbide Corporation v. Union of India*.⁴¹ Hence, when the Apex Court has previously stated that company shall be responsible for all the liabilities in regards to accidents arising out of hazardous activity, then there does not seem to be any reason for deviation for that set path.

It is essential to keep in mind that the maintenance of

³⁸ Civil Liability Act, Section 4(4).

³⁹ MC Mehta v. Union of India AIR 1987 SC 965.

⁴⁰ *supra* note 30, at Section 4.

⁴¹ *Union Carbide Corporation v. Union of India* (1989) 2 SCC 40,

environment is of paramount importance, and its relevancy could not be more justified in the modern world, where young individuals like Greta Thunberg⁴² are conducting rallies for environmental protections. Further, during times like these, short-handed legislations are giving a free license to corporate giants to exploit the environment against the established legal principle, without reasonable cause.

But at the end of the day, one has to strike an accord between the use of nuclear sources as a viable source of energy while also ensuring that individual rights and liberties are protected. The same was held in the case of *R v. The Secretary of State for the Environment*,⁴³ where the court had weighed the cost-benefit analysis of disposal of radioactive waste from Thorp and human rights issues in acceptability of that risk and came to the conclusion to quash the authorisation of disposal of such waste.

Therefore, the interpretation of Article 21 can be narrowly constructed to the extent of it being proportionate to the benefit it gives to the people. However, the moment the cost overbears the benefit, the interpretation has to be changed. This principle was applied in the case of *R v Secretary of State for Environment, Food and Rural Affairs*,⁴⁴ where court accepted the proposed practice of British Nuclear Fuels Limited (BNFL) of manufacturing mixed oxide fuel (MOX), which would yield economic benefit over the mild radiological detriment as the benefit overcomes the cost of the transactions.

⁴² Umair Irfan, *Greta Thunberg Is Leading Kids and Adults From 150 Countries in A Massive Friday Climate Strike*, VOX (Dec.20, 2019) <https://www.vox.com/2019/9/17/20864740/greta-thunberg-youth-climate-strike-fridays-future>.

⁴³ *R v. The Secretary of State for the Environment* (1994) 4 All ER 352.

⁴⁴ *R. v. Secretary of State for Environment, Food and Rural Affairs*, (2002) ELR 24.

It was stated in the case of *KM Chinnappa v. Union of India*⁴⁵ that no economic development is possible without certain damage to the environment, due to which such public utility projects cannot be abandoned. The court further held that “It is necessary to adjust the interest of the economy and also to maintain the environment. Where the commercial ventures or enterprises would bring in results which are far more useful for the people, the difficulty of a small number of people has to be bypassed.”

At the same time, the Government must ensure that by restricting the interpretation of Article 21, the main spirit of the Article i.e. the right to life does not get lost in the process. The concept of the right to life is not the bare minimum living or animal existence, but as Aristotle has said the existence of “good life”. The same principle has been reiterated in the case of *Chameli Singh and others v State of UP*,⁴⁶ where the court has stressed that “organized society right to live as a human being is not ensured by meeting only the animal needs of man, but secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth.” This whole concept gets defeated with the invocation of Section 5 of the Act, where the operators can use sub-standard materials and will be able to get away from the clutches of the law without suffering any consequences for it whereas, the price of such unfortunate incident are paid by residents of that locality. It would mean guillotining human rights, for when the candle of life gets extinguished, all rights of that person perish with it.

2. Is Article 14 the “Saviour”?

Article 14 is one of the foremost articles in the Constitution as it provides safeguards against any arbitrary and unreasonable laws

⁴⁵ *KM Chinnappa v. Union of India* (2002) 10 SCC 606.

⁴⁶ *Chameli Singh v. State of UP* (1996) 2 SCC 549.

enacted by the Government. The Article ensures that the Government does not take any action based on mere presumption but a solid foundation.

The Act suffers from various vices which makes the Act unconstitutional in its operation. The proviso of Section 3 of the Act gives substantial and unregulated power to the Atomic Energy Regulatory Board to decide whether any notification has to be made regarding the nuclear incident or not based, on the gravity of the risk involved in it. Such wide discretionary powers to decide whether the incident is grave enough to call for notification or not must be limited by guidelines which lay down the criteria for considering a threat as grave. In the absence of such detailed guidelines, the powers vested in them are not only arbitrary, but also against the established principle of rule of law which is part of the basic structure.⁴⁷ The interference of court is called for in this regard. As per the case of MP Oil Extraction v. State of MP,⁴⁸ the court stated that *“only when the policy is capricious, unreasonable or is invalid in constitutional mandate then only court’s attention can be sought and the power given under this particular section is unreasonable and arbitrary.”*

In regards to claiming of compensation, the drafters have given wide liberties to the private players, that it is unlikely for them not to meddle with the environment. The proviso to section 4(2) states that in case of joint liability, the extent of the liability shall not exceed the upper limit set in section 6(1) i.e. 300 million SDR or Rs. 3000 crores. This proviso is arbitrary because if any incident occurs due to the combined effect of more than two operators, and the net effect crosses the threshold prescribed in the Act, then people will not only suffer, but they will suffer without any remedy. And as per section 6(1), as already mentioned, 3000 crores is the maximum amount that

⁴⁷ Keshavananda Bharti v. State of Kerala (1973) 4 SCC 225.

⁴⁸ MP Oil Extraction v. State of MP (1997) 7 SCC 592.

shall be borne by the operators in case of any nuclear disaster.

Now, the Government has not given any reason as to how they have deduced that number, or on what basis they are claiming the number. Furthermore, the amount must change as per the magnitude of the situation. If a situation like Chernobyl occurs, then an amount Rs. 3000 crores may not suffice. Such arbitrary and unreasonable action on the part of Government undermines all advancement in human rights jurisprudence. Furthermore, the section neglects to provide for the establishment of any commission or regulatory body for undertaking regular inspection regarding the safety standards maintained in the factory. The result of this may be that the operators would have a free hand to be negligent, and people may suffer for that the same, while their liability will still be capped at a certain maximum limit.

Another section suffering from the same vice is Section 45 of the Act. It states that the Government can give exemption to any nuclear installation under the present legislation if it deals with a very small amount of nuclear material, and risk involved is small. The issue is that the Act does not provide what quantity is to be regarded as a small quantity. Nor has any classification been given as to when any quantity of nuclear material, or risk involved in it shall be considered as insignificant. Unwarranted discretion without any control is detrimental for the democratic principle of the country and the section ought to be amended to bring within the ambit of Article 14. Furthermore, three important sections of the Act shall be analysed with two components of the classification test of Article 14 i.e. test of reasonable nexus and non-arbitrariness test to analyse the constitutionality of the Act.

Reasonable Nexus: - One of the factors which determine whether there has been a violation of Article 14 is through the analysis of

reasonable nexus. Reasonable nexus states that classification made by the Act must have a close connection with the objective of the Act.⁴⁹ The Act makes classification between victims who file complaints within the stipulated time with those who do not file complaints within such time period. Such classification does not fulfil the criteria of intelligible differentia since there is no clear basis of providing such classification. The Act fails not only to provide the basis of taking such time period but also fails to take into account the fact that nuclear discharge remains in the area way beyond the time limit given in the Act. Even if the present generation is compensated, the lives of the future generations are still at risk. Reference can be taken from the Chernobyl incident where it is said that areas are not habitable for at least 2000 years⁵⁰, and people born 30 years after the incident still suffer from different cancer diseases.⁵¹

The objective of the Act states that the purpose of enacting the legislation is to provide prompt compensation to the victims of the nuclear incident. But there is no reasonable nexus between the objective and the intelligible differentia since the objective was to give compensation to the victim of nuclear damage incident and at the same time sec 15(2) and 18(b) provides restriction as to who all can avail such remedy. Section 15(2) states that that the claim has to be filed within 3 years from the date of knowledge of the nuclear damage. Further, in Section 18(b) it states that person loses his right to claim compensation if he does not claim it within 10 years in case

⁴⁹ Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar & Ors. A.I.R. 1958 S.C. 538.

⁵⁰ Erin Blakemore, *The Chernobyl disaster: What happened, and the long-term impacts*, NATIONAL GEOGRAPHIC (2019), <https://www.nationalgeographic.com/culture/topics/reference/chernobyl-disaster/>.

⁵¹ *Chernobyl 30 years on and the tragic generation of children blighted by a merciless cancer cloud*, MIRROR, (Apr. 24, 2016), <https://www.mirror.co.uk/news/world-news/chernobyl-30-years-tragic-generation-7817717>.

of property damage, and 20 years in case of personal injury.

Because of fixation of such period, the valuation of compensation will be determined by taking into consideration the suffering of the surviving victims only, and not that of the future generation. This fixture of the time period is neither based on any substantial reason nor founded on any nexus with the objective of the Act, so there cannot be any justified reason to deny any person their rightful claim merely because of a technicality. Even the Paris⁵² and Vienna Conventions⁵³ provide for 30-year claim period. The reason being that once post-accident studies are conducted then only people should be given the opportunity of being heard so that they can make a knowledgeable claim.

Arbitrariness: Another component added in the 'classification test' was the issue of arbitrariness as decided in the case of *Charanjit Lal Chowdhury*⁵⁴. This principle states that classification made in the Act should not be arbitrary, evasive or artificial. It means there has to be a certain reason as to why certain classification has been made and not to be arbitrary.

Now, the section affected by this test of Article 14 is Section 38(1) of the Act. The section provides that the Government has untrammelled power to dissolve the Nuclear Damage Claim Commission (established under Section 19) if the Government assumes that the function for which it was established has been fulfilled, or the due case is so less that it would not justify the cost of its establishment. Furthermore, the section provides that any claims remaining undecided after the dissolution of the commission shall be transferred to the claims commission as per sub-section 2(a) of the

⁵² OECD, Convention on Third Party Liability in the Field of Nuclear Energy (Paris Convention), OECD/LEGAL/0038.

⁵³ G.A. Res 59/38, Vienna Convention on Civil Liability For Nuclear Damage, (May 21, 1963).

⁵⁴ *Charanjit Lal Chowdhury v. Union of India*, A.I.R. 1951 S.C. 41.

section.

The prima facie problem with the section is that it has made classification between persons whose claims are being settled by Nuclear Damage Claim Commission, with those whose were meant to be settled by the Commission but now being settled by claims commission. So, if the Government decides to dissolve the Nuclear Damage Claim Commission and shift the remaining cases to claims commission then those persons whose claim has been transferred shall be negatively affected. It would then mean creating a different class of people; i.e. a certain class of people whose claim has been decided by nuclear damage claim commission and another class whose claim shall be decided by claims commission and this classification do not have any nexus with the objective of law nor does it stand the test of reasonableness.

Such unchecked power is not only un-democratic but also against the welfare of the people. Thus, this provision can be regarded as unconstitutional under Article 14 of the constitution. Apart from that, application of the section arises some additional problems like; firstly, the Act has not given any guidelines as to when shall Government have the ability to exercise the power of this provision, secondly, the Act has not provided any checks and balances regarding the use of the power, thirdly, the Act has not provided any basis for determining when shall it be necessary to establish claims commission and when shall it be necessary to establish nuclear damage claim commission.

C. Viewpoint of Directive Principles of State Policies

It is been often considered that the Directive Principle of State Policy (DPSPs) is not enforceable and will not have that stature as that of fundamental rights so it can be easily violated. However, the Supreme Court from time and again has held that DPSPs and

Fundamental Rights have to be read as one supplementing the other rather than both existing independently of each other. Supreme court in the case of *Keshavananda Bharti v. Union of India*⁵⁵ and in the *Minerva Mills case*,⁵⁶ have held that both fundamental rights and DPSP should be treated equal and the courts' attempt should be to bring about the harmony between the two concepts instead of reading a conflict.

1. Article 38- The Last Stand

Article 38 of the Constitution states that "*State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life.*" This Article may seem like a marginalized portion of the constitution, but the court has laid enough stress on it and in the case of *Charan Lal Sahu v. Union of India*.⁵⁷ The court decided that "*it is the duty of the State to protect its citizens and it takes into custody the rights and the privileges of its citizens for discharging its obligation.*" The Court also held that *maxim saluspopuli suprema lex* or, public welfare is the highest law.

Furthermore, in the case of *Pritam Pal v. High Court of MP, Jabalpur through Registrar*,⁵⁸ the Court again emphasised on the welfare of the citizens being the highest law of the land, and that the State ought to look out for its citizens. The spirit of the constitution lies in the welfare of the people, and the Supreme Court has established that in the case of *State of Karnataka v. Dr Praveen Bhai Thogadia*,⁵⁹ where it stated that "*welfare of the people is the ultimate goal of all laws, and State action and above all the Constitution. They have one common object that is to promote the well-being and larger interest of the society as a whole and not of any individual or particular groups carrying any brand names.*"

⁵⁵ *Keshavananda Bharti v. State of Kerala* (1973) 4 SCC 225.

⁵⁶ *Minerva Mills v. Union of India* AIR 1980 SC 1789.

⁵⁷ *Charan Lal Sahu v. Union of India* AIR 1990 SC 1480.

⁵⁸ *Pritam Pal v. High Court of MP, Jabalpur through Registrar* 1993 Supp (1) SCC 529.

⁵⁹ *State of Karnataka v. Dr. Praveen Bhai Thogadia* (2004) 4 SCC 684.

Now, when the welfare of the people has gained so much importance, much after the unfortunate Bhopal Gas Tragedy, it would seem like a hasty act of the legislators to impress some foreign power and private players in passing the Act, rather the securing the needs of the people.⁶⁰ The Act gives bare minimum welfare to the people, which is ironic because our country was founded in the ideology of “welfare state”. The Act has multiple provisions such as Sections 3(1), 4(4), 5, 6 which are not only un-democratic in nature but also anti-people. Reference must be taken from the case of *G. Sundarrajan v. Union of India*, where the Court held that “the collective interests should not be thrown overboard for the development of the power sector. If the safety measures are adequately not taken and the apprehensions are not removed and the fear is not completely ostracized from the minds of the people of the locality, posterity may not recognize the same as a development or a progressive step.”⁶¹

2. The *Parens Patriae* Principle

Parens Patriae is a well-known principle which imposes an obligation on the State to ensure the welfare of its citizen. This concept is derived from reading the Articles 38 and 39 with the Preamble of the Constitution. The principle states that it is the right and duty of the sovereign in the public interest, to protect persons under disability who have no rightful protector.⁶² This principle states that it is on the State to look out for those who cannot look for themselves. It is on the State to look for the disabled, injured person who needs special attention of the State to survive in the competitive world. It is the obligation to ensure the protection of the rights and privileges of those people who cannot ensure their own welfare. It is for the State to fight for the rights of the people who are not in any

⁶⁰ Sandeep Dikshit, *Manmohan may carry Nuclear Liability Dilution as Gift for U.S. Companies*, THE HINDU (Sept. 19, 2013), <https://www.thehindu.com/news/national/manmohan-may-carry-nuclear-liability-dilution-as-gift-for-us-companies/article5142882.ece>.

⁶¹ *G. Sundarrajan v. Union of India* (2013) 6 SCC 620.

⁶² *Charan Lal Sahu v. Union of India* (1974) 2 SCR 348.

position to assert and secure their own rights.

In the US case of *Alfred L Snapp & Son, Inc v. Puerto Rico*,⁶³ the Supreme Court of the U.S. justified this principle by stating that the Commonwealth of Puerto Rico has legitimate standing to sue as *parens patriae* to enjoin apple growers' discrimination against Puerto Rico migrant farm workers. In this case, the Government of Puerto Rico working as "*parens patriae*" of the farm workers and sued the Virginia apple workers regarding the discrimination Puerto Ricans workers faced which violated the Wagner-Peyser Act⁶⁴. The US Supreme Court held that the Government of Puerto Rico have "*parens patriae*" standing to sue for its citizens, for the people who cannot ensure the protection of their own rights. It further held that its workers were getting discriminated and the Government has a valid standing to protect for their citizen's rights.

This principle is, without a doubt, part of our Constitution. From the *Banku Behary v. Banku Behary Hazra* case⁶⁵ to *Charan Lal Sahu* case,⁶⁶ all have reiterated the principle of "*parens patriae*". In light of the same, the Government must stand for the right of those people who may suffer from nuclear radiation or any sort of radioactive radiation-related diseases. The Government ought to stand for the people whose rights have been violated in the hands of the nuclear companies, and fight for them till they get the requisite claim justified for their sufferings. Instead, the Government and the legislation appear to be safeguarding the interest of the accused, protecting those who are already capable enough to protect themselves, and safeguarding the financial interest of those who are already financially secure.

The Section which violates this principle is Section 14 of the Act. The Section deals with the principle of *locus standi*, i.e. all who are eligible to file for the claim arising out of a nuclear incident. In this

⁶³ *Alfred L Snapp & Son, Inc v Puerto Rico* 458 US 592.

⁶⁴ Wagner-Peyser Act of 1933 29 U.S.C. 49a.

⁶⁵ *Banku Behary v. Banku Behary Hazra* AIR 1943 Cal 0203.

⁶⁶ *Charan Lal Sahu v. Union of India* AIR 1990 SC 1480

section, there is no such provision for the Government to file a claim on behalf of the affected persons. This is not an isolated section which shows that Government is abandoning its *parens patriae* duty, there are other sections too such as Sections 4,5,6, 38(1), which limits liabilities and gives the Government the right to dissolve the commission even when certain cases are yet to be decided.

In case of any environmental crisis like the Narmada or Bhopal gas tragedy cases, the first victims are always the poor and uneducated people, and in those hours of crisis if the Government does not support their cause, the concept of an “organised society” and “welfare state” may simply be unsuccessful experiments.

[III.] RECOMMENDATIONS

It is important to understand that a certain balance needs to be maintained between the growth of the economy and the preservation of the environment. But the Act goes one step forward and adopts the strict liability standard only thereby neglecting the absolute liability principle which is more important when one is dealing with any hazardous element. This creates a haven for the private sectors to exploit the environment for profit at the cost of the lives of the people. It may seem that the Act is supporting corporates but certain amendments can make the Act equally balanced:

- i) Instead of setting a maximum cap on the amount for which the operator shall be liable, the Act should focus on setting a minimum cap for the liability amount. It would mean that even if an insignificant loss of life or property takes place, even then operators shall be liable for a certain minimum amount.
- ii) The amount of damage must also include the interest amount for delay of payment after the prescribed time limit.

- iii) The Act should change its scope from fixing strict no-fault liability to absolute liability on the part of the operators. This will lead to more caution and responsible behaviour on their part.
- iv) The Act should give a detailed guideline as to when a claim can be settled in Claim Commission and when it can be settled in the Nuclear Claim Damage Commission.
- v) The exclusionary clause of the Act given in Section 45 should be removed in the event of the precautionary principle.

[IV.] CONCLUSION

Our environment must be preserved and maintained. But people have started to use it as a means to an end. The shortcoming in this Act are examples of the degree of materialization prevalent in our times, with people willing to destroy core aspects of = the very things which ensures their survival, and reflects their psyche towards the environment.

The Act appears to focus on socializing the risk and privatising the profit. The Act has been passed even when it faced strong opposition from social action groups and environment activists who reminded our legislators of past detrimental environmental effect on human life. But as Friedrich Nietzsche said: “and those who were seen dancing were thought to be insane by those who could not hear the music.”⁶⁷ The Act neglects Fundamental Rights, Directive Principle of State Policy and every judicial pronouncement made in favour of environmental and human rights jurisprudence.

This Act, going against the principles for which it was enacted, to

⁶⁷ *Friedrich Nietzsche*, GOODREADS, (Dec. 25, 2019) <https://www.goodreads.com/quotes/7887-and-those-who-were-seen-dancing-were-thought-to-be>.

draw comparisons with the legendary Leviathan has going rogue, forgetting his reason for creation in the first place. The Act is likely to draw more resistance unless a significant overhaul is made.

COMMENTS

RECONCILING LOCALIZATION MANDATE OF THE PERSONAL DATA PROTECTION BILL, 2019 WITH INTERNATIONAL TRADE OBLIGATIONS

By Prahalad Sriram*

The Personal Data Protection Bill, 2019 which was tabled in the Lok Sabha recently, has stirred controversy amongst the citizens of India who raise questions about the manner in which the Bill aims to protect their fundamental right to privacy, as well as by private companies, who feel the provisions of the Bill are not clear, or simply that it unfairly restricts the scope of their business which deals in the processing of data. Certain provisions of the Bill can be criticized on the ground that it does not serve the object and reasons it sets out to achieve.

The subject of this comment will be broadly an attempt to critically analyse certain provisions of the proposed Personal Data Protection Bill, 2019 (hereinafter PDPB) tabled in Parliament and some issues therein, and specifically how it affects India's international obligations with respect to the General Agreement on Trade in Services (hereinafter GATS). More specifically, the provisions of the Bill that might prove especially troublesome are those related with restriction of cross-boundary free flow of data viz provisions encouraging localization of personal and critical personal data and how these might prove problematic in light of the World Trade Organisation 's (hereinafter WTO) principles regarding elimination of non-tariff barriers to trade in services enshrined in GATS.

Keywords: Personal data protection, trade obligation, GATS.

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[I.] INTRODUCTION

The Personal Data Protection Bill, 2019, which was introduced in the Lok Sabha on December 11, 2019, is a proposed legislation aimed at safeguarding the constitutional guarantees of privacy for citizens of India, and at regulation of those private and public entities that collect, store, and process personal data of citizens of India for various reasons such as for market analysis, profit making strategies, or whatever other reasons for which they might have to deal in data.

The PDPB in its statement of objects and reasons¹ sets out fairly ambitious goals such as fostering a free and fair digital economy, ensuring accountability of data fiduciaries, and to promote innovation while recognizing data as a critical means of communication in light of the privacy judgement.² In essence, the Bill attempts to regulate processing of data belonging to individuals (referred to as data principals)³ by the Government as well as by private entities (referred to as data fiduciaries)⁴ regardless of whether they are incorporated in India or otherwise. This regulation manifests as an obligation towards the Fair Information Practice Principles (FIPPs) that have evolved through several earlier instruments and foreign enactments such as the Privacy Act, 1974,⁵ principles from organisations such as OECD,⁶ Asia Pacific Economic Cooperation Privacy Framework,⁷ Europe's General Data Protection

¹ Personal Data Protection Bill, 2019.

² Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India, (2017) 10 SCC 1.

³ *supra* PDPB, 2019, cl. 3(14).

⁴ *supra* PDPB, 2019, cl. 3(13).

⁵ Privacy Act of 1974, 5 U.S.C. Section 552a, as amended.

⁶ *Thirty Years After*, THE OECD PRIVACY GUIDELINES, 2011, p. 21-23. (Jan. 2, 2020, 10:55 PM), <http://www.oecd.org/sti/ieconomy/49710223.pdf>.

⁷ *Privacy Framework*, APEC, 2005, p. 11-30 (Jan. 2, 2020, 10:55 PM),

Regulation (GDPR),⁸ and Committee Reports such as the Justice A.P. Shah Committee Report on Privacy,⁹ and the Justice Srikrishna Committee Report on Protecting Privacy.¹⁰

The idea that an individual has rights with respect to their data and consequently, the data fiduciary having obligations against such rights, is thus not new. The Bill also provides for the setting up for a national-level Data Protection Authority of India (DPAI)¹¹ for supervision and further regulation of data fiduciaries. But the Bill does not come without its fair share of potential lacunae and outright logical fallacies that may prove counter-productive in the Bill's exercise of fostering a culture of innovation and preparing the Indian economy for the emerging trends of digital trade. A few such provisions of the Bill shall be analysed briefly before moving on to digital trade.

<https://www.apec.org/Publications/2005/12/APEC-Privacy-Framework>.

⁸ General Data Protection Regulation, 2016, Ch. 2 and 3, (Jan. 2, 2020, 10:55 PM), <https://gdpr-info.eu/>.

⁹ J. A.P. Shah Committee Report, Report of the Group of Experts on Privacy, 2012, p. 71, (Jan. 2, 2020, 10:55 PM) http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf.

¹⁰ J. B.N. Srikrishna Committee Report, A Free and Fair Digital Economy, 2018, Ch. 4 and 5, (Jan. 2, 2020, 10:55 PM), https://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf.

¹¹ *supra* PDPB, 2019, cl. 41.

[II.] CRITIQUE OF CERTAIN PROVISIONS

Firstly, the Bill requires data fiduciaries to inform the DPAI in the event of a data breach.¹² The caveat here is that it is mandated to do so only if the data fiduciary (normally a private entity) if it feels such breach is likely to cause harm to the data principal. Placing the onus of deciding what kinds of breach needs to be notified to the DPAI to a private entity, and the power associated with assessing the consequences of such harm by a private entity at the first instance itself is largely problematic. There appears a prima facie conflict of obligations as the data fiduciary themselves are evaluated by the DPAI with regard to processing of data with new technology or other large-scale projects according to the Bill.¹³ The DPAI also has power under this clause to direct the data fiduciary to cease the new processing of data entirely, or and require that such processing be subject to conditions it may deem fit.

Secondly, the Justice Srikrishna Committee Report embarks on an in-depth analysis regarding the requirement of consent for data processing after the White Paper suggested¹⁴ that it may not be possible to obtain consent in every situation. The normative statement that every interaction between the State and its citizens should be rooted in consent is flawed considering the sheer quantity of such interactions. The Committee recognized that there should exist other grounds for processing data that are not intrinsically

¹² *supra* PDPB, 2019, cl. 25(1).

¹³ *supra* PDPB, 2019, cl. 27.

¹⁴ White Paper of the Committee of Experts on a Data Protection Framework for India (Jan. 2, 2020, 10:55 PM), http://meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_18122017_final_v2.1.pdf, p. 103.

based on consent.¹⁵

However, recognizing that there exists a fundamental right to privacy pursuant to the privacy judgement,¹⁶ the Committee rightly observes that a law which aims to statutorily cement the fundamental right to privacy with respect to data processors, also cannot omit the likelihood of the State itself acting as a data processor and thus not apply to it. After analysing the nature of the power exercised by the State, the nature of its functions and the manner in which the individual is affected by the actions of the State, and keeping in mind the imbalance of power in such a transaction, and contrasting the dilemma of feasibility of mandating consent requirements for all such transactions with the State, the Committee borrowed from the GDPR to arrive at a conclusion.

Keeping at the fore the fundamental right to privacy while borrowing wisdom from the Puttaswamy case,¹⁷ the Justice Srikrishna Committee considers it essential for the Government, while processing data in furtherance of any of its functions not related to specifically offering subsidies in the nature of welfare, and secondly, regulatory functions to the tune of issuance of licenses, permits, etc., must rely on consent obtained from individuals as a ground for collection of personal data – on par with private entities.¹⁸ The Bill, however, does not do its part to reflect this recommendation.

Thirdly, the Bill aims to provide a vision to foster a free and fair ‘collective culture’ for the future of India’s digital economy’ while respecting privacy of individuals, and ensuring empowerment,

¹⁵ *supra* J. B.N. Srikrishna Committee Report, p. 107.

¹⁶ *supra* note at 2.

¹⁷ *supra* note at 2, para 181.

¹⁸ *supra* J. B.N. Srikrishna Committee Report, p. 110 – 111.

progress, and innovation.¹⁹ However, this goal seems to have been ignored in the ambit of Clause 91 of the Bill.²⁰ Clause 2 of the Bill²¹ observes that the provisions of the Bill shall not apply to processing of anonymized data, other than those referred to in Clause 91.²² ‘Anonymization’ of personal data is defined as the irreversible process of altering or converting personal data into a form from which a data principal from whom it was sourced cannot be identified.²³ Clause 91 allows the Central Government to direct any fiduciary regulated by the Bill to provide anonymized personal data, or non-personal data, to enable “targeted delivery of services” or “evidence based policy making”.²⁴

The criticism here is that anonymization is not a perfect method to hide the identities of data principals according to recent research on the subject.²⁵ Modern machine learning techniques can be used to decode the previously concealed identities of principals.²⁶ Further, the assumption that the Government’s right to acquire data is in conflict with principles of copyright law and trade secret protection of private entities. Such data is a significant commercial venture for private players who use data they collect for commercial exploitation.²⁷ Mandating private entities to hand over data which

¹⁹ *supra* PDPB, 2019, Statement of Objects and Reasons.

²⁰ *supra* PDPB, 2019, cl. 91.

²¹ *supra* PDPB, 2019, cl. 2(B).

²² *supra* PDPB, 2019, cl. 91(2).

²³ *supra* PDPB, 2019, cl. 3(2).

²⁴ *supra* note at 22.

²⁵ Rocher, L., Hendricks, J.M. & de Montjoye, Y., *Estimating the success of re-identifications in incomplete datasets using generative models*, NAT COMMUN 10, 3069 (2019) doi:10.1038/s41467-019-10933-3.

²⁶ Caroline Brogan, *Anonymising personal data*, IMPERIAL, 2019, (Jan. 2, 2020, 10:55 PM), <https://www.imperial.ac.uk/news/192112/anonymising-personal-data-enough-protect-privacy/>.

²⁷ Divij Joshi, *Personal Data Protection Bill strikes a discordant note on ‘non-personal data’*, INDIAN EXPRESS (Jan. 2, 2020, 10:55 PM), <https://indianexpress.com/article/opinion/columns/data-and-its-discontents-lok->

they have appropriated for commercial use seems to undermine rights of these private entities.

Finally, in connection with the more specific topic of this comment, the mandate that a copy of sensitive personal data to be kept within India²⁸ supplemented with the reason of expedition of law enforcement's access to data might not serve its purpose, especially considering that many fiduciaries are registered in foreign countries. It would not be feasible, nor convenient for such an entity to store large quantities of data in a country foreign to their base of operations. It would serve the larger interest to set up an alternative mechanism for ease of access to such data by the State's instrumentalities without a 'serving copy' of such data to be stored and locally managed in India.

[III.] TRADE OBLIGATIONS

The first question when it comes to deciding if any measure violates any provision of the GATS is whether the service in question falls under the definition of services that GATS provides for. It is only after that that the allegedly offending measures are examined by the WTO. Regarding the question of whether digital trade in data can be classified as 'services' within the scope of GATS needs to be examined. The definition of services within Article I 3(b)²⁹ is inclusive and states 'services' includes any service in any sector. Thus, viewed alone, trade in data seems to fall under this definition. However, another aspect should not be overlooked, which is also at the core of the WTO itself. The idea is that a consensus amongst

sabha-personal-data-protection-bill-6197029/.

²⁸ *supra* PDPB, 2019, cl. 33(1).

²⁹ The General Agreement on Trade in Services, 1995, art. I 3(b).

member nations to agree on policy drafted within the WTO is integral to functioning of the WTO laws. Recently, the 'Osaka Track' was signed by 78 signatory countries, which is essentially a declaration on unrestricted flow of data across international borders. Notably, India decided to boycott this declaration.³⁰

This move might set a dangerous precedent regarding data policy-drafting monopoly, including definitional challenges outside the negotiations framework WTO, effectively excluding a large portion of developing countries, and forcing them to commit to a law that may be unfavourable to them.

Acting upon the assumption that data does fall under the scope of GATS as other services normally do, India is in for several challenges, most of which are caused directly by the PDPB. Chapter VII of the Bill³¹ which deals with restriction on transfer of personal data outside India and has stirred up controversy on the global economic front, with many large MNCs opposing this part of the Bill. The controversy is not limited solely to economic ramifications for India, but political as well, but that is for a future paper to conclusively analyse. This is in connection with the third criticism noted above as the requirement that foreign entities have to go through additional steps to set up localized data servers and processing units might not be in consonance with non-tariff trade barriers envisioned by GATS.

Clauses 33³² and 34³³ of PDPB speak about restrictions on transfer of sensitive personal data across borders, and list conditions for the

³⁰ Shubhajit Roy, *G-20 Osaka Summit*, THE INDIAN EXPRESS (Jan. 2, 2020, 10:55 PM), (<https://indianexpress.com/article/india/g-20-osaka-summit-narendra-mod-india-declaration-on-free-flow-of-data-across-borders-shinzo-abe-5805846/>).

³¹ *supra* PDPB, 2019, Ch. VII.

³² *supra* PDPB, 2019, cl. 33.

³³ *supra* PDPB, 2019, cl. 34.

same, respectively. In a nutshell, the idea is that any data controller or processor who collects or processes data in India, even if the controller is not present within the territory of India, to offer services within India, or makes profit from said data has to ensure the storage of at least one 'serving copy' of sensitive personal data on a server or data centre located in India. Further, if sets of data are categorized as critical personal data by the Central Government, then such data can only be processed in a server or data centre located in India.

Going back to GATS, a general obligation on member countries, also enshrined in paragraph 1 of Article II, is that of Most-Favoured-Nation Treatment.³⁴ This clause ensures that a member accords the no less favourable treatment to any member, as it does to any other member country. Such a provision is intended to reduce discriminatory trade practices and countries showing favouritism to their allies, which goes against the principles of free and fair global trade. While the provisions of the PDP Bill do not immediately conflict with the MFN clause, future problems may arise due to certain companies being at an advantage owing to lesser costs and infrastructure barriers attributable to geographic proximity. An example is companies incorporated in countries geographically closer to India would have an inherent advantage when it comes to setting up and monitoring the functioning of data servers. How this will play into WTO jurisprudence will be interesting to note later on when the Bill becomes law.

Article XVII of the GATS provides for the specific commitment of National Treatment.³⁵ This states that a member shall not accord treatment that is less favourable to the services or service providers of another member, than it does to its own services and service

³⁴ The General Agreement on Trade in Services, 1995, art. II para 1.

³⁵ *supra* GATS, 1995, art. XVII.

providers. Clause 33³⁶ of the Bill can be said to violate this obligation by requiring foreign service providers to set up local data centres or at the least, procure local servers. This is something that is an inherent requirement of local service providers in that they cannot provide data services without storing them locally, or that is the presumption at least. Foreign entities would also already have data servers located at their home countries naturally and would be forced to set up secondary, or even tertiary servers in India to ensure compliance. This is an additional burden that will be exclusive to foreign entities. A counter-argument to be made is that the aforementioned issue is an inherent competitive disadvantage owing to the foreign character of the service provider, and also does not apply to all entities under scrutiny. Going by this logic, there should thus be no obligation on India to compensate for such a disadvantage. This is a view the GATS itself provides.³⁷

Finally, a question arises as to whether the PDPB can be afforded the general exception under Article XIV, sub-paragraph (c) of which allows compliance with laws not inconsistent with GATS to diverge from general obligations.³⁸ Sub-subparagraph (ii)³⁹ of said sub-paragraph provides for the protection of the privacy of individuals in relation to the processing and dissemination of personal data. However, an argument could be made that the provisions of the PDPB which, while protecting personal data, also places a disguised restriction on trade in services, which is not allowed as per Article

³⁶ *supra* note at 32.

³⁷ *supra* GATS, 1995, art. XVII, para 1.

³⁸ *supra* GATS, 1995, art. XIV, sub-para (c).

³⁹ *supra* GATS, 1995, 1995, art. XIV, sub-para (c), sub-sub-para (ii).

XIV.⁴⁰ Recently, companies such as Reliance,⁴¹ and Alibaba⁴² have publicly stated their support of India's shift towards a paradigm of data localization. This support is largely understandable because certain companies with a geographic advantage such as Reliance and Alibaba Cloud, as well as companies that are already in similar businesses such as Xilinx⁴³ are at a unique position to take advantage of data localization norms as it gives them a distinct edge over their competitors.

[V.] CONCLUSION

The Personal Data Protection Bill, 2019 quite clearly falls short in its attempt to protect privacy as a fundamental right. It is a resource that has to be protected not only from private entities, but also from the Government itself. The idea that the Government can demand the production of 'anonymised' personal data from private entities for vague reasons appears particularly problematic in light of the lack of regulations relating to non-personal data. If the Bill were to be implemented as law before the Gopalakrishnan Committee submits its recommendations regarding non-personal data, the law would inevitably be outdated and inadequate. Moving on the subject of India's trade obligations, the Bill would affect India's digital trade

⁴⁰ *supra* GATS, 1995, 1995, art. XIV.

⁴¹ Ronak D. Desai, *India's Data Localization Remains A Key Challenge For Foreign Companies*, FORBES (Jan. 2, 2020, 10:55 PM), <https://www.forbes.com/sites/ronakdesai/2019/04/30/indias-data-localization-remains-a-key-challenge-for-foreign-companies/#5e363d17e0a3>.

⁴² Mugdha Variyar, *Alibaba backs data localization in India*, ET TECH (Jan. 2, 2020, 10:55 PM), <https://tech.economictimes.indiatimes.com/news/internet/alibaba-backs-data-localisation-in-india/65869783>.

⁴³ CR Sukumar, *Data Localization will see growth of data centres in India*, ET TECH (Jan. 2, 2020, 10:55 PM), <https://tech.economictimes.indiatimes.com/news/people/data-localization-will-see-growth-of-of-data-centres-in-india-xilinx-ceo/66698353>.

with respect to the NT and MFN clauses. Whether this measure falls under the ambit of the GATS general exceptions, to what extent it violates trade obligations will be answered in due course when the measure is challenged at the WTO and its jurisprudence is applied.

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