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FOREWORD

It is with pride that we present the Ninth Volume of the NUALS Law Journal which is brought out by the students of NUALS.

I appreciate the Editorial Board for their concerted efforts in bring out this volume of the Law Journal. This is an initiative to encourage the students of NUALS to be research-oriented and to realize the importance of highlighting significant legal issues and the need to research on growing areas of law and development.

I wish the endeavour all success.

Prof. (Dr.) Rose Varghese
Vice-Chancellor
NUALS, Kochi

EDITORIAL COMMENT

“You don’t write because you want to say something, you write because you have something to say.”

– F. Scott Fitzgerald

The flagship publication of the National University of Advanced Legal Studies (NUALS) was promoted as a platform for members of the legal fraternity to share their thoughts and views on developments in the field of law. Over the years, we have published articles on a plethora of subjects that exhibited originality, relevance and clarity of thought.

It is with abundant pride and pleasure that the Editorial Board has brought out the 9th Volume of the NUALS Law Journal. It has been a privilege to receive articles from authors from various parts of the nation. The present volume has attempted to cover a wide range of topics while choosing the best articles we received.

We would like to express our utmost gratitude for the help and support extended by Prof. (Dr.) Rose Varghese, our Vice-Chancellor, in the completion of this journal. Further, the completion of this journal would not have been possible without the constant guidance and support extended by our faculty advisor Dr. Anil R. Nair. We are grateful for the contribution from all the authors and hope that we continue to receive articles of substance in the years to come. The present volume is the product of the combined efforts of the Editorial Board that has drawn a lot from the experiences of previous Editorial Boards and we hope that this process of learning continues in our future volumes.

Anju Anna John,
Editor-in-Chief

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The Proposed National Counter Terrorism Centre in the Light of the Federal Structure of our Nation

- Abhay Upadhyay & Siddharth Sharma*

Abstract

After the 26/11 Mumbai terror attack, the nation felt the need to establish an agency which would coordinate with other security agencies at national and state levels. The idea of a National Counter Terrorism Centre (NCTC) evolved during this period. A detailed study with regard to the function and structure of the NCTC has been deliberated upon. The State Governments pointed out the unconstitutionality of NCTC, arguing on the ground of distortion of federal structure which forms the basic structure of the Indian Constitution. In this paper the establishment of the NCTC has been critically evaluated to analyse its constitutional validity. A contrast has been drawn between the NCTC and National Investigation Agency (NIA) set up in 2008, for the purpose of investigating the cases post the occurrence of the terrorist attack. A detailed and comprehensive study of the U.S. NCTC, which is the inspiration to the Indian NCTC, has been carried out. Further, a comparative analysis regarding the functional and structural difference between the two agencies has been made and then a conclusion has been drawn keeping in view the various committee reports and the arguments of both espousers and critics of the NCTC.

Introduction

Terrorism anywhere threatens democracy everywhere. The nature of terrorism has shifted from “traditional international terrorism of the late 20th

century into a new form of trans-national state warfare.”¹ Extremism in the Middle East is at its zenith and is affecting countries the world over and India is no exception. It is spreading like a cancer the world over and attacks taking place in India, Afghanistan, Indonesia and other parts of the world are a symptom of this disease.

Post 9/11, the world’s view on terrorism has changed dramatically. Two weeks after the attack, the United Nations Security Council (UNSC) unanimously adopted anti-terrorism resolution 1373(2001) on 28th September 2001.² It condemned the attack and obligated all Member States to criminalise the wilful provision or collection of funds for terrorist acts and to freeze any financial assets and economic resources of those who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts and of persons or entities acting on behalf of the terrorists.³

Legal framework to deal with terrorism in India

The Prevention of Terrorism Act, 2002 (POTA) was India’s response to the UNSC resolution.⁴ It provided more teeth to the Central and State

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¹ *Combating Terrorism: Protecting by Righteousness*, Second Administrative Reforms Commission, Government of India, Eighth Report, 2008.

² *Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution; Calls For Suppressing Financing, Improving International Cooperation*, SC/7158, September 28, 2001, available at <http://www.un.org/press/en/2001/sc7158.doc.htm>, as viewed on 8 February, 2016.

³ *Ibid.*

⁴ F Galloway, *Anti-Terrorism Resolutions: The Security Council’s Threat to the UN System*, *Journal of Terrorism Research*, (2011), Vol. 2, Issue (3).

governments to fight the war against terrorism. It embodied a very wide definition of a terrorist act which included any act of violence or disruption of essential service done with ‘intent to threaten the unity and integrity of India or to strike terror in any part of the people’⁵.

POTA was heavily criticised by National Human Rights Commission (NHRC) and Human Rights NGOs alike.⁶ For the purposes of this paper it is not essential to deliberate on the specific provisions of the Act, but provisions such as a suspect being detained for up to 180 days without filing of charges in court and the fact that it allowed for secret interception and recording of conversations and the use of police confessions as evidence in

⁵The entire definition as per POTA is as follows: “S. 3 (1). Whoever, (a) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act;

(b) is or continues to be a member of an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 (37 of 1967), or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, commits a terrorist act”.

Further, according to POTA, a terrorist act also includes the act of raising funds intended for the purpose of terrorism.

⁶ Jyotsna Singh, *The problems with Pota*, BBC NEWS, September 17, 2004, available at http://news.bbc.co.uk/2/hi/south_asia/3666716.stm, as viewed on February 18, 2016.

courts of law did not find favours with NGOs and the NHRC and were therefore labelled as draconian.⁷

The POTA was eventually repealed in December 2004.⁸ It was replaced by amending the provisions of Unlawful Activities Prevention Act (UAPA) of 1967 and including within it the fundamental provisions of POTA. Further, the list of 32 organisations banned under POTA was included in the amended version of UAPA⁹ and the wiretapping authority of the government was strengthened even further in cases involving terrorism.¹⁰

Effectively, the only union legislation which deals with terrorism in particular is Unlawful Activities Prevention Act, 1967 as amended by the Unlawful Activities Prevention (Amendment) Act, 2004.¹¹ The NCTC, which is the subject matter of the paper, is given adequate legal authority through the UAPA.¹²

National Counter Terrorism Centre

The NCTC is a proposed anti-terror body to be constituted under the Ministry of Home Affairs.¹³ The earlier proposal was to set up the NCTC

⁷ *Ibid.*

⁸ Sudha Ramachandran, *Filling India's anti-terrorism void*, ASIA TIMES ONLINE, September 23, 2004, available at http://atimes.com/atimes/South_Asia/FI23Df03.html, as viewed on February 18, 2016.

⁹ *Ibid.*

¹⁰ *Country Reports on Terrorism 2004*, U.S. Department of State, April 2005.

¹¹ *Supra* note 1.

¹² National Counter Terrorism Centre (Organisation, Functions, Powers and Duties) Order, 2012, Ministry of Home Affairs, Government of India, available at http://www.satp.org/satporgrp/countries/india/document/papers/2012/NCTC_2012.pdf, as viewed on February 18, 2016.

¹³ *Centre, states need to work together for NCTC: Home Minister Sushilkumar Shinde*, THE ECONOMIC TIMES, June 11, 2013, available at

within the Intelligence Bureau (IB), but after vehement opposition from the other political parties, the Central Government gave up the idea and now it will be directly under the aegis of the Ministry of Home Affairs.¹⁴

One of the biggest oppositions raised by political parties was that since the NCTC was to be under the IB, it would defeat the very purpose of the IB.¹⁵ The reason behind this statement is that the IB neither has the power to arrest people nor is it subject to any legal scrutiny; whereas the NCTC was to have the power to arrest people and interrogate them.¹⁶ Hence, in light of this argument the Central Government stepped down and the proposition to set up the NCTC under the IB was dismissed.¹⁷

Genesis of NCTC

The 26/11 attack was termed as the failure of intelligence and operational forces and exposed the lacunae in our country's security arrangement.¹⁸ A

http://articles.economictimes.indiatimes.com/2013-06-11/news/39899596_1_nctc-non-congress-chief-ministers-national-counter-terrorism-centre, as viewed on February 18, 2016.

¹⁴ *Centre Climbs Down On NCTC; State DG To Be Informed On Operations*, TEHELKA, February 26, 2013, available at <http://www.tehelka.com/2013/02/centre-climbs-down-on-nctc-state-dg-to-be-informed-on-operations/>, as viewed on February 18, 2016.

¹⁵ Arun Jaitley, *Why the NCTC cannot be set up at the cost of states*, FIRSTPOST, February 25, 2013, available at <http://www.firstpost.com/politics/why-the-nctc-cannot-be-set-up-at-the-cost-of-states-638975.html>, as viewed on February 18, 2016.

¹⁶ P.R. Chari, *National Counter Terrorism Centre for India: Understanding the Debate*, Institute of Peace and Conflict Studies, No.181, March 2012, available at http://www.ipcs.org/pdf_file/issue/IB181-Chari-NCTC.pdf, as viewed on February 18, 2016.

¹⁷ *Supra* note 2.

¹⁸ Praveen Swami, *Mumbai attack: failures to command*, THE HINDU, January 22, 2016, available at <http://www.thehindu.com/opinion/op-ed/mumbai-attack-failures-of-command/article87787.ece>, as viewed on February 18, 2016.

huge hue and cry was made regarding the lack of coordination between the centre and the state, thus necessitating the formation of a central agency to tackle terrorism.¹⁹ The then Home Minister, P. Chidambaram was one of the biggest proponents of this idea. During his visit to the U.S. after the attack, he studied the working of the U.S. NCTC and came up with the idea of having a similar body for India as well.²⁰

The Office Memorandum issued by the Government of India in 2012 also lists the reasons for having a centre like the NCTC.²¹ Among the reasons given, some of the important ones are:²²

- Terrorism becoming one of the gravest threats to internal security;
- Review of current architecture to deal with terrorism has revealed several gaps and deficiencies;
- Suggestion of the Group of Ministers that reviewed the internal security system after the Kargil War to establish a Multi-Agency Centre;
- Recommendation of the Group of Ministers to establish a permanent Joint Task Force on Intelligence and an Inter-State Intelligence Support System;
- Recommendation of the Second Administrative Reforms Committee to convert the Multi Agency Centre into the NCTC with personnel drawn from intelligence and security agencies;

¹⁹ *Ibid.*

²⁰ *Supra* note 16.

²¹ *Supra* note 12.

²² *Ibid.*

-
- Need to have a single and effective point of control and coordination of all counter terrorism measures.

Thus, keeping in mind all these factors, the Central Government, in exercise of its powers under Article 73 of the Constitution ordered for the establishment of the NCTC.²³

Powers and functions of the NCTC

The duties and functions of the NCTC as per 2012 order are as follows:²⁴

- Draw up plans and coordinate actions for counter terrorism;
- Integrating of intelligence regarding terrorism; analysing the same; and mandating the other agencies to peruse the same and coordinate with the existing agencies for effective purpose;
- Maintaining a comprehensive database of terrorists and their associates, friends, families and supporters; of terrorist modules and gangs; and of all information pertaining to terrorists;
- To prescribe counter terrorism priorities for each stake holder;
- To prepare daily threat assessment reviews and disseminate them to Central and State governments.

The NCTC will have three divisions each headed by an officer in the rank of Joint Director, IB or equivalent rank. The three divisions will be responsible for:²⁵

- Collection and disseminating intelligence

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

- Analysis
- Operations

The Director of the NCTC shall be the designated authority under S. 2(3) of the Unlawful Activities (Prevention) Act, 1967.²⁶ The Director will report to the Home Secretary.²⁷ Among other powers of the NCTC, it shall have the power to set up Inter-State Intelligence Support Team (INSIST), power to requisition the services of the National Security Guards (NSG), power to seek information which shall include documents, reports and every other kind of information from any agency.²⁸

The Multi Agency Centre shall be a part of the NCTC and all civil authorities of the Government of India within the territory of India and all authorities of the Government of India outside the territory of India shall act in aid of the NCTC with regard to the duties and functions which have been entrusted to the NCTC.²⁹ It shall also consist of nominees from the Research and Analysis Wing (RAW), Intelligence Bureau (IB), Naval Intelligence, National Investigation Agency (NIA) and DGPs of seven states, who will be selected every two years on the basis of a rotational policy.³⁰

Another important aspect of the NCTC is that it shall consist of a Standing Council which will be comprised of the Director of NCTC, the three Joint Directors of NCTC along with the Heads of Anti-Terrorist Organisation or

²⁶ *Ibid.*

²⁷ NCTC emerges a toothless wonder, THE NEW INDIAN EXPRESS, June 5, 2013, available at <http://www.newindianexpress.com/nation/NCTC-emerges-a-toothless-wonder/2013/06/05/article1620360.ece>, as viewed on February 18, 2016.

²⁸ *Supra* note 12.

²⁹ *Ibid.*

³⁰ *Supra* note 27.

Force in each State.³¹ The Standing Council is directed to meet as often as necessary and is required to ensure that NCTC is the single most effective point of control and coordination of all counter terrorism operations.³²

The Operations division of the NCTC, which is the source of many controversies, shall have the power to arrest and search by virtue of S. 43A of the Unlawful Activities (Prevention) Act, 1967.³³ Earlier, the search and seizure operations of the NCTC were carried on without the permission of the police of the concerned state, but now it shall be done in conjunction with the state police.³⁴

The other fundamental change in the working of the NCTC is that as soon as any arrest is affected under S. 43A of the UAPA, then the arresting authority under S. 43B of the same Act will hand over the persons arrested to the officer in charge of the nearest police station.³⁵

Constitutionality of NCTC

Arguments against NCTC

The critics of the NCTC have opposed and rejected outright its establishment. The compromise with the federal structure of the nation is the core and central issue raised at the forefront by the major political parties

³¹ *Supra* note 12.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Supra* note 27.

³⁵ Will meeting address CMs' concerns on NCTC?, THE HINDU, May 5, 2012, available at <http://www.thehindu.com/news/national/will-meeting-address-cms-concerns-on-nctc/article3384806.ece>, as viewed on February 18, 2016.

countering the NCTC.³⁶ The apprehension of interference and encroachment in the execution of police functions in states by officials working under the NCTC develops fear in the minds of State governments.

The distinction on the subject matter between the Union and State is provided under Article 246 of the Indian Constitution wherein Schedule 7 provides three Lists - Union, State and Concurrent. This demarcation is influenced by S.100 of the Government of India Act, 1935 which supplied powers to Federal and Provincial Government.³⁷ The entries in the said Lists are the mere heads of legislation. They do not impose any implied restriction on the legislative power conferred by the Constitution.³⁸ The framers of the Constitution, to maintain harmony and to uphold the federal structure of government introduced this division on the basis of subject matter.

The diminishment of the federal structure by infringing the powers of the State under List II raised concern for the critics. Article 246 (3) empowers the State to formulate laws with regard to the subject matters mentioned in List II. In normal circumstances (excluding the situation of Emergency), Parliament is not entitled to intrude by formulating laws for the same subject matter. The use of the word 'exclusive' in Clause 3 denotes that within the

³⁶ *Federal Nail on NCTC*, The Telegraph, July 11, 2013, available at http://www.telegraphindia.com/1130711/jsp/nation/story_17105009.jsp#.VsVeW_197IU, as viewed on February 18, 2016.

³⁷ Basu, D., COMMENTARY ON THE CONSTITUTION OF INDIA, Lexis Nexis, 8th Edn. (2011).

³⁸ *State of Bihar v. Kameshwar*, AIR 1952 SC 252.

legislative fields contained in List II the State legislature exercises authority as plenary and ample as Parliament.³⁹

The maintenance of public order is a subject matter which falls under List II Entry 1. Only the State concerned has the power to create laws with this regard. The expression 'Public Order' signifies the state of tranquillity which prevails among the members of a political society as a result of internal regulations enforced by the government. It may thus be equated with public peace and safety.⁴⁰ Maintenance of law and order is the responsibility of police working under the directions of Home Ministry of the concerned State. Police too falls under List II Entry 2 and any act formulated by legislatures without legislative competency is null *ab initio*.⁴¹

The doctrine of colourable legislation applies to the evolvment of the NCTC. The doctrine implies that what cannot be done directly cannot be done indirectly.⁴² The legislature cannot under the guise, or the pretence, or in the form of an exercise of its own powers, carry out an object which is beyond its powers and a trespass on the exclusive powers of the other.⁴³ The Parliament by framing the NCTC is violating the powers of State governments as the subject matter falls under the State List and thus a colourable legislation can be witnessed.

³⁹ *Greater Bombay Co-op Bank Ltd. v. United Yarn Tex (P.) Ltd.*, AIR 2007 SC 1584.

⁴⁰ *Ramesh Thappar v. State of Madras*, AIR 1950 SC 124; *Brij Bhushan v. State of Delhi*, AIR 1950 SC 129.

⁴¹ *R.M.D.C. v. Union of India*, AIR 1957 SC 628 (633).

⁴² *G.W. Saddlery v. The King*, (1921) AC 91.

⁴³ *A.G. for Alberta v. A.G. for Canada*, AIR 1939 PC 53.

One of the objects for bringing the NCTC into existence is carrying out operations in case of terrorist attacks in that particular State. To facilitate the operations post or pre-attack the NCTC is empowered to arrest, interrogate and seize properties and such powers are derived from Section 43(a) of the Unlawful Activities Prevention Act.⁴⁴ According to the previous draft, the NCTC was empowered to interrogate, arrest and investigate any individual without giving prior information to the concerned State.

However, in a revised draft, NCTC officials would have to inform the Director General of Police of that particular State,⁴⁵ but still the critics are opposing this as in certain situations, where they think it is urgent to act, they have the power to act arbitrarily without informing the concerned State authorities, so this would confine the powers of the State.⁴⁶ Analysing the powers of the NCTC, the State police will act as a mere tool to assist them in carrying out their options.

The Central Government cannot gain the power to control the police unless the Constitution is amended as it is covered under Entry 2 List II. Although the Union has the power to amend and legislate regarding criminal procedure as it falls under the Concurrent List, this does not mean they

⁴⁴ *Supra* note 12.

⁴⁵ *NCTC: Centre relents, anti-terror body to inform states before ops, will states budge?*, THE INDIAN EXPRESS, 27th February, 2013, available at <http://archive.indianexpress.com/news/nctc-centre-relents-antiterror-body-to-inform-states-before-ops-will-states-budge-/1080151/>, February 18, 2016.

⁴⁶ *National Counter Terrorism Centre will inform state police before conducting operation*, THE ECONOMIC TIMES, February 27, 2013, available at http://articles.economictimes.indiatimes.com/2013-02-27/news/37331554_1_federal-structure-nctc-national-counter-terrorism-centre, as viewed on February 18, 2016.

could attain the powers over the police. The Centre can only prescribe as to how the police will investigate or its powers to arrest.

Under Article 73 of the Indian Constitution, it is stated that the Centre can exercise its executive powers over the States' executive power in two circumstances: first, when there is a Constitutional provision for the same; second, when the Parliament passes such law which gives them power to prevail their executive powers over the States. With regard to Article 73 the Centre has the power to use the Unlawful Activities Prevention Act, 1967 but there must be a proper justification before using it as it was added in the amendment passed in 2004.⁴⁷

Under S.25 of the said Act, there is a provision to seek approval from the "Designated Authorities" of the concerned State within 48 hours but the power of the NCTC to arrest and seize properties without taking the approval of the designated authority violates this provision. Hence, the powers of police or State authorities would be hampered by the same. Judiciary has recognized federalism as the basic structure of Indian Constitution.⁴⁸ Therefore, the Centre cannot alter or misuse its power and interfere with the functioning of State machineries and cannot violate the basic principles of the Constitution.

The Sarkaria Commission in its report dealt with Centre-State relations.⁴⁹ The suggestion offered by the Commission to the Government of India regarding creation of different agencies to tackle terrorism was empowering

⁴⁷The Unlawful Activities (Prevention) Amendment Act, 2004.

⁴⁸ *S. R. Bommai v. Union of India*, 1994 3 SCC 1.

⁴⁹ Sarkaria Commission on Centre-State Relations, Government of India, 1988.

the States by providing them with modern technologies and enhancing their police powers. The Commission further advised the Centre to take concurrence from respective States before entering their jurisdiction rather than infringing their rights through these agencies.

The U.S. Constitution places a duty on the Central Government to guarantee that they would protect every State from invasion or any other disturbance. Similar provisions are there in the Australian Constitution. S.119 provides that the Centre has to protect States against invasion or domestic violence. The sole difference between these two federations and India is that in the former, States must request the Centre to send their forces while in the latter there is no such requirement. The Union can send their forces without any request made by the concerned State.⁵⁰

The Commission objected towards such arbitrary power with the Union and proposed for consensus between the Centre and States regarding the use of agencies established to counter terrorism. The Argument put forward by the States fall in the same line as the suggestion offered by the Commission- rather than setting different numerous agencies to counter disturbances in States it shall be more beneficial to increase their capacity to combat such actions.

Arguments in favour of NCTC

The urgency and laudable idea of establishing an institution to combat terrorist actions led to the concept of the NCTC. The pertinent argument

⁵⁰ M.P. Jain, INDIAN CONSTITUTIONAL LAW, Lexis Nexis, 6th Edn. (2011).

regarding the constitutionality of the NCTC is the violation of federal structure and infringement on the police powers of the concerned State. A terrorist attack in a particular State is not only confined to that particular State, it must be considered as an attack on the sovereignty and integrity of India.⁵¹

Therefore in such exceptional situations where restoration of the harmony and peace in the State is of utmost priority, the Central forces are required to act against such attacks. The same argument had been placed in the report of Soli Sorabjee Committee where it was observed that the activity of terror attack is a transnational crime that jeopardises national security.⁵²

Entry 2A of the Union List empowers the Central Government to deploy armed forces or any other forces under the control of the Union in the State in aid of the civil power. The words “in aid of civil power” in this Entry indicates that Central forces can be deployed to help and supplement the efforts of State forces in restoring public order. The constitutional validity of the Armed Forces (Special Powers) Act, 1958 enacted by Parliament for maintaining public order in the state of Assam was challenged before the Supreme Court in the case of *Naga People’s Movement of Human Rights v. Union of India*.⁵³ Here, upholding the constitutional validity of the Act, the Apex Court rejected the argument stating that the supervision and control of armed forces shall be under the State civil authorities.

⁵¹ *State v. Afsan Guru*, Appeal (crl.) 373-375 of 2004; *Mohammad Ajmal Mohammad Kasab v. State of Maharashtra*, Criminal Appeal No. 1899-1900 of 2011.

⁵² Police Act Drafting Committee (PADC), Government of India, 2005.

⁵³ AIR 1998 SC 431.

It is a duty of the Union to deploy *suo motu* its armed forces in the State if in their opinion the law and order situation has been disturbed and that it would amount to “internal disturbance” according to the ambit of Article 355. The power of Entry 2A can only be justified with reference to Article 355 read with Entry 93 of List I which provides offences against laws, with respect to any of the matters in this List.⁵⁴ The phrase “in the aid of civil power” means that the Centre will help and assist State authorities and machineries for peace and harmony in the State, but the Union has the power to send their forces and take charge of the law and order situation by overriding the power of the State. Hence, the framers of the Constitution had kept in mind the federal nature but in exceptional situations Centre’s power overrides the state’s power.

The formation of the NCTC has been with the same object, to aid the State government in restoring public order after the terrorist attacks. Though, before entering in a State and carrying out the operations, NCTC officials will first inform the Director General of Police of that concerned State except in situations where the nature is extremely grave and calls for immediate action to combat that attack.

The argument with regard to the encroachment of State powers can be nullified by applying the Pith and Substance Test which was enunciated by the Apex Court in *Balsara* case⁵⁵ as “if an act so viewed substantially falls within the powers expressly conferred upon the legislature which enacted

⁵⁴ *Sarbananda Sonowal v. Union of India*, 2005 5 SCC 665.

⁵⁵ *State of Bombay v. Balsara*, AIR 1951 SC 318.

it, then it cannot be held to be invalid merely because it incidentally encroaches on matters which have been assigned to another legislature.” The Central Reserve Police Force Act, 1949 enacted by Parliament falls under Entry 2 of List I and Entries 1 and 2 of List III and not under Entry 2 of List II. Hence, NCTC can be set up under the Entry 2 of List I without encroaching the powers of State under Entry 2 of List II which provides for police under the supervision and control of State Government.

The residuary power under Article 248 empowers the Parliament to frame laws regarding the subjects which are not mentioned in the List provided by the Constitution.⁵⁶ There exists no specific subject matter regarding the formation of agencies battling out terrorism in the List provided under Schedule VII. Therefore, it is the prerogative of the Parliament to frame laws under Article 248 with the subject matter regarding terrorism and law and order. For the formation of NCTC, Parliament shall apply Article 248 and consider it as a residuary power of the same.

Terrorism affects the country at large. The law made countering these actions shall fall under the ambit of ‘national interest’. Though federalism is the basic structure of our Constitution,⁵⁷ the makers of the Constitution provided an extraordinary power to the Union over States under Article 249. During the Constitution Assembly debates Dr. Ambedkar mentioned that Article 249 was for the purpose of national interest and also

⁵⁶ *Kartar Singh v. State of Punjab*, 1994 3 SCC 569.

⁵⁷ *Kesavananda Bharti v. State of Kerala and Anr.*, AIR 1973 SC 1461.

comprehensively stated that such provisions are the means to minimize the rigidity and legalism of a federal Constitution.⁵⁸

Though the U.S., Australian and Canadian Constitutions have different perspectives regarding the same, the Indian legal system permits the Parliament to frame laws mentioned in the State List for national interest. The Council of States has the power to pass a resolution to create a law listed under List II which lasts for one year and for further implementation can be renewed again. In 1986, Rajya Sabha passed a resolution to make law to resolve and curb the terrorist actions in Punjab.⁵⁹

The question regarding the national importance of establishment of the National Counter Terrorism Centre cannot be questioned. The Parliament is empowered to frame laws for the creation of the NCTC under Article 249, though the only limitation for the same is the temporary nature of the said Article. The law passed by the Parliament shall have effect only a year but the same shall be renewed again by passing a resolution for its continuance. And if there exists any repugnancy between the law enacted by Parliament under Article 249 and the law created by State legislature, the former shall prevail as provided by Article 251 and the effects of legislation made by Parliament continues to exist.⁶⁰ Another transitory Article which empowers the Centre to frame laws under the State List is Article 250. The said Article shall apply only during the proclamation of emergency.

⁵⁸ CONSTITUENT ASSEMBLY DEBATES, Vol. VII, p. 34.

⁵⁹ RAJYA SABHA- ITS CONTRIBUTION TOWARDS INDIAN POLITY, Rajya Sabha Secretariat, 2012, p. 15.

⁶⁰ *Kuldip Nayar v. Union of India*, 2006 7 SCC 1.

The situation of terrorist attacks may be grave in nature and demand for emergency conditions in that particular State. Under those circumstances, the responsibility to protect the State lies before the Centre as provided by Article 355. The said Article prescribes duty on the Centre to protect and re-establish the harmony and brotherhood in the state in situations of external aggression or internal disturbance. Other federations such as the U.S. and Australia too provide with such powers to the centre to guard the states in case of emergency.⁶¹

In the U.S., the Supreme Court held that the National Government can send their forces to protect states on their own initiative.⁶² Article 355 provides for a situation where the State government is unable to maintain the law and order due to internal disturbance or external actions which cause disarray in the state.

In *S. R. Bommai v. Union of India*⁶³, the judiciary was of the opinion that ‘internal disturbance’ mentioned in Article 355 is of larger connotation than ‘armed rebellion’ mentioned in Article 352, and Article 355 is not an arbitrary power given to the Central government in intervening in the powers and functions of the State government, but it is the nature of justification for the measures to be adopted under Article 356 and Article 357.

⁶¹ *Supra* note 51.

⁶² *In Re Debs*, 158 US 564 (1895).

⁶³ *Supra* note 49.

Moreover the Sarkaria Commission⁶⁴ and the Punchhi Commission⁶⁵ on Centre-State Relations had similar views that Article 355 not only imposes the duty on the Union but grants them the rights and gives them the power to use their forces in an effective manner to create harmony and proper law and order in the State.

In *ITC Ltd. v. Agricultural Produce Market Committee*,⁶⁶ a Constitution Bench of the Apex Court opined: “The Constitution of India deserves to be interpreted, language permitting, in a manner that it does not whittle down the powers of the State Legislature and preserves the federalism while also upholding the Central supremacy as contemplated by some of its articles.”

Through Article 355, the Union defends the establishment of the NCTC and argues that by setting up the NCTC, it would not disturb the federal structure of India. Dr. Ambedkar too, in his address to the Constituent Assembly stated that *the separation of power between the States and the Union is not provided by any law but by the Constitution itself*.⁶⁷

The Constitution does provide the Centre with broader powers than the States in legislative and executive matters but this is not the principle to determine the federal structure of a nation. The principle to determine the federal structure is separation of power and hence under Article 355, the Centre in the interest of the State and citizens of the said State must intervene and protect the harmony of the States and bring back the normal

⁶⁴ *Supra* note 50.

⁶⁵ Report of the Commission on Centre-state Relations (Punchhi Commission Report), 2010.

⁶⁶ *ITC Ltd. v. Agricultural Produce Market Committee*, 2002 9 SCC 232.

⁶⁷ CONSTITUENT ASSEMBLY DEBATES, Vol. X1, 25th November, 1949.

law and order situation in the State⁶⁸ and it must not be an invasion by the Centre which is wanton, arbitrary and unauthorised by law.⁶⁹ The phrases ‘internal disturbance’ or ‘external aggression’ in Article 355 deal with law and order situations and not public disorder.

The argument put forward by the critics of the NCTC regarding “Public Order” falling under the State List shall be countered through the judgment of *Ram Manohar Lohiya v. State of Bihar*⁷⁰, where Hidayatullah J. observed

“Just as public order apprehends disorders of less gravity than those affecting the security of state, law and order also apprehends disorders of less gravity than those affecting public order. One has to imagine three concentric circles. Law and order represents the largest circle within which it is the next circle representing public order and the smallest circle represents the security of state. It is then easy to see that an act may affect law and order but not public order, just as an act may affect public order but not the security of state.”

Substantiating the argument to establish the NCTC, the NCTC will operate in those places where the law and order situation has been distressed and it is beyond the control of State police.

⁶⁸ *Supra* note 51.

⁶⁹ CONSTITUENT ASSEMBLY DEBATES, Vol. IX, p. 133, September 10, 1949.

⁷⁰ 1966 AIR 740.

Contrast between NCTC and NIA

The NIA was set up under the National Investigation Agency Act, 2008 which was enacted as India's law enforcement response to terrorism in the wake of 26/11 Mumbai attacks.⁷¹ The NIA is empowered to investigate various offences covered under the Unlawful Activities (Prevention) Act, 1967, maritime offences (Suppression of Unlawful Acts against Safety of Maritime Investigation and Fixed Platforms on Continental Shelf Act, 2002), the Indian Penal Code, 1860 and many others. The NIA works under the Ministry of Home Affairs. The NIA works on the request of State government or otherwise if the situation is grave and demands immediate action. The NIA can *suo moto* start investigation.⁷²

The need for establishing a national agency for the purpose of investigation has been substantially stated by Supreme Court in *Prakash Singh & Ors. v. Union of India*⁷³ and also mentioned and suggested by the Police Act Drafting Committee under the Chairmanship of Soli Sorabjee.⁷⁴

No operational power is attached to the NIA, only investigating power is allotted. This is in contrast to the NCTC, where both operational and investigating power is attached. The jurisdiction of the NIA is limited to certain specific, registered cases while the NCTC being an intelligence

⁷¹ Information available at http://www.nia.gov.in/writereaddata/FINAL_NIA_BROCHURE.pdf, as viewed on February 17, 2016.

⁷² Raghavan, R. K., *The National Investigation Agency will have to show its mettle quickly if it is to justify its creation*, FRONTLINE, 2012, Volume 26 Issue 1.

⁷³ (2009) 17 SCC 329.

⁷⁴ *Supra* note 52.

agency has broader scope to investigate and carry out searches.⁷⁵ Also, the NCTC is empowered to prevent the attacks whereas the NIA can only come into action after an attack as described through its power under S.3(1) of the Act.⁷⁶

The same allegations of distorting federal structure were levelled while establishing the NIA by the State governments. The constitutional validity of the NIA was challenged before the Bombay High Court by the accused of the Malegaon Blast of 2008. The court refused to entertain the petition and upheld the constitutionality of the NIA.⁷⁷

Comparative analysis of NCTC with U.S. NCTC

The structure and working of the U.S. NCTC

In the U.S, the NCTC was established in August, 2004 by a Presidential Executive Order and received its statutory backing from the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTP).⁷⁸ The precursor to

⁷⁵ Karnik, A., *The National Counter Terrorism Centre: An Assault on Federalism?*, FREEDOM FIRST, Iss. 540, 2012.

⁷⁶ Available at http://www.humanrightsinitiative.org/programs/aj/police/india/police-reforms/issues_paper_on_the_national_investigation_agency_act_2008.pdf, as viewed on April 15, 2014.

⁷⁷ *HC dismisses petitions challenging NIA probe in Malegaon case*, BUSINESS STANDARD, October 11, 2013, available at http://www.business-standard.com/article/current-affairs/hc-dismisses-petitions-challenging-nia-probe-in-malegaon-case-113101100777_1.html, as viewed on February 19, 2016.

⁷⁸ Information available at <http://www.nctc.gov/overview.html>, as viewed on February 18, 2016.

the NCTC was the Terrorist Threat Integration Centre (TTIC) which was established in the year 2003.⁷⁹

A little over a year later, the National Commission on Terrorist Attacks upon the United States (9/11 Commission) recommended the formation of the NCTC on the foundations of the TTIC.⁸⁰ This was done keeping in mind the fact that there were already a number of various centres in different parts of the government assigned to combine disparate pieces of information.⁸¹ The IRTP Act also established the position of the Director of National Intelligence (DNI) along with the Office of DNI (ODNI), thus the NCTC was placed within the ODNI.⁸²

As per the report of the 9/11 Commission, the NCTC would compile all source information on terrorism but also undertake planning of counterterrorism activities, assigning operational responsibilities to lead agencies throughout the Government.⁸³ The Director of the NCTC is the Deputy Secretary who will report to two authorities, namely:⁸⁴

- The President regarding the Executive branch-wide counterterrorism planning
- To the Director of National Intelligence

⁷⁹ Best, R., *The National Counter Terrorism Centre (NCTC) - Responsibilities and Potential Congressional Concerns*, CRS Report for Congress, December 19, 2011, available at <https://www.fas.org/sgp/crs/intel/R41022.pdf>, as viewed on February 19, 2016.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *The 9/11 Commission Report*, 2004, pp. 400-406.

⁸⁴ *Supra* note 80.

The NCTC comprises of experts from 16 federal agencies with a mission to prevent another major terrorist attack in the U.S.⁸⁵ It operates as a partnership of organisations which includes among others the Central Intelligence Agency (CIA); the Department of Justice/Federal Bureau of Investigation (FBI); the Department of State, Defense, and Homeland Security.⁸⁶

Functions

Under the law, the NCTC serves as the nation's primary agency for analysing and integrating terrorism intelligence.⁸⁷ The IRTP Act gives the NCTC six "primary missions" and has assigned the director of the NCTC with nine "duties and responsibilities", and additional missions have been assigned to the NCTC by the Implementing Recommendations of the 9/11 Commissions Act of 2007, Intelligence Community Directive 900 and other Executive Directives.⁸⁸

As per its website, the NCTC "serves as the USG's central and shared knowledge bank on known and suspected terrorists and international terror groups. NCTC also provides USG agencies with terrorism intelligence analysis and other information they need to fulfil their missions. The NCTC collocates more than 30 intelligence, military, law enforcement and

⁸⁵ Information available at <http://www.fbi.gov/about-us/nsb/nctc020309>, as viewed on February 18, 2016.

⁸⁶ Information available at: <http://www.nctc.gov/whatwedo.html>, as viewed on February 18, 2016.

⁸⁷ *Supra* note 86.

⁸⁸ *Supra* note 79.

homeland security networks under one roof to facilitate robust information sharing. The NCTC is a model of interagency information sharing.”⁸⁹

In addition to this, it also maintains a system known as Terrorist Identities Datamart Environment (TIDE) which is a database of international terrorist identities in order to support the government’s watch-listing system designed to identify potential terrorists.⁹⁰

Essentially, the function of the NCTC is to gather all information from all governmental agencies and from other open sources.⁹¹ It also analyses the data and provides policy makers with greater awareness about the existing situations and warning about planned attacks.⁹²

Comparative analysis

The Indian and U.S. NCTC can be compared at two levels. Namely:

- Establishment level
- Functional level

At the establishment level, both the U.S. and Indian Centres were initially established by executive orders and went on to receive statutory backing. While the US NCTC gets its “primary functions” from the IRTP Act,⁹³ this is not the case with its Indian counterpart.

⁸⁹ *Ibid.*

⁹⁰ *Supra* note 80.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Supra* note 79.

The duties and functions of the Indian NCTC have been given by the governmental order of 2012.⁹⁴ The Director of the American NCTC also has his nine “duties and responsibilities” enlisted in the IRTP Act,⁹⁵ while in India this is not the case. The UAPA, under which the Director of the NCTC is appointed, does not enlist any such functions for the Director.

In other words, the manner in which the U.S. Centre has been established is much more concrete than the Indian Centre. The American Centre is a partnership between 16 federal intelligence agencies who work together to keep terrorist attacks at bay.⁹⁶ On the other hand, though the Indian NCTC does have a Standing Council consisting of members from other intelligence agencies; its working has not been envisaged in the form of a partnership. Its modality is very different.

The governmental order does provide for the functions of the NCTC on the lines of the American Centre, but for it to be carried out in a flawless manner a huge level of coordination and cooperation is required. But the existing internal security system in India is not conducive for such levels of partnership. If the NCTC were to see the light of the day, whether it'll carry out the functions and perform the duties which it is supposed to will still remain anybody's guess.

Any intelligence organization performs two functions. First, they collect and assess the information received from various sources and secondly they

⁹⁴ *Supra* note 12.

⁹⁵ *Supra* note 79.

⁹⁶ *Supra* note 86.

conduct intelligence operations to gather information and undertake counter-intelligence operations.⁹⁷

At the functional level, the Indian NCTC has the powers to investigate and arrest which is not the case with the American NCTC.⁹⁸ This is the most fundamental difference between the two. The function of the U.S. NCTC is limited to collecting and analysing information, and is limited to being just a knowledge bank of terrorists' data.⁹⁹ Hence, the question of it encroaching upon the powers of States does not even arise.

Conclusion

Terrorism is a menace which has to be dealt with by both the Centre and the State jointly and reiterating this point is an exercise in otiosity. While the idea of having a central institution is praiseworthy, efforts should be made to strengthen the intelligence units of the respective States and provide more fire power to them.

When it comes to strengthening the internal security system, India still has a long way to go. While the NCTC of our country is modelled on the lines of the American NCTC, it has to be borne in mind that in the U.S. they have a separate Department of Homeland Security under which their NCTC is placed. India should also make similar arrangements.

⁹⁷ *Supra* note 16.

⁹⁸ *Ibid.*

⁹⁹ *Supra* note 79.

In *Kartar Singh v. State of Punjab*¹⁰⁰, the Supreme Court has categorically held that since terrorism affects the sovereignty and integrity of a nation, it must fall under the ambit of the Ministry of Defence. A change in the existing system on these lines will be a step in the right direction.

As regards federalism, the Constitution has given overriding powers to the Centre when it comes to the security of the country. But it also has to be borne in mind that under the garb of national security, the Centre should not take steps which would infringe upon the powers of the States and dent the federal fabric of our country.

Having said that, the States should also realise that the security and safety of our nation is of paramount importance and the interest of the nation must be given priority over the interest of a State. In the Soli Sorabjee Commission it has been rightly pointed out that State intelligence bodies with their limited jurisdiction and power cannot prevent grave terrorist attacks. Hence, the need for a national agency is justified and always welcome.

What needs to be done is that a fine balance has to be struck between national security and basic structure.

In its present form, the NCTC is bound to hamper the federal structure of our country. The arguments of the critics hold strong ground and the Centre has to come up with a solution for the same. In the end, the effectiveness and future of the NCTC is solely dependent on the cordial relationship

¹⁰⁰ *Supra* note 57.

between the Centre and the States and political parties should keep aside their petty differences and look at the larger picture of national security.

Settlement of Intellectual Property Disputes at the WTO: Recent Trends and Challenges

- Jacob George Panickasseril*

The whole future of the WTO is inextricably linked to the success of the dispute settlement process.

– Peter Sutherland, First Director-General, World Trade Organization¹

Abstract

International law has traditionally evolved to settle legal disputes between States and private parties by providing for economic retaliation and demand for repatriation in case of trade in goods. When it comes to disputes between States diplomatic efforts have attempted to prevent trade ‘wars’ from affecting the movement of goods. However with the advent of intellectual property, dispute settlement has been a cause of concern. Citing deficiencies in other international institutions the WTO has taken upon itself the role of creating minimum standards of intellectual property and interpreting the same with the backing of an ‘effective’ dispute settlement process. This paper attempts to analyse these disputes and the patterns emerging from the nature of settlement of issues of compliance. What eventually emerges is a picture of challenges ranging from unilateral trade sanctions to free trade agreements which ignore the WTO thus calling for concerted efforts to restore the legitimacy of its dispute settlement process

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¹ John Zaracostas, “Dispute Process Crucial to WTO, Sutherland Says,” Journal of Commerce, November 14, 1994, pg. 1A.

to enable it to justify the role it set out to do at its genesis in Marrakesh two decades ago.

WIPO: indifference towards dispute settlement

Disputes arising as a result of misappropriation of intellectual property raise difficulties as it is in the form of non-physical intangibles provided as rights at the discretion of particular sovereign States. Protection across national boundaries therefore is concomitant on bilateral and plurilateral arrangements between two or more States.²Treaties over and above such arrangements such as the Berne and Paris Conventions³ tended to disfavour nationals of States with market economies as opposed to States which maintained a planned economy with little protection of intellectual property. Consequently these treaties failed to recognize advances in the field of communication which allowed countries in the South to imitate technologies prevalent in industrialised States without incurring the same costs in research and development.⁴ The comparative advantages that developed countries enjoyed in the past were removed due to free riding competitors from other countries, entailing the need for greater intellectual property protection on a supranational basis.⁵ Knowing the nature of international law where ambiguity prevails in textual interpretation, it is no surprise that disputes did arise between States especially with regard to

²J.H. Reichman, *Intellectual Property in International Trade: Opportunities and Risk of a GATT Connection*, 22 Vand. J. Transnat'l L. 747, 796-800 (1989).

³Berne Convention for the Protection of Literary and Artistic Works of September, 1886 (828 U.N.T.S. 221) and Paris Convention for the Protection of Industrial Property of 20 March, 1883 (828 U.N.T.S. 305).

⁴Joseph Straus, *A Marriage of Convenience: World Economy and Intellectual Property From 1990 to 2012*, 40 AIPLA Q. J. 633, 639-40 (2012).

⁵J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement*, 29 Int'l. L. 345, 346 (1989).

protection (or the lack of it) provided to intellectual property of nationals *vis-a-vis* non-nationals.

Unfortunately the World Intellectual Property Organization (WIPO) which was founded with the objective “to promote the protection of intellectual property throughout the world through cooperation among States”⁶ by administering the abovementioned treaties was victim to features such as ‘coordinated group voting’ which politicised efforts at a consensus between States.⁷ The mentioned Conventions contain provisions for settlement of disputes between States by referring to the jurisdiction of the International Court of Justice (ICJ).⁸ However the inherent limitation of this forum was that the process was considered ineffective, as enforcement of its judgments required the sanction of the United Nations Security Council, a practice which is generally reserved for matters such as humanitarian crises. Not surprisingly, no dispute has been initiated, let alone adjudicated, through this forum for intellectual property disputes. WIPO’s draft Treaty on the Settlement of Disputes between States in the Field of Intellectual Property which has been under discussion since 1990 has been opposed by several developed countries including the United States due to a lack of enforcement mechanism and the institution has been relegated to settling disputes between private parties primarily pertaining to domain name resolution through its Arbitration and Mediation Centre in Geneva.⁹

GATT 1947: non- institutional deficiencies in dispute settlement

⁶ Article 3, Convention establishing the World Intellectual Property Organization, 14 July 1967, 828 U.N.T.S. 3.

⁷ Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 Va. J. Int'l L. 275, 294 (1997).

⁸ Article 28, Paris Convention and Article 33, Berne Convention.

⁹ Dreyfuss and Lowenfeld, *supra* note 7 at 295.

At the end of the Second World War, the Bretton Woods discussions envisaged an International Trade Organisation (ITO) which was intended to play a role in facilitating international trade amongst States in order to stimulate economic growth after the war period but a lack of consensus prevented it from being created. States therefore came to look upon a legal text without an institutional support, the General Agreement on Tariffs and Trade 1947,¹⁰ for the purposes of international trade. As a result the GATT system suffered from what has been termed 'birth defects' due to the uncertainty regarding its status as against other Bretton Woods institutions like the International Monetary Fund (IMF). A positive consensus mechanism for settlement of trade disputes was rendered nugatory as instances of 'blocking' by States could effectively nullify a panel report to render its enforcement a non-event. Blocking was used for several stages of the dispute settlement- for constitution of a panel, adoption of a panel report and compliance measures on the basis of the report.¹¹ The lack of an enforcement mechanism meant that adverse rulings of panels were akin to a "punch that will not hit anyone."¹²

The above shortcomings of the GATT system led to the Uruguay Round negotiators adopting certain changes to its dispute settlement mechanism which presaged several of the WTO dispute settlement mechanism features such as the right to a panel and time-bound procedure for panel

¹⁰ General Agreement on Tariffs and Trade (GATT 1947), 55 U.N.T.S. 194.

¹¹ John H. Jackson, *Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects*, THE WTO AS AN INTERNATIONAL ORGANIZATION, 161, 161-164 (Anne O. Krueger ed., Oxford University Press, 2000).

¹² Robert E. Hudec, *'Transcending the Ostensible: Some Reflections on the Nature of Litigation Between Governments*, 72 Minn. L. Rev. 211, 219 (1987).

proceedings.¹³ These were a culmination of earlier attempts at codifying the practices of dispute settlement¹⁴ but remained silent on the procedure for adoption of the panel's report and review of the report in the form of appeal was absent. The GATT system however continued to be plagued by issues such as contracting parties resorting to unilateral action against other parties instead of following the dispute settlement practices derived over the course of the previous decades.¹⁵

When it came to disputes dealing with intellectual property the GATT system had only a few cases to deal with. Negotiations dealing with counterfeiting of copyrighted works did occur after the Tokyo Round but no consensus was built before the Uruguay Round.¹⁶ Panels constituted to examine intellectual property either failed to realize the expanding realms of intellectual property¹⁷ or came to inconsistent conclusions over similar measures.¹⁸ At best the panels could only 'recommend' that States bring its municipal law in conformity with the GATT system.¹⁹ Thus it can be seen

¹³ Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures, GATT B.I.S.D (36th Supp.) at 61.

¹⁴ See the Decision of 5 April 1966 on Procedures under Article XXIII, GATT B.I.S.D (14th Supp.) at 18; The Understanding on Notification, Consultation, Dispute Settlement and Surveillance, adopted on 28 November 1979, GATT B.I.S.D (26th Supp.) at 210; The Decision on Dispute Settlement, contained in the Ministerial Declaration of 29 November 1982, GATT B.I.S.D (29th Supp.) at 13 and the Decision on Dispute Settlement of 30 November 1984 GATT B.I.S.D (31st Supp.) at 9.

¹⁵ Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of Intellectual Property Lawmaking*, 29 Yale J. Int'l L. 1, 22 (2004).

¹⁶ David Hartridge & Arvind Subramanian, *Intellectual Property Rights: the Issues in GATT*, 22 Vand. J. Transnat'l. L. 893, 897 (1989).

¹⁷ Report of the Panel, Japan - Customs Duties, Taxes And Labelling Practices On Imported Wines And Alcoholic Beverages, L/6216 (Nov. 10, 1987), GATT B.I.S.D. (34th Supp.) at 83 finding that trade names are not contemplated under GATT 1947.

¹⁸ Report of the Panel, United States - Imports Of Certain Automotive Spring Assemblies, L/5333 (May 26, 1983), GATT B.I.S.D (30th Supp.) at 107 and Report of the Panel, United States — Section 337 of the Tariff Act of 1930, L/6439 (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) at 345.

¹⁹ Report of the Panel, The United States Manufacturing Clause, L/5609 (May 15/16, 1984), GATT B.I.S.D. (31st Supp.) at 74.

that the GATT regime with its institutional limitations had little opportunity to assess disputes exclusively in the field of intellectual property and focussed primarily on reducing tariffs and other trade barriers.

The WTO: a merger of treaty making and dispute settlement

Developed countries led by the United States saw WIPO as being held ransom by opposition from developing countries during negotiations of a substantive Patent Law Treaty for stronger intellectual property protection. The national treatment principle in the Paris Convention in particular also came under scrutiny as countries did not have to extend special protection for nationals from other countries where there was little protection for intellectual property under its municipal law.²⁰ A need to progress from the regulatory heterogeneity of municipal laws to a regulatory homogeneity thus became necessary during the Uruguay round of negotiations.²¹

The GATT regime on the other hand was particularly attractive with its possibility of trade sanctions to ensure States change their municipal laws to comply with 'international' standards on intellectual property rights. However implementation of minimum standards of protection of intellectual property could become effective only if its dispute settlement mechanism was overhauled to ensure that states enacted such laws. The 'promise' of trade concessions to developing countries which were dependent on the United States for trade purposes ensured that negotiations

²⁰ Monique L. Cordray, *GATT v. WIPO*, 76 J. Pat. & Trademark Off. Soc'y 121, 123-24 (1994).

²¹ Ravi Ramamurti, *Global regulatory convergence: the case of intellectual property rights* in INTERNATIONAL BUSINESS AND GOVERNMENT RELATIONS IN THE 21ST CENTURY, 341, 347 (Robert Grosse ed., Cambridge University Press, 2005).

were by and large focussed on linking effective dispute settlement with stronger protection of intellectual property.²²

This linkage was the underlying motivation for the evolution of the TRIPS Agreement at the Uruguay Round whereas WIPO only focussed on contributing suggestions on ‘generally internationally accepted and applied standards/norms’ of intellectual property.²³ Negotiators were aware that bringing intellectual property within its ambit would result in debating about the role and relevance of WIPO. Even though there dawned a need for recognising “a mutually supportive relationship”²⁴ between the WTO and WIPO, the position became clear by referring future intellectual property disputes to the newly created World Trade Organization for settlement.²⁵

The WTO and intellectual property disputes

Unlike the earlier GATT regime, the Dispute Settlement Understanding (DSU) mandates that States complaining of an alleged measure of another State have a right to have a panel constituted by a Dispute Settlement Body (DSB) even where there is no consensus between the States.²⁶ The entire proceedings from the consultation stage to the compliance stage is stipulated to be undertaken in a time bound manner²⁷ and there is provision for review of the panel report by an Appellate Body (“AB”).²⁸ Adoption of

²² R. Michael Gadbaw, *Intellectual Property and International Trade: Merger or Marriage of Convenience?*, 22 Vand. J. Transnat'l L. 223, 228-29 (1989).

²³ Existence, Scope and Form of Generally Internationally Accepted and Applied Standards/Norms for the Protection of Intellectual Property, GATT Doc. MTN.GNG/NG11/W/24, May 5 1988.

²⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), para 8 of the Preamble.

²⁵ Helfer, *supra* note 15.

²⁶ Article 6, DSU.

²⁷ See Articles 4.3, 8.7, 12.12, 16.4, 17.14, 20 and 21.3, DSU.

²⁸ Article 17, DSU.

panel and AB reports work on the principle of reverse consensus in contrast with the earlier GATT consensus model.²⁹ With the signing of the WTO Agreement states which were not party to the WIPO conventions became governed by the TRIPS Agreement. Under Article 64.1 of the TRIPS Agreement dispute settlement is to be governed by the DSU procedure³⁰ stipulated for other disputes under the WTO system rejecting the earlier ‘GATT *a la carte*’ model with a defective compliance mechanism.³¹

Subject matter of disputes

Thirty four disputes relating to the TRIPS Agreement have been brought before the DSB with patents being the most contested subject matter indicating the stakes involved in issues of public health and protection of intellectual property.³²

<u>Subject Matter</u>	<u>Number of Disputes</u>
Patents	13
Copyright	7
Trademarks	7
Copyright and Trademarks	1
Trademarks and Geographical Indications	2
Trade Secrets	1
General	3

²⁹ See Articles 16.4 and 17.14, DSU.

³⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S. 401.

³¹ Mitsuo Matshushita, Thomas J. Schoenbaum, Petros C. Mavroidis, THE WORLD TRADE ORGANIZATION, 7 (Oxford University Press, 2003).

³²Information available at:

https://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm, as viewed on 11th December 2015.

Relatively few disputes have been raised when compared to other WTO Agreements on subjects such as anti-dumping (111 disputes), subsidies and countervailing measures (109), and agriculture (77).³³ This can be due to the TRIPS Agreement³⁴ excluding non-violation complaints³⁵ from being raised before the DSB despite pressure from the United States and Switzerland.³⁶ As a result only violation complaints can be raised which places a heavy burden on the complaining Party to prove that measures are clearly violating the TRIPS Agreement.³⁷

Parties to the disputes

Developed States, especially the United States and the European Communities (and its constituent Member States) are using the WTO system to settle their disputes in comparison to developing countries, reflecting the general pattern for other disputes brought under the WTO.³⁸ Notwithstanding special provisions within the DSU in favour of developing countries,³⁹ the early years saw developed states with well-established municipal laws on intellectual property attempt to ensure the same standards in developing countries through the TRIPS Agreement. The United States

³³Information available at: https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm#, as viewed on 11th December 2015.

³⁴ Article 64.2, TRIPS Agreement.

³⁵A 'non-violation complaint' alleges that an objective of the treaty is being impeded by any measure of the respondent party, in contrast to a 'violation complaint' which alleges a clear violation of a provision of the treaty by nullifying a benefit accruing under the treaty.

³⁶Dreyfuss & Lowenfeld, *supra* note 7 at 283.

³⁷ J.H. Reichman, *Securing Compliance with the TRIPS Agreement after US v. India*, 1 J. Int'l Econ. L. 585, 597-98 (1998).

³⁸ Currently the United States and the EC have been involved in 232 and 167 disputes out of the 500 disputes at the WTO involving all the covered Agreements. Information available at: https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm, as viewed on 11th December 2015.

³⁹ See Articles 3.12, 4.10, 8.10, 12.10, 12.11, 21.2, 21.7, 21.8 and 27.2 DSU.

and the EC, leveraged by pro-industry lobbies, have been in a better position to raise disputes whereas a barrier to developing countries' participation is the expenditure involved for prosecution through legal personnel competent in international trade and intellectual property rights in particular, which are few in these countries.⁴⁰

<u>Party (Applicant)</u>	<u>Number of disputes</u>
United States	16
EC (and Member States)	9
Brazil	2
Australia, Canada, Cuba, Dominican Republic, Honduras, India, Indonesia	1 (each)

<u>Party (Respondent)</u>	<u>Number of disputes</u>
EC (and Member States)	12
Australia	5
United States	4
Argentina, Canada, China India, Japan	2 (each)
Brazil, Indonesia, Pakistan	1 (each)

While Least Developing Countries (“LDC”) were largely ignored due to the benefit of the transition period provided under the TRIPS Agreement,⁴¹ developing countries such as India and Brazil faced scrutiny for not changing their municipal laws in the initial years. Disputes were also raised

⁴⁰Marc L. Busch and Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37 J. World Trade 719, 721-722 (2003).

⁴¹Article 66, TRIPS Agreement.

against developed countries such as Canada and member States of the EC highlighting the significance of the TRIPS Agreement being seen as a global standard.⁴² However the number of disputes against developing countries has reduced in the new millennium barring the disputes against China.⁴³ This can indicate the swift speed at which the minimum standards approach has been implemented by States under their respective municipal laws. In recent years the trend is reversing and developing countries are showing more appreciation in utilizing the WTO System. Also disputes are being increasingly adjudicated rather than being settled through consultations⁴⁴ as developed countries come under domestic pressure not to settle disputes and developing countries are able to resist giving in to the demands of developed countries.⁴⁵

Settlement of disputes

Fourteen disputes have been mutually settled with resulting change in the municipal laws of the respondent Party in concordance with the DSU's objective of prompt settlement of disputes.⁴⁶ Panels have been constituted in fifteen other disputes and only in two disputes have the decisions of the Panels and the AB not been complied with.⁴⁷

⁴² Information available at: https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm, as viewed on 11th December 2015.

⁴³ China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights (DS362) and China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers (DS372).

⁴⁴ Only 19 disputes have been settled through negotiations since 2005 compared to 75 disputes in the first decade of the WTO (1995-2004). See *supra* note 41.

⁴⁵ Joost Pauwelyn, *The Limits of Litigation: "Americanization" and Negotiation in the Settlement of WTO Disputes*, 19 Ohio St. J. on Disp. Resol. 121,124 (2003).

⁴⁶ Articles 3.3 and 3.7, DSU.

⁴⁷ *Supra* note 42.

<u>Status</u>	<u>Number of disputes</u>
Consultation Stage (No Panel)	5
Panel Formed (Dispute Pending)	5
Mutually Settled	14
Compliance with Panel Reports	6
Compliance with AB Reports	2
Non-compliance	2

While the relatively high rate of compliance gives reason to be content with the WTO system, it is pertinent to note that both the disputes alleging non-compliance have involved the United States, which has showed a tendency to contest them. While in *US- Section 110(5) Copyright Act* the United States provided compensation to the EC for a period of three years as a ‘temporary’ solution⁴⁸ even though nationals of third party countries continue to be discriminated by the provisions of the statute by being uncompensated,⁴⁹ monthly status reports have been submitted in *United States – Section 211 Omnibus Appropriations Act Of 1998* from August 2002 promising to “continue to work on a solution” without any legislative amendment of the TRIPS-inconsistent provisions.⁵⁰

When it comes to third parties that can take part both in the panel and AB proceedings⁵¹ and at the consultation stage where they have a ‘substantial

⁴⁸ Notification of a Mutually Satisfactory Temporary Arrangement, United States-Section 110(5) of the US Copyright Act, WT/DS160/23 (June 26, 2003).

⁴⁹ Brendan McGivern, *Implementation of Panel and Appellate Body Rulings*, KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 98, 104 (Rufus Yerxa and Bruce Wilson eds., Cambridge University Press, 2005).

⁵⁰ Status Report Regarding Implementation of the DSB Recommendations and Rulings, United States - Section 211 Omnibus Appropriations Act of 1998, WT/DS176/11/Add.147 (Mar. 13, 2015).

⁵¹ Articles 10.2 and 17.4, DSU.

trade interest’,⁵² their presence (or absence) is significant when it comes to the settlement of disputes.⁵³ In *Canada — Patent Protection of Pharmaceutical Products*, due to the involvement of third parties in the dispute, the panel did not prefer a ruling on the interpretation of what is ‘legitimate interest’ under Article 30 of the TRIPS Agreement as the “concept should not be used to decide, through adjudication, a normative policy issue that is still obviously a matter of unresolved political debate.”⁵⁴ Under the TRIPS Agreement in particular, only one of the fourteen mutually settled disputes has had a third party.⁵⁵ Thus the presence of third parties will discourage early settlement of disputes as these parties can ‘listen’ in to negotiations between disputants at the consultations stage and increase costs by participating in the panel and AB proceedings.⁵⁶ This can have a negative effect on developing countries’ attempts to settle disputes as mentioned earlier.⁵⁷

The difficulties in implementation

Non-implementation of panel reports which can result in counter measures such as compensation and retaliation are rare, reflecting the cautious approach shown by earlier GATT 1947 panels.⁵⁸ Moreover retaliation as an effective measure to coerce States into changing their municipal laws and

⁵² Article 4.11, DSU.

⁵³ Marc L. Busch & Eric Reinhardt, *Three’s A Crowd: Third Parties and WTO Dispute Settlement*, 58 *World Politics* 446, 464 (2006).

⁵⁴ Report of the Panel, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R (Mar. 17, 2000), para 7.82.

⁵⁵ The United States was the third party in *China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers* (DS372).

⁵⁶ Busch & Reinhardt, *supra* note 53, at 455-56.

⁵⁷ Busch & Reinhardt, *supra* note 40.

⁵⁸ Hartridge & Subramanian, *supra* note 16, at 908-09.

policies is questionable even under the WTO system.⁵⁹ This is because the difficulties in calculating the level of suspension of rights may prove complicated for intangible rights such as intellectual property which can enter the public domain during the period of suspension and be appropriated by any person to the detriment of the erstwhile right holder.⁶⁰ Also where intellectual property is broad enough to cover sectors such as entertainment and publishing (copyright) to pharmaceuticals (patents) it may be difficult to rely on the present definition of 'sector' in the DSU so as to apply retaliation measures across different industries.⁶¹ Considering the convoluted nature of proceedings in *US- Section 110(5) Copyright Act*, developing countries may refrain from retaliation even after obtaining authorization from the DSB.

Similarly cross-retaliation permitted by the DSB through suspension of rights under the TRIPS Agreement may appear necessary in cases where a state which produces little or no intellectual property will face hardly any consequences in situations where retaliation across the same sector is opted for by the complaining Party.⁶² However this proves difficult to justify when it affects vital sectors such as the pharmaceutical industry providing drugs needed for the public which have not contributed to the offending measures. Complications in retaliation and cross-retaliation also arise as States are obligated not to derogate from its obligations under the WIPO Conventions

⁵⁹ William J. Davey, *Compliance Problems in WTO Dispute Settlement*, 42 *Cornell Int'l L.J.* 119, 123-24 (2009).

⁶⁰ Frederick M. Abbot, *WTO Dispute Settlement and the Agreement on Trade Related Aspects of Intellectual Property Rights*, *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* 415, 434 (Ernst-Ulrich Petersmann ed., Kluwer Law International, 1997).

⁶¹ Article 22.3(f) (iii), DSU.

⁶² William A. Kerr, *CONFLICT, CHAOS AND CONFUSION: THE CRISIS IN THE INTERNATIONAL TRADING SYSTEM*, 80 (Edward Elgar, 2010).

which have been incorporated by reference into the TRIPS Agreement.⁶³ The question therefore whether suspension of rights under the TRIPS Agreement may affect these obligations has been left unanswered by the arbitrators in *European Communities — Regime for the Importation, Sale and Distribution of Bananas* who observed that it was up to the respective States to consider whether such a measure “gives rise to difficulties in legal or practical terms under such treaties.”⁶⁴ Such measures may actually affect the complaining Party more if it has an economy dependent on foreign investment and supply of essential goods. Not surprisingly, in disputes where the DSB has authorized cross-retaliation through suspension of intellectual property rights no actual suspension of these rights has taken place.⁶⁵

Delays in the system

The time bound procedure under the DSU has had its positive and negative impacts on the credibility of the WTO system and the TRIPS Agreement in particular. The large number of disputes wherein constitution of the panel has been deferred by the DSB has enabled continuation of consultations beyond the stipulated time period. However the respondent party has not shown the inclination to reply to the request for establishment of the panel and the DSB has been left with the task of appointing the panel members.⁶⁶ The DSB has had to appoint the panel in all thirteen disputes where the establishment of the panel has been deferred. In none of these

⁶³ Articles 1.3 and 2.2, TRIPS Agreement.

⁶⁴ Decision by the Arbitrators, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB/ECU (Mar. 24, 2000), para 152.

⁶⁵ See also *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (DS285) and *United States — Subsidies on Upland Cotton* (DS267).

⁶⁶ Article 8.7, DSU.

cases did a mutually agreed solution evolve as a result of further consultations indicating that parties to the dispute instead prepared for adjudicating before panels once the dispute fails to be resolved during the time period of consultations.⁶⁷

<u>Compliance period</u>	<u>Disputes</u>
Within Time	2
Mutually Fixed Extension	3
Reference to Arbitration under Article 21.3 DSU	3

In disputes where the panel report is adopted by the DSB, timely compliance by removing the alleged measure which goes against the TRIPS Agreement is an issue.⁶⁸ Resort to arbitral proceedings to determine the reasonable period or mutual agreement on extension of period of implementation under Article 21.3 DSU is becoming the norm, as a result of which once corrective measures are eventually in place they fail to remedy the impairment to trade that has occurred in the interim period between consultations and compliance. Importantly what exactly constitutes a reasonable period has not been arrived on a consistent basis by these arbitral proceedings.⁶⁹

Legalization of the proceedings

The Panels are also showing an increasing appreciation in interpreting the locus of the TRIPS Agreement within the GATT/WTO system and in respect with the WIPO Conventions. While it is no surprise that the negotiating history of the TRIPS Agreement has been used to interpret the

⁶⁷ *Supra* note 47.

⁶⁸ Article 21.1, DSU.

⁶⁹ Ernst-Ulrich Petersmann, *Administration of Justice in the World Trade Organization: Did the WTO Appellate Body Commit 'Grave Injustice'?* 8 Law & Prac. Int'l Cts. & Tribunals 329, 342 (2009).

provisions therein,⁷⁰ panels and the AB have relied on the negotiating history of WIPO conventions with respect to provisions which have been incorporated by reference into the TRIPS Agreement.⁷¹ While it can be argued that incorporation by reference to these conventions which have an adequate body of state practice means that States that have become party to the TRIPS Agreement become bound under interpretation by state practice of these conventions,⁷² this has the effect of binding developing countries which have not been party to the negotiating history of the earlier WIPO Conventions and the TRIPS Agreement.⁷³ With respect to WIPO treaties which have entered into existence subsequent to the TRIPS Agreement, the panel in *United States - Section 110(5) of US Copyright Act* has recognized the need for a harmonious interpretation of the WIPO treaties with the TRIPS Agreement by seeking ‘contextual guidance’ from state practice.⁷⁴

Enforcement of TRIPS obligations in municipal laws

The TRIPS Agreement is unique within the WTO system because it prescribes Member States to take positive action in its respective municipal laws for bringing substantive minimum standards protection of intellectual

⁷⁰ See Report of the Panel, India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS79/R (Aug. 24, 2008), Paras 7.40 and 7.72 and Report of the Panel, United States - Section 110(5) of US Copyright Act, WT/DS160/R (June 1, 2008), para 6.64.

⁷¹ See Report of the Panel, Canada - Patent Protection of Pharmaceutical Products, WT/DS114/R (Mar. 17, 2000), Para 7.70 and Report of the Appellate Body, United States - Section 211 Omnibus Appropriations Act of 1998, WT/DS176/AB/R (Jan. 2, 2002), para 145-146.

⁷² Abbot, *supra* note 60, at 421-22.

⁷³ Carlos M. Correa, *The TRIPS Agreement and Developing Countries*, THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 419,431-32 (Patrick F. J. Macrory, Arthur E. Appleton & Michael G. Plummer eds., Springer, 2005).

⁷⁴ Report of the Panel, United States - Section 110(5) of US Copyright Act, WT/DS160/R (June 15, 2008), para 6.70.

property rights.⁷⁵ Implementation raises two costs to the State in the form of overhauling the legal system and enforcing rights of right holders.⁷⁶ Nevertheless there is leeway given to the Member States in determining ‘the appropriate method of implementing the Agreement within their own legal system and practice.’⁷⁷ This can be either in the form of administrative or legislative reforms.

On the question of which reforms in particular will be in conformity with a State’s obligations, the panels have not showed a consistent pattern of adjudication on this point. While in *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the contention of India that it had fulfilled its obligations under Article 70 in permitting Exclusive Marketing Rights for pharmaceutical products through administrative guidelines was rejected,⁷⁸ mere representations that administrative measures are consistent with the TRIPS Agreement were found to be sufficient in *United States — Sections 301–310 of the Trade Act 1974*⁷⁹ and *Canada - Patent Protection of Pharmaceutical Products*.⁸⁰

Another issue was whether implementation through enactment of TRIPS consistent with municipal laws was sufficient or enforcement therein is required. In *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights* the panel held that the TRIPS Agreement under Article 44.1 only requires judicial authorities to “have the authority

⁷⁵ Report of the Panel, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R (Aug. 24 2008), para 7.53.

⁷⁶ Bernard M. Hoekman And Michel M. Kosteci, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* 290 (Second Edition, Oxford University Press, 2001).

⁷⁷ Article 1.1, TRIPS Agreement.

⁷⁸ Report of the Appellate Body, WT/DS50/AB/R (Dec. 19, 1997), Para 70.

⁷⁹ Report of the Panel, WT/DS152/R (Dec. 22, 1999), para 7.184.

⁸⁰ *Supra* note 50, at para 7.99.

to order a party to desist from an infringement” and “not an obligation to 'exercise' authority.”⁸¹ Thus judicial authorities are provided far greater discretion in contrast to executive action through administrative measures as seen in *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*. Claiming non-compliance of the TRIPS Agreement subsequently becomes difficult on the ground of non-enforcement as compared to non-implementation into the municipal law.

Challenges to the WTO dispute settlement

Settlement of disputes under the WTO regime aims at a ‘mutually satisfactory solution’⁸² but less than five years after its creation, the violent protests at the ‘Seattle Tea Party’⁸³ brought sharp focus on the nature of the institution by raising the issue of WTO obligations which bind developing countries with consequences in politically sensitive sectors such as agriculture and labour. Developments outside the WTO nevertheless challenge the legitimacy of the dispute settlement process in the form of:-

The plethora of Free Trade Agreements

DSB panels have been clear as to the interpretation as to whether bilateral agreements come within the scope of ‘covered agreements’ under Article 7.2 DSU and have held that such agreements which fall outside the WTO system cannot be agitated before the panels even though it affects international trade.⁸⁴ Nevertheless the spate of trade agreements being

⁸¹ Report of the Panel, *China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009), para 7.236.

⁸² Art. 11, DSU.

⁸³ Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. Int'l Econ. L. 19, 24 (2000).

⁸⁴ See Report of the Panel, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R (June 30, 2010), Para. 7.324 and Report of the Appellate Body, *Mexico - Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006), para 49.

negotiated by the United States and the EC in the last two decades has seen the evolution of what are called ‘TRIPS-Plus’ obligations.⁸⁵ Ironically Member States of the WTO have taken advantage of the freedom given by the WTO⁸⁶ to enter into such agreements with its own dispute settlement mechanisms including provisions for non-State actors such as multinational corporations to raise disputes.⁸⁷

These trade agreements go against the Most Favoured Nation and National Treatment principles of the WTO as they exclude non-member States from its ambit. These two principles are important as they reduce the protectionist tendencies of States under the WIPO Conventions and contribute to the concept of ‘non-discrimination’ in the multilateral WTO system so as to provide States with flexibilities to negotiate international trade issues.⁸⁸ The surfeit of such agreements may eventually cause disputes to be settled at such forums resulting in the ouster of jurisdiction of the WTO agreements only for the reason that multilateral negotiations take years to arrive at a consensus.⁸⁹

The nonchalance of the United States

Unilateral trade sanctions by the United States under Section 301 of the Trade Act of 1974 have been the subject matter of disputes under the GATT

⁸⁵Peter Drahos, *BITS and BIPS: Bilateralism in Intellectual Property*, 4 J. World I.P. Law 791,791 (2001).

⁸⁶Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, 33 I.L.M. 1161.

⁸⁷M Sornarajah, *The Neo-Liberal Agenda in Investment Arbitration*, REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 199, 200 (Wenhua Shan, Penelope Simons & Dalvinder Singh eds., Hart Publishing, 2008).

⁸⁸Mike Moore, *A WORLD WITHOUT WALLS: FREEDOM, DEVELOPMENT, FREE TRADE AND GLOBAL GOVERNANCE*, Cambridge University Press, Cambridge, UK, 2003, 104.

⁸⁹Yong- Shik Lee, *RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM* 142 (Cambridge University Press, 2006).

and WTO systems. While in the former dispute the panel ‘requested’ the United States to amend its law,⁹⁰ the WTO panel in the latter refused to rule against the United States solely on the assurance that the United States would not attempt resort to such measures without authorization from the WTO though there is an inconsistency with WTO obligations.⁹¹ This is of little consolation to developing countries which are increasingly facing pressure to comply with both TRIPS and TRIPS-Plus obligations as the United States has not refrained from using Section 301 even against countries such as China which has a huge trade surplus with the United States. Not surprisingly China has been forced to change its domestic intellectual property laws to ‘comply’ with WTO standards.⁹²

Instead of seeking remedies within the WTO system through periodic reviews at the TRIPS Council,⁹³ the United States has availed itself of these measures due to uncertainty facing adjudication before DSB panels, especially against Member States which were in the transitional phase of their respective TRIPS obligations.⁹⁴ This is in violation of the principle of multilateral negotiation between States enshrined in Article 23 DSU and can undermine the credibility of the WTO notwithstanding the complaints raised by many States against such measures.⁹⁵

⁹⁰*Supra* note 18.

⁹¹*Supra* note 74, at paras 7.96 and 7.126.

⁹² P. K. Yu, *From Pirates To Partners: Protecting Intellectual Property In China In The Twenty First Century*, 50 Am. Uni. L. R., 131,141 (2000).

⁹³ Article 71.2, TRIPS Agreement.

⁹⁴ Carlos Primo Braga & Carsten Fink, *Trade-related Intellectual Property Rights: From Marrakech to Seattle*, THE WORLD TRADE ORGANIZATION MILLENNIUM ROUND: FREER TRADE IN THE TWENTY-FIRST CENTURY 180, 192 (Klaus Gunter Deutsch & Bernhard Speyer eds., Routledge, 2001).

⁹⁵ See United States-Import Measures on Certain Products from the European Communities (DS165) and

Third World interpretations of Intellectual Property

Both the TRIPS Agreement and the DSU contain provisions which provide special and differential treatment for developing countries and LDCs.⁹⁶ While developing countries have by and large become integrated into the WTO system, the participation of LDCs is minimal as the transitional period to comply with the TRIPS Agreement has been extended to 1 July 2021.⁹⁷ Nevertheless buoyed by the ‘success’ in raising concerns during the Doha Round,⁹⁸ both groups have raised enormous debate in the intellectual property landscape in fields such as traditional knowledge and biodiversity through newly negotiated treaties.⁹⁹ This can be explained by the fact that the TRIPS Agreement is perceived in contradistinction to international agreements such as the Convention on Biological Diversity 1992 (CBD). While the former aims to provide protection of intellectual property in every field without discrimination subjecting life forms to private exclusive rights,¹⁰⁰ CBD is created with the mandate of establishing common rights over life forms such as plant genetic resources to ensure benefit sharing.¹⁰¹ The WTO panels are however having jurisdiction to examine disputes pertaining to only WTO-covered agreements but there are examples of WTO disputes¹⁰² which have been adjudicated in other international forums such as the International Tribunal for the Law of the

European Communities-Measures Affecting Trade in Commercial Vessels (DS301).

⁹⁶ See para 6 to the Preamble, Article 66, 67 TRIPS Agreement and Article 24, DSU.

⁹⁷ Extension of the Transition Period under Article 66.1 for Least Developed Country Members, Decision of the Council for TRIPS, 11 June 2013, Doc. WTO/IP/C/64.

⁹⁸ Amrita Narlikar, *INTERNATIONAL TRADE AND DEVELOPING COUNTRIES: BARGAINING COALITIONS IN THE GATT & WTO 192* (Routledge, 2003).

⁹⁹ Helfer, *supra* note 15, at 6.

¹⁰⁰ Article 27.3, TRIPS Agreement.

¹⁰¹ John Madeley, *HUNGRY FOR TRADE: HOW THE POOR PAY FOR FREE TRADE 98* (Penguin Books, 2001).

¹⁰² Chile — Measures affecting the Transit and Importing of Swordfish (DS193) and Nicaragua — Measures Affecting Imports from Honduras and Colombia (DS201).

Seas (ITLOS)¹⁰³ and the ICJ¹⁰⁴ raising the possibility of conflicting decisions in international law.¹⁰⁵

Proposals for reforms to the WTO DS system

The WTO at its inception contained provisions for periodic review of the DSU.¹⁰⁶ However following the failure at Seattle, the Doha Round has attempted to bring back the focus on reforms to the working of the DSU by requiring ‘negotiations on improvements and clarifications of the DSU’.¹⁰⁷ More than a decade later such negotiations have not made any headway within the WTO as developed and developing countries differ as to how to make the institution work ‘efficiently’. Two proposals which can help in settlement of intellectual property disputes in particular are as follows:-

Engaging other international institutions

At present international organisations such as the Food and Agriculture Organization (FAO) and the United Nations (UN) are members of the various WTO Councils including the Council for TRIPS and engage in discussions within the WTO framework but are barred from participating in the DSB proceedings.¹⁰⁸ Institutions such as WIPO can be called to participate in the proceedings especially when a question of interpretation of the TRIPS Agreement *vis-a-vis* rights under WIPO Conventions are

¹⁰³ Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union).

¹⁰⁴ Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras).

¹⁰⁵ Joost Pauwelyn, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 450 (Cambridge University Press, 2003).

¹⁰⁶ Decision on the Application and Review of the Understanding on Rules and Procedure Governing the Settlement of Disputes, WTO Doc. LT/UR/D-1/6 (1994).

¹⁰⁷ Doha WTO Ministerial Declaration, para 30, Nov.14 2001, WTO Doc. WT/MIN (01)/DEC/1.

¹⁰⁸ Article 68, TRIPS Agreement.

concerned. WIPO can also provide details on the negotiating history of international agreements under its administration under Article 13 DSU, a role it has already played in *US-Section 110 Copyright Act* and *United States - Section 211 Omnibus Appropriations Act* for the Berne and Paris Conventions respectively. The institution can also interpret certain provisions of the TRIPS Agreement which are outside the ambit of the DSB such as Article 6 and also post-TRIPS treaties.

Constitution of Panels and Appellate Body

Panels are constituted on a dispute to dispute basis by the Director General of the WTO in consultation with the Chairman of the DSB and the TRIPS Council.¹⁰⁹ The AB on the other hand is a standing body whose members are rotated.¹¹⁰ Not surprisingly there is growing clamour for a permanent roster of panellists after the AB has reviewed the composition of a panel by the Director General in a recent dispute.¹¹¹ Considering the technical nature of intellectual property disputes it may be prudent on the part of the DSB to ensure panels adjudicating on such disputes should contain persons with ‘a wide spectrum of experience’¹¹² in intellectual property issues in particular. In this manner the chances of the AB deferring to the panel reports can increase as the role of the AB is to only supervise the work of the panels and not interpret intellectual property.¹¹³

¹⁰⁹ Article 8.7, DSU.

¹¹⁰ Article 17, DSU.

¹¹¹ Recourse to Article 21.5 of the DSU by the European Communities, *US-Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/AB/RW (May 14, 2009), para 172.

¹¹² Article 8.2, DSU.

¹¹³ Dreyfuss & Lowenfeld, *supra* note 7, at 322-23.

Conclusion

International trade in intangibles such as intellectual property as opposed to goods raises new concerns including monopoly rights which may affect free trade between nations, the avowed goal of Uruguay Round institutions. From the discussion above it can be seen that both the GATT and WTO dispute settlement mechanism has its advantages and disadvantages. While the former was noted for its *ad hoc* approach to resolving disputes, the latter is increasingly reflecting the rule-based approach in adjudication. This may not bode well for amicable settlement of disputes between different countries as these proceedings can neither add nor subtract rights and obligations under the TRIPS Agreement.¹¹⁴ Since WIPO as a forum is not precluded from adjudication, dispute settlement in this manner under the aegis of WIPO can prove particularly beneficial as the threat of trade sanctions is absent therein.¹¹⁵ Another alternative can be diplomatic efforts within the confines of the TRIPS Council in consultation with international institutions such as WIPO to settle disputes. In the present climate of diffusion of law making in different international institutions it may be sagacious on the part of the WTO to step back from its zealous mission to resolve intellectual property disputes through the threat of trade sanctions and involve institutions of a longer standing.

¹¹⁴ Articles 3.2 and 19.2, DSU.

¹¹⁵ Abbot, *supra* note 60, at 435-36.

Land Acquisition Issues in India: Overview, Critique and Pragmatic Suggestions

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Abstract

In India, land has been subject to competing pressures, ranging from food security to national development. The Land Acquisition Act, 1894 provided the framework for land acquisition, till it was finally repealed in 2013. However, the exercise of 'eminent domain' power by State for acquiring land for 'public purpose' gradually resulted into unmitigated abuse. Series of efforts were made by government to strike a balance between individual needs and the need for development, which have now culminated in the resettlement and rehabilitation approach. This article first elucidates the need for land acquisition and instrument used for the same purpose along with issues associated with it. Secondly, the policy and statute framed by government to cure past injustices, and the ongoing debate associated with it. Finally, this article suggests some of the policy options, among other measures, to make the new land acquisition process more promising.

Introduction

Several rights have been created in the legal world related to land access, especially with respect to indigenous people or group, as several other rights are affected by this, such as rights to housing, food, water and work, etc. Food and Agriculture Agency (FAO) of the United Nations suggested that, "rural landlessness is often the best predictor of poverty and hunger"¹, and

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¹ *Climate Change*, Food and Agricultural Organisation, available at <http://www.fao.org/climatechange/65622/en/>, as viewed on February 9, 2016.

access to land is not only the pathway out of poverty but also the way to generate higher incomes², and the absence of any such right creates economic insecurity.

Thus, distribution of land is an important and contentious right all over the world. With the increase in population, its importance increased at the same rate, and it became one of the basic needs of living.

Government also needs land for extraction of resources and for fulfillment of ‘public purposes’. For this, it acquires land by virtue of principle of eminent domain³ which has been in use for this purpose since the British rule. In order to regulate the manner of land acquisition, British monarch enacted the Land Acquisition Act, 1894 (hereinafter referred to as ‘1894 Act’) for the purpose of acquiring land when it is required for public purpose or company.

Independent India put special emphasis on rapid economic growth through planned development, which was fuelled by the Nehru vision for a new India. Big dams and mega development projects were termed as the modern temple of development. Over sixty years, due to urbanization, rapid economic development, and increasing infrastructure requirements, acquisition of land continued to be made under number of colonial and post-colonial central and state laws⁴ out of which 1894 Act is the most important that had remained in force post-independence and was amended frequently by Parliament and

² Alain De Janvry and Elisabeth Sadoulet, *Access to Land and Land Policy Reforms*, ACCESS TO LAND, RURAL POVERTY, AND PUBLIC ACTION 4 (2001).

³ The power to take private property for public use by State.

⁴ The Telegraphs Act, 1885; the Railways Act, 1890 (replaced by the Railways Act, 1989); the Electricity Act, 1910 (replaced by the Electricity Act, 2003) and the Forest Act, 1927 contain provisions for land acquisition. Further post-independence laws such as the Damodar Valley Corporation Act, 1948; the Slum Areas (Improvement and Clearance) Act, 1956 and the Coal Bearing Areas (Acquisition and Development) Act, 1957 also contain similar provisions.

state legislatures post-independence, till it was finally repealed by The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as '2013 Act'), assisted by The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance, 2014 (hereinafter referred to as '2014 Ordinance').

The 1894 Act

The 1894 Act provided the legal framework for acquisition of parcels of land, by virtue of principle of 'eminent domain', i.e., power to acquire land for public purposes.

Conceptually, 'acquisition' is different from 'purchase'⁵, and for the purpose of land acquisition, 1894 Act provided a detailed procedure under which government identifies land based on its needs; a notification to this effect is published in the official Gazette. Concerned Collector is responsible for disposing off the issues pertaining to interest of interested parties. After this a 'Declaration of Intention' to acquire land and the collector issues final notice to all persons interested to appear in an enquiry with respect to the area of land, compensation etc. to be held before him and subject to approval of the government, the collector makes an 'award'⁶.

Gradually, by reason of its loopholes and liberally interpreted provisions ('public purpose'), this more than a century old law came to be identified as a tool of oppression. Here, we discuss the general discontent among Indian

⁵ Contrary to purchase, in which owners' free consent is mandatory to prove its validity and mutually agreed price is paid, free consent is not mandatory for acquisitions and payment is made on basis of market value.

⁶ Award is the total amount of compensation which is determined on the basis of market value of the land; once the compensation is paid the government can take over possession and have complete ownership rights over the land. Detailed procedure is provided under Sections 3A to 16 of 1894 Act.

masses related to land acquisition policies, with special emphasis on their role in fuelling Naxalism, and the anti-Special Economic Zone (hereinafter referred to as 'SEZ') agitations in India.

Issues related to land acquisition in India

- **Naxalism**

Article 31(2) of the Constitution of India empowers the government to acquire land for public purposes that is in the interest of general well-being of the community. However, section 3(f) of 1894 Act provided an inclusive definition of 'public purpose', and for a lot of time it was subject to colorable exercise of power, i.e., acquiring land citing some public-purpose, but subsequently covertly diverting it to private ends and finally power of eminent domain resulted into unmitigated abuse.

To counter this issue, several provisions were incorporated in 1894 Act to put restrictions on acquisition of land for private purposes⁷. Unfortunately, these reformative steps remain ineffective to resolve the dispute or to provide any kind of relief. Relying on the prudence of executives, judiciary has also failed to correct this injustice. Only a few cases of acquisition have been annulled by courts on ground of faulty compliance to given procedure. The apex court held in a matter that as long as a part of the compensation cost is paid out of the State exchequer, it was considered 'acquisition for public purpose' even when acquisition is done for companies⁸.

Maoist insurgency is the gravest insurgency in India, expanded with time and presently active in around half of India's 28 states. Insurgents often use local narratives for their recruitment, such as forceful land acquisition

⁷ Ss. 38 - 44.

⁸ *Indrajit C Parekh v. State of Gujarat*, AIR 1975 SC 1182.

together with injustices done by State authorities in acquiring land. This has resulted in expansion of Naxalist ideology in different parts of India.

The “double-pronged counter-insurgency strategy” adopted by Indian government remains counterproductive because of following reasons:

- a) Little support from intelligence during armed operations resulting heavy casualties of local inhabitants,
- b) Mishandling of development measures,
- c) Forced relocation⁹.

Naxalism is more effective in those states where large portion of land is covered by dense forest and hills. Mostly, tribals have been concentrated in these forest and hilly regions¹⁰. At the same time, these areas happen to be resource rich. Some instances are:

<u>State</u>	<u>Tribal population</u>	<u>Resources</u>
Chhattisgarh	7,822,902	Highest coal producing state; third highest iron ore producer.
Odisha	9,590,756	Chromite, nickel, bauxite, iron ore and coal. ¹¹
Jharkhand	8,645,042	One of the largest single deposits of Hematite in the world; Almost 100% of prime coking coal, 93% of medium coking coal and about 30% of the semi coking coal reserves. ¹²

⁹ Numerous deaths caused due to dearth of food grains, water, medical aid and other bare necessities at relocated centres.

¹⁰ R.N. Pati & J. Dash, TRIBAL AND INDIGENOUS PEOPLE OF INDIA: PROBLEMS AND PROSPECTS 401 (2002).

¹¹ *Geology and Mineral Resources of Orissa*, available at http://www.orissaminerals.gov.in/Download/GEOLOGY_MINERAL_RESOURCES_ORISSA.pdf, as viewed on February 9, 2016.

¹² Available at http://archive.jharkhand.gov.in/new_depts/mines/mines_mineralresources.html, as viewed on February 9, 2016.

Maharashtra	10,510,213	Coal, iron ore, manganese, limestone, bauxite,
West Bengal	5,296,953	Stands third in terms of mineral production; third largest coal producing state.
Madhya Pradesh	15,316,784	Largest reserves of diamond and copper in India

Source: Census, 2011.

Forests are a major source of livelihood for tribals and are considered ritually sacred. With the passage of time, as the resources present there acquired a commercial value, the State exhibited an increased interest in their acquisition by virtue of the power of 'eminent domain'. The new legal regime adopted by government restricted tribals' access to the forest. In this process, the tribals were displaced in huge numbers and their rights abolished. The displacement results in snapping of their ties cultural ethos, while abolition of rights negatively affected their subsistence economy. On account of historical injustices, tribals have come to be looked upon as encroachers of forest lands.

According to Census 2011, these above mentioned states (except Maharashtra) have the dubious distinction of housing a high number of tribals, and are a part of Red Corridor, i.e., states worst hit by Naxalite activities. Thus, we find an unfortunate connect between the states worst hit by Naxalism, and population of tribals it houses.

This could be attributed to the government's historic mishandling of socio-economic issues and arbitrary use of power vested in it. In the midst of exercising its power of eminent domain, the government sometimes loses sight of socio-economic right and wrong. By creating an illusion of industrial development and inclusive growth, government favours industrialists at the

cost of poor tribals and their rights, strengthening their support for the Naxalite movement.

Thus, we find that states having more tribal population are characterized by increased Naxalite activities. In other words, Naxalism is mostly found to be rooted in areas that score lowest in terms of human development index¹³.

The generally accepted standards for determining a social group's standing in society are its levels of health-nutrition, education, standard of living, and literacy. Tribals score low on all these parameters and are ignorant of their rights. They have had a history of harassment at the hands of administration, marked by a lack of political will towards their upliftment¹⁴. Having remained untouched by the lifestyle of the modern world, they have no social standing or bargaining power in terms of influencing policy decisions. Their grievances and aspirations are largely ignored by the administration.

This creates two problems for the State:

- Project implementation takes a beating due to constant agitations and threats from those displaced, resulting in delayed execution of projects and increased costs. For instance, National Mineral Development Corporation, a PSU, has been trying to set up a steel plant in Bastar district of Chhattisgarh since 2001. Being unable to accomplish the task in last 12 years, it floated a tender in March 2013 for a joint venture, seeking to disinvest 49 percent of its shares¹⁵.

¹³ P.V. Ramana, *THE NAXAL CHALLENGE: CAUSES, LINKAGES AND POLICY OPTIONS*, 27 (2007).

¹⁴ *Supra* note 13, at 30, 31.

¹⁵ Anil Mishra, *Chhattisgarh: NMDC to Enter into a Joint Venture for Nagarnar Steel Plant*, *TEHELKA*, March 19, 2013, available at <http://www.tehelka.com/2013/03/chhattisgarh-nmdc-to-enter-into-a-joint-venture-for-nagarnar-steel-plant/>, as viewed on February 9, 2016.

- Setting up a development project at the cost of their livelihood results in anti-State perception among them. Sooner or later, this arbitrary nature of State creates a sense of alienation in the heart of aggrieved oustees, gradually pushing them towards insurgency. It leads them to support Naxalite insurgency as CPI cadres provide them a unified organizational structure, local self-government and a way to chase away Forest Department officials, along with redistributed land, higher prices with traders for forest products, and fair wages.
- **Anti-SEZ agitations against land acquisition**

The First SEZ of India was drafted to promote export oriented industrial and economic development in the early 1990s, well complimented by the provisions of the Acts and Rules of Special Economic Zone drafted subsequently. More than a thousand SEZs all over the country have been sanctioned in the last ten years, resulting in a large scale land acquisition process most of which is forced and not necessarily through very legitimate means. With the State resorting to the principle of 'eminent domain', the meaning of the term 'public purpose' has not just been distorted but subverted¹⁶.

SEZ and land acquisition are interconnected, since vast tracts of land are required for setting up of SEZs. Successive governments have encouraged setting up of SEZs in India, for they help in boosting trade. The problem with the land acquisition for SEZs arises on account of the nature of land so acquired. SEZs are mainly established in agricultural lands, which are to be

¹⁶ Shirish N. Kavadi, THE ANTI-SEZ MOVEMENT IN INDIA: AN ACCOUNT OF THE STRUGGLE IN MAHARASHTRA, National Centre for Advocacy Studies 3 (2010).

acquired from farmers, thereby resulting in loss of agricultural produce and putting food security of India at risk. This, in turn, has the effect of evicting those who are dependent upon the agricultural land. As a consequence, land acquisitions for SEZ have resulted in uproar, discontentment, violence, and opposition from farmers in various parts of the country.

In the past, there have been several SEZ related land acquisition controversies, the most prominent being Nandigram (West Bengal) in 2007¹⁷ among others, such as the land acquisition in Atchutapuram (Vishakhapatnam)¹⁸, Maha-Mumbai SEZ struggle¹⁹, Anti-SEZ protests in Goa, 2007²⁰, and the ilk.

From past instances, it can also be noted that SEZ initiative is fast becoming a real estate initiative. It is evident from the following findings²¹:

- a) In 2012-2013, operations commenced in only 62.42% of land notified for SEZ purposes. This shows that while large tracts of lands were allotted to developers in the name of SEZ, only a fraction of it was used for the said purpose while rest was sought to be de-notified for commercial gains²².
- b) The Report further states that out of total allotted land in the six states²³, only 55.09% land was actually notified, rest being kept with private

¹⁷ Forcible acquisition of land for SEZ, where police firing led to 14 deaths and the army had to be deployed.

¹⁸ Where farmers declared war against the setting up of SEZs on their land, accusing that the compensation is very less.

¹⁹ 2006, in Raigad (Maharashtra).

²⁰ Protesters alleged that the policy would not create the number of jobs it promises.

²¹ Report of CAG on 'Performance of Special Economic Zones (SEZs) for the year 2012-2013', Report No.21 of 2014 (Performance Audit), Dept. of Revenue.

²² *Supra* note 21, Chapter 4, at 35.

²³ Andhra Pradesh, Gujarat, Karnataka, Maharashtra, Odisha, and West Bengal.

developers²⁴. In the light of the CAG's findings, it is safe to assume that vast tracts of land are acquired under the guise of "public purpose" for setting up SEZs, in order to facilitate its ultimate transfer to highest bidding corporate entity.

c) It was also noted that the transfers of government land to the developers were mostly taking place on ownership basis, while the option of transfer on lease basis was also available. It must be noted here that the SEZ Rules, 2006 does not insist that the developer must be the owner of the land²⁵. In the face of this, the key concern of a developer must be to have access to land for carrying on his business, rather than seeking ownership of land.

However, certain steps have been taken by the Ministry of Commerce and Industry, GOI in the past in form of 'guidelines for development of SEZs' to ensure that land acquisition for SEZs remains transparent and non-controversial. Instruction no. 29²⁶ provides that "The state governments would not undertake any compulsory acquisition of land for setting up of the SEZs". This seeks to rule out the menace of forced acquisition of land. Instruction no. 65²⁷ provides that "First preference should be for acquisition of waste and barren land, followed by single crop land and double crop land

²⁴ *Supra* note 21, Chapter 4.5, at 41.

²⁵ Rule 7: Details to be furnished for issue of notification for declaration of an area as Special Economic Zone: (1) The Developer shall furnish to the Central Government, particulars required under Sub-section (1) of Section 4 with regard to the area referred to in Sub-section (2) or Sub-section (4) of Section 3, (hereinafter referred to as identified area), with a certificate from the concerned State Government or its authorized agency stating that the developer(s) have legal possession and irrevocable rights to develop the said area as SEZ and that the said area is free from all encumbrances: [Provided that where the Developer has leasehold rights over the identified area, the lease shall be for a period not less than twenty years.]

²⁶ No. C.8/3/2009-SEZ, Ministry of Commerce and Industry, Department of Commerce, (SEZ Section) (18th August, 2009).

²⁷ F. No. D-1/ 19/ 2009-SEZ, Ministry of Commerce and Industry, Department of Commerce, (SEZ Section) (27th October, 2010).

necessary to meet the contiguity requirements". This seeks to solve the problem related to loss of agricultural produce.

Resettlement and Rehabilitation Policy, 2007

One of the several drawbacks of 1894 Act was the absence of R&R provisions. The purpose of any R&R policy is not only to ensure survival of displaced persons, but also to improve their standard of living by providing them with opportunities.

The need for R&R provisions emerged when it was realized that the loss caused to displaced persons could not be measured on monetary scale only²⁸. The first effort in this direction was made in 1990, under the then Secretary Rural Development, N.C. Saxena. It was proposed that efforts be made to bring displaced persons above poverty line, by making a provision of spending 10 percent (excluding compensation) of project cost on their resettlement. However, it got entangled in political web and its provisions could not be enforced.

In February 2004, the Draft National Rehabilitation Policy was notified. It avoided most of the suggestion made in N.C. Saxena's draft policy, while providing several escape clauses. It was severely criticized.

This policy was then sought to be revised, which resulted in the Resettlement and Rehabilitation Policy, 2007. This policy was framed with an aim to strike a balance between the requirements of land for developmental activities and protecting the interests of the land owners whose livelihood depends on the land involved, while minimizing displacement of people. Other benefits made available were- Land-for-land, preference in employment under

²⁸ M. Asif, *Land Acquisition Act: Need for an Alternative Paradigm*, 24 EPW 1564 (1999).

project, training for taking up suitable jobs and for self-employment, housing, and other benefits.

Unfortunately, the above mentioned initiative by government in the form of policy was subject to following shortcomings:

- a) Exclusion of the land owners, vulnerable groups and the poorest from the decision making process,
- b) No right to say “no” to a project,
- c) Absence of participation of the affected person in Environment Impact Assessment and Social Impact Assessment reports.

Thus, regulatory bodies appointed under R&R Policy-2007, in the absence of independency and exclusion of affected groups from consultation, are prone to abuse. Application of any such policy in a Naxalite affected region would have the effect of justifying insurgency. This underlined the need for an immediate rethink on the National Rehabilitation and Resettlement Policy of 2007.

The 2013 Act: provisions and critical analysis

Numerous amendments were made to the Act of 1894, but these efforts failed to address some important issues associated with land acquisition, leaving legislature with no other option but to repeal it. It was clearly reflected that till the government removes the arbitrary 1894 Act provisions, conflicts between State and aggrieved citizens would continue. It is the duty of the government to provide a conducive environment of development where everyone derives rewards equally, since a development policy that arouses conflict at the local level is counter-productive.

As a corollary of the various shortcomings of 1894 Act which could not be overcome by way of amendments, heightened public concern on land

acquisition issues, and absence of a national law to provide for the R&R and compensation for loss of livelihoods, the need for a new law was felt across the social and political spectrum.

On the issue of repealing the 1894 Act, both legislature and judiciary were on the same page. In August, 2011, a bench of Justices G. S. Singhvi and H. L. Dattu observed that forcible acquisitions have turned the 1894 Act into a “fraud”, and that the law seems to have been drafted with “scant regard for the welfare of the common man”. This sentiment was reflected in another judgment²⁹ of the apex court, where it held that “To say the least, the 1894 Act has become outdated and needs to be replaced at the earliest by fair, reasonable and rational enactment in tune with the constitutional provisions, particularly, Article 300A of the Constitution.”

To address the past injustices under 1894 Act, it was repealed by the 2013 Act which seeks to bring transparency to the process of land acquisition. The 2013 Act is the central legislation in India for R&R of families affected by land acquisitions, consisting of several welcome provisions. However, these provisions have been criticized by the industry for making land acquisition more tedious and having the tendency to stall projects:

- **Retrospective operation:** The 2013 Act applies retrospectively to acquisitions where the land was acquired five years ago but no compensation has been paid, or no possession has taken place. In such an event, the 2013 Act will apply to it and land acquisition proceeding will be started afresh. While calculating this time period, if land acquisition proceedings were stalled or halted on account of stay order of a court, tribunal’s award specifying period for possession, or where possession had been taken while

²⁹ *Ramji Veerji Patel & Ors v. Revenue Divisional Officer & Ors.* (Civil Appeal No. 137 of 2003), para 12.

compensation is deposited in a court or any bank account, then such period shall be excluded³⁰.

The premise of original 'retrospective clause' is that the public purpose will get frustrated on account of delay. However, its critics believed that fixing a time limit for taking over possession is unfeasible, since it may vary from project to project. This argument is the premise of alterations made by the recent 2014 Ordinance in original retrospective clause as it appeared in 2013 Act.

- **R&R:** It provides for mandatory drafting of an R&R scheme that must detail the steps proposed to be taken by the government towards amount payable to the affected family, particulars of house site and house to be allotted, details of mandatory employment to be provided to the members of the affected families, and other entitlements. Its inclusion ensures that land acquisition and R&R are seen necessarily as inseparable. This provision was wholly absent in the 1894 Act, and the experience so far warranted its inclusion in the new law.

In the 1894 Act, the only provision available in the name of R&R was that of monetary compensation, which had some inherent shortcomings associated with it, particularly for tribals who are not used to managing such amount of cash³¹ and usually end up spending the compensation amount on payment of their dues or for other non-essential purposes. To counter this dilemma, the new law ensures an additional entitlement of a job to the affected family member, thereby ensuring a continuous source of returns for the family. In respect of acquisitions under 13 legislations, which were

³⁰ The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance, 2014.

³¹ For instance, the cash compensation given to affected families of Kulekhani Hydroelectric Project (Nepal). See M.Q. Zaman, *Land Acquisition and Compensation in Involuntary Resettlement*, 14 (Cultural Survival Quarterly, November 4, 1990), 63-66.

originally exempted from the 2013 Act, the 2014 Ordinance³² brings the R&R provisions of these 13 laws in conformity with the 2013 Act. With respect to tribals, who are characterized as being shy of contact with community, the government may need to go the extra mile for their R&R.

• **Compensation:** To resolve the age old issue of compensation, the 2013 Act provides that compensation for the owners of the acquired land shall be four times the market value in case of rural areas and twice in case of urban areas. This is a crucial change, given the inaccurate nature of market value of land. The issue of payment of compensation was one of the primary concerns at the time of drafting of 2013 Act, since in most of the cases; disputes were regarding the amount of compensation, leading to the halt of infrastructural and industrial projects. The objective of this development, therefore, is to prevent any sort of unrest or resentment regarding payment of compensation, in the minds of those whose lands are sought to be acquired. Generally, those who are not compensated reasonably against the acquisition of their lands tend to sympathize with the Maoist ideology. Harassed by the State machinery, this gives them all the more reason to side with the Maoists³³.

The government tends to measure the loss of land in terms of money alone, which seems unfeasible in the long run. A one-time compensation is generally found to be insufficient to help a person, who has lost his source of livelihood, to sustain his family. Further, compensation is awarded to land

³² *Supra* note 30.

³³ In *Mahanadi Coal Fields Ltd. & Anr v. Mathias Oram & Ors*, (2010) 7 SC 352, the Supreme Court found that people whose lands were taken two decades ago were still not paid any compensation, and that it was fuelling extreme discontent and giving rise to Naxalism and militancy.

owners only. Those who are dependent on the land for their livelihood, say, agricultural workers, sharecroppers, are ignored in this process³⁴.

• **Restricting the scope of emergency clause:** Except in five special categories³⁵, the 2013 Act requires mandatory consent of 80% of land owners for private projects, and consent of 70% of land owners for PPP (Public Private Partnership) projects unlike the 1894 Act, where the only recourse available was of filing an objection on limited grounds.

• **Time-bound social impact assessment:** In all cases, except in five special categories³⁶, the 2013 Act mandates a Social Impact Assessment to determine the social impact that the acquisition is likely to have, and the families that are likely to be affected. This gains importance in the light of Indian socio-economic conditions, where displacement may endanger the cultural identity of the displaced group (say, a cultural minority). For many, acquisition of their land may amount to loss of livelihood. Tribals, who mainly rely on output from their lands for their subsistence and are least exposed to the mainstream society, make up 40-50 % of displaced³⁷. The displacement of a particular group of tribals may result in disturbance of their well-established cultural roots in the area that is sought to be acquired³⁸. Keeping these factors in consideration, this provision has been inserted to minimize the social costs involved in acquisition, and is indeed a step in the right direction.

³⁴ Xavier Eyra, *An SEZ with a Defiance*, 58 Social Action, 281 (2008).

³⁵ *Supra* note 30 (Defence, Rural infrastructure, Affordable housing, Industrial corridors, and Infrastructure projects).

³⁶ *Supra* note 35.

³⁷ Anupamhazra, *Development at the Cost of Human Life*, Social Action, volume 60 April-June 2010, p 192.

³⁸ Janhavi SS, *An Overview of Land Acquisition Act and Human Rights Issues*, 2 (International Journal of Humanities and Social Science Invention), Chapter V.

• **Consent:** In all cases of land acquisition, except in five special categories³⁹, the 2013 Act requires mandatory consent of 80% of land owners for private projects, and consent of 70% of land owners for PPP projects. Unlike the 1894 Act, where the only recourse available was of filing an objection on limited grounds, the new law provides a mechanism for dialogue with the affected families with the agenda of resolving their concerns. This seeks to negate the possibility of forced acquisitions in the future while ensuring representation of owners in matters of acquisition.

Yet, no consent is required by PSUs while acquiring land, given that the record of PSUs in displacement is worse than that of private sector⁴⁰.

While the 2013 Act is generally considered as a huge improvement over the 1894 Act, it is marred by certain shortcomings and ambiguous policy framework that may prove to be an impediment in fulfilling the objectives sought to be achieved by its enactment. The present 2013 Act, undoubtedly a step in the right direction, has certain limitations, as is evident in implementation of the R&R Policy of 2007. It clearly exhibits that no matter what we incorporate under different heads regarding R&R, it remains futile till the State understands the relationship between application of its policies and consequent rise in conflict across the nation.

³⁹ *Supra* note 35.

⁴⁰ Girija Shivakumar, 'Jairam: forcible land acquisition by PSUs led to Naxal problem', THE HINDU, September 9, 2013, available at <http://www.thehindu.com/news/national/jairam-forcible-land-acquisition-by-psus-led-to-naxal-problem/article5107234.ece?ref=relatedNews>, as viewed on February 9, 2016; Vinayak Chatterjee, *Land and the Greater Common Good*, BUSINESS STANDARD, October 23, 2013, available at http://www.business-standard.com/article/opinion/vinayak-chatterjee-land-and-the-greater-common-good-113102201066_1.html, as viewed on February 9, 2016.

Critique and suggestions

• Issues related to compensation

The land market in India has been distorted, owing to past inadequate policies⁴¹. The current formula for awarding compensation on basis of market value is flawed at different levels. Determination of market price is, indeed, a difficult task, and therefore is susceptible to errors. This value is determined by considering the prices of similar properties that have been traded in the market in a given time period. For instance, if a particular area gets urbanized and investment flows in, the value of land around it will also increase. On the contrary, an area, though similarly placed, may not witness an increase in land prices around it if it lacks urbanization. The officially determined compensation is bound to differ from the true market value of the property.

Provided the dynamics of land markets in India and fluctuation in land prices, market price does not seem to be a fair benchmark for determining compensation. No justification has been provided for ‘two times (urban)/ four times (rural) the market value of land’ compensation rule in the 2013 Act⁴²; it may be excess compensation in some cases, while inadequate-compensation in others. Another instance is of awarding compensation in cases of acquisitions under urgency clause on basis of market price for voluntary transactions.

The concern remains, therefore, that how the amount is to be determined.

⁴¹ Morris, Sebastian and Pandey, Ajay, Land Markets in India: Distortions and Issues (June 01, 2009) in INDIA INFRASTRUCTURE REPORT 2009: LAND - A CRITICAL RESOURCE FOR INFRASTRUCTURE, Nirmal Mohanty, Runa Sarkar, Ajay Pandey, eds., 3inetwork, Oxford Univ. Press, New Delhi, 2009, at 18.

⁴² Initial draft of the National Advisory Council had proposed ‘6 times the market value’ compensation for rural areas.

We propose that a percentage of profits, generated after completion of proposed projects, shall be paid to the displaced persons, especially in those instances where a change in land use (CLU) has been proposed by the developer. The percentage to be paid, and the mechanism to be adopted has to be decided by the State. This will ensure that the displaced people do not feel cheated, and receive fair compensation. This can also be a deterrent to those who seek such change in land use (CLU) for purely commercial purposes.

Auction has been felt to be a plausible avenue for selling of land⁴³ in the face of irregularities by government officials, as it will fetch a higher return compared to returns on basis of market price. The involvement of government must be limited to administer the auction.

• **Issues related to consent**

In case of private and PPP projects, consent of at least 80% and 70% of displaced people, respectively, is required⁴⁴. This implies that a large number of stakeholders with different requirements need to be persuaded now, as their consent is now mandatory.

More number of stakeholders implies an increased probability of conflict of interests since more people need to be persuaded now. The chances of stalling of projects will naturally increase since achieving the necessary consent percentage will be nothing short of a Herculean task for the government. This fact challenges the government's resolve of making the land acquisition law an industry friendly legislation.

⁴³ Maitreesh Ghatak and Parikshit Ghosh, *The Land Acquisition Bill: A Critique and A Proposal*, 46 (Economic and Political Weekly), 2011.

⁴⁴ Section 2(2) of 2013 Act.

To deal with this issue, we propose that a mechanism for dialogue with people be established at the grass root level in areas where land acquisition is sought. Farmers need to be made aware of ‘engagement in agriculture: contribution to GDP’ ratio⁴⁵ and the rampant disguised unemployment prevalent in agriculture. This must be done with the agenda of making them understand that the government’s intention behind acquiring their land is bona fide. People need to be persuaded that their grievances will be addressed, and they will find representation. The consent requirement under the new law can only be fulfilled by bridging this trust deficit that exists between government and people. Such initiatives on part of the government will also take care of the resentment that persons-to-be-displaced may have against the acquisition. A mechanism for dialogue will ensure that the persons-to-be-displaced appreciate the agenda of the government behind acquisition, and display least resistance.

• **No more liberal land laws**

The new law seeks to combine R&R with acquisition, with the objective of reducing the social costs involved. However, the recent 2014 Ordinance seeks to dilute it to some extent.

It must be noted that India has had a rather flexible land acquisition law till the enactment of 2013 Act, but industrialization has still lagged behind. This implies that a flexible land acquisition Act is not sufficient in itself to support industrialization and urbanization efforts in a country. Furthermore, the menace of Naxalism in India was also fuelled by the flexible 1894 Act.

⁴⁵ More than 60% of population engaged in agriculture, contributing only 13.7% to the GDP. See ‘Estimates of Gross Domestic Product, for the first quarter (April-June) of 2013-14’, The Central Statistics Office (CSO), Ministry of Statistics and Programme Implementation.

We propose that contemporary land acquisition policies need to discuss numerous other factors which may possibly hamper the process of acquisition at later stages, such as delayed environment clearances, etc. Past experiences have taught us that the solution does not lie in merely simplifying the process of land acquisition, making it easier to acquire land. It shall also involve initiatives towards removing obstacles via social friendly ways. Thus, less attention shall be paid to making land acquisitions laws flexible. A less flexible land acquisition law would mean reduced social costs, while incorporating more of social justice provisions.

The Commercial Appropriation of Personality in India

- Bhargavi Vadeyar*

Abstract

The commercial appropriation of personality is rapidly becoming an important part of intellectual property law in today's world, where the internet and other media make it increasingly easy to exploit another's image for economic gain. In India, the right in one's image is at a nascent stage, but other countries such as the US, UK and Germany each have their own experiences with, and approaches to, this right. This paper aims to study the doctrinal bases behind the protection given to the right over one's image in these three countries, and to discuss the benefits and pitfalls of each. The paper then closely examines the Indian judgements and cases that have recognised and used this right. Finally, the jurisprudence developed in these judgements is compared to that present in the other countries, in order to comment on what the direction of development of this right in India ought to be.

Introduction

The term 'personality rights', which is often used synonymously with the rights of a person over his or her image, is, in fact, an umbrella term, and covers a variety of different interests such as privacy rights, the right to self-determination and the right to personal identity, among others. This paper is primarily concerned with one interest, which can be called the interest in the commercial appropriation of a personality.¹ This generally means the

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¹ Gert Bruggemeier, Aurelia Colombi Ciacchi & Patrick O'Callaghan, PERSONALITY RIGHTS IN EUROPEAN TORT LAW 567 (2010).

right that people have over their own image, voice or any other outward manifestation of themselves.² In recent times, the increasing commodification of the human image means that the law now has to take into account the fact that a person's external features or name are valuable economic assets that are often commercially exploited in advertising and manufacturing.³

In various countries, there have been very different approaches to this right, based on different doctrinal bases. The acceptance of these rights has also been very varied, with the US developing them very early on in *Haelan Laboratories Inc. v. Topps Chewing Gum Inc.*,⁴ while the German legal system was slower to accept them.⁵ The first case in the UK to accept any such right was the 2002 case of *Irvine v. Talksport Ltd.*⁶

In India, the law of personality rights is in a nascent stage. The small amount of law that there is has been developed through judicial decisions, and there is no legislative mention of these rights. In the digital age, instances of personality infringement will only grow more common as the widespread use of technology and the Internet makes it very easy to obtain and misappropriate a celebrity's image for use.

Consequently, it is important to understand the various doctrinal bases for personality rights. This paper will therefore examine the doctrinal basis for these rights in the US, UK and Germany in order to highlight the differences

² Tabrez Ahmad and Satya Ranjan Swain, *Celebrity Rights: Protection under IP Laws*, 16 JIPR 7, 8 (2011).

³ Huw Beverly-Smith, *THE COMMERCIAL APPROPRIATION OF PERSONALITY* 6-7 (2002).

⁴ 202 F.2d 866 (1953).

⁵ Bisman Kaur and Gunjan Chauhan, *Privacy and publicity: the two facets of personality rights*, IAM Magazine, 47-49 (Apr. 2011), available at <http://www.iam-media.com/Intelligence/Brands-in-the-Boardroom/2011/Articles/Privacy-and-publicity-the-two-facets-of-personality-rights>, as viewed on February 9, 2015.

⁶ [2002] EWHC 539; [2003] EWCA Civ 423.

in these doctrines and to compare them to the developing doctrine in India. It is important that India learn from the experiences of these countries in developing its own jurisprudence in the area of personality rights.

The development of commercial personality rights in the US, UK and Germany

U.S. doctrines of personality rights

The right in the commercial appropriation of personality has been recognised for a long time in the United States as the right of publicity. This right both provides protection to the potential commercial value of a person's identity, and provides a person the right to control how their name, likeness or personality is commercially exploited.⁷ However, unlike English law, where the tort of passing off is more commonly used, it is a property right in its own right.⁸

As a property right, it can be freely assigned and can be inherited, though usually only for a limited number of years. It forms the basic skeleton for endorsement agreements.⁹ Furthermore, liability is based on the misappropriation of the commercial value of a person's image, and not on the misrepresentation of a product being endorsed by a person, which has the potential to deceive consumers.¹⁰

The first case to set out the right of publicity in the US was *Haelan Laboratories Inc. v. Topps Chewing Gum, Inc.*¹¹ In this case, Haelan Labs

⁷ Susanne Bergmann, *Publicity Rights in the United States and Germany: A Comparative Analysis*, 19 Loy. L.A. Ent. L. Rev. 479, 479-497 (1999).

⁸ Huw Beverly-Smith, Ansgar Ohly & Agnes Lucas-Schloetter, *PRIVACY, PROPERTY AND PERSONALITY: CIVIL LAW PERSPECTIVES ON COMMERCIAL APPROPRIATION* (2005), pp. 14-15.

⁹ Bergmann, *supra* note 7 at 479.

¹⁰ Beverly-Smith, Ohly & Lucas-Schloetter, *supra* note 8 at 7.

¹¹ *Supra* note 4.

and Topps were two rival manufacturers of chewing gum. Haelan had entered into some contracts with baseball players, where the athletes had granted Haelan the exclusive right to use their photographs on their packaging, and had promised not to enter into similar contract with any other chewing gum manufacturers.¹²

Despite this, Topps had been printing the photographs of baseball players on its products, in some cases without the consent of the players themselves.¹³ Since the players had not granted Haelan the right to sue on their behalf, and had not experienced any mental distress, they could not proceed under the right of privacy.¹⁴ The Court therefore recognised a new right to publicity, stating “a man has a right in the publicity value of his photograph i.e., the right to grant the exclusive privilege of publishing his picture...[t]his right may be called a ‘right of publicity’”. In the Court’s opinion, it was immaterial whether it was called a ‘property right’, as this term only “symbolises the fact that courts enforce a claim which has pecuniary worth”, which is essentially the function of this right.¹⁵

The right gained national recognition when the United States Supreme Court decided the case of *Zacchini v. Scripps-Howard Broadcasting Co.*,¹⁶ in which a circus artist, Zacchini, had an act where he performed as a “human cannon ball”. A broadcasting company filmed the whole act and broadcasted it on its evening news without Zacchini’s consent. The Court held that the broadcast was “a substantial threat to the economic value of his performance”, as it was a film of his entire act, and that it therefore

¹² *Id.*

¹³ *Id.*

¹⁴ Bergmann, *supra* note 7 at 479, 481 (1999).

¹⁵ *Supra* note 4.

¹⁶ 433 U.S. 562 (1977).

violated his right of publicity.¹⁷ Interestingly, the Court drew parallels between this right and right in intellectual property such as patents and copyrights, as they said that it “provides an economic incentive” for performers to produce entertainment.¹⁸

This right has helped to establish a clear framework by which celebrities and others can enter into agreements to license their image. The right provides commercial stability for the licensees or assignees and allows the value of a person’s image to be easily calculated, so that litigation and determination of damages becomes easier.¹⁹

UK doctrines of personality rights

The English law on the commercial misappropriation of property is fragmented, and does not provide much protection.²⁰ There have been attempts in the UK to protect the image of persons using the Trade Marks Act, 1994. The UK has seen a recent trend in celebrities registering their names as trademarks, prompting the UK Patent Office to issue a Practice Amendment Notice covering “Names of Famous People (Living and Deceased) and Groups.” These celebrities use the classes under the Trade Marks Act to cover not only the primary areas in which they are well-

¹⁷*Id.*

¹⁸ Bergmann, *supra* note 7 at 482.

¹⁹ Bergmann, *supra* note 7 at 498.

²⁰ Thorsten Lauterbach, *US-style ‘personality’ right in the UK – en route from Strasbourg?*, 20th British & Irish Law, Education and Technology Association Conference, 4 (Apr. 2005), available at <http://www.bileta.ac.uk/content/files/conference%20papers/2005/US-style%20Personality%20Right%20in%20the%20UK%20En%20Route%20From%20Strasbourg.pdf>, as viewed on February 9, 2016.

known, but also secondary products which they may be able to provide their name to in order to merchandise their images.²¹

However, using a trademark to register a name can be difficult, as the names must be distinct. Full names are therefore easier to register than just first names or surnames.²² Also, the granting of trademark would be based on who registers the mark first, so that two people in similar industries or areas with the same name cannot both have trademarks for their names. This is connected to the problem of which goods and services classes to apply for. If the classes applied for are fewer, there is less protection, but if they are greater, there is more risk of losing the trademark because of non-usage.²³

Furthermore, as Laddie J. explained in *Re Elvis Presley Trade Mark*,²⁴ “fame leads away from distinctiveness in the trade mark sense”, because when a famous person’s name is associated with a product, the product itself loses its value because people only want to buy the product because it has the image of that celebrity on it. As the Court of Appeal added, the image of celebrity becomes the product, with the good or service being only a vehicle. Therefore, there exists a paradox that the more famous a name becomes, the less able it is to distinguish a good or service, and so the less protection it receives under trademark law.²⁵

Apart from the limited protection offered by trademarks, people wishing to protect their image have recently been given a new tool in the form of the

²¹ Gillian Davies, *The Cult of Celebrity and Trade Marks: the next instalment*, 1(2) SCRIPTed 230, 231 (2004), available at <http://www2.law.ed.ac.uk/ahrc/script-ed/issue2/celebrity.asp>, as viewed on February 9, 2016.

²² Lauterbach, *supra* note 20 at 5.

²³ Davies, *supra* note 21 at 233.

²⁴ [1997] R.P.C. 543.

²⁵ Jan Klink, *50 years of publicity rights in the United States and the never ending hassle with Intellectual Property and personality rights in Europe*, 4 I.P.Q. 363, 368 (2003).

tort of passing off. In the past, this tort could not be used in the context of personality rights, as the goods or services of the defendant had to be in a 'common field of activity' with those of the claimant.²⁶ This made it difficult to use this doctrine for personality rights, because it is based on the personality or image of a person, and not in any good or service.²⁷

In 2003, however, the Court of Appeal upheld the High Court decision to recognise a right to sue when a person's image has been used as an endorsement without their consent in *Irvine v. Talksport Ltd.*²⁸ In this case, a well-known Formula 1 driver, Eddie Irvine, made a claim against a radio station that had used his image in an advertisement. The radio station had altered a photograph of Irvine in which he was holding a mobile phone and substituted the phone for a portable radio with the name of the radio station on it.²⁹

The radio station had had legally obtained the right to use the photo, but the claimant argued that it should come under the tort of passing off because the public was being deceived into thinking that he had endorsed the radio station. The Court took notice of the fact that it is common for celebrities to commercialise their names by giving endorsements, which represents a substantial part of their incomes.³⁰

The Court held that "there is nothing which prevents an action for passing off succeeding in a false endorsement case." In order to succeed, however, two things must be proven: firstly, that at the time of acts complained of, the claimant had "significant reputation or goodwill", and secondly, that

²⁶ *MacCulloch v. May*, (1948) 65 RPC 58.

²⁷ *Lauterbach*, *supra* note 20 at 6.

²⁸ *Supra* note 6.

²⁹ *Id.*

³⁰ *Id.*

“the actions of the defendant gave rise to a false message...that his goods have been endorsed, recommended or are approved of by the claimant.”³¹

The case is, however, limited to passing off in the case of endorsements. This is much narrower than the US right of publicity, which envisages a property right in the commercial value of personality, and the German law on personality, which can be thought of as a quasi-copyright in a person’s name and image.³²

German law on personality

In Germany, there exists a general right of personality, which includes within it the protection of the commercial appropriation of a personality.³³

The right stems from a mixture of both human rights law and property law, which creates difficulties for the enforcement of any rights on personality.³⁴

Two facets of this general right are the right to one’s name, granted under Section 12 of the German Civil Code, and the right to one’s picture under the Copyright in Works of Art and Photography Act. Every person has the right to his own name and the right to prevent others from using it without his consent, which is supposed to stop misrepresentation or confusion about an individual’s name.³⁵

Articles 22 and 23 of the Copyright in Works of Art and Photography Act has guaranteed the right of individuals over photographs of themselves, and allows them to control if and how they would like their image to be used in the public domain. However, there is an exception to this right whereby

³¹*Id.*

³² Beverly-Smith, Ohly & Lucas-Schloetter, *supra* note 8 at 23.

³³ Bergmann, *supra* note 7 at 500.

³⁴ Lauterbach, *supra* note 20 at 3.

³⁵ Klink, *supra* note 25 at 377.

“personalities of history” i.e. people who form a part of everyday public life, are not allowed to control the printing of their photographs if it is in legitimate public interest.³⁶ However, these rights, being subsets of the general human right of personality, cannot be the subjects of contracts. They cannot be sold, bought, waived or inherited, which is a problem when considering the commercial appropriation of personality.³⁷

The general personality right is based on Articles 1 and 2 of the German Constitution, which protects the inherent human dignity necessary to ensure the right to develop freely one’s personality.³⁸ The German Federal Supreme Court has recognised the commercial interests in personality as being a part of this human right,³⁹ which includes the self-determination to decide whether or if one’s personality will be used for business interests. Remedies such as injunctions are available under the German Civil code.⁴⁰

However, in order to claim damages, the claimant has to establish that the personality right can be commercialised, that it is usually paid for, and that the claimant would allow the commercial use of his personality. This has made it difficult for claimant’s to obtain damages. Even in cases where damages have been awarded,⁴¹ they have been of such a small amount that it would be more profitable to violate the right and pay the damages. Notably, in the case of *Caroline von Monaco*, the German Court awarded what appeared to be punitive damages, which is a new concept for German law.⁴²

³⁶ *Id.* at 378-379.

³⁷ *Id.* at 377-380.

³⁸ *Id.* at 380.

³⁹ *Catarina Valente*, (1959) N.J.W. 1269, BGH; *Fußballtor*, (1979) N.J.W. 2205, BGH.

⁴⁰ *Klink*, *supra* note 25 at 380.

⁴¹ See *Paul Dahlke*, (1956) N.J.W. 1554, BGH.

⁴² *Lauterbach*, *supra* note 20 at 4.

The case of *Marlene Dietrich*⁴³ has recently incorporated the more commercial aspects of personality in German law by incorporating some aspects of the right of publicity. In this case, the daughter of a famous actress wanted to prevent a music producer from giving licenses of the name and image of her mother to other manufacturers. The German Federal Supreme Court introduced a new economic personality right, which provides the right to determine the economic use of one's image and benefit from the proceeds of its value. The Court also stated that this right would be inheritable, as the person's family should receive the benefits of using a personality after their death.⁴⁴

However, there is a danger that in stretching the human right of personality, it will be diluted. The Court in *Marlene Dietrich* was careful to stay away from any judgement about the ability to include such rights in a contract, and as Klink observes, “[h]uman rights, by doctrine, can – and in fact should – not be transferred, waived or inherited. They serve other, more important tasks.” Therefore, the German protection of the commercial appropriation of personality is not doctrinally sound.⁴⁵

The commercial appropriation of personality in India

The Indian judiciary on commercial personality rights

Personality rights have been gaining recognition in India in recent years, including the issues surrounding the commercial appropriation of personality. For example, the famous actress Sridevi recently served a legal notice on Ram Gopal Verma for naming his upcoming Telugu movie

⁴³ *Marlene Dietrich*, (2000) N.J.W. 2195, BGH.

⁴⁴ *Id.*

⁴⁵ Klink, *supra* note 25 at 381-382.

'Sridevi'.⁴⁶ The film had already attracted publicity for its "sleazy" content about a teenage boy who has a crush on an older woman. The notice states that the public is bound to relate the film to the actress, and that it is apparent that the title was chosen in order to cash in on her popularity.⁴⁷

The notice invokes personality rights by declaring that Sridevi has the right to command and control the use of her name, image or likeness, and any misuse of these would infringe her personality right and amount to passing off, as it would cause the public to believe that Sridevi has given her approval to the film. The notice goes on to say that Sridevi apprehends that due to the immoral nature of the film, the use of her name as its title would damage her reputation and goodwill. Finally, the notice states that the unauthorised use of Sridevi's name amounts to an infringement of her personality rights, intellectual property rights and also amounts to the tort of passing off.⁴⁸

Another recent case where an actor alleged that a film with a title including his name would harm his reputation was *Shivaji Rao Gaikwad v. Varsha Productions*.⁴⁹ Legendary Tamil actor Rajinikanth approached the Madras High Court in a suit to grant an injunction staying the release of a film entitled '*Main Hoon Rajinikanth*'. The actor put forward three arguments for the stay of the film: (1) that the use of his likeness, name, style of acting and dialogue delivery, would amount to passing off; (2) that he does not

⁴⁶ Devika Agarwal, *SpicyIP Tidbit: First Rajinikanth, now Sridevi*, SpicyIP, Oct. 17, 2014, available at <http://spicyip.com/2014/10/spicyip-tidbit-first-rajinikanth-now-sridevi.html>, as viewed on February 9, 2016.

⁴⁷ *Boney Kapoor slaps 'Sridevi' with legal notice: Well played Ram Gopal Varma!*, FIRSTPOST, Oct. 14, 2014, available at <http://www.firstpost.com/bollywood/boney-kapoor-slaps-sridevi-with-legal-notice-well-played-ram-gopal-varma-1755675.html>, as viewed on February 9, 2016.

⁴⁸ *Id.*

⁴⁹ (2015) 2 CTC 113.

usually commission any work based on his personality, and so this film is a violation of his privacy, and (3) that the film contains scenes of an obscene nature which is defamatory. The Madras High Court granted a stay after considering the suit.⁵⁰

Celebrities in India have started to become aware that they have rights in their personality and likenesses. When Amitabh Bachchan, for example, came to know that an imitation of his famous voice was being used to advertise a brand of 'gutka' pan, he expressed his disapproval of others using a celebrity's image for commercial gain without any compensation being given, and has since campaigned for a greater protection to the personalities of celebrities.⁵¹

The Indian concept of personality rights is at a nascent stage, and it is therefore important that we analyse the recent judgements in order to see the doctrinal direction of the Indian courts. The Delhi High Court first spoke about the right of publicity in *ICC (Development) International Ltd. v. Arvee Enterprises & Another*,⁵² where it held that the right of publicity could only inhere in an individual, and only he can profit from it.⁵³

The first judgment pertaining to commercial appropriation of property was *D.M. Entertainment v. Baby Gift House*.⁵⁴ In this case, Daler Mehndi, a popular entertainer, sued several gift shops for carrying dolls that were

⁵⁰ L. Gopika, *Superstar Rajinikanth moves Court over personality rights*, SpicyIP, Sep. 18, 2014, available at <http://spicyip.com/2014/09/superstar-rajinikanth-moves-court-over-personality-rights.html>, available at February 9, 2016.

⁵¹ Shouvik Kumar Guha, *Bachchan lodges Protest not in sotto voce, but in Customary Baritone*, SpicyIP, Nov.13, 2010, available at <http://spicyip.com/2010/11/bachhan-lodges-protest-not-in-sotto.html>, February 9, 2016.

⁵² 2003 (26) PTC 245 (Del).

⁵³ *Id.*

⁵⁴ CS (OS) 893/2002; MANU/DE/2043/2010.

made in his likeness. Daler Mehndi had previously assigned all his rights in his personality to the plaintiff company.⁵⁵

The plaintiff put forth the argument that the sale of these products would leave a false impression on the public that they were sponsored or approved of by the plaintiff, which would be a false endorsement. The plaintiff also submitted that if a famous person's image or any aspect of his personality was used by another for commercial gain without such person's consent, this would be an infringement of such person's right of publicity. Finally, the plaintiff argued that the selling of such products had led to commercial loss and also loss and damage to the reputation of Daler Mehndi.⁵⁶

The Court stated that in order to prove infringement of the right of publicity, it was necessary to be able to identify the plaintiff from the unauthorised use. In order to prove false endorsement, it is necessary to prove that the use would be likely to mislead customers, while in a passing off action, it is not material whether it would lead to deception, but only whether the defendant is selling goods or services "calculated to lead purchasers to believe they are plaintiff's goods".⁵⁷

On this basis, the Court came to the conclusion that the plaintiff had established all three grounds, and that "no one was free to trade on another's name or appearance and claim immunity". However, the Court did not award more than token damages, as there was no evidence of "persistent or widespread appropriation of the persona".⁵⁸

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

In 2012, the case of *Titan Industries Ltd. v. Ramkumar Jewellers*⁵⁹ was decided by the Delhi High Court. The case was regarding the use of an advertisement by a jeweller in Delhi, which was an exact copy of an advertisement by Tanishq. The Tanishq advertisement used the images of Amitabh and Jaya Bachchan, and therefore Titan Industries, the owners of Tanishq, sued the defendant for misappropriation of personality rights on the basis of an agreement for services in which the Bachchans had agreed to promote the Tanishq jewellery. The agreement transferred the intellectual property rights in anything created by such promotion to Titan Industries.⁶⁰

The Court, in awarding a permanent injunction in favour of the plaintiffs, Titan Industries, noted that they have an exclusive license from the Bachchans for the endorsement of Tanishq jewellery for a particular time period, and has indemnified them against any infringement or violation by third parties relating to the endorsement. The Court cited the definition of the right of publicity from *Haelan Laboratories*⁶¹ with approval, and said that the right to control when, where and how a famous person's identity is used should vest with them.⁶²

In this case, the Court elaborated upon the right of publicity and stated that the basic elements for liability of its infringement are: (i) validity (that "the plaintiff own an enforceable right in the identity or persona of a human being"), and (ii) identifiability (that the "celebrity must be identifiable from the defendant's unauthorised use"). The Court distinguished the right from

⁵⁹ 2012 (50) PTC 486 (Del).

⁶⁰*Id.*

⁶¹ *Supra* note 4.

⁶²*Id.*

false endorsement, stating that the right of publicity does not require any deception or confusion when the celebrity is identifiable.⁶³

The Bombay High Court also recognised personality rights earlier this year when Sonu Nigam filed a suit seeking an injunction against Mika Singh and the recording label OCP Music. The defendants had published posters advertising the Mirchi Music Awards that contained a picture of Sonu Nigam, separate from the official advertisements, which had taken Sonu Nigam's permission to use his image.⁶⁴

Sonu Nigam therefore filed a petition claiming infringement of his personality rights and defamation, because Mika Singh was shown to be bigger than Sonu Nigam in the advertisements. The Bombay High Court accepted only the argument on infringement of personality rights, and ordered the defendants to refrain from publishing or reproducing this advertisement on hoardings or through Mika Singh's twitter account.⁶⁵

An analysis of the Indian development of commercial personality rights

After a close reading of the cases discussed above, we can attempt to analyse the doctrines being used by the Indian judiciary. The Indian judiciary seems to have accepted many doctrines from various countries, and to be using them without a great deal of clarity as to their various benefits and drawbacks.

⁶³ *Id.*

⁶⁴ Spadika Jayaraj, *Bollywood Music Awards and Personality Right: Sonu Nigam v. Mika Singh and Ors.*, SpicyIP, May 6, 2014, <http://spicyip.com/2014/05/bollywood-music-awards-and-personality-rights-sonu-nigam-v-mika-singh-and-ors.html>, as viewed on February 9, 2016.

⁶⁵ *Id.*

First, the judiciary has incorporated the United States concept of the right of publicity. It was mentioned in *D.M. Entertainment*⁶⁶, but was only one of the arguments accepted by the Court, and was then used as the chief argument in the cases of *Titan Industries*⁶⁷ and *Sonu Nigam*. Curiously, the Court has thus far only used the right to grant injunctions, and not to grant damages, as it is used in the United States. In the only case where damages were given, *D.M. Entertainment*⁶⁸, the Court seemed to rely on passing off to justify the damages, and therefore only awarded nominal damages as the appropriation of the persona was not “persistent or widespread” enough. In the other two cases, only injunctions were asked for, so it is not clear what the Court would have done if they had to decide on damages.

In all of these cases, the right of publicity, which vests in the individual, was being transferred to another person, whether by an endorsement contract, or together with all rights in the personality of the individual. Therefore, it could be concluded that the judiciary has accepted that personality rights can be transferred, and are therefore more of a property right. Again, this is closest to the United States’ understanding of personality rights. The case of *D.M. Entertainment*⁶⁹ is significant here, as Daler Mehndi had assigned all his rights and interests in his personality, including his right of publicity, to a company.⁷⁰

Second, the tort of passing off has been used frequently. It formed a part of the legal notice served by Sridevi,⁷¹ was one of the arguments in *Shivaji*

⁶⁶ *Supra* note 54.

⁶⁷ *Supra* note 59.

⁶⁸ *Supra* note 54.

⁶⁹ *Id.*

⁷⁰ *Supra* note 53.

⁷¹ *Supra* note 47.

*Rao Gaikwad*⁷² and one of the grounds of the decision in *D.M. Entertainment*.⁷³ While it is a useful tool to prevent unauthorised use, the case of *D.M. Entertainment*⁷⁴ perfectly highlighted its drawback. Proving the tort of passing off is not easy, as the plaintiff must prove that the use was calculated to lead consumers to be deceived about whether the plaintiff has approved of the product. In order to prove this, it needs to be proved that the plaintiff is well-known and has goodwill in this personality.⁷⁵ This is similar to the requirements laid down by the English Court in *Irvine v. Talksport*.⁷⁶

Furthermore, the Court was hesitant to award anything other than nominal damages for the unauthorised use, as the misappropriation of the plaintiff's personality did not seem to be large enough, as mentioned above. This is slightly different from the recent developments in the English law through *Irvine v. Talksport*⁷⁷, where the court awarded significant damages amounting to £25,000.⁷⁸

Third, the Courts have recognised the concept of false endorsement, which is very similar to passing off, but which contains the additional element that the unauthorised use must be likely to cause deception or confusion among consumers that the product is approved of or sponsored by the well-known person. Besides being one of the grounds made out in *D.M. Entertainment*,⁷⁹ there was also a hint of it in the legal notice served by Sridevi, which states

⁷² *Supra* note 49.

⁷³ *Supra* note 54.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Supra* note 6.

⁷⁷ *Id.*

⁷⁸ Klink, *supra* note 25 at 375.

⁷⁹ *Supra* note 54.

that the title of the film is likely to lead people to think that the actress has approved of the film.⁸⁰

Finally, many of the celebrities in the cases discussed above have invoked defamation, arguing that being associated with the goods or services that have used their images would be detrimental to their reputation and would harm their goodwill. In Sonu Nigam's case, however, the Court did not accept this argument as the basis of its decision, but relied only on the argument about the infringement of personality rights.⁸¹ While this is not a new area of law by any means, it remains to be seen whether the courts will use this right to protect the commercial appropriation of personality.

Conclusion

The Indian law on the commercial appropriation of property does not have a clear direction as yet. There has not been any apex court ruling on the subject, and the High Courts that have decided these cases have used several different doctrines. Specifically, the US right to publicity, the tort of passing off and false endorsement have been primarily used by the Indian courts.

From the previous discussion of the law in various countries, it is clear that Indian jurisprudence on this subject is currently divided between two paths: first, the clear-cut right of publicity found in the United States, and second, the tort of passing off and false endorsement as found in the United Kingdom.

The US style of publicity rights offers much more protection to celebrities, while still being balanced against the right to free speech, which is at the heart of the American constitution. When an unauthorised use is classed as

⁸⁰ *Supra* note 47.

⁸¹ Jayaraj, *supra* note 62.

“communicative”, it will be classed as free speech and will overrule the right of publicity. When the use is “commercial”, it becomes an infringement of the individual’s personality rights. Klink explains that the medium often decided which of the two classes it falls under. If, for example, the image is used to print on an item that can be sold to make a profit, such as a t-shirt, then it is likely to be “commercial”, as opposed to when the image is used on the news to report something newsworthy.⁸²

The UK, on the other hand, does not offer much protection to the commercial value of personalities of famous people. Until the recent case of *Irvine v. Talksport*⁸³, there was no other way to protect one’s personality than through trade marking one’s name and likeness, which has its own limitations, as explained above. The tort of passing off was not applicable to celebrities’ personalities, as the products often were not in ‘a common field’.⁸⁴

Even when the tort was used in India in *D.M. Entertainment*⁸⁵, the Court did not award more than nominal damages, which suggests that if this doctrine is adopted, celebrities may find it difficult to obtain a great amount of damages. This would create a situation like Germany, where manufacturers did not have any incentive to stop infringing their personality rights, since the amount of damages payable were far below the profits that could be gained from an unauthorised use.⁸⁶

In conclusion, it is for the Indian courts to decide what level of protection they want to afford celebrities and their personalities. In the humble opinion

⁸² Klink, *supra* note 25 at 489.

⁸³ *Supra* note 6.

⁸⁴ Lauterbach, *supra* note 20 at 6.

⁸⁵ *Supra* note 54.

⁸⁶ *Id.*

of the researcher, the US doctrine of the right of publicity offers the simplest and clearest method of protection. It accurately reflects the realities of the market where celebrities enter into transactions to assign their rights in their personality, and which represents a significant part of their income. The best way to protect these rights and allow celebrities to use them as easily as possible in the market would be to adopt a right of publicity.

The Need for a Constitutional Mandate in Investigative Agencies: A Comparative Overview

- Piyush Chhabra & Anmol Diwan*

Abstract

Intelligence and investigative agencies have become, in recent times, an integral cog in the wheel of a State's functioning. In India, there are several agencies that have been established as a means to combat major criminal activities and to provide an efficient system for successful investigation and prosecution of cases in courts of law. Therefore, it is vital that the status of these agencies be devoid of ambiguity. In recent times, questions have been raised pertaining to the legal framework behind such agencies. Our paper attempts to contrast the situation of Indian investigative agencies with respect to the procedure and functioning of their counterparts in other nations. The paper comments on the debate concerning such national agencies and whether they should be given a constitutional status or otherwise. Our attempt is to scrutinize all the divergent views so as to provide a true and stable direction to other police forces in the country for promoting inter and intra-state police co-operation in pursuance to the standards laid down in the Constitution of India.

Introduction

History has been witness to the fact that intelligence is an indispensable element of statecraft. The espionage systems under empires like the Persian Empire and that of the Mughals in India are well known. Intelligence has been used in the pursuit of different objectives, ranging from military

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supremacy and trade and wealth creation to a review of the socio-economic conditions in societies. The concept and form of intelligence has evolved with changing times. With the emergence of the modern democratic states, intelligence agencies have now diversified their role with, besides matters of security of the State, those of human security and human rights and freedoms being given a lot more importance.

With the onset of the concept of 'Rule of Law', arbitrariness in any aspect of the State's functioning has been sought to be curbed. National security and civil liberties are sometimes at crosshairs when it comes to intelligence and law enforcement agencies. Although national security- both internal and external- is of prime importance, it is inappropriate to allow these agencies to function without a well-defined legal basis. It is vital in a democracy that every organization must draw its powers, privileges and authority from clearly defined legal statutes which create a specific legal framework.

The paradigm shift in the nature of the security threats being faced by India in recent times makes the cry for reforms in the intelligence apparatus more pertinent. The mandate behind agencies like the Central Bureau of Investigation, Intelligence Bureau and the Research and Analysis Wing, while working as specialized agencies for maintenance of national security, has often been a matter of public debate. It is therefore necessary that the validity of their status be accurately and unambiguously defined.

Intelligence and investigation in India

The Indian intelligence system was a product of the Indian police system which had been crisis- driven and not an evolution of any detailed administrative policy.

“While intelligence information is at times incomplete, good intelligence has often made the difference between victory and defeat, life and death. By the same token, faulty intelligence leads to failures of varying degrees”.¹

Intelligence Bureau (IB) and Research and Analysis Wing (RAW)

It is customary, for interests of secrecy and national security, to deny the existence of intelligence organizations. In the United Kingdom for many years, the MI-5 was seen as a deeply mysterious organization. Successive governments intended it to be so. The intelligence community, though it existed, was meant to stay as far away from the public view as possible.²

The Intelligence Bureau is considered the oldest living intelligence organization in the world. It falls under the authority of the Ministry of Home Affairs. The agency is mainly responsible for counterterrorism, counterintelligence, intelligence collection in border areas etc. IB was founded on December 23, 1887, as the ‘Central Special Branch’ by the Secretary of State for India in London. The name ‘Intelligence Bureau’ was adopted in 1920. Until 1968, the IB was responsible for both internal as well as external intelligence but after its failure in the Sino-Indian war of 1962, a separate external intelligence agency called Research and Analysis Wing was born out of it. The Central Industrial Security Force (CISF) and the Special Protection Group (SPG) can trace their roots in the Intelligence Bureau.³ The work by the Bureau has had its share of controversies too. The domestic wiretapping of phones and other forms of communication without

¹ Address of Vice President of India, Shri Hamid Ansari at 4th Kao Memorial Lecture, *Intelligence for the World of Tomorrow*, January 19, 2010.

² Christopher Andrew, *THE DEFENCE OF THE REALM: THE AUTHORISED HISTORY OF MI-5*, (2009).

³ Jayshree Bajoria, *RAW: India's External Intelligence Agency*, Council on Foreign Relations Backgrounders, November 7, 2008, available at <http://www.cfr.org/india/raw-indias-external-intelligence-agency/p17707>, as viewed on 17th January 2016.

the presence of any legal oversight is a major issue.⁴ Moreover, there have been allegations against the IB for working with the ruling party and keeping tabs on the activities of the opposition.⁵

In spite of the fact that the intelligence community has common origins and are expected to work in tandem, the various agencies often find themselves in turf wars. India's intelligence organizations were a colonial heritage and thus they endorsed the legacy of anonymity and denial. Till recently, questions in Parliament pertaining to the legal architecture under which the Intelligence Bureau elicited the response that Entry 8 of the Union List under the Seventh Schedule of the Constitution of India provides for the Union Government's power to enact legislation concerning it.⁶ But this undermines the existence of an important organization like Intelligence Bureau to being merely in the nature of an *ad hoc* administrative arrangement by the executive. According to the report of the Kargil Review Committee, it was mentioned that the IB would liaise with foreign agencies dealing with counter-terrorism in consultation and coordination with RAW, after obtaining permission from the government at the highest level.⁷ Some charters have now been codified but lack the sanction of specific legislative

⁴ Ashish Khetan et al., *The Secret World of Phone Tapping*, INDIA TODAY, December 9, 2010, available at <http://indiatoday.intoday.in/story/the-secret-world-of-phone-tapping/1/122693.html>, as viewed on 17th January 2016.

⁵ Saikat Datta, *War Below the Radar*, INDIA TODAY, July 31, 2006, available at <http://www.outlookindia.com/article/war-below-the-radar/232026>, as viewed on 17th January 2016.

⁶ Manish Tiwari, *Legally Empowering the Sentinels of the Nation*, ORF ISSUE BRIEF #20, August 2009, available at http://www.orfonline.org/wp-content/uploads/2009/08/IssueBrief_20.pdf, as viewed on 17th January 2016.

⁷ The Group of Ministers' (GoM), Report on the Kargil Review Committee referred by Mr. Satish Chandra, in AGNI, Studies in International Strategic Issues, Vol.10(4), December 2007, as mentioned in A CASE FOR INTELLIGENCE REFORMS IN INDIA, IDSA Task Force Report, 2012, p.33, available at http://www.idsa.in/system/files/book/book_IntelligenceReform.pdf, as viewed on 17th January 2016.

enactments. The legal basis must be clear to obviate any obfuscation about both the intent of the legislature and the mandate it seeks to bestow.⁸ A result of the deficiency of a legal enactment is that there is no legal protection against those officials who undertake operations beyond the purview of law.

Owing to this disorganized state of affairs, the Intelligence Agencies (Powers and Regulation) Bill, 2011 was introduced in the Parliament so as to delineate the geographical reach of the Intelligence Bureau and making it distinct from RAW while also fixing some kind of accountability. But this Bill has been gathering dust.

In 2011, the Karnataka High Court asked for a clarification from the Union Home Ministry concerning the legal status after a PIL was filed by a retired IB officer. The petition pointed out that there was no charter of duties, no framework of policies and no regulations relating to personnel, recruitment, training, promotion and transfers. Also, the broad powers of the IB and almost no accountability act as a threat to Indian citizens' rights under Article 21. Taking cognizance of the seriousness of the issue, the court ordered the Centre to explain the issue of IB's existence in 2012.⁹ The issue of parliamentary oversight has been debated in various circles among the administration and a report by the Defense Studies and Analysis Task Force on Intelligence Reforms has argued that the functioning of the IB must be under parliamentary oversight and scrutiny. It recommended institutionalized reforms by the government.¹⁰

⁸ AK Verma, *Intelligence needs a new order*, INDIAN EXPRESS, 10th February 2005.

⁹ GOI Monitor Desk, *Who watches the Watchdogs*, April 1, 2011.

¹⁰ Rana Banerji, A CASE FOR INTELLIGENCE REFORMS IN INDIA, IDSA Task Force Report (Institute for Defence Studies & Analysis, 2012).

Central Bureau of Investigation (CBI)

The Central Bureau of Investigation is an investigation agency set up by the Government of India to investigate crime, especially corruption cases, in Union Territories which are directly administered by the Government of India. It is the premier investigation agency in the country. Other states also refer sensitive and large-scale cases to the CBI. It was created by an executive order in 1963.¹¹ The Delhi Special Police Establishments Act¹², which came in to force on 19th November 1946 succeeding two ordinances, gave CBI the status of an independent entity. It draws all its powers from the antiquated 1946 Act, under which it was probably never formally re-constituted.¹³ CBI personnel are also trained to prosecute.¹⁴

Sections 3, 4, 5 and 6 of the DSPE Act deal with the various rules and regulations which the investigating agencies have to follow keeping in mind the basic objective of the DPSE and the Constitution of India. The jurisdiction of the Central Bureau of Investigation to investigate an offence is determined by the notification made by the Central Government under Section 3. Section 4(1) states that the Central Government shall be vested with the superintendence of the Delhi Special Police Establishment. Under Section 5, the Central Government has, with the concurrence of the State

¹¹ CBI Manual, available at http://cbi.nic.in/aboutus/manuals/Chapter_1.pdf, as viewed on 17th January 2016.

¹² The Delhi Special Police Establishments Act, Act 25 of 1946.

¹³ B.S. Dalal, et al., *10 Points Legal Framework for Law Enforcement and Intelligence Agencies in India*, Perry 4 Law, September 2009, available at <http://perry4law.org/blog/wp-content/uploads/2013/11/10-Points-Legal-Framework-For-Law-Enforcement-And-Intelligence-Agencies-In-India.pdf>, as viewed on 17th January, 2016

¹⁴ Dharam Chand Jain, *Effective Legal and Practical Measures for Combating Corruption: A Criminal Justice Response-An Indian Perspective*, The 138th International Senior Seminar, Resource Material Series No.77, February 2008, available at http://www.unafei.or.jp/english/pdf/RS_No77/No77_12PA_Jain.pdf, as viewed on 17th January 2016.

Governments, by order extended the jurisdiction of the DPSE division to all states. Section 6 of the Act provides that no member of the said establishment can exercise powers and jurisdiction in any area in a state without the consent of the government of that state.

In *Vineet Narain v. Union of India*¹⁵, the Supreme Court held that under Section 6 of the Act the Delhi Special Police Establishment required the consent of the State Government to exercise powers and jurisdiction under the Act. This is because ‘police’ is a state subject, being in List II Entry 2 of the Seventh Schedule in the Constitution. It further held that superintendence cannot be construed as interference in the investigation of the offence and the Central Government is precluded from issuing any “directions to the CBI to curtail or inhibit its jurisdiction to investigate the offence”.

*Kanayalal v. State of Gujarat*¹⁶, following the decision of the Supreme Court in *E.G. Barsay v. State of Bombay*¹⁷, held that while a direction is given by the court in an appropriate case, consent as envisaged under Section 6 of the Act is not a condition precedent to compliance with the court’s direction and Section 6 of the Act does not apply when the court gives a direction to the CBI.

Thus, the CBI can only investigate a case if specifically requested by the State Government concerned or directed by the High Court or Supreme Court, except if it is a matter that pertains to the Central Government. In the past several states have tried to revoke orders giving consent with retrospective effect to the CBI to investigate matters. The Supreme Court,

¹⁵(1998) CCR 190.

¹⁶1989 Cr.L.J. 492 Guj.

¹⁷AIR 1961 SC 1762.

however, has ruled that state governments cannot revoke consent given to the CBI to investigate and prosecute any matter with retrospective effect.¹⁸

The Guwahati High Court in *Navendra Kumar v. Union of India*¹⁹ quashed the executive resolution which declared the CBI as *ultra vires* and hence, unconstitutional. While the judgment itself has been thoroughly criticized, which led to a stay being granted by the Supreme Court, it did raise some pertinent issues. The assertion that CBI is a constitutionally valid police force empowered to register an FIR, investigate crimes, conduct search and seizure and submit a charge-sheet is questionable. While Entry 8 of the Union List empowers the Central Government to set up intelligence and investigative bureaus, it does not bestow upon them the power to create a parallel police force carrying out those police functions that have been vested with the police under the Code of Criminal Procedure, 1973. That power solely rests with the state since 'police' is a state function under the State List.

However, this decision cannot be implemented in full since holding the CBI unconstitutional on technicalities of the law would lead to drastic effects on the justice administration system in the country.

To clear the air of ambiguity surrounding the validity of the CBI, efforts were made by the CBI by proposing a draft CBI Act in 2010, which is pending before the Parliament for approval. This Draft was proposed as per the provisions of Article 246 of the Constitution. The objective of this proposed legislation was to formulate an Act to constitute the Central Bureau of Investigation to prevent, investigate and prosecute offences or classes of offences relatable to matters in the Union List throughout the

¹⁸*Supra* note 10.

¹⁹WA No. 119 of 2008.

territory of India and also to investigate matters in the Concurrent List of the Seventh Schedule. It also sought to repeal the DSPE Act.²⁰ A purposeful legislation must lay down a transparent procedure for the selection of personnel by competent self-respecting officers.²¹

Intelligence systems in other countries

MI-5 and MI-6: United Kingdom

In *Harman & Hewitt v. UK*²² which came up before the European Court of Human Rights, the lack of a specific statutory basis for MI-5 was held to be fatal to the claim that its actions were “in accordance with the law” for the purpose of surveillance and file keeping, contrary to safeguards provided by the Convention on the right to privacy.²³ The ECHR later further specified that observing the rule of law by maintaining a simple veneer of legality would not suffice. A ‘Quality of Law’ test would have to be met, which required any such legal regime to be clear, foreseeable and accessible.

In 1989, the Security Services Act placed MI-5 on a statutory footing. Three years later, Stella Remington, its first female chief, was publicly acknowledged as its Director General. She undertook the task of demystifying the service for the public and the media and touted this as one of the main achievements of her term. The establishment of a parliamentary

²⁰ Civil Liberties Protection in Cyberspace, *The Central Bureau of Investigation Act, 2010: A Political Fiasco and PMO Indifference*, information available at ptlb.in/clpic/?p=123, as viewed on 11 December 2015.

²¹ Sankar Sen, *Liberating the CBI*, THE TELEGRAPH, May 16, 2013, available at http://www.telegraphindia.com/1130516/jsp/opinion/story_16901757.jsp#.Vpt8fP197IU, as viewed on 17th January 2016.

²² (1992) 14 EHRR 657.

²³ Hans Born & Ian Leigh, MAKING INTELLIGENCE ACCOUNTABLE: LEGAL STANDARDS AND BEST PRACTICE FOR OVERSIGHT OF INTELLIGENCE AGENCIES, (2005).

oversight committee as well as the legal recognition of the external intelligence organization - The Secret Intelligence Service or MI-6, under the Intelligence Services Act, 1994, further encouraged this demystification.

In summary the functions of MI-6 are to protect national security against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers, and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means, to safeguard the economic well-being of the UK against threats posed by the actions or intentions of persons outside the British Isles and to act in support of the activities of police forces and other law enforcement agencies in the prevention and detection of serious crime.²⁴

In a democracy, a domestic security service must be apolitical and accountable. The Intelligence Services Act, 1994 places MI6 under the authority of the Secretary of State, in practice the Home Secretary, who answers in Parliament for the Service.

The Act also sets out the Director General's responsibilities in law for ensuring that the Service does not act to further the interests of any political party. Its role is to protect democracy, not to influence its course. The government of the day cannot instruct the Service to perform any action for party political reasons.²⁵

The Central Intelligence Agency (CIA): USA

A set of 16 agencies constitute the United States intelligence establishment.

²⁴ Section 1, Security Service Act, 1989.

²⁵ Section 2, Security Service Act, 1989.

Led by the DNI, these include units under United States Departments of Defence, Justice, State, Homeland Security, Energy and Treasury.²⁶

The Central Intelligence Agency Act, 1949 is also called the "CIA Act of 1949" or "Public Law 110". This act established the Central Intelligence Agency as a separate body. Earlier the National Security Act was enacted in 1947 which established both the CIA and the National Security Council.

The 1947 Act charged the CIA with coordinating the nation's intelligence activities and correlating, evaluating and disseminating intelligence which affected national security. In addition, the Agency was to perform such other duties and functions related to intelligence as the National Security Council might direct. The Act also made the Director of Central Intelligence (DCI) responsible for protecting intelligence sources and methods.²⁷

In 1949, the Central Intelligence Agency Act was passed. A grave need was felt for certain specific provisions regarding the CIA. The 1949 Act supplemented the 1947 Act by permitting the Agency to use confidential fiscal and administrative procedures. It also exempted the CIA from many of the usual limitations on the expenditure of federal funds.

The Act's constitutionality was challenged in the Supreme Court in *United States v. Richardson*²⁸, on the basis that the Act conflicted with the penultimate clause of Article I, Section 9 of the United States Constitution, which states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and

²⁶ *An Overview of the United States Intelligence Community for the 111th Congress*, Office of the Director of National Intelligence, 2009, available at <http://fas.org/irp/eprint/overview.pdf>, as viewed on 17th January 2016.

²⁷ Sharad S. Chauhan, *INSIDE CIA: LESSONS IN INTELLIGENCE*, APH Publishing (1st January, 2004), p.2.

²⁸ 418 U.S 166 (1974).

Account of Receipts and Expenditures of all public Money shall be published from time to time." The Supreme Court found that Richardson, as a taxpayer, lacked sufficient undifferentiated injury to enjoy standing to argue the case.

In the year of 1980 certain ground breaking statutes were passed by the US Congress, one of which was the Intelligence Oversight Act, 1980. Despite its promises and provisions and regardless of being strong and stringent, not much control could be exercised on the CIA. However, today the CIA reports regularly to the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, as required by the Intelligence Oversight Act of 1980 and various Executive Orders. Regardless of the presence of so many provisions many people are of view that a large number of overt acts are still being performed by CIA which do not come into public domain.

The Central Investigative Agency Act, 1949 contains provisions for protection of the operatives of the CIA, which also includes protecting the identity of these operatives. In the (in)famous Lewis Scooter Libby case,²⁹ of 2007, the former Chief of Staff to the US Vice President Dick Cheney was convicted on a charge sheet filed by a Special Counsel, for revealing the identity of CIA's 'deep cover operative' Valerie Palme- a US foreign service officer- in 2003.³⁰

²⁹*United States v. Libby*, 461 F.Supp.2d 3 (2006).

³⁰V. Balachandran, A Paper on Intelligence Reforms sent to IDSA Task Force, June 2010, as mentioned in A CASE FOR INTELLIGENCE REFORMS IN INDIA, IDSA Task Force Report, 2012, p. 34, available at http://www.idsa.in/system/files/book/book_IntelligenceReform.pdf, as viewed on 17th January 2016.

The road to legality, accountability and oversight in India

Modern day theorists on intelligence reform identify the following principal concerns relating to oversight:

1. Legality
2. Effectiveness
3. Efficiency
4. Budgeting and accounting
5. Conformity with human rights
6. Policy and administration³¹

At present, the challenges faced by intelligence and investigative agencies like the Intelligence Bureau and the Central Bureau of Investigation are mainly related to their legal status and their method of functioning. There is no debate on the necessity of these institutions of State machinery. Both of these agencies face allegations of politicization and widespread corruption. While the IB always remains in the shadow of doubt due to the lack of a legal mandate behind it other than a mention in the Union List, the CBI has been plagued by deep-rooted problems of being pressurized by successive governments to act on what's suitable for them. Moreover, since Section 6 of the DSPE Act states that the CBI can only investigate in a state only with its consent, it undermines the objective with which the CBI was formed. It is then left to the High Courts to direct the CBI, to which the states cannot object. Due to the uncertainty surrounding the actual ambit of the power given to the CBI, it has acquired the reputation of being a 'caged

³¹ Wolfgang Krieger, OVERSIGHT OF INTELLIGENCE: A COMPARATIVE APPROACH: NATIONAL INTELLIGENCE SYSTEMS, CURRENT RESEARCH AND FUTURE PROSPECTS, (2009).

parrot'.³² However, these hurdles can be overcome. The focus should primarily be codification of the law governing these agencies.

Codification can either be done by enacting a law and giving these agencies the status of being statutory bodies, or their functioning could be brought directly under the Constitution of India, thereby giving the agencies constitutional status like the offices of the Comptroller and Auditor General (CAG) and the Election Commission. However, there are certain reservations to this proposal due to the nature of power that would be with these agencies. This can be countered by introducing an internal corrective mechanism to detect, report and correct irregular or illegal actions. This can be done through institution of an Intelligence Ombudsman or Inspector General.³³

Executive control should also be exercised over the agency concerned. In India, there is a Special Relations wing in the Cabinet Secretariat to process administrative and financial matters, but this office has functioned merely as a post office without any clout. Ideally, the executive would also exercise control over covert action and undertake a concomitant broad scrutiny of operational funds, without compromising the secrecy of source operations.³⁴ Strengthening financial accountability of intelligence agencies by sending annual reports to the CAG and a provision for an in-camera audit of secret service funds can be introduced.

Parliamentary oversight could also be an alternative. This could be done by making a committee to oversee the functioning of the CBI, and the proper

³²*An Opportunity to free CBI*, THE HINDU, November 12, 2013, available at <http://www.thehindu.com/opinion/editorial/an-opportunity-to-free-cbi/article5339885.ece>, as viewed on 17th January 2016.

³³ *Supra* note 9.

³⁴ British Cabinet office paper, *Improving the Central Intelligence Machinery*, July, 2009.

use of secret service funds.³⁵ This will induce transparency into the system and reduce the political influence of one group since most major parties will have members in the committee.

Conclusion

An intelligence agency with a dissatisfied and aggrieved workforce can neither safeguard its own security nor that of the nation. Given the kind of security threats that our nation faces, we cannot afford to have an intelligence setup that is rusty and lethargic. The vitality of well-oiled intelligence and investigation agencies does not need to be emphasized. In such a scenario, a swift wave of reform is needed to modernize our intelligence agencies. The first step in this process would have to be a proper legal existence of these agencies. The way in which countries like the US and the UK have regulated the working of their intelligence agencies can be kept as a reference point for reforms in our intelligence mechanism. Legal framework is the backbone for any crucial function of the government. It would be both ironical as well as violative of basic human rights if law enforcement and intelligence activities are conducted in an illegal, unreasonable and improper manner.³⁶

A balanced approach towards systemic and institutional changes is required. Any changes within institutions should be invested with an ethical purpose. Misuse of funds and politicization of the work done are issues that can be dealt with through proper oversight and by fixing accountability. Sufficient measures must be undertaken so that there is a free, immediate and effective

³⁵ *Supra* note 26.

³⁶ *Supra* note 12.

sharing of intelligence information among various law enforcement authorities.

Elimination of existing lacunae with enhanced coordination among intelligence agencies is the only way forward.

A Much-Needed Extension of the Basic Structure Doctrine: Judicial Review of Election Disputes

- Vishwanath Pratap Singh*

Abstract

Article 329(b) primarily intended to oust the jurisdiction of all courts in respect to electoral matters and aimed at establishing a separate and independent body to try such cases, apparently prescribing the manner, grounds, and stage at which challenge to an election could be urged. The non-obstante clause specifically implies that those grounds cannot be urged in any other manner and at any other stage before any other court. The paper discusses at length, how courts have gradually bypassed the blanket ban on litigative challenges put forth by Article 329(b), and have extended their jurisdiction, original as well as appellate, on election disputes which was also one of the major concerns behind abandonment of election tribunals. The paper critically analyses the intent of the Supreme Court behind such active interpretations of the key Constitutional provision, and as to why the long term ramifications of such approach should be considered while exercising such extraordinary jurisdiction by the courts.

Introduction

Democracy is one of the basic inalienable features of the Constitution of India and forms part of the basic structure of the constitution.¹

In a democratic polity, 'election' is the mechanism devised to mirror the true wishes and the will of the people in the matter of choosing their political

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¹ *Keshavananda Bharti v. State of Kerala*, AIR 1973 SC 1461.

manager and their representatives who are supposed to echo their views and represent their interest in the legislature.² Free, fair, fearless and impartial elections are the guarantee of a democratic polity. The word “election” used in Part XV of the Constitution implies the entire process of election commencing with the instance of notification and terminating with the declaration of election result in favour of candidate.³ Elections symbolise the Sovereignty of the people and aim to provide legitimacy to the authority of the Government. Therefore, free and fair elections are indispensable for the success of any democratic institution.⁴ Effective mechanism is a *sine qua non* for having such election. For conducting, holding and completing the democratic process, a potential law based upon requirements of the society tested on the touchstone of the experience of times is concededly of paramount importance. A balanced judicial approach in implementing the laws relating to franchise is mandatory.⁵

Article 329(b) of the Constitution of India, 1950 provides that no election, either to the House of Parliament or to the House of the Legislature of a State, shall be called upon in any court, but in a specialised Election Tribunal established for the purpose. For Article 329(a), the orders made by the Delimitation Commission regarding delimitation of constituencies and published in the official gazette, could not be agitated in a court of law.⁶ The words ‘notwithstanding anything in this Constitution’, makes it clear

² Azhar Hussain v. Rajeev Gandhi, AIR 1986 SC 1253.

³ N.P. Punnuswami v. Returning Officer, AIR 1952 SC 64; Hari Vishnu Kamath v. Ahmad Ishaque, AIR 1955 SC 233; N.B. Khare v. Election Commissioner, AIR 1957 SC 694; Mohinder Singh Gill v. Chief Election Commissioner, AIR 1978 SC 851.

⁴ Sumandeep Kaur, *Electoral Reforms in India: Proactive Role of Election Commission*, MAINSTREAM (Vol. XLVI, Issue 49).

⁵ V.S. Achuthanandan v. P.J. Francis and Anr., [1999] 2 LRI 200.

⁶ M.P. Jain, INDIAN CONSTITUTIONAL LAW 819(5th ed. Wadhwa Nagpur, 2007).

that this clause overrides everything else in the Constitution and thus has overreaching effect both on election and constitutional law.⁷

The Supreme Court in *Durga Shankar v. Raghuraj Singh*⁸ observed:

"The 'non-obstante' clause with which Article 329 of the Constitution begins and upon which the respondent's counsel lays so much stress, debars us, as it debars any other court in the land, to entertain a suit or a proceeding calling in question any election to the Parliament or the State Legislature. It is the Election Tribunal alone that can decide such disputes and the proceeding has to be initiated by an election petition and in such manner as may be provided by a statute."

However, the remedy in respect of election matters was held not to be construed as extinguished by virtue of Article 329(b), but postponed to the post-election stage. Article 329(b) is a blanket bar on legal proceedings to challenge electoral steps taken by the electoral machinery for carrying forward the process of election and the only remedy to challenge such steps on the basis of illegality, is an election petition to be presented after the elections are over.⁹ Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.¹⁰

⁷ *Meghraj Kothari v. Delimitation Commission*, AIR 1967 SC 669: (1967) 1 SCR 400.

⁸ AIR 1981 SC 231.

⁹ Anand Ballabh Kafaltiya, DEMOCRACY AND ELECTION LAWS 83(Deep and Deep Publications Pvt. Ltd. 2003).

¹⁰ *N.P. Ponnuswami v. The Returning Officer, Namakkal Constituency*, AIR 1952 SC 64.

The Representation of the People Act, 1951, prior to the Representation of the People (Second Amendment) Act, 1956 (27 of 1956) provided for a separate Election Tribunal for looking into the disputes arising from the elections. Section 81(1) of the Act expressly provides, inter alia, that no election petition shall be filed before the date of declaration of election results. Section 105¹¹ of the Representation of the People Act, 1951 provided no scope for judicial review of the decisions of these Election Tribunals. Keeping in view the importance of the legislature, the main objective sought to be achieved through the enlisted provisions was to conduct the elections in due time and keep the election disputes out of the purview of courts. It provided the Election Tribunal so as to expedite the resolutions relating to election law. However, the judiciary, through its corpus of judicial review and judicial activism, expanded its scope of jurisdiction and has made an attempt to restructure the meaning of Article 329(b).

The paper delves into how courts have widened their horizon to include both original and appellate jurisdiction on the disputes relating to election laws, and how Article 226 has been so widely interpreted so as to include those petitions which were not earlier under its jurisdiction. We shall endeavour to show how a liberal and active role has been adopted by the Supreme Court in interpreting the provisions of the Constitution so as to remove restraints on election petitions to be entertained in the courts.

Adding life to Article 329(b): judicial interpretation

The Supreme Court has tried to establish a balance between the sweeping powers of the High Courts under Article 226 and the limitations put on its

¹¹ “Every order of the Tribunal made under this Act shall be final and conclusive”.

power by virtue of Article 329(b) through its various landmark judgements on election laws. In the case of *N.P. Ponnuswami v. The Returning Officer, Namakkal Constituency*¹², the plaintiff filed a petition for writ of certiorari under Article 226 in the Madras High Court but the court refused to intervene, holding that Article 329(b) barred its jurisdiction to interfere in the electoral matters and his remedy lay in filing an election petition after the election was over. The Supreme Court upheld the decision and enunciated the constitutional position and mandate that electoral process, once started, cannot be interdicted or interrupted by the courts at any intermediary position till it is completed and the results are duly declared. The Hon'ble Court established certain principles:

“The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution, and another after they have been completed by means of an election petition. In my opinion, to affirm such a position contrary to the scheme of Part XV of the Constitution and the Representation of the People Act. Any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the Article would lead to anomalies, which the Constitution could not

¹² AIR 1952 SC 64.

have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it....”

The principles enunciated in *N.P. Ponnuswami*¹³ are still held sacrosanct and have been reiterated in a number of cases. The view was further elucidated in *Mohinder Singh Gill v. Chief Election Commissioner and Ors.*¹⁴ In the instant case, the constitutional bench expanded the bar on courts to issue writs challenging “re-poll” as it is coupled with election. This case established Article 329(b) as a blanket ban on litigative challenges, in the courts, to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of results. It also interpreted the term ‘Election’ and gave it a wider interpretation so as to denote the period from the presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate. The plenary bar of Article 329(b) rests on the peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion.¹⁵

Electoral rolls, one of the most indispensable aspects of elections, have also witnessed conflicting views as to whether they form part of elections under Article 329(b) or not. The Hon’ble Supreme Court held the preparation,

¹³ *Supra* note 10.

¹⁴ AIR 1978 SC 851.

¹⁵ *Id.*

revision and correction of electoral rolls as a stage anterior to election.¹⁶ Stepping further in *Indrajit Barua*¹⁷, the Supreme Court held that where an election has been held on the basis of an electoral roll, the issue of validity of the election cannot be raised on the ground that the electoral roll was defective. However, where it is alleged in the election petition that any name has been included in or deleted from an electoral roll after the last date of making nominations when the roll becomes final under S. 23 (3) of the Representation of the People Act, 1950, the High Court has the jurisdiction to go into that question to determine whether any vote has been improperly accepted or rejected.¹⁸

Supreme Court and its judicial agility: adding wings to the clamour of Article 226

Although the Hon'ble Court in its previous decision clearly restrained courts from interfering in electoral matters till the Election proceedings were over, it may be noted that the Hon'ble Supreme Court, in the case of *K. Venkatachalam v. A. Swamickan*¹⁹, parted from its decision given in *Ponnuswami*. In the latter case the petitioner was not in a position to file an election petition to challenge the election of the appellant since the limitation period had expired before the appellant was discovered. A division bench of the Madras High Court, in exercise of its writ jurisdiction under Article 226, had held that the appellant was not qualified to sit as a member of the Tamil Nadu Legislative Assembly. The appellant filed an

¹⁶ *Lakshmi Charan Sen v. AKM Hassan Uzzaman and Ors.*, AIR 1985 SC 1233; *Indrajit Barua and Ors. v. Election Commission of India and Ors.*, AIR 1986 SC 103.

¹⁷ *Indrajit Barua and Ors v. Election Commission of India and Ors.*, AIR 1986 SC 103.

¹⁸ *Baidyanath Panjiar v. Sita Ram Mahto*, AIR 1970 SC 314; *Kabul Singh v. Kundan Singh*, AIR 1970 SC 340; *Narendra Madivalapa Kheni v. Manikarao Patil and Ors.*, AIR 1977 SC 2171.

¹⁹ AIR 1955 SC 233.

appeal in the Supreme Court raising his right to sit as a member of the Legislative Assembly. The contention before the Supreme Court was that the Madras High Court didn't have jurisdiction over the writ petition since Article 329(b) barred the jurisdiction of the court in electoral matters. However, the Supreme Court upheld the jurisdiction of the High Court in the instant case giving Article 226 widest possible meaning, especially in cases where recourse could not be had to the provisions of the appropriate Act or statute. The Court also held that Article 329(b) will not come into force when the case falls under Articles 191 and 193.

The Hon'ble Supreme Court leaped further to widen the scope of jurisdiction under Article 226 in *Manda Jaganath v. K.S. Rathnam*²⁰, and observed that erroneous actions which are amenable to correction in the writ jurisdiction of the courts should be such as had the effect of interfering in the free flow of the scheduled election or hinder the swift progress of the election which is the paramount consideration. However, it held, if by an erroneous order, the conduction of the election is not hindered, then the courts, under Article 226 of the Constitution, should not interfere with the orders of the returning officers, the remedy for which lies in an election petition only. The Supreme Court has further exaggerated the role of courts in entertaining disputes in respect to election disputes holding that the proceeding has to be initiated by an election petition and in a manner as provided by the statute, but once the Tribunal has made any determination or adjudication on the matter, the powers of this Court to interfere through special leave can always be exercised under Article 136.²¹

²⁰ AIR 2004 SC 3600.

²¹ *Durga Shankar Mehta v. Thakur Raghuraj Singh*, 1954 AIR 520.

In the landmark judgement, *Hari Vishnu Kamath v. Ayed Ahmed Ishaque*²², in regard to the High Court's jurisdiction to entertain disputes regarding election disputes, the Supreme Court held that once the proceedings have been instituted in accordance with Article 329(b) by the presentation of an election petition, the constitutional requirement has been fully satisfied, and thereafter the trial of the election petition by the election tribunal was subject to the general law and supervision of High Courts over that of the election tribunal.

Advanced judicial activism and changed judicial attitude of the Supreme Court, in *Election Commission of India v. Ashok Kumar and Ors.*²³, evolved a new era and laid down the foundation for the gradual tectonic shift in the court's approach to election matters. The Hon'ble Court carved out certain exceptions in the sweep of Article 329(b) and laid down as to when High Courts could intervene in electoral matters in exercise of their writ jurisdiction under Article 226. The apex court determined that any decision sought and rendered will not amount to '*calling in question an election*' if it sub-serves the progress of the election and facilitates the completion of the election, it added, anything done in furtherance of the election proceedings cannot be described as questioning the election. The court went further to state that judicial intervention is available, but without interrupting, obstructing or delaying the progress, if assistance of the courts has been asked merely to correct or smoothen the proceedings of the election, to remove the hindrance therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and the stage is set for invoking the

²² AIR 1955 SC 233.

²³ AIR 2000 SC 2979.

jurisdiction of the court. The Court, revealing the irretrievable injustice caused to the petitioner in *Sarvothama Rao v. Chairman, Municipal Council, Saidapet*²⁴, observed:

“I am quite clear that any post-election remedy is wholly inadequate to afford the relief which the petitioner seeks, namely, that this election, now published, be stayed, until it can be held with himself as a candidate. It is no consolation to tell him that he can stand for some other election. It is no remedy to tell him that he must let the election go on and then have it set aside by petition and have a fresh election ordered. The fresh election may be under altogether different conditions and may bring forward an array of fresh candidates.”

Fading clout of election tribunals

With the enactment of the Constitution, stating India as a Sovereign Democratic Republic, the right to vote in the form of Universal Adult Franchise gave equal status to all Indian citizens. Subsequently, the Representation of the People Act, 1950, which came into force on 12th May 1950, and the Representation of the People Act, 1951 were passed which provided for allocation of seats, qualification of voters, the preparation of electoral rolls and an authority to adjudicate the issues involving election matters in the form of an Election Tribunal. Initially provisions were made in Section 86 of the Representation of the People Act, 1951 for the appointment of an Election Tribunal to try petitions calling in question any election to parliament or any of the state legislatures within Indian territories, and the Election Commission under Article 324(1) was provided power to appoint election tribunals.

²⁴ 73 Ind Cas 619, (1923) 45 MLJ 23.

The next important contention before the Hon'ble Supreme Court was whether the High Courts under their wide sweeping jurisdiction under Article 226 could issue writs against the decisions of the election tribunals as they were under their territorial jurisdiction. It was argued that since the election tribunal becomes *functus officio* after they pronounce the decision, therefore, they did not come under the jurisdiction of High Courts under Article 226. However the Supreme Court held that if the true meaning of Article 226 is construed, the High Courts have power under Article 226 to issue writs of certiorari for quashing the decisions of the election tribunal, notwithstanding that they become *functus officio* after election.²⁵ Election tribunals were also held to be under the superintendence of the High Courts, both judicial and administrative, under Article 227 of the Constitution.²⁶ Gradually the courts have assumed appellate jurisdiction over electoral matters. However, this view of the Supreme Court was in total contrast to Section 100 of the Representation of the People Act, 1951 which stated that the decisions of the election tribunal shall be final and binding.

The experience of the Election Commission showed that the system of election tribunals was not functioning smoothly and the trial of election petitions by the election tribunals was getting inordinately delayed, as even the interlocutory orders of the tribunals were being challenged before the High Courts under their writ jurisdiction under Articles 226 and 227 and, in many cases, further before the Supreme Court by way of appeals against the order of High Courts. In the *Hari Vishnu Kamath*²⁷ case, it was also held that once the proceedings for an election petition proceeded in the election tribunals, thereafter, the constitutional embargo created by Article 329(b)

²⁵ *Supra* note 21.

²⁶ *Waryam Singh and Anr. v. Amarnath and Anr.*, AIR 1954 SC 215.

²⁷ *Supra* note 21.

would not be attracted, and election tribunals were under both judicial and administrative supervision of the respective High Courts under Article 227. Thus both Supreme Court under Article 136, and High Courts under Article 226 assumed their exceptional jurisdiction over disputes regarding election matters. High Courts were given formal appellate jurisdiction over election matters when the Representation of the People Act, 1951, was amended in 1956. Therefore, a three tier system came into force to try election petitions, which eventually took a long time to resolve election disputes. Under such circumstances, the election Commission, for expediting the disposal of election petitions, recommended that the trial of election petitions should be entrusted to the High Courts instead of the election tribunals.

In its furtherance, Constitution (Nineteenth Amendment) Act 1966 was passed amending Article 324(1), taking away the jurisdiction of the Election Commission to appoint election tribunals, and the Representation of the People (Amendment) Act 1966 inserted Section 80A, providing the court having jurisdiction to try an election petition shall be the High Court. Further, Article 329A²⁸ was also deleted by the Constitution (Forty fourth Amendment) Act, 1978 providing for all petitions to be filed only before the High Courts. Current status is that election petitions are directly to be entertained by the High Courts²⁹ from where an appeal may be taken to the Supreme Court under Articles 132, 133, 136.

²⁸ Article 329A provided for elections disputes regarding Prime Minister and the Speaker shall lie not before the high court but before such authority as may be prescribed, and it shall be tried by such authority as may be especially constituted for the purpose.

²⁹ *Hari Prasad Mulshankar Trivedi v. V.B. Raju*, AIR 1973 SC 2602.

The jurisdiction of the high court post the array of amendments: an outline

The array of amendments to the Constitution, seizure of power from Election Commission to appoint election tribunals and direct entrustment of election petitions to High Courts under Section 80A of the Representation of the People Act puts forth a serious concern - up to what extent does Article 329(b) of the Constitution override the jurisdiction of High Courts in entertaining election disputes. Article 329(b) has for long remained a debated contention. Provisions of the Representation of the People Act, 1951 and Articles of the Constitution read in consonance provide remedy for every wrong done during the election process. They do not outrightly exclude the right of a citizen to approach the court so as to have the wrong done remedied, nevertheless the lesson is that the election rights and remedies are statutory, and trifles even if there are irregularities and illegalities shall be ignored till the election proceedings in question are over. The non-obstante clause under Article 329(b) automatically excludes the jurisdiction of the High Courts under Article 226 in disputes calling in question an election, including the conduct thereof, but it does not extinguish the remedy- it only postpones the remedy to the post-election stage.

On an analysis based on the principles laid down by the Supreme Court in different landmark judgements, jurisdiction of High Courts can be summed as:

1. If an election (the term being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and questioning which may have the effect of interrupting, obstructing

or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completion of proceedings in election.³⁰

2. Any decision sought and rendered will not amount to “calling in question an election” if it sub-serves the progress of election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.³¹
3. Subject to the above, the action taken or orders issued by the Election Commission are open to judicial review of decisions of statutory bodies such as, in a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.³²
4. Without interrupting, obstructing or delaying the progress of election proceedings, judicial intervention is available if assistance of the court has been sought merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, *or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and the stage is set for invoking the jurisdiction of the court.*³³
5. The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken

³⁰ *Supra* note 21.

³¹ *Id.*

³² *Id.*

³³ *Id.*

to see that there is no attempt to utilise the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end.³⁴

6. High Courts shall have jurisdiction wherein the relief sought may not restrict or interfere the election proceedings but the jurisdiction of the court is invoked so as to correct the election process taking care of such aberrations, as failing to such step, it may result in stopping or breaking the election process.³⁵

Conclusion

Judicial review being a basic feature of the Indian Constitution³⁶ gives the Supreme Court wide jurisdiction to interpret the Constitution and other different statutes of the country. Extensive analysis of different case laws makes it quite evident that though Article 329(b) of the Constitution bars courts from entertaining any disputes regarding election matters, the courts have effectively assumed writ jurisdiction in election matters. Moreover, all the election petitions filed under Section 80 and 80A of the Representation of the People Act, 1951 are under exclusive jurisdiction of High Courts. But the legislative intent of the constitutional forefathers behind Article 329(b) was well reflected as, if any irregularities are committed while election is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the "election" and enable the person affected to call it in question, they should be brought up before a special tribunal by means of election petition and not

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Keshvananda Bharti v. State of Kerala*, AIR 1973 SC 1461, *Minerva Mills v. Union of India*, (1980) 3 SCC 625.

made the subject of a dispute before any court while the election is in progress.³⁷ The court also elucidated that it finds, howsoever, no meaning in enacting Article 329(b) if the grounds on which an election proceeding can be called in question could be raised at any prior stage and errors, if any, are rectified.

However, in light of the above grounds, it is needless to say that due to the sensitive and extraordinary nature of the power exercised by the courts, it is mandatory for the courts to act with extra care and great reluctance and refrain from doing so as far as possible except when a clear and strong case for its intervention has been made out by raising the pleas with particulars and precision and supporting the same by necessary material.³⁸

Although the courts have assumed this jurisdiction in the best ever connotation 'interest of justice', the long term ramifications of such activism must be considered. The debate is broadly framed with respect to ensuring an effective instrument - "separation of powers"- that is the lifeline of the Indian Constitutional framework. It puts forth a question as to the legitimacy of separation of power between the legislature, executive and judiciary, as well as concerns about the legitimacy of judicial interventions in the long run.

Another negative postulate of High Courts' assuming jurisdiction in election matters is its detrimental effect on the expeditious disposal of cases. Section 86 and Section 87 of the Representation of the People Act, 1951, provide that the High Court shall make an endeavour to dispose of an election petition within six months, from the date when it is presented, and also as far as possible conduct proceedings of election on a day to day basis.

³⁷ *Supra* note 10.

³⁸ *Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman*, (1985) 4 SCC 689.

The extensive backlog of cases and overburdening of the Indian legal system is no more an unknown fact, jurisdiction in election matters have further added to this burden. In practise, however, cases involving an election petition are seldom seen to be resolved in a timely manner. According to the report “Ethics in Governance” of the Second Administrative Reforms Commission, “such petitions remain pending for years and in the meanwhile, even the full term of the House expires thus rendering the election petition infructuous.” It recommended that “Special Election Tribunals should be constituted at the regional level under Article 329(b) of the Constitution to ensure speedy disposal of election petitions and disputes within a stipulated period of 6 months.”³⁹

Moreover, if we analyse Section 100 of the Representation of the People Act, 1951, before 1966, it stated that the orders of election tribunal shall be final to ensure expeditious disposal of election disputes, considering the important functions delivered by the legislature, but the gradual encroachment by courts in election matters seems to have failed the legislative intent. The main objective behind making judicial review the backbone of the Constitution was to eliminate the legislative intricacies and to give a clear picture of the Constitution, or statute. Considering the importance of election matters, it is humbly submitted that the concept of Election Tribunals as envisaged before 1966 was the most successful method of resolving disputes in election matters. Article 329(b) also substantially deals with the requisite behind a judicial tribunal to deal with disputes arising out of or in connection with elections.

³⁹ *Background Paper on Electoral Reforms*, (Legislative Department Ministry of Law and Justice, Government of India) 31.

Detailed analysis of the issue has made it quite clear that the courts now actively exercise jurisdiction over electoral disputes even in the intermediary stage of the electoral process, though exclusively barred by Article 329(b), but the courts must ensure that while exercising such extraordinary jurisdiction they must not interfere in the formation of the legislature, considering the important purpose it serves.

Dialectics of Equality: Parliamentary and Judicial Perspectives

- Nayantara Ravichandran *

Abstract

The Indian Constitution, like the constitutions of most modern democracies, recognises the right to equality. It also recognises the need for affirmative action by permitting reservations for certain communities. This paper discusses how the Supreme Court and Parliament differ in their approaches to reservation. Both organs initially subscribed to a 'colour blind' notion of equality. However, in the last two decades the Parliament appears to place a greater emphasis on group rights and expand the scope of special treatment given to backward classes. The Supreme Court has attempted to balance this by accounting for other concerns such as administrative efficiency, social cohesion and the risk of elite individuals belonging to disadvantaged groups garnering all the benefits. These developments in Indian Constitutional law have been analysed by comparing them to the approach taken by the American Supreme Court in dealing with similar affirmative action policies.

Introduction

"The idea of equality is used in political discussion both in statements of fact, or what purport to be statements of fact - that men are equal - and in statements of political principles or aims - that men should be equal, as at present they are not. The two can be, and often are, combined: the aim is

then described as that of securing a state of affairs in which men are treated as the equal beings which they in fact already are.”¹

In the last two decades, the Indian Parliament has enacted a number of amendments to Article 16 of the Indian Constitution dealing with the fundamental right to equality. Each of these amendments was enacted in response to a Supreme Court ruling on reservation for backward classes in state employment. The judicial rulings and the consequent constitutional amendments point to differing notions of equality that are held by the Court and Parliament.

All modern democratic constitutions guarantee citizens equality before law and prohibit discrimination by the state. But there are different understandings of this concept of equality. At one end of the spectrum is the “colour blind” notion of equality that requires the law and the state to treat all individuals alike, without regard to the groups they belong to. In fact this notion treats all classifications as inherently suspect and that classifications based on groups would only perpetrate divisions in society. In countries such as India where centuries of caste-system has left significant sections of the society socially, educationally and economically backward or the USA with its history of racial discrimination, this “colour blind” or “anti-classification” concept of equality has been countered by the “anti-subordination” concept which provides that equality in society can be achieved only if historical injustices are corrected only by granting special

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¹Williams, Bernard, *The Idea of Equality*, PHILOSOPHY, POLITICS AND SOCIETY (P. Laslett & W.G. Runciman eds., 1962).

rights to marginalised groups.² As Williams points out, men should be equal but are not and equality requires securing such a state.

The Indian Constitution, even as it was originally framed, did not believe in a mere formal vision of equality i.e. the equal treatment of all citizens by the laws and the State without discrimination on the basis of race, religion, caste or gender. The Constitution recognized the existence of highly unequal groups for historical reasons and that equal treatment of individuals would only serve to reinforce these group inequalities. It allowed for special treatment for individuals on the basis of their group identity or their membership in a weaker section of society by way of reservation in state employment.

In the last two decades, however, the Supreme Court and Parliament have differed in their approaches to reservation. This paper discusses how over time the Indian Parliament has expanded the scope of special treatment of backward classes while the Supreme Court has been more cautious in balancing such special treatment with other concerns such as administrative efficiency, social cohesion and the risk of elite individuals belonging to disadvantaged groups garnering all the benefits. The development of Indian Constitutional law in this regard is analysed by comparing it to the approach taken by the U.S. Supreme Court in dealing with similar affirmative action policies.

The era of colour blindness

Article 14 of the Indian Constitution guarantees equality to all persons before law. Article 15 prohibits the State from discriminating against

²Owen Fiss, *Groups and the Equal Protection Clause*, 5(2) PHILOSOPHY AND PUBLIC AFFAIRS 107 (1976).

citizens, Article 16 and Article 29 respectively prohibits discrimination in public employment and in admission to State educational institutions. At the time the Constitution came into force, Article 16(4) was the only provision that recognised group rights by permitting reservations for backward classes in State employment. The debates of the Constituent Assembly further indicate that reservations were seen as a time-bound, transitional measure to end caste differences, whereupon citizens would have rights only as individuals.³ Thus the Constitution appeared to advocate a colour-blind view of equality, with the sole exception of Article 16(4).

The Supreme Court supported this view in the early years, viewing Article 16(4) as the only exception to the rule that discrimination on the basis of group identity was unconstitutional. Since Article 16(4) was limited to appointments, the Court considered reservations in educational institutions⁴ and in matters related to remuneration, superannuation etc.⁵ as unconstitutional. It further clarified that Article 16(4) was enabling, rather than mandatory, and thus the absence of reservations could not be challenged.⁶

Keeping in line with the colour-blind vision, the Court had struck down the Madras Government's policy for reservation on the basis of caste and religion in educational institutions.⁷ The Parliament enacted Article 15(4) in response to permit special provisions for the advancement of socially and educationally backward classes, Scheduled Castes and Scheduled Tribes and therefore reservation in educational institutions. The Supreme Court

³ Scott Grinsell, *Caste and the Problem of Social Reform in Indian Equality Law*, 35 YALEJ.INT'L.L. 199 (2010).

⁴ *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226.

⁵ *General Manager, Southern Railways v. S. Rangachari*, AIR 1962 SC 36.

⁶ *C.A. Rajendran v. Union of India*, AIR 1965 SC 507.

⁷ *Supra* note 4.

and Parliament largely did not differ in their approaches towards equality – perhaps the reason for this was that this was the only significant constitutional amendment in that period. Both saw colour-blindness as the rule and that all exceptions had to be constitutionally permitted. The Court held in *MR Balaji*,⁸ that the exception could not overshadow the general rule of anti-discrimination and thus reservations could not exceed 50%.

It is interesting to note the similarity with the approach of the Supreme Court of the United States in the 1950s and 1960s. In this period the Court declared unconstitutional racially discriminatory laws that provided for racially segregated schools⁹, anti-miscegenation laws,¹⁰ and laws prohibiting inter-racial marriages.¹¹ In doing so, the Court applied the colour-blind anti-classification principle, but used anti-subordination justifications as well. But in the 1970s, the Court decided in a number of cases that facially neutral measures with differential impact on races were not unconstitutional unless adopted with discriminatory purpose.¹² Thereafter the Court began to apply strict scrutiny to affirmative action policies on the basis that anti-classification would apply even to benign but race-conscious measures,¹³ even though liberal judges wanted strict scrutiny for race-based actions that burdened minorities and only intermediate scrutiny for efforts to promote racial integration.

⁸ *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649.

⁹ *Brown v. Board of Education* 347 U.S.483 (1954).

¹⁰ *McLaughlin v. Florida* 379 U.S. 184(1964).

¹¹ *Loving v. Virginia* 388 U.S. 1(1967).

¹² *Keyes v. School District No. 1413* U.S.189 (1973); *Washington v. Davis* 426 U.S. 229 (1976); *Personnel Administrator v. Feeney* 442 U.S. 256 (1979).

¹³ *Regents of the University of California v Bakke*, 438 U.S. 265 (1878); *Metro Broadcasting, Inc. v. FCC* 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Co.* 515 U.S.200 (1995).

In India, the move away from the strict anti-classification perspective was seen for the first time in Subba Rao J.'s dissenting opinion in *T. Devadasan v. Union of India*.¹⁴ The majority held that it would be unconstitutional to carry forward unfilled reservation seats in order to maintain the total proportion of people employed from the reserved group if it were used to make reservations for over 50% of the seats. Subba Rao J., in his dissenting opinion made the radical claim that the provisions under Article 16(4) did not create an exception and that affirmative action was part of the larger concept of equality. This was the first time that there was a deviation from the idea that Article 16(1) was the paramount provision dealing with equality and that all special treatments on the basis of group identity violated Article 16(1) unless permitted by another provision in the Constitution.

But this dissenting view in *Devadasan* was adopted thirteen years later as the Court's view in *State of Kerala v. N.M. Thomas*¹⁵ where the Court upheld the promotion of unqualified SC/ST candidates, giving them a two year period to fulfil their requirements. This was based on the reasoning that it would ensure equality in representation of groups while fulfilling efficiency requirements and that equality needed to be understood as applying to similarly situated groups.¹⁶ In other words, differently situated groups could be treated differently. A majority of four judges held that Article 16(4) was merely an *emphatic restatement* of Article 16(1) and was a method to achieve the equality envisaged by it, implying that even Article 16(1) permitted reservations. This was a major departure from precedent. If

¹⁴*T. Devadasan v. Union of India*, AIR 1964 SC 179.

¹⁵*State of Kerala v. N.M. Thomas*, AIR 1976 SC 490.

¹⁶*Ibid.*

Article 16(4) was not an exception, then even the rule in *Balaji* would lack a proper basis.

It is interesting to note that even in this case the judges were not unanimous in their reasoning. While Fazl Ali and Krishna Iyer JJ. used anti-subordination justifications, Beg J. held that the case was covered by Article 16(4). Mathew J. held that while the objective was *individual* equality, membership of a group could be used as a means to identify individuals that had suffered discrimination.

Mandal Commission and after

The recent conflict really began with the reservation for the backward classes in state employment following the recommendations of the Mandal Commission. It is important to note that this reservation was not authorised by a constitutional amendment or a statute but by an executive act of reservation of 27% of posts in public employment for Socially and Economically Backward Classes (SEBCs). . The SEBCs were identified by a set of social, educational and economic indicators. The reservation was in addition to the existing 22.5% reservation for Scheduled Castes and Tribes. The limit of 27% was fixed so that the overall reservation did not exceed 50%, and thus run afoul of *Balaji*. As is well known, this executive measure led to several protests and social debate as well as a legal challenge. In *Indra Sawhney v. Union of India*,¹⁷ a nine-member bench of the Court dealt with a challenge to the implementation of the Mandal Commission on grounds that it violated Article 16. In order to uphold the reservation for SEBCs, the Court ruled that Article 16(4) was not an exception but a restatement of Article 16(1). But the Court laid down certain conditions.

¹⁷AIR 1993 SC 477.

First, the Court held that insofar as the SEBCs were concerned the “creamy layer” had to be identified and denied benefits but this need not be done for Scheduled Castes and Tribes. The identification of a creamy layer takes individuals out of a group.¹⁸ This appears to remedy the problem of “over-inclusiveness” and thus ensure that only *backward individuals* receive the benefit of the policy.¹⁹ However it also appeared to operate on the assumption that all Scheduled Caste and Scheduled Tribe individuals deserve the benefit of the policy.

Secondly, the Court upheld the 50% limit on reservations laid down in *Balaji*. However it provided no rigorous justification for continuing with the limit. Since the Court held that Article 16(4) was merely a restatement of Article 16(1), the *Balaji* reasoning that the exception cannot overshadow the rule does not seem to have any logical basis.²⁰

Thirdly, the Court held that the 50% limit would apply even when the carry forward rule was applied i.e. unfilled seats could be carried forward only as long as the total number of seats reserved do not exceed 50%. It was reasoned that equality guaranteed under Article 16(1) had to be balanced against the special provision in Article 16(4) for socially disadvantaged classes, with neither being permitted to eclipse the other. This appears to be somewhat inconsistent with the idea that Article 16(4) is an emphatic restatement. It instead seems to suggest that Article 16(1) and the idea of

¹⁸ Clark Cunningham & Madhav Menon, *Race, Class, Caste...? Rethinking Affirmative Action*, 97 MICHIGAN L.REV. 1296 (March, 1999).

¹⁹Fiss, *supra* note 2.

²⁰Gautam Bhatia, *Reservations, Equality and the Constitution – V: Indra Sawhney*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, (March 1, 2014), available at <https://indconlawphil.wordpress.com/2014/03/01/reservations-equality-and-the-constitution-v-indra-sawhney/>, as viewed on December 12, 2014.

individual equality has to be balanced against the notion of group equality in Article 16(4).

Fourth, the Court also overruled previous decisions that had permitted reservations in promotions.²¹ It was held that reservations could be made only for direct recruitment. The risks of inefficiency and the ‘leapfrogging’ of backward classes over the general category were considered relevant while arriving at this conclusion.

The wide-spread protests following SEBC reservations²² were noted by the Court,²³ as was the Mandal Commission’s warning that the social fabric of the country would be rent unless the high castes deal with the demands and aspirations of historically suppressed and backward classes.²⁴ The Court responded to these concerns by directing that a permanent body be established at the Centre and State level to redress grievances regarding the inclusion or non-inclusion of groups, classes and sections in the list of OBCs. It also recommended the periodic revision of the list to ensure that groups that ceased to be backward were excluded.²⁵ The Court appears to have not just applied the anti-subordination principle but also articulated a third principle – one of balancing the need for special treatment for members of historically advantaged groups with considerations such as preventing over-inclusiveness and not compromising administrative efficiency.

²¹*General Manager, Southern Railways v. Rangachary*, (1962) 2 SCR 586; *State of Punjab v. Hiralal*, [1971] 3 SCR 267; *Akhil Bhartiya Soshit Karamchari Sangh v. Union of India*, [1981] 1 S.C. 246.

²² Kyle Rene, *Affirmative Action in the U.S. and India*, 3GEO.J.L&MOD.CRIT.RACEPERSP. 303 (2011).

²³*Indra Sawhney v. Union of India*, AIR 1993 SC 477, para 23.

²⁴*Indra Sawhney v. Union of India*, AIR 1993 SC 477, para 14.

²⁵M.P. Jain, *INDIAN CONSTITUTIONAL LAW*, (5thedn., 2009).

It is useful to compare these developments in India with the approaches adopted by the US Courts. Conservative American judges apply a “*colour blind anti-classification*” principle to view equality provisions as being applicable to individuals rather than groups. They view the classification of individuals as perpetuating divisions unless it is to remedy specific wrongs. Liberal judges on the contrary distinguish between benign and invidious discrimination by applying the “*anti-subordination*” principle. They take the view that affirmative action in favour of historically disadvantaged groups would be valid while facially neutral policies with differential impact on groups are suspect.²⁶ This approach may increase the risk of arbitrary classifications and reinforcement of distinctions. It is criticised on the ground that conferring group rights could result in over-inclusiveness or under-inclusiveness, not benefiting the intended individuals.²⁷

It may be seen that ‘swing judges’ have taken a differing approach – one that has been termed as *anti-balkanisation*.²⁸ This approach allows affirmative action but imposes certain constraints to prevent aggravating racial resentments. In *Regents of the University of California v Bakke*²⁹ where the Court held that reservation of seats for minority races was discriminatory, Justice Powell who was part of the majority said that race could be considered to establish diversity, provided it was one of multiple criteria.³⁰ Siegel sees the Court’s upholding of the affirmative action policy

²⁶ Reva Siegel, *From Colorblindness to Anti-balkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE LAW JOURNAL 1278 (2011).

²⁷Fiss, *supra* note 2.

²⁸ Siegel, *supra* note 26.

²⁹*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

³⁰Varn Chandola, *Affirmative Action in India and the United States: The Untouchable and Black Experience*, 3 IND.INT’L&COMP.L.REV. 101 (1992-3).

in Michigan Law School³¹ on grounds of diversity as a continuation of this approach.³²

In a similar manner, one can say that the Indian Supreme Court in *Indra Sawhney* gave up the colour blindness approach without accepting the anti-subordination approach in its entirety. It appeared to be balancing group rights against individual rights and administrative efficiency. In fact, in every significant judgement thereafter, the Supreme Court was to reiterate that this balance was crucial.

Plethora of constitutional amendments

As against this balancing approach of the Supreme Court, Parliament moved rapidly with a strong anti-subordination perspective, making several constitutional amendments to overcome Supreme Court decisions. Article 16(4A) was introduced to permit reservations for SCs/STs in promotion, reversing the ruling in *Indra Sawhney*.³³ While the Court upheld the constitutionality of this provision, it continued to refer to the need to balance between two concepts of equality and stated that such reservation in promotions would have to be consistent with the constitutional requirement for efficiency in administration under Article 335.³⁴

The Court further applied this balancing principle when it upheld the ‘catch up’ rule. It provided that when a reserved candidate was promoted before a senior general candidate, he could not claim seniority when the general candidate was later promoted.³⁵ The Parliament responded with a

³¹*Grutter v. Bollinger* 536 U.S. 332 (2003)

³² Siegel, *supra* note 26.

³³ Art 16(4A), Constitution of India, 1950.

³⁴*Ashok Kumar Thakur v. State of Bihar*, AIR 1996 SC 75.

³⁵*Ajit Singh (II) v. State of Punjab*, AIR 1999 SC 3471.

retrospective amendment to do away with the rule.³⁶ It further added Article 16(4B) to permit carrying forward of unfilled reservation vacancies without a limit of 50%. Article 335 was also amended to clarify that considerations of administrative efficiency would not prevent any special provisions for SCs or STs.³⁷

In *R.K. Sabharwal v. State of Punjab*,³⁸ the court held that all reserved vacancies are to be filled only by reserved candidates even if some reserved candidates get through the general selection. In fact, the challenge to the rule was couched in group-rights terms, since if the group got adequate representation whether in the general or reserved quota, group parity was achieved. But the Court's reasoning that individuals who are incapable of getting through the general selection should not be prejudiced because of the success of other members of the group emphasises individual rights. In relation to how the appointments should be made after the quota is achieved, the Court held that every vacancy had to be filled from the same category in the roster and justified this on the ground that Articles 16(1) and 16(4) have to be balanced.

The Supreme Court, in *M. Nagaraj v. Union of India*³⁹, dealing with a challenge to the amendments to Articles 16(4A), 16(4B) and 335, observed that the amendments did not alter the basic structure since they only affected *judicially evolved concepts* and not constitutional code of equality. It was stated that the judicially evolved restrictions such as the 50% limit, the creamy layer principle, the need to show backwardness and efficiency in administration would have to be applied. Here, again, the Court's decision

³⁶Constitution (85thAmendment) Act, 2002.

³⁷ Constitution (81stAmendment) Act, 2000.

³⁸*R.K. Sabarwal v. State of Punjab*, AIR 1995 SC 1371.

³⁹AIR 2007 SC 71.

was based on the principle that Articles 16(1) and 16(4) have to be balanced. The Court also upheld an amendment permitting special provisions in educational institutions for SEBCs on the ground that while the larger principle of equality is part of the basic structure, it is possible to modify the manner in which it is viewed.⁴⁰

The rationale of *Nagaraj* was applied in *U.P. Power Corporation Ltd. v. Rajesh Kumar*⁴¹ when the Court struck down reservations in promotions as arbitrary since they were not based on quantifiable data regarding ‘backwardness’ and ‘inadequacy of representation’. This new requirement to show backwardness to justify reservations for SCs/STs essentially performs the same function as the ‘creamy layer’, a clear deviation from the Court’s previous position. There is a further risk that the ambiguity regarding the standard to prove backwardness will lead to under-inclusion, thus affecting individual rights. The Parliament attempted to solve this problem with the Constitution (117th Amendment) Bill, 2012 that specified that all SCs/STs are to be considered backward and their rights would prevail regardless of administrative efficiency.⁴² This Bill lapsed though it is conceivable that the Parliament will pass such an amendment in future to further entrench the anti-subordination principle in the Constitution.

Most recently, the Supreme Court in *Rohtas Bhankhar v. Union of India*⁴³ upheld the constitutionality of relaxing standards for SC/ST candidates. The decision reiterated the conclusions of *Nagaraj* that justified the insertion of Articles 16(4A) and (4B) since they do not alter the structure

⁴⁰*Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

⁴¹(2012) 7 SCC 1.

⁴²Constitution (117th Amendment) Bill, 2012.

⁴³(2014) 8 SCC 872.

of Article 16(4) and are to be balanced against existing constitutional requirements.

It is clear from the constitutional amendments that the Parliament now subscribes to the anti-subordination perspective. The recent decisions of the Supreme Court make it similarly clear that it no longer conforms to the *Thomas* view that Article 16(4) is a restatement of Article 16(1). It instead appears to acknowledge that there is a need to balance the individual rights guaranteed under Article 16(1) with the group rights guaranteed under Articles 16(4), (4A) and (4B). Despite these differing approaches, it is interesting to note that the Court has so far upheld the constitutionality of all the amendments. The rationale behind this may be gleaned from the Court's observations in *Nagaraj*. Here, the Court recognised that *equality* is part of the basic structure of the Constitution, without explaining which conception it referred to. It further observed that both Articles 16(1) and 16(4) are restatements of equality guaranteed under Article 14. If this logic is accepted, only an amendment that cannot be justified under any conception of equality will be in violation of the basic structure. This raises several interesting questions regarding the future interactions between the Court and Parliament. If the Court follows its own ruling in *Nagaraj*, it will be able to apply the balancing principle only to a limited extent and will be largely bound to accept future constitutional amendments.⁴⁴

There is a pending case before the Supreme Court regarding the reservation policy followed in Tamil Nadu. The state currently has 69% reservation,

⁴⁴Gautam Bhatia, *Reservations, Equality and the Constitution – VIII: Ashoka Kumar Thakur, 15(5) and the Basic Structure*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, (April 6, 2014), available at <https://indconlawphil.wordpress.com/2014/04/06/reservations-equality-and-the-constitution-viii-ashoka-kumar-thakur-155-and-the-basic-structure/>, as viewed on December 17, 2014.

sidestepping previous rulings by enacting legislation under the ninth schedule of the Constitution. The State Government has justified the high percentage by citing the high percentage of backward classes in the population.⁴⁵The Court has so far permitted the practice to continue so far by creating 19% additional seats to offset the extra reservation.⁴⁶While it is not clear what the final decision will be, it is possible that the Court will consider the peculiar composition of the population and apply the balancing principle to uphold the existing reservation policy.

Conclusion

The understanding of the equality provisions has evolved out of a unique dialectic interaction between Parliament and the Court. The original colour-blind perspective adopted by the Court was uncontested by Parliament and the gradual shift towards an anti-subordination perspective was reflected in both Government policies and Court decisions. But once Parliament became more resolutely anti-subordination, the Court seems to be concerned about entrenching caste rights without regard to the belief that India should ultimately become a casteless society. This appears to be the reason the Court has moved to balancing with individual rights.

The Court was also conscious of the problem of identifying appropriate beneficiaries and the risk of classification encouraging identity politics. If traditional classifications were not modified to account for changing social

⁴⁵ J. Venkatesan, *TN justifies 69 per cent quota law in Supreme Court*, THE HINDU, (April 2, 2013), available at, <http://www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/tn-justifies-69-per-cent-quota-law-in-supreme-court/article4571875.ece>, as viewed on December 17, 2014.

⁴⁶ *SC last word not yet out, 69% reservation in Tamil Nadu stays for now*, TIMES OF INDIA, (November 8, 2014), available at <http://timesofindia.indiatimes.com/city/chennai/SC-last-word-not-yet-out-69-reservation-in-Tamil-Nadu-stays-for-now/articleshow/45076738.cms>, as viewed on December 17, 2014.

conditions, benefits would be appropriated by the better off among the group.⁴⁷ For these reasons, the Court appears to have reserved its right to determine whether the classifications are an ill-fit on a case to case basis and formulated the concept of the creamy layer.

The later decisions of the Court are not rigorous from one perspective and suffer from some illogicality, blurring the two concepts. But the Court was also performing an institutional balancing role. Hence the discourse of balance: balance between efficiency and social justice, balance between the individual rights and group equalities, balance between Articles 16(1) and 16(4).

⁴⁷Menon, *supra* note 18.

Stridhana & the Hindu Succession Act, 1956: A Positive Step?

- Dhruva Murari Gandhi*

Abstract

The Hindu Succession Act, 1956 is often characterised as a watershed moment in the history of the empowerment of women in India. However, an analysis of the requisite provisions of the statute in contraposition to the concept of Stridhana leads one to question the holistic nature of this characterisation. Accordingly, in the first part of the paper, the author examines the concept of Stridhana, a pivotal concept in classical Hindu law to bring to the fore three fundamentals of this concept, namely, (i) ownership, (ii) control and (iii) heirship. In the backdrop of these essentials, the author, then, proceeds to scrutinise the changes effected by the Hindu Succession Act. Whereas the statute progressively confers absolute ownership rights to women over all such property owned and possessed by them, the fundamentality of control and heirship have been reversed by the legislation in that the individuality of women has, consequently, been affected detrimentally. This conclusion is arrived at by a reflection of the statutory provisions both in terms of constitutional mandates and material realities. A doubt, though, is cast upon this deduction by a study of the relationship between the property rights of women and the domestic violence inflicted upon them. In the opinion of the author, however, a resort to the same as justification for the prevalent position of law is tantamount to a dereliction of its duty by the State. Therefore, the law to the extent that

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it has diluted the essence of Stridhana marks as much of a missed opportunity in the context of the goal of the empowerment of women.

Introduction

Discrimination on the grounds of sex has for long been an accepted norm in Indian society. Moreover, such discrimination has not been confined to select domains but has been all-pervasive. Naturally, unfair and unjust outcomes have been the resultant of this persistent inequality and there has been felt a need to rectify the same. The State has responded to this challenge at different times by different measures. However, the two broad themes underlying all such efforts by the State have been the empowerment of the discriminated and the removal of unequal practices.

The Hindu Succession Act of 1956 ('the HSA', hereinafter) too, in its endeavour to reverse the marginalisation of Hindu women in the domain of succession, sought to embody these themes in that it made an attempt to empower Hindu women and to eliminate traditions that furthered the discrimination of Hindu women. The steps envisaged in this legislation to give effect to the same included, among others, the conferment on women of absolute ownership of all property possessed and acquired by them, the conferment on women of inheritance rights and the removal of re-marriage as a disqualification to the procurement of an interest in property. Concomitant, however, to the bestowal of these rights was a discontinuation, whether advertent or inadvertent, of the erstwhile practices in this regard and the paradigm shift, thereby, brought about in the position of law was bound to have varied consequences.

This paper, then, marks an attempt to analyse comprehensively the contours and the ramifications of the cessation of one such tradition, namely, *Stridhana*. In light of the same, the paper is divided into three parts. In Part

I, the author seeks to study the meaning, as it was historically understood, of *Stridhana* itself. In the second part, the author analyses the change effected by the HSA as well as the constitutional and material implications of the same. The analysis, conducted in the backdrop of the objective of the legislation, attempts to bring to the fore the ineffectiveness in the actualisation of such objective. In Part III, however, the author peruses the nexus between the revelations made in Part II and the incidences of Domestic Violence and other analogous crimes against women and, thereby, raises further questions. The purpose of this entire examination is to ascertain whether the pertinent provisions of the HSA are, indeed, a positive measure. Accordingly, the Concluding Part of the paper seeks to assess the same.

Stridhana

The word *Stridhana* is derived from the words *stri*, woman, and *dhana*, property, and literally means a woman's property.¹ There is, however, a disagreement among the ancient texts with respect to the precise scope of such property. Manu, for instance, enumerated six kinds of properties to be included within the scope of *Stridhana*, namely, gifts made before the nuptial fire, gifts made at the bridal procession, gifts made as a token of love and each of the gifts made by the father, the mother and the brother of a woman.² Katyayana interpreted the same definition to subsume gifts made before the nuptial fire and at the bridal procession by strangers as well.³

Vijnaneswara, in the *Mitakshara*, further broadened the scope of this conceptualisation to include property obtained by inheritance, purchase,

¹D.F. Mulla, *PRINCIPLES OF HINDU LAW* (Sunderlal Desai ed., 16thedn., 1990), p.157.

²*Id.*

³Mulla, *supra* note 2, at 158.

partition, seizure and finding.⁴ Jimutavahana, in the Dayabhaga, on the other hand, excluded property obtained through inheritance and on partition.⁵ However, none of the ancient sages construed wealth, earned by means of mechanical arts or, received through gifts made by strangers as a token of affection to be *Stridhana*.⁶ The matter was finally laid to rest by the Privy Council when it held that neither inherited property⁷ nor the share obtained by a woman on partition would be a part of her *Stridhana*.⁸

The decision of the Privy Council, however, did not have any bearing on the nature of such property. The distinctive feature that characterised all kinds of *Stridhana*, that set it aside from other property possessed by women, was the absolute dominion that women had over such property. They enjoyed independent decision-making power in this regard and could sell, spend, gift or devise the property (also known as *Saudayika* property) at their own pleasure. Husbands could neither control the transactions entered into by women vis-à-vis their *Stridhana* nor could they use the property for themselves. A husband could exercise control over *Stridhana* only in times of extreme distress and even then he was deemed to have a moral obligation to reimburse his wife along with interest.⁹ Moreover, this right to exercise control was one that was personal to the husband and could not be availed of by his creditors.¹⁰

⁴J.D. Mayne, HINDU LAW AND USAGE (15th edn. 2006), p. 847.

⁵*Ram Gopal v. Narain*, (1906) 33 Cal 315.

⁶Mayne, *supra* note 5. It is to be noted that an exception has been carved out in this regard for maidens and widows. The self-earned property of a maiden or a widow, as the case may be, and the property gifted to them by strangers as a token of affection was held to be their *Stridhana* and all incidences of the same applied to such property.

⁷*Bhugwandeem v. Myna Bae*, (1867) 11 M.L.A. 487 (Privy Council).

⁸*Debi Mangal Prasad v. Mahadeo Prasad*, (1912) 34 All. 234 (Privy Council).

⁹Mayne, *supra* note 5, at 849.

¹⁰*Tukaram v. Gunaji*, (1871) 8 Bom HC (ACJ) 129.

The essence of the aforementioned distinctive nature may be truly appreciated when it is realised that the property earned by women through mechanical works or gifted to her by strangers (namely, non-*Saudayika* property) was subject to the control of the husband irrespective of her absolute ownership of the said property. The independent power of women over such property was restricted. In fact, husbands had an inherent right to take, use and dispose this property at their own pleasure.¹¹ This right was, however, a mere reflection of the dependent position of women in Indian society. Women being socio-economically dependent on their husbands, their time were considered to belong to the husbands and the property acquired at the expense of such time was subject to the control of the husbands.¹² The fundamentality, thereby, of *Stridhana* may be said to lie in the control that women exercised over property and not in the mere ownership of the same.

According to the author, this fundamental feature may be fleshed out in its true composition by an observation of the heirs who succeeded to a woman's *Stridhana*. Mitakshara law divides *Stridhana* into two categories for the purposes of succession, namely, *shulka* and non-*shulka* types of property. The heirs to the *shulka* property¹³ are the full brothers, in their absence the mother and in her absence the father of the intestate¹⁴ whereas the order of succession for the non-*shulka* property is (i) the unmarried

¹¹Mayne, *supra* note 5, at 850.

¹²G. Banerjee, HINDU LAW OF MARRIAGE AND STRIDHAN (5th edn. 1923), p. 282.

¹³*Shulka* property covered the gratuity for which a bride was given in an *Asura* form of marriage, the ornaments, utensils and other such perquisites given at the time of marriage. However, this practice has long turned obsolete and the rules of succession applicable to such property, too, had changed before the enactment of the HSA.

¹⁴Mulla, *supra* note 2, at 172.

daughter, (ii) the married daughter who is not provided for¹⁵, (iii) the married daughter who is provided for, (iv) daughter's daughter¹⁶, (v) daughter's son, (vi) son and (vii) son's son.¹⁷ In the absence of each of the aforementioned heirs, the *shulka* property devolves upon the heirs of the father whereas the non-*shulka* property devolves upon the husband and after him, to his heirs. On the other hand, in the Dayabhaga School of law in the event of the default of the father of the intestate, the *shulka* property devolves upon her husband whereas the non-*shulka* property is further sub-categorised into *yautaka*, *ayautaka* and *anwadheyaka*, each with its own order of succession.¹⁸

The nub of the above discussion, however, lies, in the opinion of the author, in the devolution of the *Stridhana* of a woman upon her own heirs in accordance with the principle of propinquity and not upon the heirs of the nearest male relative. In light of the same, the true meaning of the fundamentality of *Stridhana*, adhered to above and as witnessed in its control and its devolution, lay in the intimate nexus of a woman's properties with her individuality. *Stridhana* symbolised, at a certain level, a crude recognition of the differentiation between sexes in contradistinction to the incorporation of the identity of a woman into that of the nearest male relative. Accordingly, the enactment of the HSA marked an opportune moment to consolidate upon such recognition in the endeavour to attain the equality of sexes.

¹⁵ The rule of *Stridhana* which favours the unmarried daughter over the married one does not apply to illegitimate daughters. All of them take equally, whether married or not.

¹⁶ A daughter's illegitimate daughter is not entitled to inherit save in case of a special custom to the contrary.

¹⁷ Mayne, *supra* note 5, at 855-856.

¹⁸ Mulla, *supra* note 2, at 178-179.

A positive step?

As a marker of change, the HSA abolished the concept of *Stridhana* altogether. Instead, it introduced the notion of absolute ownership rights for women over all property, irrespective of the nature of the same, possessed as well as acquired by them.¹⁹ Moreover, the legislation also provided for a separate scheme of inheritance to the property held by women.²⁰ Consequently, the HSA was touted by many to be a harbinger of a new era of equality among men and women. However, a few distressing constitutional as well as material defects did percolate the edifice of the law.

From a constitutional perspective, S. 15 of the HSA infringes upon the mandate of both Articles 14 as well as 15 of Part III of the Constitution. As per S. 15, the order of succession to the property of a female intestate is (i) the children (and in their absence the surviving grandchildren) and the husband, (ii) the heirs of the husband, (iii) the father and the mother, (iv) the heirs of the father and (v) the heirs of the mother. When juxtaposed with order of succession to a male intestate, it may be observed that while the principle of propinquity seems to constitute the basis of the classification of the heirs to a male, the same is not adhered to in case of a female in that the heirs of the husband precede the members of a woman's natal family.²¹The

¹⁹S.14, HSA.

²⁰S.15, HSA.

²¹Kulwant Gill, HINDU WOMEN'S RIGHT TO PROPERTY IN INDIA (1986), p. 494. The distinction, hence, provided for in the law also marks a failure on the part of the legislators to separate religious precepts from civil law. Civil law, as the name suggests, is not a fiefdom of religious leaders but a domain for the effective provision of civil rights. Accordingly, even though Hinduism may perceive the identity of women to be a derivative of that of their husbands, civil law must guarantee independent legal rights nonetheless. Further, the Right to Freedom of Religion under Article 25 being subject to public order, the same cannot be resorted to in order to justify such practices. See *Report of the National Commission to Review the Working of the Constitution* para. 3.39.3 (Ministry of Law, Justice & Company Affairs, Government of India, 2002).

unfairness of the conceptualisation envisaged becomes evident in the situation wherein a son of the husband's sister inherits in preference to a woman's mother herself.²² Importantly, however, there is no intelligible differentia to distinguish between men and women in the manner²³ thus provided for and the resultant unfairness, as stated above, amounts to a discrimination solely on the grounds of sex in direct contravention of the mandate of Article 15.

Besides an infringement of the constitutional identity envisaged in the fundamental law as a concomitant to the infringement of Article 15, the HSA also leads to a reversal of the intimate nexus established by *Stridhana* between a woman and her property in that it perpetuates the patrilineal descent of property. The heirs under S. 15(1) (a) & (b) and S. 15(2) effectively being the heirs of the requisite male relative, no matrilineal line of descent is created and never, in substance, does the property leave the clutches of the patriarchy.²⁴ The gravity of this ramification comes to the fore when contemplated in light of the objective of women empowerment.

²²*Omprakash v. Radhacharan*, (2009) 15 SCC 66. On the offhand, it is germane to note that the mother of a male intestate enjoys a better position as compared to the mother of a female intestate in that the former is a Class I heir and, thereby, inherits in equal measure with the widow and the children, as the case may be, whereas the latter only inherits in the absence of all Class I as well as Class II heirs of her daughter's husband. See Kasturi Gakul, *Hindu Women's Property Rights under Hindu Succession Laws*, 2(2) THE CLARION 149, 153 (2013).

²³ The absence of intelligible differentia may even be noticed in S. 15(2), HSA. While the law makes a provision for and draws a difference between the property inherited from the father and that inherited from the husband, there is no provision made for the self-acquired property of a woman.

²⁴ In light of the same, it may even be remarked that the property rights granted to women under this statute are mere secondary land rights i.e. rights enjoyed by indirectly by women through men. The vesting of ownership in a woman continues to remain a mere detour before property proceeds along a patriarchal lineage. See *World Survey on the Role of Women in Development: Globalization, Gender and Work*, U.N. General Assembly, U.N. DOC. A/RES/54/227 (1999).

At this juncture, it shall be appropriate to reflect upon the true position of women in Indian society by means of a study of material realities. Most women in India continue to occupy a position of socio-economic dependency within the family even today. There is an explicit denial of autonomy and independent decision making-power to women²⁵ and the same has been established empirically. According to the third round of the National Family Health Survey (2005-06), married women took merely 27% of the decisions regarding their own health, 32% of the decision regarding their daily needs and only 8% of the decisions regarding major household purchases.²⁶ Unfortunately, an improvement in employment and in education only had a positive impact on decisions made jointly by spouses. Independent decision-making rates showed minimal improvements.²⁷ The same could possibly be explained by the worth associated with the education of a woman in an Indian society. The society, even today, continues to emphasize upon the observation of traditions by its daughters-in-law with their education only being a secondary concern.²⁸

The vulnerability created by a subservient position within the family structure is compounded by a lack of access to and a deprivation of control

²⁵Reena Patel, *Women's Right to Property under Hindu Law*, 31(1&2) IND. SOC.-LEG. J. 73, 89 (2005).

²⁶National Family Health Survey, *Gender Equality and Women's Empowerment in India* 94 (2005-06).

²⁷*Id.* at 94-96.

²⁸Tejaswee Rao, *Is it Possible that some women secretly want a dowry*, THE LIFE AND TIMES OF AN INDIAN HOMEMAKER, July 12, 2013, available at <https://indianhomemaker.wordpress.com/2013/07/12/is-it-possible-that-some-women-secretly-want-a-dowry-perhaps-to-enhance-their-social-standing/>, as viewed on December 18, 2014.

Another possible explanation for a lack of mobility could possibly be the stereotypical norms along which work is divided between married couples.

See Rahul Lahoti, Hema Swaminathan et al., *Women's Property, Mobility and Decision-Making* 22 (2012) (Discussion Paper 01188, International Food Policy Research Institute).

over economic resources.²⁹ In an agrarian economy such as India, the figures for the ownership of agricultural land-holdings by women are abysmal.³⁰ Whereas 74.8% of the women in India are agricultural workers, only 9.3% of them own the land they cultivate.³¹ Further, there prevails a strong male domination both in the control of agricultural technology and in the dissemination of informational inputs.³² This disadvantage is only magnified when read in light of the low literacy levels, poor income earning skills and restricted employment opportunities prevalent among women.³³

These prejudicial material realities, when construed in the context of property rights, lead to the uncomfortable conclusion that whereas women own minimal shares of property, the control exercised by them over such property is even smaller. The extent and nature of any control exercised by an individual is generally, in the opinion of the author, discerned from the autonomy of decision-making and from the ability to make effective use of

²⁹ U.N. Dept. of Economic & Social Affairs, *The World's Women 2010: Trends and Statistics*, U.N. DOC. ST/ESA/STAT/SER.K/19 (2010).

³⁰ The situation is worsened by the fragility of the nature of ownership. There have been incidents reported in Haryana wherein Panchayats have passed resolutions to the effect that daughters are compelled to give up their share in parental property to their brothers on marriage. This practice, one could say, is also another reflection of the stereotypical perception of a man as *Shravan Kumar* and of a woman as *Paraya Dhan*. See Tejaswee Rao, *So why don't Indian women fight for their own ancestral property rights?*, THE LIFE AND TIMES OF AN INDIAN HOMEMAKER, JULY 12, 2013, available at <https://indianhomemaker.wordpress.com/2013/07/23/so-why-dont-indian-women-fight-for-their-own-ancestral-property-rights/>, as viewed on February 16, 2016.

³¹ U.N. Women, *Data on Women*, available at <http://www.unwomensouthasia.org/media-corner/data-on-women/>, as viewed on December 18, 2014. At an international platform, it has been quipped that while women perform 66% of the work and produce 50% of the world's food, they earn only 10% of the world's income and own merely 1% of the property. See OECD, *Women's Economic Empowerment* 6 (2011).

³² Bina Agarwal, *Widows v. Daughters or Widows as Daughters*, WIDOWS IN INDIA 153 (Martha Chan ed., 1998).

³³ According to the data assimilated by the erstwhile Planning Commission, women constituted only 26.5% of the labour force in the rural sector. The corresponding figure for the urban sector was 14.6%. However, the illiteracy rate among these women was as high as 60%. See Planning Commission, *Report of the Working Group on Women's Agency and Empowerment* 9 (2012).

such control. Women, in India, have traditionally always been under the heritage of a male individual, be it the husband, the brother or the father. Moreover, the empirical evidence of decision-making as quoted above, too, substantiates the contention that the decisions made by a woman vis-à-vis her property may rarely be autonomous. The other disadvantages experienced by women in terms of skills, learning, education, status et al., then, drive home the point that they lack the appropriate ability to effectively utilise their land. Accordingly, both the ownership as well as the control of land by women in India is negligible.

Land, the primary productive asset in an agrarian economy as India, is of utmost significance to assure to an individual a dignified life.³⁴ Given that land is a source of employment and livelihood, the income earned therein can be utilized for the provision of education and healthcare for the members of one's family.³⁵ Further, land may also be used as collateral in the course of commercial transactions and as a source of investment. Land, therefore, is an assurance of an adequate standard of living and a measure of stability and security.³⁶ A lack, thereby, of ownership and control over the land furthers economic vulnerability and social instability. Consequently, then, an improvement in the economic autonomy and social status of women mandates a fortification of their property rights. Women empowerment, therefore, may be infructuous without suitable measures to secure land rights, namely, measures to secure both ownership and control.

³⁴ U.N. Women, *Realising Women's Rights to Land and Other Productive Resources* 2 (2013).

³⁵ U.N. Dept. of Economic & Social Affairs, *Women's Control over Economic Resources and access to Financial Resources, including Microfinance* 8, U.N. DOC. ST/ESA/326 (2009).

³⁶ *Id.* at 7.

The HSA, in that it reinforces the patriarchal devolution of property irrespective of whether the same may be the self-acquired property of a woman, establishes the control of the nearest male relative of a woman over her property and, thereby, contributes to an exclusion of the woman from control over property. None of the father, brother, husband or other such male relative of a woman is ever under the apprehension of property moving out of their clutches. A woman's ownership of property is perceived to be a mere aberration; a secondary right. Accordingly, thereby, real control over the property is said to remain with the requisite male relative and there is no psychological or material compulsion to respect a woman's independent claim over her property.

In the opinion of the author, the provision of a truly distinct set of heirs to a woman would have resulted in a material difference in the perception of her property. A non-patriarchal line of descent would mean that property would not remain within the clutches of the patriarchy in perpetuity. A woman could, then, be viewed as an identity distinct from her husband or her father, as the case may be, and as individual in herself. Accordingly, the HSA can be construed as a moment in history wherein an opportunity to create a new social norm came to be squandered. This opportunity, however, could have been availed of by a continuation and expansion of *Stridhana*.

The labelling of the HSA as a squandered opportunity is also supported by the lapse on part of the Legislature to use the word "control" or any such phrase to that effect in S. 14.³⁷In the opinion of the author, a statutory

³⁷ The mere use of such a phrase, however, without a suitable difference in the construction of S.15, as noted above, may not have made a significant contribution to the objective of women empowerment. Ideally, S.14 in its current form must guarantee both ownership and control. However, the social realities, as have been highlighted in this paper, reveal that ownership does not necessarily confer control. Accordingly, whereas suitable modification in the construction of S. 15 holds the key for the conferment of such

recognition of the same would constitute an approval by the law of both, as noted above, the autonomy of decision-making and the capability of effective utilization of property. Besides the potential to create an apt social norm, such recognition could also create suitable justiciable rights.³⁸ Instead, the simultaneous abolition of *Stridhana* and the absence of a statutory recognition of the aforementioned nature have strengthened the substantial control of property by men. The HSA, in that it dilutes the control and freedom of a woman with respect to her property, yet again, leads to a reversal of the intimate nexus established between a woman's property and her individuality by the tradition of *Stridhana*.

As has been noted during the course of this paper, the empowerment of women is closely knitted to a guarantee of the fundamental values symbolised by *Stridhana*. Accordingly, the reversal of these fundamentals by the HSA has resulted in a scenario wherein the practical working of the law runs counter to its very objective.³⁹ In light of the same, it is, indeed, questionable whether the HSA was a positive step. However, an assessment in this regard cannot be carried out without an analysis of the interface between property rights and domestic violence.

Property and violence

In a study conducted in the state of Kerala by eminent economist Bina Agarwal, it was reported that the ownership of property by women shared

control, a difference in S. 14 would have buttressed the effort for change in that the change sought to be effected by S.15 would have gotten supplementary recognition in S.14.

³⁸ It is the submission of the author that these rights would have been broader in scope than the ones already conferred by the word 'ownership'. For instance, the exclusion of a woman from control over property owned by her could be considered to be mental cruelty and, thereby, a valid ground for divorce.

³⁹Reena Patel, *supra* note 26, at 92.

an inverse relation with the incidence of domestic violence.⁴⁰ Spousal physical violence among women who owned neither land nor housing was as high as 49% whereas among those owned both land as well as housing incidence of the same was only 7%. The corresponding figures for women who owned only land or only housing were 10% and 18% respectively.

On the other hand, in a study conducted at the University of Birmingham,⁴¹ it was reported that the incidence of physical violence shared an inverse relation with the control exercised by the husband over property. Accordingly, an increase in the control exercised by the wife led to an increase in the violence against her. The probable reason cited for the same was the compulsive need on part of the husband to ensure that the property be used in accordance with his desires and for the betterment of his household. Similar findings were also put forth in a study carried out by the National Bureau of Economic Research.⁴² Further, the third round of the National Family Health Survey, too, revealed a positive correlation between the control exercised by a woman over her employment earnings and spousal violence.⁴³

The contradiction, then, in the empirical evidence presented herein could possibly be explained by the difference between ownership and control. As has been noted in the previous chapter, in practical terms, ownership may

⁴⁰ Bina Agarwal, *India: Why property rights for women matter*, ONE WORLD SOUTH ASIA, November 7, 2013, available at <http://southasia.oneworld.net/features/india-why-property-rights-for-women-matter#.VJLABfmSxqV>, as viewed on December 18, 2014.

⁴¹ Sofia Ammaral, *Do Improved Property Rights decrease violence against women in India?*, December 2012 (unpublished article, on file with the University of Birmingham).

⁴² Nikita Lalwani, *Educated Women are less vulnerable, right?*, WALL STREET JOURNAL, March 27, 2014, available at <http://blogs.wsj.com/indiarealtime/2014/03/27/educated-women-are-less-vulnerable-right-wrong-says-study/>, as viewed on December 18, 2014.

⁴³ In the absence of any official data on the interface between domestic violence and ownership/control of property, the author is constrained to look at the findings of studies conducted in related areas to support his contention.

only amount to a formal holding of the property. The property is, in substance, only held by those with actual control over the property. A material change, if any, therefore, in the equation of power prevalent in status quo can only be effected by control over, and not mere ownership of, property. Accordingly, the HSA in that it conveys mere ownership of, and not control over, property preserves retention of power by the patriarchy. This perpetuation of status quo could, then, possibly explain the relatively lower rates of domestic violence as compared to what could have resulted had control of property by women, too, received legal recognition. In light of the same, it is not incongruent to question whether the HSA was, indeed, a retrograde step.

Conclusion

Over the course of this paper, the author has explained the concept of *Stridhana* as it prevailed prior to the enactment of the HSA, analysed the abolition of this concept by the HSA from a constitutional and a materialist standpoint and studied the interface between control over property and domestic violence. The question, however, that remains to be answered is whether the HSA was a positive step with respect to the property rights of women.

Proponents of this historic enactment would contend that the law extended for the first time ownership rights over every kind of property to women, most of which were, hitherto, considered to be the sole dominion of men. Moreover, the guarded approach adopted by the law even sought to safeguard women from acts of violence, whether physical, mental or emotional. On the other hand, the argument raised in criticism of the law would be that it was constitutionally unsound and materially irrelevant on

account of the manner of devolution of property and the nature of control over property provided for by it.

In the opinion of the author, a conclusive assessment of the law lies in a reconciliation of the aforementioned views. Whereas it is true that the HSA provided security and stability to several women by converting their limited estate into an absolute estate and by expanding the scope of their ownership rights, the claims that the law diluted the essence of *Stridhana* and, thereby, whittled down the realisation of its objective of women empowerment, too, are equally true. Further, a justification of the continual exclusion of women from property on the basis of the need to safeguard them from instances of domestic violence amounts to a grant of an exemption to the State from due performance of its most basic duty. Moreover, this argument presumes the non-formation of suitable norms in society subsequent to a due change in the law that may effectively change behavioural tendencies. On a concluding note, therefore, it may be said that though the HSA was a positive measure, it failed to successfully avail of the opportunity to truly empower the women of India.

The Factories (Amendment) Bill, 2014: A Critical Analysis

- Neha Barupal & S. Mohammed Raiz*

Abstract

The controversial Factories (Amendment) Bill, 2014 is yet another step towards extensive labour reforms in India and has faced strong resistance from trade unions. The purpose of this paper is to analyze certain important amendments proposed in this Bill in order to ascertain the net potential effect on various groups, specifically vulnerable factory workers. The Bill seeks to achieve the object of relaxing labour laws while also providing for certain praiseworthy provisions that are beneficial to workers. We have scrutinized pros and cons of the salient features of the Bill and have given suggestions for improvement in certain areas such as provisions relating to women workers, criteria for constituting a 'factory', hazardous processes, increase in 'spread over' and overtime hours, and penalty provisions. Overall, the proposed changes are pro-labour; however a few are highly anti-labour and their effects need to be examined.

Introduction

The Factories Act, 1948 (hereinafter 'the Act') is one of the various legislations that govern labour laws in India. The Act specifically pertains to regulation of labour in factories and was enacted with the objective of providing safe and comfortable working conditions for employees thereby ensure their health and welfare. It has subsequently been amended seven

times¹ and is in limelight again amidst the extensive labour reforms taking place.

The latest amendment proposed to the Act, the Factories (Amendment) Bill, 2014 (hereinafter ‘the Bill’), aims to reform the outdated labour laws in the country and align it with the various changes in the manufacturing practices and emergence of new technologies, ratification of ILO Conventions, judicial decisions, recommendations of the Committees and decisions taken in the Conferences of Chief Inspectors of Factories.²

The Bill contains 64 clauses, many of which are undoubtedly beneficial for the workers though the degree of the benefit may vary from provision-to-provision. For instance, there are provisions for cool and safe drinking water to be provided to workers during summer irrespective of the number of workers employed;³ canteen(s) to be provided for by the employer in any factory where 200 or more workers are ordinarily employed instead of 250;⁴ supply of suitable personal protective equipment and protective clothing to the workers exposed to hazards.⁵ The Bill states that a factory with more than 75 workers should provide separate shelters or restrooms for male and female workers, as opposed to the existing limit of 150 workers.⁶ It also rectifies various omissions and mistakes in the Act and replaces the archaic unit of “horsepower” with power in kilowatts in line with the metric system.

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¹ The last of them was in 1987, post the Bhopal Gas Tragedy, whereby a separate chapter relating to hazardous processes was inserted.

² The Factories (Amendment) Bill, 2014, Statement of Objects and Reasons.

³ The Factories (Amendment) Bill, 2014, Clause 8, amending Section 18 of the Act.

⁴ *Id.*, at Clause 34, amending Section 46.

⁵ *Id.*, at Clause 20, inserting a new Section 35-A to the Act.

⁶ *Id.*, at Clause 35 of the Bill amending Section 47.

In the present paper, the authors aim to focus on and analyze the most important and contentious amendments proposed such as the change in definition of “factory”, aspects concerning women workers and overtime amongst others. Currently, there are many unanswered questions regarding the net effect of the proposed amendments on various groups concerned – the workers, existing factory owners, future factory owners, inspectors, and the public at large. The age old Marxist theory of conflict between haves and have nots is relevant here since there are many conflicting opinions regarding some of the proposed changes. It has to be seen whether the bill aims to be pro-business or pro-labour or is trying to strike a median between the two. The State is supposed to make provisions for securing just and humane conditions of work and for maternity relief⁷ in particular, but are these objectives being fulfilled in reality? The initial reactions from workers and various trade unions indicate that they are less than happy with some of the imminent changes.⁸ But then again, there is seldom absolute consensus when it comes to changes of such magnitude.

⁷ THE CONSTITUTION OF INDIA, 1950, Article 43.

⁸ Major trade unions participated in a rally on 5th December, 2014 protesting against ‘pro-management and anti-worker’ changes proposed in labour laws. See ‘Move to amend labour laws opposed’, THE HINDU, December 5, 2014, available at <http://www.thehindu.com/news/cities/Visakhapatnam/move-to-amend-labour-laws-opposed/article6665584.ece>, as viewed on December 31, 2015.

The opposition is evident from many statements such as that of D.L. Sachdev, National Secretary of the All India Trade Union Congress, who remarked: “*We oppose the amendments vehemently because we feel that they are against the interests of the workers*”, while Tapan Sen, General Secretary of Centre of Indian Trade Unions pointed out that “*The workers will be at the complete mercy of the employers*”. See ‘Can India’s Modi Government Navigate the Tough Terrain of Labor Law Reform?’, KNOWLEDGE@WHARTON, August 18, 2014, available at <http://knowledge.wharton.upenn.edu/article/india-modi-government-labor-law-reform/>, as viewed on December 31, 2015.

Major amendments proposed in the Bill**A. Definition of “factory”**

The Bill seeks to amend the criteria as to what constitutes a “factory” so as to fall under the purview of the Act. As is the common misconception, the Bill does not increase the minimum number of workers required for a premise to be a factory. However, in its bid to relax the labour law restrictions imposed on the businesses in the country, the Central Government has in a subtle manner, delegated to the State Government, the power to raise the minimum number of workers required to form a factory.

The Act prescribes minimum limit of 10 workers in a factory run with the aid of power and 20 workers without the aid of power.⁹ However, this power delegated to the State Government is not absolute since a proviso is added which restricts State Governments from raising the minimum prescribed limit beyond 20 workers with the aid of power and 40 workers without the aid of power.¹⁰ It safeguards the proposed amendment from being challenged in the judiciary on the ground of excessive delegation.

Such an amendment would allow State Governments the power to give relaxation with respect to which premises would fall under the definition of a factory and thereby come under the purview of the Act. This simply means that there is a possibility that the number of premises covered by the Act could reduce by a significant extent. The Trade Unions while making a representation before the Standing Committee, used the estimates made by the Annual Survey of Industries, to point out that enhancement of the threshold level of employment in an establishment to 40 workers will take

⁹ Factories Act, 1948, Section 2(m).

¹⁰ The Factories (Amendment) Bill, 2014, Clause 2(vi).

out more than 70% of the factory establishments in the country out of the coverage of the Act.¹¹

Considering the already existing difficulty in ensuring compliance with the same, premises which have no legal responsibility to comply could possibly provide extremely low standards of facilities relating to the work environment. This is an unwelcome situation for the labourers because not only will new premises be exempted from the Act, but existing premises, which can now be brought out of the purview of the Act, will be tempted to drop their standards too in the absence of any legal ramifications.

However, the proposed amendment cannot be categorised as out of tune with the overall Act because although the Act lays down provisions to be followed by all factories in the country, many powers are granted to the State Governments for implementation. For instance, the State Government has power to make rules regarding the approval, licensing and registration of factories.¹² Moreover, section 85 of the Act empowers the State Government to declare any establishment to be covered under the Act irrespective of the number of workers.¹³

Thus, the proposed amendment to the definition of 'factory' can also be viewed as bringing the provision in consonance with the Act itself. Another argument in favour of this change is that the State Governments are better equipped to decide the minimum limit to be set in their respective states

¹¹The Standing Committee on Labour (2014-2015), Third Report on 'The Factories (Amendment) Bill, 2014'; Surabhi, *Changes in labour law will affect half of all factories*, THE INDIAN EXPRESS, August 14, 2014, available at <http://indianexpress.com/article/india/india-others/changes-in-labour-law-will-affect-half-of-all-factories/>, as viewed on December 31, 2015.

¹²See Factories Act, 1948, Sections 4, 5 & 6.

¹³ *Id.*, at Section 85.

after analysing the local economic and labour conditions, thus promoting federalism in the nation.

While analysing the said change, it has to be noted that the same was demanded by a few State Governments in order to increase the threshold limits in their States for application of the Act. For example the Rajasthan State Government even came up with The Factories (Rajasthan Amendment) Bill, 2014 to increase the minimum number of workers required to the upper limit provided in the Bill.¹⁴ Heeding to this demand, the Bill proposes to give such power to them.

B. ‘Hazardous processes’ or hazardous provisions?

While amendments in sections 36¹⁵ and 37¹⁶ of the Act broaden the scope of protection to workers engaged in the specified tasks, there are certain major changes which could prove to be fatal:

Change in definition of ‘hazardous process’: The existing definition in section 2(cb) of the Act provides that “hazardous process” *means any process or activity in relation to an industry specified in the First Schedule where unless special care is taken, raw materials used therein or the intermediate or finished products, bye products, wastes or effluents thereof would cause material impairment to the health of the persons engaged or connected therewith, or result in pollution of the general environment.* The proviso states that State Governments may amend the First Schedule by way of addition, omission or variation of any industry specified. The Bill seeks to redefine it as a process involving a “hazardous substance”, the definition of which has been inserted by way of clause (cc). It means “*any substance*

¹⁴ Factories (Rajasthan Amendment) Bill, 2014, Clause 2.

¹⁵ Factories Act, 1948, Section 36 deals with ‘precautions against fumes, gases, etc.’

¹⁶ *Id.*, at Section 37 deals with ‘explosive or inflammable dust, gas, etc.’

as prescribed or preparation of which by reason of its chemical or physio-chemical properties or handling is liable to cause physical or health hazards to human being or may cause harm to other living creatures, plants, micro-organisms, property or the environment.”

According to the change, ‘hazardous substances’ will be duly notified from time to time allowing removal of the First Schedule. Though the reason provided behind such a change is the restrictive scope of the First Schedule, oppositions have maintained that there may be situations where hazardous substances may not be used, in spite of which the process may be hazardous.¹⁷ Therefore, removal of the First Schedule hints towards dilution of norms regarding such processes and this is a cause of worry as it plays with the safety of workers. If processes that may actually be hazardous are carried on without the use of hazardous substances as notified, they would be outside the purview of many safety provisions in the Act and adequate protective measures may not be taken. Thus, we suggest that the First schedule should not be deleted;¹⁸ rather the norms should be made more stringent and specific.

Compulsory Disclosure of Information: Section 41B(4) of the Act currently mandates every occupier to make an on-site emergency plan and detailed disaster control measures with approval of the Chief Inspector and make this known to the workers and public living in the vicinity. The Bill seeks to confine this requirement to factories using ‘hazardous substances’

¹⁷ Gopal Krishna, ‘Chrysotile Asbestos, Rotterdam Convention's PIC List, Hazardous Substance & Factories (Amendment) Bill, 2014’, TOXICS WATCH ALLIANCE, December 26, 2014, available at <http://www.toxicwatch.org/2014/12/chrysotile-asbestos-rotterdam.html>, as viewed on February 10, 2015.

¹⁸ *Supra* note 11. The Government of Goa suggested that the First Schedule be made more specific in regard to the hazardous process in different types of industries. The Standing Committee also recommended that the First Schedule should not be deleted and instead revised regularly.

beyond specified threshold quantities.¹⁹ In light of the inherent dangers in certain processes, the risk of not having an emergency plan is like playing with fire. This should be a mandatory requirement for all because there can be no justification behind putting in peril not just the workers, but also the public at large.

C. ‘Spreadover’ period

‘Spreadover’ refers to the spread of periods of work of an adult worker and includes intervals for rest as provided under section 55 of the Act. This ‘spreadover’ is currently restricted to 10.5 hours.²⁰ However, the Bill amends the proviso to section 56 and empowers the State Government to increase the period of spreadover up to 12 hours in a factory or group or class or description of factories by way of a notification in the Official Gazette.²¹

This may lead to exploitation of workers through long working hours as has been pointed out by Trade Unions opposing the Bill. Labour as a factor of production is used in such a casual manner that they forget when their working day begins and when it ends.²² Such a feeling could be heightened in workers if their period of spreadover is increased by State Governments in terms of this provision. Considering the general demand of dilution of ‘stringent labour laws’ pervading the air of labour reforms and the initiative by Government of Rajasthan on the same lines, many State Governments are likely to relax their labour laws in order to promote their economic

¹⁹ Factories (Amendment) Bill, 2014, Clause 26.

²⁰ Factories Act, 1948, Section 56.

²¹ Factories (Amendment) Bill, 2014, Clause 36.

²² Jan Breman, *FOOTLOOSE LABOUR: WORKING IN INDIA’S INFORMAL ECONOMY* 124 (Cambridge University Press, 1996).

growth, in which case need and welfare of the workers will surely take a backseat.

It must be noted that the spreadover could have been increased to 12 hours under the Act also, if the Chief Inspector provided reasons for doing so in writing. The purpose of this amendment is to do away with the discretion of the Chief Inspector in this regard. Much has been said about the excessive powers given to Inspectors to regulate industries and factories in India and how this leads to gross discrimination.²³ Is it possible however, that in its endeavor to end ‘Inspector raj’ the Government may have sidelined welfare of the workers? There has been increasing pressure from the business community for making domestic labour laws more flexible and several steps taken by the Central and State Governments tend to follow that path. This may have an immense impact on workers who are not even being appropriately consulted before introducing such important changes.²⁴ An increase in the spreadover is no small matter as it affects workers’ daily lives and has consequential effects on their everyday schedule, their health and on the lives of their dependents.²⁵ Another observation is that increase in spreadover allows for more breaks to be incorporated between works.

²³ See Bibek Debroy, *India’s Segmented Labour Markets, Inter-state Differences, and the Scope for Labor Reforms* in Bibek Debroy, L. Bhandari, S. Aiyar and A. Gulati, *ECONOMIC FREEDOM OF THE STATES OF INDIA*, (Cato Institute 2013); Hemal Shah, *Transition to Labor Law Reform: State-Level Initiatives & Informal Sector Labor Relations*, 1 *The Indian Journal of Industrial Relations* (July 2014), p.50, available at <http://wiego.org/sites/wiego.org/files/publications/files/IJIR%20July%202014.pdf#page=38>, as viewed on December 31, 2015.

²⁴ *Supra* note 11. The Trade Unions alleged that the Government did not consult them on the proposed Amendment Bill before placing the Bill in Lok Sabha on 7th August, 2014 and that it was required to do so under the ILO Convention No.144 on Tripartism (ratified by the Government of India) since it provides for a *tripartite consultation* between the Government, the Employers’ Organisations and the Trade Unions before such legislative initiative.

²⁵ The effects on health and family have been discussed further under the heading “Overtime” in this Chapter.

Thus, workers could press this aspect, though employers are likely to utilize this opportunity to increase the work time rather than provide longer or multiple breaks.

Moreover, under the existing provision of the Act, the Chief Inspector is mandated to record reasons for increasing the period of spreadover, which is not required on part of the State Government, should it decide to do the same as per the Bill.

D. Overtime

One of the most important changes the Bill seeks to make is increasing the threshold limit of “overtime”. “Overtime” generally means any work done in excess of the normal hours. One puts in excess labour over and above the normal working hours in order to gain some extra monetary benefit²⁶ and an employer requires overtime work for meeting his output targets. Section 64(2) of the Act empowers the State Government to make rules providing for certain exemptions. According to section 64(4), the State Government cannot exceed specified limits of work and one such limit is that the total number of hours of overtime shall not exceed 50 for any one quarter.²⁷ The Bill proposes an amendment in clause (iv) of section 64(4) so as to double the permissible total number of overtime hours from 50 to 100.²⁸

On the same lines, clause 39 of the Bill proposes to amend section 65 which empowers the State Government to make exempting orders in relation to certain factory/factories owing to exceptional press of work. Section 65(3) is sought to be amended such that an exemption granted is subject to the condition that total number of overtime hours in any quarter shall not exceed

²⁶ See Hugh Collins, EMPLOYMENT LAW 91 (Oxford University Press, 2nd ed. 2010).

²⁷ Factories Act, 1948, Section 64(4) (iv).

²⁸ Factories (Amendment) Bill, 2014, Clause 38.

115. This figure currently stands at 75 hours. Moreover, a *proviso* has been introduced providing for further extension of hours of overtime work in any quarter in “public interest” by the State Government or Chief Inspector with prior approval of State Government up to 125 hours.

Beyond doubt, such amendments will have overbearing effects on workers of concerned factories. The issue can be addressed from two perspectives: i) that of existing workers and ii) that of the eligible but unemployed persons in the economy. In the first case, it becomes a problem of inferior quality of existing employment; and in the latter, it translates into loss of potential opportunity to be employed.

(i) Less / no time for leisure or for carrying out other responsibilities:

Increase in number of hours of work naturally leaves the worker with less time for himself/herself and his/her family. Although it may be beneficial for our developing economy, it comes at a price. The human resource development aspect is forgone when we consider such legislations because it inevitably leaves the worker with even lesser opportunities for rest and leisure activities, let alone personal growth. The family members of such a worker are also adversely affected as they are unable to spend quality time with the wage-earner. More hours spent working would leave a worker with less time to carry out basic activities such as sleeping, parenting and other household jobs.²⁹ In a short period of time, such overburden on a worker could lead to continuous physical fatigue, impact their psychological well-being and even make them prone to accidents in the workplace or endanger

²⁹Lonnie Golden and Helene Jorgensen, *Time after time: Mandatory overtime in the U.S. economy*, 30(1) Labor Studies Journal, (March 2005) p. 1-25.

a fellow worker.³⁰ He may become unable to work efficiently;³¹ and if the work involves manufacturing of certain articles, there may be deficiencies in those articles due to his/her inefficiency, which may even prove to be unsafe for the consumer.³²

The failure to create sufficient employment opportunities is a problem many countries, including ours, are grappling with. However, it is also common knowledge that less regard is shown towards the quality of employment being generated or provided. The philosophy seems to be: “First let us have jobs, and we can worry about their quality later.”³³ But surely, such a philosophy is bound to result in deterioration of employment standards and as a result, deterioration in the standard of living.

(ii) Negative Impact on Employment Generation:

It has been suggested that the proposed change would have a negative impact on employment generation or aggravate the problem of unemployment.³⁴ This is based on the logic that if the existing number of workers can carry out increased amount of work by putting in extra hours, the factory owner would not be compelled to hire more workers and thus not be required to extend any additional benefit. This is especially

³⁰ A. Dembe, *et al.*, *The impact of overtime and long work hours on occupational injuries and illnesses: new evidence from the United States*, 62(9) OCCUP ENVIRON MED., 588–597 (Sept. 2005); A. Kerin & J. Carbone, *OVERTIME IN EXTENDED HOURS OPERATIONS: BENEFITS, COSTS, RISKS, AND LIABILITIES*, (Lexington, Massachusetts, Circadian Technologies, 2003); A. Spurgeon, *WORKING TIME: ITS IMPACT ON SAFETY AND HEALTH* (International Labour Office, Korean Occupational Safety and Health Agency, 2003).

³¹ Michael White, *WORKING HOURS: ASSESSING THE POTENTIAL FOR REDUCTION*, (Geneva: International Labour Office, 1987).

³² *Supra* note 29.

³³ Gerry Rodgers, *et al.*, *THE INTERNATIONAL LABOUR ORGANIZATION AND THE QUEST FOR SOCIAL JUSTICE, 1919-2009*, (Geneva: International Labour Office, 2009).

³⁴ *Supra* note 11.

advantageous to him where the requirement for overtime is seasonal or intermittent. However, it denies unemployed people the opportunity to gain employment.

Another aspect to note here is use of the expression “public interest”. Its ambiguous nature allows possible misuse or overuse in order to extend the overtime work hours limit for any factory or factories. Thus, it provides scope for arbitrariness.

Now, the reason provided for amendment of these provisions is that the maximum permissible limit for overtime was felt inadequate in respect of some exceptional work such as in Government presses where workers are pressed for completion of urgent jobs in a short period. When the Ministry of Labour and Employment was asked to elaborate on this point by the Standing Committee on Labour, it was further emphasized that this change is proposed on demand of industries and seasonal factories. The Standing Committee has concluded with certainty in its Report that increasing the overtime hours across the factories would lead to an adverse impact on employment generation and suggested that a further amendment be put in effect such that industries/seasonal factories where a rise in overtime hours is seen as inevitable are distinguished and mentioned accordingly.³⁵

This is a sound recommendation as it balances the genuine need of certain industries or seasonal factories for carrying out more work with the general welfare of workers in other factories as they are saved from the burden of excessive overtime work. It is also a good proposition for those unemployed persons who will at least have the opportunity to be employed in factories

³⁵*Supra* note 11 ¶VI of “Observations/Recommendations”.

that require extra work to be carried out but are not covered by this provision.

E. Annual leave with wages

The Bill seeks to relax the provision regarding Annual Leave with wages as provided for in the Act. The conditions required for a labourer to avail of annual leave with wages, known also as paid leave, have been drastically relaxed. The Act required a worker to have worked for a minimum of 240 days; or if the worker started his work after first of January, for two thirds of the remaining calendar year.³⁶ Clause 43 of the Bill reduces the minimum days required from 240 to 90. This implies that if the worker started his work after first of January, working for one fourths of the remaining calendar year would entitle him to annual leave with wages as opposed to the previous limit of two thirds.

Thus, this proposed change would significantly increase the number of labourers who would be entitled to paid leave. This is an improvement on the benefits available to labourers in the country, who apart from being entitled to only minimal benefits often do not receive these as employers find ways to circumvent the legal provisions. The proposed amendment rightly aims to increase the number of workers who would get this benefit than to increase the quantum of this benefit.

F. Changes for women workers –relief after all?

Measures to improve the working conditions and prevent exploitation of women workers by employers are patent in labour legislations all over the world.³⁷ The Act contains many provisions with respect to women workers

³⁶ Factories Act, 1948, Section 79.

³⁷A. M. Sarma, ASPECTS OF LABOUR WELFARE AND SOCIAL SECURITY 197 (Himalaya Publishing House, 9th ed. reprint 2007).

and while the goal of many such provisions is their safety, the same have been rightly criticized as being discriminatory.

Two clauses of the Bill are aimed to promote gender equality or rather do away with some specific gender discriminatory language. By virtue of Clause 11 of the Bill, women can now work in or near machinery in motion, provided they are specially trained and wearing tight fitting clothing – just like their male counterparts. Similarly the prohibition placed in Section 22(2), barring women from carrying out tasks such as cleaning, lubricating or adjusting any part of a prime mover or of any transmission machinery while in motion, has been removed in the Bill and restriction is only on pregnant women, persons with disabilities and young persons.³⁸

This is a welcome change for all those women whose employment was earlier restricted in scope by virtue of this prohibition and thus served as reason for their non-employment by factory owners.

Another major change is removal of complete ban on employment of women at night. Section 66 of the Act states that no woman shall be required or allowed to work in any factory except between the hours of 6 a.m. and 7 p.m. A relaxation is provided in sub-section (2) in terms of the possibility of a State Government making rules for exemption from restrictions in sub-section (1). However, in that case also, no woman can be employed between 10 p.m. to 5 a.m.

The inspiration for such protective legislations is often the International Labour Organization. A Convention³⁹ was adopted by the ILO at its first Conference which prohibited night work for women. Nevertheless, it

³⁸ Factories (Amendment) Bill, 2014, Clause 11.

³⁹ Night Work (Women) Convention, 1919 (No. 4).

transformed from a “protective approach” to that of mainstreaming gender equality, as the former was consistently condemned by women’s movement.⁴⁰The Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948 was adopted to remove such restrictions on women’s employment.

India is attempting to follow the same path by way of this amendment. As per Clause 40 of the Bill, the absolute prohibition of employment of women between 10 p.m. and 5 a.m. has been removed to make way for gender equality, provided that the concerned State Government is satisfied as to existence of adequate safeguards in any factory/factories. It is pertinent to note that various parameters have been given in respect of these safeguards such as occupational safety and health, provision of shelter, restrooms, lunch rooms, night crèches and ladies’ toilets, equal opportunity for women workers, adequate protection of their dignity, honour and safety, protection from sexual harassment, and their transportation from factory premises to the nearest point of their residence. It is also required that State Government hold due consultations and obtain the consent of women workers, employer and representative organizations of the employers and workers before taking such measures.

This provision is clearly aimed at balancing the safety and protection of women with equal opportunity at workplace. *Prima facie*, it seems to be in line with various judgments of several High Courts⁴¹ and beneficial for

⁴⁰*Supra* note 37.

⁴¹*R. Vasantha v. Union of India & Ors.*, (2001) IILLJ 843 Mad: Section 66 was held to be *ultra vires* and a set of guidelines was given to ensure safety and welfare for women while being allowed to do night work. In *Mahila Utkarsh Trust v. Union of India*, 2014LabIC611: Held Section 66(1) (b) of the Factories Act, 1948 as *ultra vires* Articles 14, 15, 16, 19(1) (g) and 21 of the Constitution of India. See also *Triveni K.S. v. Union of India*, (2002) III ILJ 320 (Andhra Pradesh).

women since it removes yet another restriction placed on their employment and widens the contours of the same. The key take away is that now women will *at least have the option* to work night shifts. Yet, a note of caution is required while dealing with provision of ‘adequate safeguards’: if women workers commence working night shifts in factories and there is lack of ‘adequate safeguards’ for their safety and protection, the results could be grave. If not so, it would surely result in nullification of perceived “gender equality” provided by law, as without adequate safety, women would not want to work at night and thus practically the position remains unchanged. They are actually at the mercy of the employer because whether he desires to go the extra mile for their safety or not, only time will tell. Looking at the increasing rate of sexual and other crimes committed against women, ensuring their safety in the dark hours of the night is a delicate task and must not be taken lightly.⁴²

Furthermore, there is prohibition of women being employed in certain dangerous operations like pressing cotton in any part of a factory in which a cotton opener is at work.⁴³ This is sought to be changed by way of Clause 14 of the Bill which places restriction only on pregnant women, young persons and persons with disabilities.

Despite these changes aiming to foster gender equality, there is no change in terms of employment in dangerous operations. According to section 87, where the State Government is of the opinion that any manufacturing process or operation carried on in a factory exposes any persons employed in it to a serious risk of bodily injury, poisoning or disease, it may make

⁴²This view is supported by the view taken by the Standing Committee on Labour in its Third Report in Para VII of its Recommendations advising the Ministry of Labour and Employment to not leave any loopholes in this regard.

⁴³Factories Act, 1948, Section 27.

rules prohibiting or restricting employment of women as per clause (b) of the Section. This remains unchanged in the Bill as far as women are concerned. It is thus apparent that only selective changes are being proposed in the name of gender equality.

G. Compounding of offences

Clause 64 of the Bill introduces a Fourth Schedule to the Act under Section 92C providing a list of 32 Compoundable Offences. Offences such as not maintaining cleanliness, not providing drinking water, latrine and urinals, spittoons etc. are to be made compoundable. The reasoning given by the Ministry of Labour and Employment behind introduction of this schedule was that since criminal offences take a very long time to settle, immediately imposing financial penalty on the offenders would prevent such violations in future.⁴⁴ The current provision which imposes general penalty for offences in the Act provides for criminal punishment on the occupier and manager of the factory apart from the monetary punishment. They are liable for punishment for a term which may extend up to two years.⁴⁵

The Bill permits the Central or State Government to prescribe the authorised officers and the amount, for compounding of the certain offences before commencement of the prosecution. They may also amend the list of compoundable offences in the Fourth Schedule. Once an offence is compounded, no further proceedings can be instituted against the offender.

Though the intention behind this is to ensure speedy punishment to the offenders, the likeliness of such punishment having a deterrent effect is very slim. Although criminal proceedings take a long time, it is difficult to

⁴⁴*Supra* note 11 at ¶ I, 50.

⁴⁵ Factories Act, 1948, Section 92.

fathom that reducing the degree of punishment would prevent violations. If anything, without the threat of criminal prosecution, mere requirement to pay a fine would have no deterrent effect on factory owners.

Notably, the offence of not providing some of the very essential facilities necessary in a factory like drinking water for example are made compoundable. It is ironic that the Bill which proposes to make it mandatory to provide cool drinking water to all factories, irrespective of the number of workers, seeks to make the said violation compoundable.

Thus, the only way a positive situation can arise from this new Schedule is if the Central and State Government deal strictly when it comes to compoundable offences with respect to the fine imposed. The fines should be hefty enough so as to create a deterrent and timely payment of the said fine ought to be ensured, in the default of which, further strict action needs to be taken against the defaulters. This is the only way possible to ensure that labourers are not made to suffer due to harsh working conditions maintained by employers.

Conclusion

It is evident that the Bill contains many labour-friendly provisions aimed at improving the facilities provided in factories such as provision of safety equipment, cool drinking water, canteen facilities, separate restrooms for men and women, relaxation of criteria for paid leave, an effort to bring women at par with their male counterparts and the like.

However, provisions which were evidently aimed at creating a business-friendly environment in the country or to increase the 'ease of doing business' are a cause for worry. The scope of the Act itself will be severely curtailed if the State Governments increase the threshold limit for factories.

The more worrying part is that the approach of relaxing the labour laws of the country to increase investment and business activity does not come with any guarantees of economic growth or job generation.⁴⁶ Such changes may hurt the workers and as a result, the economy.

It has always been the case that in a country like India, due to the population, manpower has always been abundant. Therein lays the importance of stricter labour laws, to prevent exploitation by businesses of the labourers, who will always be willing to suffer disadvantages simply because of the competition that exists in seeking employment.

Relaxing the same and exposing the labourers to the profit-driven business industry might not be well advised considering the socio-economic and political landscape of our country. The vision of businesses investing more and performing well and consequently causing a trickledown effect to the lower sections, leading to creation of more jobs and better quality of life seems merely theoretical. The widespread exploitation of labourers even at present when the labour laws are supposedly strict does pave the way to the question of what would happen in the absence of these.

Thus, the authors would like to conclude by commending the various beneficial provisions proposed in the Bill but at the same time strike a note of caution as to the nature of certain other changes which can potentially affect labourers of the country in a very negative manner. Of course, like most laws, the implementation of this law would ultimately determine the outcome, and may that not be a readiness to sacrifice the labourers of our country to promote the businesses. In that case, we would have to look at

⁴⁶See Atul Sood, Paaritosh Nath, Sangeeta Ghosh, *Deregulating Capital, Regulating Labour, The Dynamics in the Manufacturing Sector in India*, ECONOMIC & POLITICAL WEEKLY, June 28, 2014 (XLIX No. 26-27).

the Bill retrospectively and ask ourselves if all the beneficial provisions were merely a farce to camouflage the actual pro-business objective that the Bill seeks to achieve.

Human Rights as an Imperial Corporate Responsibility

- Arjun Mihir Joshi*

Abstract

It has been argued, time and again, that human rights have the potential to function as the new tool of civilization - that they are motivated by international political and economic aims. I attempt to synthesize and visualize these critiques in the context of the human rights industry – an institutionalized market that seeks to capitalize on the plight of the suffering. The rhetoric of corporate social responsibility campaigns bears a striking resemblance, both in conception and language, to the burden of the civilizing imperial. Far from serving as a real emancipatory tool, these campaigns (the ‘responsibility of corporates’) have become a standard part of the justification of the neo-liberal project. They deviate attention from the evident harms of the market economy to pose the hegemonic framework as a saviour of the downtrodden. With such an understanding, I conclude that the hegemony of the neo-liberal system has firmly established itself as the inevitable and the saviour, serving numerous concealed objectives at the same time. In this sense, the human rights campaign, driven by the glamour of sympathy evoking rhetoric, will march on.

Introduction

The word ‘campaign’ has an interesting etymology. It comes from an early French usage ‘*campagne*’ used to describe “a tract of open country”.¹

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Stretches of bucolic terrain were often used by armies to prepare, manoeuvre and fight. Gradually, this practice became symbolically synonymous with the topology it referred to. The space became no different from the purpose for which it was occupied: military operation. Further in time, the militaristic connotation of the word takes the meaning of establishing a set of political goals with a system.² From ‘taking the field’, it set its sights on a normative shaping of the field it has taken. Closer to today, the word is most closely associated with the ubiquitous ‘ad campaign’ - the corporate-controlled, media-propelled vehicle of presenting particularistic desires as emancipatory wants, predicates of happiness.

In many ways, the military occupation, political configuration and consolidation through consumptive desire that is implicit in the history of the word ‘campaign’ is also implicit in the history of campaigns within the human rights industry. The human rights campaign is the tainted smile of the Empire. The desire to ‘make the world a better place’ through the diversionary mission of corporate social responsibility has proven to be a lucrative space to be occupied, configured and consolidated. In the paper I argue that the emancipatory countenance of human rights campaigns are avatars of transnational economic hegemony.

Costas Douzinas argued that the sovereign was established on the basis of unlimited individual desire but by assuming the function of the party, the class or nation it could turn its desire into a murderous rage and a denial of

¹As defined in the Oxford Online Dictionary, available at <http://www.oxforddictionaries.com/translate/french-english/campagne>, as viewed on 4th December 2015.

²As defined in the Oxford Online Dictionary, available at <http://www.oxforddictionaries.com/definition/english/campaign>, as viewed on 4th December 2015.

all right.³ He further argued that when the sovereign is devised according to the characteristics of the desiring self, it had the ability, to empirically deny individuals and frustrate all human desire and surrender people to the horrors it was made to protect them from.⁴ In this paper, ‘sovereign’ will be construed to mean an *industry* whose desire is to promote certain rights for its own propaganda, thereby systematically denying access to all rights, except the ones this industry promulgates.

This paper will be broadly divided into three parts. First, I will ground the premise of a human rights industry in theory. Second, I attempt to explain the necessity of that industry to capitalize on emancipatory desire, and the role of the human rights campaign and neo-liberalization therein. Third, I explore how the ‘Corporate Social Responsibility’ campaign, by selectively invoking images of suffering and calling for intercession, converts ‘voicelessness’ into a discursive space to be occupied, configured and consolidated.

The human rights industry

Article 28 of the Universal Declaration of Human Rights, which states “Everyone is entitled to a *social and international order* in which the *rights and freedoms* set forth in this Declaration can be *fully realized*” (emphasis supplied), is the quintessential ambition that the human rights campaign in the 21st century strives to achieve, i.e. to be acultural and ahistorical. But despite its totalizing claims of universality, this system did not always exist as undisturbed and unchallenged as it seems today. The geopolitical history of how western liberal capitalism won is rooted in the invasion of territory

³ Costas Douzinas, *THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY*, (2000), p.374.

⁴*Id.* at 375.

through bloody conquest, colonial dehumanization, forced religious conversion, destruction of indigenous economies, and so on in a list longer than one of all the rights one can possibly compile. In other words, “to argue that human rights has a standing which is universal in character is to contradict historical reality...”⁵

Given this track record, it becomes imperative for the neoliberal economic system to obscure its history and consolidate the future. The neoliberal corporate order, as Pierre Bourdieu puts it, devotes “as much time to concealing the reality of economic acts as it spends in carrying them out”.⁶ The system of corporate social responsibility is thus preoccupied with appearances to cover up its own rapacity, to cover up the impossible irony of declaring everyone equal when it feasts on inequality. Within this paradoxical space, the marketization of human rights becomes a venture that is not merely useful, but integral to keeping appearances while maintaining profits: the human rights industry.⁷

Against this backdrop, Anthony Carty’s articulation of a threefold legal phenomenon is useful in understanding the idea of a “human rights market”.⁸ Carty states that the first legal phenomenon sees the world as a “cacophony of desire”⁹ that accommodates the consumerism of advanced capitalism. The second legal phenomenon, he believes, is the Western legal attribute to identify law as a criterion of validity- the primary and a never absent criterion being sanctions ensuring effectiveness.¹⁰ He contends that

⁵ Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES, (1980), pp.1-4.

⁶ Vanessa Smith, *INTIMATE STRANGERS: FRIENDSHIP, EXCHANGE AND PACIFIC ENCOUNTERS*, (2010), p 112.

⁷ Anthony Carty, *THE PHILOSOPHY OF INTERNATIONAL LAW*, (2007), pp. 193-197.

⁸*Id.* at 211.

⁹*Supra* note 4.

¹⁰*Id.*

a voluntarist approach to the understanding of human rights favours sanctions that effectuate the western idea. In his last legal theory, Carty questions the existence of a universal international legal order.¹¹ Carty argues that the western language of human rights favours a voluntarist understanding of these rights, i.e., a reading of the rights that is self-serving and favourable to the western agenda. The human rights market then legitimises this western agenda, giving legal effect to western economic desires through human rights instruments. Carty therefore affirms the relation between western-influenced, universal legal values of human rights and the expansion of western economic interests, and contends that they are “entirely compatible”.¹²

The language and symbolism of human rights, presumed to be universal, becomes an immensely valuable commodity in the perpetuation of “the materialist-hedonist culture that requires a militarized control of the planet to ensure its continued expansion.”¹³ Public opinion itself becomes a commodity. Opinion polls exist somewhere beyond any social production of opinion. They rebound incessantly in their own images: elected political representatives of the masses merely become dummies, who discard public opinion and adopt the principles of the human rights campaign. In this Janus-faced order, it becomes a primary impulse to contract away the responsibility for human life by declaring allegiance to the ‘human rights campaign’. Similarly, Baudrillard speaks of the human rights campaign as commodity *par excellence*- its circulation has become all but indistinguishable from the circulation of capital.¹⁴

¹¹*Id.* at 210.

¹²*Id.* at 211.

¹³*Id.* at 196.

¹⁴ Jean Baudrillard, *POWER INFERNO*, (2002), pp.63-83.

In this context, it may not be difficult to reimagine the denoted economy of the human rights campaign through the “messianic ethos” of the transnational human rights industry.¹⁵ The appearance of a saviour is necessary for hegemonic stability which is in turn contingent on there being a victim to be saved: but to be saved cost-effectively, i.e. profitably. Of course, as discussed, the neoliberal propensity to conquer, configure and consolidate is the only way to maintain profits. This situation presents a macabre, but also an ingenious opportunity: *proactively* use the neoliberal vehicle to spread the good emancipatory news of human rights.

An infamous example of this effortless synthesis is Lucky Strike’s ‘Torches of Freedom’ campaign of 1929. Looking to expand its clientele for Lucky Strike cigarettes to include women, for whom smoking in public was a social taboo, the American Tobacco Company sought the help of Edward Bernays, the so-called ‘father of public relations’. Bernays, in turn was advised to advertise the act of smoking as symbolic of women’s equality and emancipation.¹⁶ He paid young debutants to walk down the streets of New York smoking Lucky Strike cigarettes, by then dubbed ‘torches of freedom’. The campaign was met with instant adulation from notable feminists such as Ruth Haley who encouraged American women to “Light another torch of freedom! Fight another sex taboo!”¹⁷ This is exemplary of how consumption and emancipation merge under corporate commission to form the modern human rights campaign.

¹⁵ Makaumutua, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE, (2001), p.215.

¹⁶ Larry Tye, THE FATHER OF SPIN: EDWARD L. BERNAYS AND THE BIRTH OF PUBLIC RELATIONS, (1998), p.2.

¹⁷ Allan Brandt, THE CIGARETTE CENTURY, (2007), pp. 84 -85.

The post-Cold War consolidation phase, if we go by Vasuki Nesiah's idea of intervention, can be interpreted as the outcome of the grotesque fusion of imperial hegemonic power and human rights activism. She speaks of an almost physical transfusion of humanitarian NGOs with wealthy, hegemonic donors in this period.¹⁸The NGOs openly engaged with the political fervour involved in their activism, although within the terms of liberal internationalism. "Humanitarian work in the field was shaped by an intricate interplay of changes in how human rights and humanitarian institutions were funded and how their projects were defined."¹⁹This phase, I argue, sees the emergence of a renewed human rights campaign: impossibly powerful, swathed in the garb of human emancipation, drunk on neoliberal idealism and of course, swimming in profit.

Neo-liberalization & human rights: capitalizing on emancipatory desires

The human rights campaign speaks self-referentially and articulates its mission as temporally different from geopolitical history, for example, military intervention in Afghanistan becomes a campaign for the rights of women – as Laura Bush told the American people, "Because of our recent military gains in Afghanistan, women are no longer imprisoned in their homes."²⁰The contemporary human rights campaign has evolved into a dealer in the world of 'emancipation *is* human rights'. By relying on the symbolic value of emancipation, the human rights campaign decides to apply its own standards of right and wrong to benefit hegemonic expansion.

¹⁸ Vasuki Nesiah, *From Berlin to Bonn to Baghdad: A Space for Infinite Justice*, 17HHRJ 7 (2004).

¹⁹*Id.* at 8.

²⁰*Id.* at 8.

In other words, “save the girl-child, save the world” becomes the call to arms of an economically-propelled endgame.

Naomi Klein orients a different thought process on the interrelation of human rights, morality and politics.²¹ The problem, as she assesses, is depoliticisation – the transformation into moral panics of phenomena that are rooted in the political economy of contemporary capitalism. She argues that governments, financial institutions and other powerful economic agents are ‘looting with the lights on, as if there was nothing at all to hide’.²² Klein characterizes neoliberalism as a holy trinity – privatization, deregulation and cuts to social spending – in which governments dismantle trade barriers, abandon public ownership, reduce taxes, eliminate minimum wage, cut health and welfare spending and privatize education. She calls the means of achieving this goal “disaster capitalism”²³ and describes how it has resulted in a worldwide redistribution of income and wealth to the already rich at the expense of economic solvency for the middle and lower classes.

Samuel Moyn advances the claim that human rights is a relatively new phenomenon than is generally assumed.²⁴ For Moyn, the revolutionary charters following the Universal Declaration of Human Rights bear little relation to human rights, which are concerned with rights against the State, not popular sovereignty.²⁵ Moyn highlights several events: invoking human rights in the United States’ foreign policy, establishment of the

²¹ Susan Marks, *Four Human Right Myths*, LONDON SCHOOL OF ECONOMICS WORKING PAPERS 10/2012.

²² Naomi Klein, *Looting with the lights on*, THE GUARDIAN, August 17, 2011, available at <http://www.theguardian.com/commentisfree/2011/aug/17/looting-with-lights-off>, as viewed on 4th December 2015.

²³ Naomi Klein, *THE SHOCK DOCTRINE: RISE OF DISASTER CAPITALISM*, (2007), p.3.

²⁴ Samuel Moyn, *HUMAN RIGHTS AND THE USES OF HISTORY*, (2014), pp. 44-73.

²⁵ *Id.* at 46.

Organization for Security and Cooperation in Europe, awarding the Nobel Peace Prize to Amnesty International and the expansion of measures for the protection of human rights within the United Nations among others as the true starting point for the history of human rights.²⁶ He asserts that previous human right projects were not rescued from obscurity by the developments in the 1950s and 1960s. He argues that human rights became a movement, a mode of activism and a language of claim, aspiration and justification that would be heard throughout the world only from the 1970s.²⁷

Naomi Klein argues that this movement itself provided some context for the vested neo-liberal agenda that would soon plague the project.²⁸ As Moyn contends,²⁹ the agenda for the human rights project has grown manifold since then. Human rights are expected not just to address repression and violence, but all generic humanitarian concerns. But Moyn fails to note that the project has grown dangerously to stand for the familiar policy prescription of privatization, deregulation and state retreat from socially beneficial action.³⁰

Selective voices and the idea of corporate social responsibility

Lastly, the idea of corporate social responsibility at once invokes the desire to enlist or at least pay homage to the noble venture of the visibly underprivileged yet smiling ‘*others*’ on the campaign banners. On August 19, 2013, Vedanta, as part of its “Khushi” initiative, launched the ‘Our

²⁶*Id.* at 54.

²⁷*Id.* at 68.

²⁸*Supra* note 20 at 24.

²⁹ This debate was discussed in: Samuel Moyn, *Human Rights and “Neoliberalism”*, available at <http://hhr.hypotheses.org/215>, as viewed on 4th December 2015.

³⁰ Ronnie Steinberg, *Ms. Magazine Review: The Shock Doctrine*, Fall 2007, available at <http://www.naomiklein.org/reviews/ms-magazine-review-shock-doctrine>, as viewed on 4th December, 2015.

Girls, Our Pride' campaign in association with NDTV.³¹ Its aim? Alleviate the plight of undernourished, unhealthy, undereducated and vulnerable young girls in India. In NDTV's campaign-launch video³², images of visibly underprivileged yet smiling young girls embellish a banner that backdrops a choice gathering of members of civil society, NGOs, government and of course, corporations.

'Our Girls, Our Pride' by the 'Khushi' initiative- the symbolic barrage of crippling joy in pain, vicarious ownership, personal responsibility and hope of salvation all at once invokes the desire to enlist or at least pay homage to the noble venture. 'Stakeholders' and concerned citizens from 'all walks of life' have come together in solidarity, all in one place, all for one cause (1:20); surely this *has* to be democracy if there ever was. The emancipatory appetite is whet and the insignia of unity is drawn as 'the poor girl child'. Now, the visual celebration of the poor-but-happy on the banners start to make sense. The images now fit perfectly without qualm in the luxurious hall of The Leela, Chanakyapuri, a hotel estimated by Forbes to have cost 391 million USD to build.³³ The violence of the contrast is erased. The spectral presence of the subaltern is ritualistically invoked. And then begins the ventriloquism of the human rights campaign.

More poor-but-happy girls are presented, statistical information is brought to notice, 'Nirbhaya' - the infamously anonymised Delhi gang-rape victim- is mentioned (3:05), and the video ends with poor-but-happy girls singing a

³¹ Priyanka Chopra named Campaign Ambassador for 'NDTV-Vedanta Our Girls Our Pride', NDTV, August 19, 2013, available at <http://www.ndtv.com/article/india/priyanka-chopra-named-campaign-ambassador-for-ndtv-vedanta-our-girls-our-pride-407688> as viewed on 4th December, 2015.

³²*Id.*

³³ *Modern Day Splendor in New Delhi: The Leela Palace Hotel*, FORBES, October 1, 2012, available at <http://www.forbes.com/sites/annabel/2012/10/01/modern-day-indian-splendor-in-new-delhi-the-leela-palace-hotel/>, as viewed on 4th December, 2015.

vernacular rendition of “We Shall Overcome” (3:38). Celebrity Priyanka Chopra then addresses the gathering in her capacity as UNICEF’s Goodwill Ambassador for India and newly appointed ‘brand ambassador’ of the campaign. The delegates then exchange views and reaffirm the decision that the campaign will make a change, bring happiness.

The assimilative tendency of the human rights campaign is showcased here. Not only are images of structural disenfranchisement displayed as objects of consumption, the recent outrage against violence fresh in memory, the Nirbhaya protests, is captured in a few moments, stripped of voice and repackaged as an ‘event’. As the song of emancipation is sung, the images on screen are replaced with the image of the celebrity on stage. Revealing her ‘human side’, she speaks of colonial discovery. She speaks of how she, at a young age, came to notice “the mind-set that people have towards the girl-child” (05:07). She determines that it is ‘us’ who must change it. The invocation of the self-other paradigm is especially apt here as the camera focuses on the impeccably dressed, visibly wealthy audience (5:42). Coincidentally, it is clear who ‘us’ refers to here- those who have the social capital to be aggrandized from the hegemonic power structure. Only they have the power to ‘bring a change’ to the pitiable, alien world of the ‘other’ inhabitants. Recall here the propulsion of emancipatory desire of the French *mission civilisatrice* in West Africa through the hegemonic colonial vehicle. The occupied space must be consecrated in the language of changing a savage culture by setting it to human rights.

The pretext of this ‘mega-event’ of change serves to simultaneously exonerate and justify any traces of irony that may be associated with a vicious mining corporation- backed by media conglomerates *and* UNICEF *and* government *and* local activists- initiating a mission in the name of

human rights. Even as the video plays and right now, Vedanta's crimes- its attempted siege of the Niyamgiri hills in Orissa, its record of displacing hundreds of Dongria Kondh, its destruction of forests, poisoning of water and pollution of air- are being erased.³⁴ Appearances and hegemonic power are consolidated simultaneously through the symbolised force of the human rights campaign.

On November 25, 2013, Vedanta announced its plans to invest 3 billion USD into its oil and gas campaign in India and acquire bauxite in Orissa.³⁵ The newspaper article relates Vedanta's statement that the denial of their mining project in the Niyamgiri hills in 2012 is "no setback to the group". Plans to expand operations to Punjab are disclosed. The article ends with the announcement that Vedanta plans to start the 'Khushi' initiative in Punjab soon.³⁶ The campaign marches on.

³⁴ Survival International provides a consolidated list of government documents relating to Vedanta's activities at: <http://www.survivalinternational.org/behindthelies/vedanta>, as viewed on 4th December, 2015.

³⁵ Neel Kamal, *Vedanta Plc to invest \$3 billion in India in 3 years*, THE TIMES OF INDIA, November 25, 2013, available at: <http://timesofindia.indiatimes.com/business/india-business/Vedanta-Plc-to-invest-3-billion-in-India-in-3-years/articleshow/26374817.cms>, as viewed on 4th December, 2015.

³⁶*Id.*

**Mandatory CAG Audit for Private Telecom Firms: A
critique of *Association of Unified Telecom Service
Providers v. Union of India***

- Ayushma Awasthi*

Abstract

This article aims to bring to the fore certain issues which have been ignored while passing the judgment in the case of Association of Unified Telecom Service Providers v. Union of India¹. In this article, an extremist view has not been taken. Auditing is one of the keys to ascertain the future course of action in an enterprise. However, a mandatory CAG audit for the private telecom firms would be doing more harm than good. Public and Private sectors are two different institutions and it's important for the economy that they carry on their separate roles, which could be an area to be affected by the judgment. A CAG audit for the private firms would also increase the financial burden of the State, of the private firm itself, and ultimately of the economy. There is no suggestion as to the impeccability of the current mechanism. However, it would be wiser to empower the Auditing and Assurance Standards Board than to mandate a CAG audit. Also, the mechanisms provided under the Companies Act are also emphasized.

Introduction

The Supreme Court bench comprising of Justices K.S. Radhakrishnan and Vikramajit Sen dismissed an appeal filed by The Association of Unified Telecom Service Providers (hereinafter referred to as 'the judgment')

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¹ (2014) 6 SCC 110.

against a Delhi High Court judgment.² The fundamental issue to be decided in the case was whether or not the CAG has an authority to audit private telecom companies. The Supreme Court, by dismissing the appeal, has empowered the CAG to audit the accounts of private telecom companies, which would inevitably lead to the widening of the powers of the office of Comptroller and Auditor General of India. The CAG had been arguing for this right for years, but the reluctance of private sector has been ostensible. According to Article 149 of the Constitution of India, the CAG is empowered in relation with the accounts of the Union and of the states and of any other authority or body as may be prescribed by the legislature. It is imperative to note at this point that the telecom sector- in question in this judgment- is not covered under any of the above categories that the CAG is empowered to audit.

The court pointed out that parliament has an obligation to ascertain whether the entire receipts of license fee, spectrum charges, have been realized by the Government of India and credited to the Consolidated Fund of India. Since all the revenues of the Government of India is credited to the Consolidated Fund of India³, going by this ratio of the judgment, the office of CAG has the power to audit every private firm and every individual who is liable to pay taxes to the government.

The judgment would certainly be used by the office of CAG as a means to determine its powers to audit private firms, especially the ones established as per the Public-Private-Partnership (PPP) model. As a leading newspaper

² Pratap Bhanu Mehta, *Of, by, for auditors*, THE INDIAN EXPRESS, April 22, 2014, available at <http://indianexpress.com/article/opinion/columns/of-by-for-auditors/>, as viewed on December 18, 2015.

³ Article 266, the Constitution of India.

of the country has marked⁴, “The court's ruling has given new ammunition to the CAG's lawyers in other pending cases. Take for instance the pending case in the Delhi High Court where the CAG has been looking to audit the books of Delhi's power distribution companies.” Gaurang Kanth, counsel for the CAG, in the Delhi discom case, said while pointing out that he considers the judgment quite relevant for his own case⁵. Also, the two-judge bench has relied on the Constitution⁶ and the provisions of a 1971 Act⁷ defining the powers of the CAG to support their judgment, rather than specific provisions of laws which cover the telecom sector⁸, which pushes the applicability of the same well beyond the telecom sector.

The institution of Comptroller and Auditor General of India was set up to bring about transparency, accountability and probity in public life⁹. Looking from this perspective, the judgment of the Supreme Court is welcome and appreciated; however, there are certain far reaching implications which have been ignored while passing the above judgment and would certainly be detrimental for stakeholders, especially the private enterprises.

The judgment has allowed the CAG to audit a private firm if it concerns the natural resources or the Consolidated Fund of India. This way, the Supreme Court has pretty much provided a *carte blanche* to the Comptroller and

⁴ Avinash Celestine, *SC judgment allowing CAG to go through private telcos' books to affect other sectors; but power limited*, THE ECONOMIC TIMES, May 4, 2014, available at <http://economictimes.indiatimes.com/industry/telecom/sc-judgement-allowing-cag-to-go-through-private-telcos-books-to-affect-other-sectors-but-powers-limited/articleshow/34596777.cms?curpg=2>, as viewed on November 10, 2015.

⁵ *Ibid.*

⁶ Article 149, the Constitution of India.

⁷ See Sections 13 and 14 of The Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971.

⁸ *Supra* note 3.

⁹ *CAG celebrates 150 Years of Existence*, available at http://www.archive.india.gov.in/spotlight/spotlight_archive.php?id=75, as viewed on November 23, 2015.

Auditor General of India's office. Every company, one way or the other, concerns the 'natural resources' or the Consolidated Fund of India. Companies and individuals contribute to the Consolidated Fund of India by paying in the form of taxes and royalties; any under-reporting will result in loss of revenue to the exchequer.¹⁰ Going by the *ratio decidendi* of the judgment, every private company would be subject to audit by the CAG, which is essentially problematic. There are certain far reaching implications which have been ignored while passing the judgment.

Blurring of institutional roles

Lately, there have been issues related to the blurring of roles of the private and public sector in the PPP model. While the two sectors agree to work together, they often face a lot of difficulties in following a single course of action since their respective goals and mechanisms are highly distinguished. The extent of participation of each of the sectors is often unmentioned, and the mentioning of the same does not create much of a difference, as their interests often contradict. The judgment has, once again, brought the issue to the fore. The judgment would highly affect the PPP model as this is where it would be directly applicable.

In the case of *Shashikant Lakshman Kale and Anr. v. Union of India and Anr.*¹¹ the Supreme Court itself emphasized the distinction between the public and private sectors. The single bench of Justice J.S. Verma held that government or public sector undertakings are a class separate from those in the private sector and the fact that the profit earned in the former is for

¹⁰ *CAG audit of private companies may open Pandora's box*, BUSINESS STANDARD, January 7, 2014, available at http://www.business-standard.com/article/news-ians/cag-audit-of-telecos-may-open-pandora-s-box-114010700677_1.html, as viewed on November 23, 2015.

¹¹ 1990 SCR (3) 441.

public benefit instead of private benefit, provides an intelligible differentia from the social point of view which is of prime importance for the national economy.

The ruling in the above case makes the distinction between the two sectors very evident and establishes the significance of the same. The private sector is that part of the economy which is State-controlled, and is run by individuals and companies for profit motive. The private sector encompasses all for-profit businesses that are not owned or operated by the government. The definition itself makes it very clear that the main intention behind the establishment of a private enterprise could only be profit earning, which is precisely why it differs from the public sector. The public sector is a State-controlled unit which is established for the public welfare and works. A recent World Bank report pointed out the institutional failures in PPPs, especially with regard to the centralized units.¹² The concept of PPP has already created enough chaos with regard to the institutional identity of these two sectors, and the judgment would only be adding misery to it.

The main issue in the present case was whether or not the CAG can audit the accounts of a private firm, as the government needs to ascertain their profits. If the CAG could confine itself to precisely directed revenue-sharing arrangements, maybe there will not be much damage and even some good; but if it uses this wedge to open all kinds of issues about the spending criteria of the companies and costs, it could seriously damage the functioning of private entities. A kind of jurisdictional inflation is inevitable whenever an institution is given powers or acquires powers.¹³

¹² *Public Private Partnership Units: Lessons for their designs and use in infrastructure*, World Bank, 2007.

¹³ *Supra* note 2.

Judicial Activism by the apex courts of the country is one such example of jurisdictional inflation¹⁴.

The CAG being a State unit is expected to and is in fact duty bound to think about public welfare. However, if the private enterprises start to work on the lines of a State unit, it would defeat the entire purpose of establishment of such private units. Partial restrictions like those of compulsory Corporate Social Responsibility, to an extent, is reasonable to prevent unfair trade practices and the unsocial activities that the private sector might indulge in. However, completely restricting the private units as per State norms can bring about a huge decline in the economy. The private sector of the economy is known for its profit motive and the privatization spree after 1991 was much likely adopted for the gaining of such profits and to enhance the economy of the country. The interference of the State in the working of the private sector was, after an extent, considered detrimental for the economy, which is why most of the restrictions were abolished.

The power provided to the CAG could again, in a way, rest powers of the economy in the hands of the government, and in turn would be detrimental for the economy for the above reasons.

Financial burden

The appointment of the auditor is made under Chapter X covering Section 139 to 148 of the new Companies Act, 2013.¹⁵ The Government, by the way of various provisions, ensures that the job of auditing is being done efficiently, the above provisions being among them. The judgment would

¹⁴ *Ibid.*

¹⁵ Ajay Mishra, *Appointment of Auditor under new Companies Bill, 2013 (Companies Act)*, CA Club India, available at <http://www.caclubindia.com/articles/appointment-of-auditor-under-new-companies-bill-2013-companies-act--18238.asp#.U3DXvxToQ9R>, as viewed on August 26, 2013.

only be adding to the burden of exchequer. The government would have to employ more auditors and the private firms would be forced to invest their resources.

“At present, the books of Telecom companies are subject to audit of Department of Telecommunications (DoT), Telecom Regulatory Authority of India (TRAI), Information Technology (IT) Department and any special audit appointed by the Department” said Rajan Mathews, Director-General of the GSM industry grouping COAI¹⁶. The judgment would only add to the burden of the private companies as they are already subject to some or the other form of audit. Now, they will have to devote resources to even a CAG audit. The judgment, evidently, would lead to multiplicity of audits, which is certainly not a welcome development. It would not only be expensive but time-consuming for the private companies. It would make the process much more cumbersome for them.

It would also add to the burden of the exchequer of the State. The State would have to raise its expenditure to a great extent for doing something which is already being done by the other units of the State. And as a result of this, the overall burden of the economy would rise to a great degree and the private unit would be discouraged to participate in such an economy, which would ultimately be detrimental for the economy of the country.

Companies have to live with multiple audits. One audit is not adequate to ensure effective enterprise governance and compliance with law. For example, the Excise Department relies on cost audit while the Income tax Department relies on tax audit. However, two audits with the same objective

¹⁶ *CAG can audit the books of private telecos, says Supreme Court*, THE ECONOMIC TIMES, available at http://articles.economictimes.indiatimes.com/2014-04-18/news/49237031_1_cag-audit-auditor-general-service-providers, as viewed on November 23, 2015.

must be avoided. CAG audit of telecom companies has the similar objective as that of the special audit conducted by chartered accountants. Therefore, a CAG audit will result in duplication of efforts.¹⁷ Duplication of efforts implies duplication of resources put, and henceforth, it would inevitably bring in financial burden.

Auditing was introduced to make sure that the companies are correctly evaluating their stands and the State is being provided with the correct evaluations. In brief, auditing was introduced to benefit the companies and the State by making sure they are not being defrauded by any means. However, application of the CAG audit would lead to something contradictory. The companies and the State will have to carry undesirable financial burden, thereby defeating the entire purpose of audit.

Efficiency of audit

Auditing is a means of evaluating the effectiveness of a company's internal controls. Maintaining an effective system of internal controls is vital for achieving a company's objectives, obtaining reliable financial reporting on its operations, preventing fraud and misappropriation of its assets, and minimizing its cost capital.¹⁸

Auditing also plays a vital role in assessment of the company's assets and the fruitfulness of the ongoing trade and investments so as to ensure the stakeholders of proper channelization of their resources. The institute of Chartered Accountants of India established the Auditing Practices Committee, or the Auditing and Assurance Standards Board, as it is now

¹⁷ *Infra* note 27.

¹⁸ Jeff Clements, *The importance of an Audit System to Companies*, Demand Media, available at <http://smallbusiness.chron.com/importance-audit-system-companies-14705.html>, as viewed on November 18, 2015.

known, in September 1982.¹⁹ One of the main objectives of the Board is to issue auditing standards.²⁰

With the help of national standards issued by the Auditing and Assurance Standards Board, the Government can very well maintain a uniform standard of audit throughout the country, as any auditor, practicing at an individual level or appointed by the Government itself, or even the Comptroller and Auditor General of India for that matter, will have to follow similar norms as those provided by the Board. The Auditing and Assurance Board has been established by the Institute of Chartered Accountants of India which was setup by the Parliament of India²¹, and henceforth is a Government body controlled by the Government of India.

Hence, an auditor, whether appointed by the Government or a private practitioner would more or less be equally efficient as all of them have to follow the same norms as provided by the Board.

Also, the Companies Act²² provides enough mechanisms (like audit committee²³) for the Board to protect audit independence; the Government as a block shareholder should ensure effectiveness of the Board, rather than ordering a CAG audit.²⁴ The professionals practicing audit at an individual level would be more or less the same as the employees of the CAG office. The Government, by making CAG audit compulsory, is showing its distrust

¹⁹ Auditing Standards in India, available at <http://www.icisa.cag.gov.in/Background%20Material/Auditing%20Standards%20in%20India.pdf>, as viewed on November 18, 2015.

²⁰ *Ibid.*

²¹ See Chartered Accountants Act, 1949.

²² The Companies Act, 2013.

²³ Sections 177, 144 and 139(11) of the Companies Act, 2013.

²⁴ Asish K. Bhattacharyya, *Should CAG audit private companies*, BUSINESS STANDARD, January 26, 2014, available at http://www.business-standard.com/article/opinion/should-cag-audit-private-companies-114012600733_1.html, as viewed on November 18, 2015.

in the audit profession, which would in turn lead to discouragement among the audit professionals²⁵.

Mandating a CAG audit, henceforth, would not be a wise decision and by no means will the judgment increase the efficiency of the audit. However, by favouring the current mechanism of audit, we certainly do not wish to convey the impeccability of the prevalent system. Rather, we would wish for the Government to take significant steps to improve the effectiveness of the standards issued by the Auditing and Assurance Standards, as that alone has the capability of protecting audit independence.

The court, while passing this judgment, seems to have missed the far reaching consequences of the same which have been elaborated above. Even though the private entities are dealing with the natural resources of the country, they have fulfilled their obligations when they obtain a license for the same and comply with various other provisions including auditing by an independent auditor. Mandating a CAG audit over that comes across as an unnecessary burden on private entities.

Conclusion

Auditing is one of the most vital ways to ensure a company's profit-making and assurance of the right evaluation of the same to the stakeholders. It is highly undisputable that the present mechanism is not free of loopholes. However, what has been suggested by the judgment might do more harm than good. Establishment of a private firm and its aims are highly distinguished with those of a public sector unit, which is also very necessary as the different courses of action of the two sectors have been aimed at the betterment of the economy. It would be highly undesirable to let the State

²⁵ *Ibid.*

take over the control of a private unit, for whatever reasons. Also, the financial burden which would be brought in by the introduction of a CAG audit is absolutely uncalled for. Multiplicity of efforts has never been a good idea and so is the case with the mechanism ruled by the Supreme Court. The Government, by the way of various provisions, has already been taking care of the efficiency and standards of audit. Now, if there is some lack in the same, it should be fulfilled by empowering the Board set up for the same. There certainly is a need to improvise the current mechanism, however, a CAG audit would not, in any way, be doing the desirable task, and hence, is not suggested.

Vodafone Transfer Pricing Matter: A Remarkable Ruling, a Respectful Retreat

- Dr. Neha Pathakji*

Abstract

Recently several multinational corporations in India were entangled with the Indian tax authorities on the issue of shares to its non-resident associated enterprises at an alleged undervalued premium. The Indian tax authorities treated the deficit as an extension of deemed loan which ought to attract deemed interest, squarely subjecting the issue of shares to transfer pricing regulations. The Bombay High Court decision in Vodafone India Services appears to have ended the ordeal of foreign corporate investors in India. This paper will examine the controversy involved on the issue of shares at a premium and analyze the ruling that aptly clarifies the scope and extent of application of transfer pricing provisions and essential pre-requisites for its application.

Introduction

It is usually considered to be ideal for a taxman to leave no stone unturned to recoup taxes from deferring taxpayers so as to adequately fill public purses. Yet, a taxman who attempts to make holes in the pockets of the taxpayers is not acceptable either. It has been quite a while now that the foreign investors in India have been experiencing and encountering the latter. The decision of the Bombay High Court delivered late last year, in *Vodafone India Services Pvt. Ltd v. Union of India and Ors.*¹ serves as a

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¹ WP-871-14, judgment pronounced by the Hon'ble Bombay High Court on 10th October, 2014.

perfect example of an imaginative taxman, chasing foreign investors to cough up taxes. The Bombay High Court landmark ruling and the government's prudent and matured decision not to appeal in the Supreme Court signaled an end to fruitless litigations and provided some stability to an otherwise ambiguous tax regime. It would be worthwhile to look into the controversy and the ruling which ended the same.

Of late several multinational companies having their operation in India had been entangled with the Indian tax authorities on the issue of shares to its non-resident associated enterprises at an allegedly undervalued premium. According to the Indian tax authorities such deficit in valuation amounts to deemed loan which ought to attract deemed interest, squarely subjected to transfer pricing provisions in India. The recent decision of the Bombay High Court appears to have ended the ordeal of foreign corporate investors in India.

The Bombay High Court (hereinafter "the High Court") categorically ruled that an expressly chargeable income within the meaning of the Income Tax Act (hereinafter "the Act") is a prerequisite for the application of transfer pricing provisions contained in Chapter X of the Act. The High Court held that the issue of shares at a premium to a non-resident Associated Enterprise (hereinafter "AE") being a capital account transaction cannot be broadly interpreted so as to be brought within the ambit of an inclusive definition under Section 24 (2). Chapter X of the Act provides machinery to arrive at an Arm's Length Price (hereinafter "ALP"), however, arriving at the transaction value on the basis of ALP does not convert non-income into income. The income under an international transaction between AEs must satisfy the test of income and chargeability under the Act.

Facts

The assessee, Vodafone India Services Pvt. Ltd. (hereinafter “VIS”), a wholly owned subsidiary of a non-resident company, Vodafone Tele-Services (India) Holdings Limited issued equity shares to its holding company at the premium of Rs.8519 per share. VIS thereby received a total consideration of Rs.246.38 crores from its holding company on such issue of shares. The fair market value per share was determined at Rs. 8,519/- by VIS in accordance with the methodology prescribed by the Government of India under the Capital Issues (Control) Act, 1947. By virtue of Section 92E of the Act, VIS filed Form 3-CED and reported the said transaction as an ‘international transaction’ after determining the ALP. However, VIS expressly clarified that since the transaction did not affect its income, transfer pricing provisions did not apply and the reporting was only a matter of abundant caution.

On the Assessing Officer (hereinafter “AO”) referring the transaction to the Transfer Pricing Officer (hereinafter “TPO”), a show cause notice was issued to VIS. VIS challenged the jurisdiction contending that the Act, neither contemplates taxation of inbound capital investment nor creates any legal fiction to treat such alleged shortfall in capital receipt on the issue of equity shares as a deemed loan or taxing the alleged deemed interest on a deemed loan. In the absence of any income arising from an international transaction, the provisions of the Chapter X of the Act had no application.

In terms of the mandate under Section 92CA, the TPO proceeded with computation of ALP and rejected the methodology of valuation adopted by VIS as unsuitable to determine ALP. Accordingly, the Net Asset Value of VIS was determined at Rs.53, 775 per share and a deficit in premium to the extent of Rs.42, 256/- per share was identified. Consequently, it was held that the issue of shares by VIS to its holding company at a lower premium

resulted in VIS subsidizing the price payable by the holding company. Further, on application of the Transfer Pricing provisions in Chapter X of the Act, both the AO and the TPO held that this amount of Rs.1308.91 crores was income and ought to be treated as deemed loan given by VIS to its Holding company, interest thereon chargeable by income tax.

Aggrieved by the assessment orders, VIS challenged the jurisdiction of AO/TPO before the Bombay High Court vide Writ Petition No.1877 of 2013. Since the objections of VIS, other than those regarding jurisdiction, were already pending before a Dispute Resolution Panel (hereinafter “DRP”) under Sec. 144C (2) of the Act, the Bombay High Court disposed of the petition with directions to the DRP to first decide only the jurisdictional issue as a preliminary issue. Consequent to such directions, the DRP having considered the issue of jurisdiction concluded that non-receipt of premium to the extent not received is an income arising from the issue of shares. Though there is no formal transfer of source of income or tangibles, yet the income forgone would be notional income liable to tax under the provisions of the Chapter X of the Act. The DRP, thus rejected VIS’s preliminary objection to jurisdiction and upheld the jurisdiction of the AO/TPO.

Issues

At the heart of this controversy lies the question whether the issue of equity shares at a premium to a non-resident associated enterprise gives rise to any income at all in first place so as to apply transfer pricing provisions under Chapter X of the Act.

Ruling**Income *sine qua non* for application of Chapter X of the Act**

The High Court held that on a plain reading of Section 92 (1) of the Act, it is clear that income arising from an international transaction is a condition precedent for application of Chapter X of the Act. Having stated that, the High Court next moved on to examine the term the ‘income’.

Meaning of the term ‘Income’

The High Court held that even where the definition of the term ‘income’ under Section 2(24) of the Act remains inclusive in nature, its meaning is well understood. Accordingly, ‘income’, in its normal meaning, will not include capital receipts unless expressly specified. Reiterating the well settled legal position in *Cadell Weaving Mill Co. v. CIT*² and *CIT v. D.P. Sandhu Bros. Chamber (P) Ltd.*³, the High Court held that receipt or accrual of capital account transaction cannot be subjected to tax in absence of express legislation. Share premium have been made taxable by a legal fiction under Section 56(2) (viib) of the Act and the same is enumerated as ‘income’ in Section 2(24) (xvi) of the Act.

However, the High Court categorically drew a distinction between the share premium under the aforesaid provision and that in present matter. The Act seeks to bring within the ambit of ‘income’ such premium received from a resident which is in excess of the fair market value of the shares. In the present matter what is sought to be taxed is capital not received from a non-resident i.e. premium allegedly not received on application of ALP. Consequently, neither the consideration received from the non-resident

² 249 ITR 265.

³ 273 ITR 1.

holding company nor any deficit therein can be considered as income within the meaning of the expression 'income' as defined under the Act.

Rules of Interpretation

Whilst determining the issue on jurisdiction, the DRP sought aid of the supposed intent of the legislature so as to import a wide meaning of the term 'income'. Having thus broadly interpreted the term 'income' to include all incomings, the DRP concluded that under Section 92 of the Act the Revenue had jurisdiction. Overturning this position, the High Court held that in case of taxing statutes, where the provision was susceptible to two or more meanings, it is not permissible to forgo the strict rules of the interpretation while construing it.

The High Court reiterated the test laid by the Supreme Court in *Mathuram Agarwal v. State of Madhya Pradesh*⁴ that the intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in plain language. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature.

The High Court therefore held that the DRP proceeds to give its own meaning to the word 'income'. This is clearly not permissible. The word 'income' would have to be understood as defined by other provisions of the Act such as Section 2(24) of the Act. A fiscal statute has to be strictly interpreted upon its own terms and the meaning of ordinary words cannot be expanded to give purposeful interpretation.

⁴1999(8) SCC 667.

The High Court starkly observed that whilst the Revenue supported the order of the DRP, its grounds were different from those found in the order. Whilst the DRP had upheld jurisdiction on the grounds that the forgone premium was notional income, the Revenue forwarded the grounds that it is the cost incurred by VIS in order to benefit its holding company which is being subjected to tax. Accordingly, the Revenue submitted that Section 92(1) to be read with Section 92(2) of the Act and such a conjoint reading would indicate that what is being subjected to tax is the cost incurred by VIS in passing on the benefit to the holding company and not the share premium not received. The High Court, however, held that the department's method of interpretation by reading a provision, omitting words in the Section, to achieve a predetermined objective is impermissible. It would lead to burial of the settled legal position that a provision should be read as a whole, without rejecting and/or adding words thereto. This would amount to redrafting the legislation which is beyond/outside the jurisdiction of courts.

Difference between charge to tax and measure to tax

The Revenue had contended that in view of Chapter X of the Act, the notional income is to be brought to tax and real income will have no place. For this purpose it had placed relevance on the Supreme Court decision in *Mazgaon Dock Ltd. v. CIT*⁵ which interpreted Section 42(2) of the 1922 Act whereby the resident was subjected to tax on notional profits in respect of its business dealing with a non-resident with whom he had close connection. Contrasting the provision of Chapter X of the Act and in particular Section 92 thereof, the High Court in this matter noticed that unlike Section 42(2)

⁵1958 AIR 861.

of the 1922 Act, the crucial words 'shall be chargeable to income tax' are absent.

Whilst substantive charging Sections are found in Sections 4, 5, 15 (Salaries), Section 22 (Income from house property), Section 28 (Profits and gains of business), Section 45 (Capital gain) and Section 56 (Income from other sources) of the Act, Chapter X is a machinery provision to arrive at the ALP of a transaction between AEs. Even income arising from an international transaction between AEs must satisfy the test of 'income' under the Act and must find its home in one of the above heads i.e. charging provisions.

The High Court highlighted four essential ingredients of taxing statute- (a) subject of tax; (b) person liable to pay the tax; (c) rate at which tax is to be paid, and (d) measure or value on which the rate is to be applied and stated that there is difference between a charge to tax and the measure of tax (a) & (d) above. This distinction was further illustrated by referring to the Supreme Court decision in *Bombay Tyres India Ltd. v. Union of India*⁶ wherein it was held that the charge of excise duty is on manufacture while the measure of the tax is the selling price of the manufactured goods.

The High Court observed that the Revenue seems to have confused the measure to tax with the charge to tax and calling the measure as notional income. In the present matter also, the charge is on income as understood in the Act and where income arises from an international transaction, then the measure is to be found on application of ALP. The amount received on issue of shares is admittedly a capital account transaction not brought within the

⁶ 1984 (1) SCC 467.

definition of 'income' as discussed. Therefore, arriving at the transactional value on the basis of ALP does not convert non-income into income.

Referring to the landmark ruling of *CIT v. B.C.Srinivasa Shetti*⁷ on charging provision, the High Court observed that computation provisions cannot replace/ substitute the charging provisions. Drawing the distinction between the present matter and *B.C.Srinivasa Shetti*⁸, the High Court observed that whereas in *B.C.Srinivasa Shetti*⁹ there was a charging provision and the computation provision failed; in the present case there is no charging provision to tax capital account transaction to tax issue of shares at premium to a non-resident and the occasion to invoke computation provisions does not arise.

Conclusion

The Bombay High Court decision is a welcome ruling that brings respite to foreign investors who have long been disillusioned with unpredictable rules and regulations. Several multinationals other than Vodafone such as IBM Corp., Royal Dutch Shell PLC and Nokia Oyj are embroiled in a transfer pricing dispute similar to that of Vodafone. The High Court refers to a catena of decisions¹⁰ to reaffirm the basic principles of interpretations of taxing statutes thereby strictly interpreting the taxing statute in the light of clearly expressed language.

⁷ 128 ITR 294.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *CIT v. Vatika Township P Ltd.* 367ITR 466, referring foreign judgments *Eidman v. Martinez* 184 U.S. 578, *Gould v. Gould* 245 U.S. 151; *Mathuram Agarwal v. State of M.P.* 1999(8) SCC 667; *Sales Tax Commissioner v. Modi Sugar Mills* 1961 AIR 1047.

In the process the decision drew distinctions from the landmark rulings such as *Mazgaon Docks*¹¹ and *B.C.Srinivasa Shetti*¹². The decision significantly underscores that the purpose of transfer pricing provisions under Chapter X of the Act and ALP is certainly not to punish multinationals and AEs for doing business *inter se*. Whilst it aims to curb the abuse or manipulations by undervaluing profits or showing higher expenses between AEs, the transfer pricing provisions has not replaced the concept of income or expenditure as normally understood in the Act. It is in furtherance of this principle that the decision reiterates that capital receipt cannot be taxed unless expressly provided for.

Following the decision, the government made a prudent decision not to appeal in the Supreme Court. This clearly indicates the government's loud and clear message to foreign investors that it is seriously committed towards creating a fair, transparent and stable tax system, within the four corners of law.¹³ The ruling and the government position will go a long way in determining favourable investor sentiments and boost investments in India. It should also serve as a timely alert to the taxman to duly consider fundamentals of taxation jurisprudence and not proceed on mere assumptions. Thus, the Vodafone transfer pricing matter is significant for the remarkable ruling by the Bombay High Court and a respectful retreat by the government.

¹¹ Supra note 5.

¹² Supra note 7.

¹³ 'Government asks I-T department to apply Vodafone principle on similar Transfer Pricing cases', available at http://articles.economictimes.indiatimes.com/2015-01-28/news/58546745_1_vodafone-case-attorney-general-mukul-rohatgi-finance-minister-arun-jaitley, January 28, 2015, as viewed on February 27, 2015.

**Not loving it: A Critique of the anti-arbitration
injunction against McDonald's in *Vikram Bakshi v.
McDonald's India Pvt. Ltd.***

- Nishkarsh Jakhar and Sarthak Vidyarthi*

Abstract

This case comment seeks to analyze and subsequently critique the approach adopted by the Delhi High Court in the case of Vikram Bakshi v. McDonald's India Pvt. Ltd.¹ The analysis suggests that the court has erred, at multiple levels, in applying and interpreting the law relating to anti-arbitration injunctions in India. The case is a perfect example of courts cherry-picking the law as per its convenience to grant an injunction, with utter disregard for the correct position of law laid down. The critique argues that the principles of Kompetenz-Kompetenz, arbitrability of oppression and mismanagement, forum non-conveniens and waiver of arbitral clause have not been correctly applied to the relevant facts in the case. Finally, the court considered the disputes of oppression on one hand and termination of the agreement on the other as one and the same while granting the injunction, both of which can be amenable to separate arbitral proceedings as per prevalent law.

Introduction

A stable legal framework, respecting the principle of freedom of contract, goes a long way in making a jurisdiction a profitable and investor-friendly business destination. Arbitration as a dispute resolution mechanism is a significant step in that direction, since investors do not intend to fall into the

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¹ Delhi High Court, Order dated 22.12.2014, C.S. (OS) No. 962/2014.

trap of prolonged litigation and immense legal costs.² However, for arbitration to be effective, it needs to be backed by a minimal-interference and pro-arbitration approach on part of the courts. India has been one of the most sought-after havens for investors in recent years.³ The Arbitration and Conciliation Act, 1996 (hereinafter ‘the Act’) established standards comparable to the international pro-arbitration rules. Still, the Supreme Court’s stand pointed to the contrary, as was seen initially in *Bhatia International*,⁴ and consequently in other judgments that followed,⁵ where the encroachment upon the jurisdiction of the arbitrator in case of foreign arbitrations increased contrary to the principles of the Act.

A watershed moment followed in the form of *BALCO*,⁶ where a Constitution Bench of the Supreme Court held that Indian courts were not to interfere with the jurisdiction of the foreign arbitrator, unless expressly permitted by Part II of the Act. Following this, a long line of pro-arbitration pronouncements followed. However, the recent judgment of the Delhi High Court in the case of *Vikram Bakshi v. McDonald’s India Pvt. Ltd.*⁷ serves as a radical break from the recent judicial trend, thereby becoming a cause of concern for the international business community. This comment attempts to show that the order of the High Court is inconsistent in approach, and proceeds on a short-sighted and contradictory view of the existing law, domestic as well as international.

²Inessa Love, *Settling out of Court: How effective is Alternate Dispute Resolution*, <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Setting-out-of-Court.pdf>, as viewed on January 2, 2015.

³Ruchir Sharma, *BREAKOUT NATIONS: IN PURSUIT OF THE NEXT ECONOMIC MIRACLES*, (2012), p. 295.

⁴*Bhatia International v. Bulk Trading S.A. &Anr.* (2002) 4 SCC 105.

⁵*Indtel Technical Services v. WS Atkins*, (2008) 10 SCC 308; *Venture Global Engineering v. Satyam Services Ltd. and Anr.* (2010) 8 SCC 660.

⁶*Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552.

⁷*Supra* note 1.

The dispute, which is still pending in court, has its roots in a Joint Venture Agreement (JVA) between the Indian plaintiff (Vikram Bakshi) and the defendant number 1 (McDonald's) situated abroad, which regulated the ownership and management of the company formed under the JVA. An international arbitration clause in the JVA regulated the resolution of disputes, under which the arbitration was to be conducted as per the London Court of International Arbitration (hereinafter, 'LCIA') Rules in London, with the governing law being Indian. After McDonald's issued a notice to acquire the plaintiff's shares, having removed him from the position of Managing Director of the company, the plaintiff filed charges of oppression and mismanagement in the Company Law Board (hereinafter, 'CLB') under the Companies Act, 1956 seeking to reinstate himself. The CLB ordered a stay on the shareholding pattern prior to acquisition of the shares by McDonald's. Meanwhile, McDonald's terminated the JVA and initiated the aforementioned arbitration proceedings in London. To restrain the arbitration proceedings, the plaintiff filed suit for injunction to refrain the defendants from proceeding with the arbitration under Order 39, Rules 1 and 2 of the CPC in the Delhi High Court as overlapping proceedings were continuing in the CLB. The defendants on the other hand sought a reference to arbitration by the court under S. 45 of the Act.

The court in its decision declined reference to arbitration and issued an anti-arbitration injunction in favour of the plaintiff, on three grounds: firstly, that the arbitration clause became inoperative on account of proceedings on overlapping grounds pending in another court, (thereby attracting the exception under the non-obstante clause under S. 45 of the Act); secondly, the LCIA arbitration was a *forum non conveniens*, as all of the parties except

one as well as the governing law was Indian and thirdly, the defendants waived the arbitration clause by withdrawing an application under S. 45 for a direction from the CLB to refer the parties to arbitration. The analysis hereinafter seeks to critique the approach used by the court on the aforementioned grounds, as well as another ground entirely absent from the court's discussion, but which, as the comment proceeds, shall be shown to be relevant for the dispute between the parties.

Overlooking the principle of *Kompetenz-Kompetenz*

Empowering arbitral tribunals to determine their own jurisdiction and allowing judicial review only later- the bedrock principle of *Kompetenz-Kompetenz*- has been ignored by the court even when it has been incorporated under Ss. 5 and 16 of the Act. The pre-emptive power of the tribunal to decide its jurisdiction to the exclusion of a court is well recognized through the UNCITRAL Arbitration Rules (Article 23), UNCITRAL Model Law (Article 16(3)) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Article II(3)). Reading these rules in accordance with the Preamble of the Act, "respecting" arbitration would require allowing the tribunal to decide upon its jurisdiction first, and not invoking S.45 as an "obstructionist" tactic.⁸

S.45 incorporates the principle of *Kompetenz-Kompetenz* by making the reference to arbitration the rule and not the exception. This was reiterated in the case of *Shin Etsu*⁹, wherein the Apex Court held that where the court finds the arbitration agreement to be *prima facie* valid or operative, reference must be made to the arbitral tribunal under S. 45.¹⁰ However, the

⁸Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION, (2009), pp.1049-54.

⁹(2005) 7 SCC 234.

¹⁰*Id.*, ¶ 17.

court there did not intend that the *prima facie* invalidity or inoperativeness would be a ground to decline reference to arbitration. The court in *Vikram Bakshi*¹¹ has erred by misunderstanding the ratio in *Shin Etsu* as the latter. It is also to be noted that the court completely ignored the application of the LCIA Rules which give the arbitrator the jurisdiction to decide upon the validity of the arbitration agreement,¹² a Rule to which the parties voluntarily bound themselves as per the arbitration clause. Also, the learned judge failed to take into account the fact that the parties agreed under Rule 23.5, without reservations, to not apply to any state authority regarding the jurisdiction of the arbitral tribunal.

The reason given by the court for invoking the non-obstante clause under S. 45 was that the arbitration agreement had become inoperative because of the ongoing and overlapping proceedings in the CLB. Paradoxically, such a rationale goes against the very case the court relies in its support, on account of similarity of facts, which is that of *WSG (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*,¹³ which held that the pendency of proceedings in another court is not a valid ground for declining proceedings under international arbitration.¹⁴ Thus, although the observation of the court under S. 45 should be on a *prima facie* basis, the pending proceedings in another court cannot act as one such basis to injunct arbitration.¹⁵ This stand was reiterated in *Swiss Timing v. Organizing Committee, CWG*.¹⁶ Thus, the court has erred in its understanding of what constitutes inoperativeness of an arbitration agreement under S. 45.

¹¹ *Supra* note 1.

¹² LCIA Arbitration Rules, Rule 23.1

¹³ AIR 2014 SC 968 (hereinafter '*MSM*').

¹⁴ *Id.*, ¶ 48.

¹⁵ *Supra* note 12.

¹⁶ (2014) 6 SCC 677.

Arbitrability of disputes involving mismanagement and oppression in the company affairs

The court also observed that disputes pertaining to oppression and mismanagement of the affairs of the company (covered under Ss.397 and 398 of the Companies Act, 1956), are solely within the jurisdiction of the civil court and therefore not arbitrable.¹⁷ Although there is no specific meaning given to the word ‘oppression’ under the Companies Act, 1956, the wrongful exclusion of a shareholder is covered under the ambit of such a meaning.¹⁸ Also, in the case of *Booz Allen & Hamilton*,¹⁹ it was held that the rights “*in personam*” are arbitrable as opposed to rights “*in rem.*” Following from this, it has also been held that the right of a shareholder is a right “*in personam.*”²⁰

Moreover, the situations where a contract is voidable, such as fraud, undue influence, oppression etc. are within the jurisdiction of a tribunal²¹ and proceedings may continue simultaneously in such a scenario.²² In the present case, the court was highly selective in its approach in relying on the Bombay High Court judgment of *Rakesh Malhotra v. Rajinder Kumar Malhotra*²³ which said that disputes pertaining to oppression and mismanagement under the Companies Act, 1956 are not referable to

¹⁷*Supra* note 1, ¶¶ 58 and 59.

¹⁸Promod Nair, ARBITRATIONS OF M&A TRANSACTIONS: A PRACTICAL GUIDE, 122-23, available at <http://www.jsalaw.com/Admin/uploadedfiles/PublicationFiles/Arbitration%20of%20M&A%20Transactions.pdf> as viewed on February 02, 2015.

¹⁹*Booz-Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532; *Fulham Football Club Ltd v. Richards and Anr.*, (2011) EWCA Civ 855.

²⁰*Gurnir Singh Gill and Anr. v. Saz International (P) Ltd. and Anr.*, (1987) 62 Comp Cas 197 (Del).

²¹*Hindustan Petroleum Corp Ltd v. Pinkcity Midway Petroleums*, (2003) 6 SCC 503.

²²*M.S. Sheriff v. State of Madras*, 1954 SCR 1229.

²³ [2015] 192 Comp Case 516 (Bombay).

arbitration, rather than following a catena of cases to the contrary which present a more pro-arbitration approach. Thus, the dispute under CLB being one of oppression, the charges, even if they overlap, can be tried by the arbitral tribunal without barring its jurisdiction.

The reliance on *MSM*²⁴ solely on the basis of the facts being *pari materia* is also flawed,²⁵ since in the present case, the governing law as per the agreement is India, and the venue of arbitration is London, whereas the governing law in *MSM*²⁶ was the law of England.

Ignorance of principles of *forum non conveniens*

As per the court in the present case, to issue an anti-arbitration injunction, two requirements have to be met under the law. Firstly, that the essential elements for granting an anti-suit injunction have to be satisfied, and secondly, as per S.45 of the Act, any of the three contingencies of the arbitration agreement (being either null and void, inoperative or incapable of being performed) also has to be met.²⁷ *Forum non conveniens*, being an essential element of an anti-suit injunction, will, therefore, be a valid ground to issue an anti-arbitration injunction.

The court's reasons in reaching the conclusion that the London-based arbitration constituted *forum non conveniens* were merely that most of the parties as well as the governing law were Indian, as also that the defendants were enjoying a position of dominance over the plaintiff.²⁸ Such a conclusion seems to be based on an ignorant view of the existing law, as

²⁴*Supra* note 13.

²⁵*Supra* note 1, ¶ 52.

²⁶*Supra* note 13.

²⁷*Supra* note 1, ¶ 71.

²⁸*Supra* note 1, ¶ 62.

will be shown below.

Anti-suit injunctions are exercised when it is necessary to avoid injustice or inequity.²⁹ Hence, the doctrines of *forum non conveniens* and anti-suit injunction are interrelated.³⁰ Moreover, in *SNI Aerospatiale's* case,³¹ the concept of a suit being vexatious and oppressive as grounds for stay of foreign proceedings was introduced. These principles were interpreted by the Supreme Court in *Modi Entertainment Network v. WSG Cricket Pte Ltd.*,³² to hold that factors such as place of cause of action or jurisdictional hardships in approaching the foreign court would not be factors in constituting *forum non conveniens* so as to grant an anti-suit injunction. It said this in light of the observation that, where parties have voluntarily entered into a contract, such an arrangement has to be given effect to unless the arrangement was such as to relieve an oppressive party of its burden under the contract.³³

The Delhi High Court's judgment has given no reasons as to why the LCIA arbitration would be a *forum non conveniens* in light of the fact that the parties voluntarily agreed to such an arrangement. The court has, therefore, taken the wrong factors into account to oust arbitral jurisdiction and has neither shown how the defendants were in a position of dominance, nor demonstrated how they wished to escape their contractual arbitration by resorting to arbitration as per the JVA. The court's understanding of what constitutes *forum non conveniens* goes against the principle of freedom of parties to a contract and the rationale for conducting the arbitration at a

²⁹*Castanho v. Brown & Root*, (1981) A.C. 577, 573.

³⁰A.V. Dicey, J.H. Morris et al., *CONFLICT OF LAWS*, (2014), pp. 408-09.

³¹[1987] A.C.871.

³²(2003) 4 SCC 341.

³³*Id.*, ¶ 28.

neutral venue, in order to minimize the chances of oppression and dominance.³⁴ The governing law (seat) being Indian, and the venue being London,³⁵ there is seemingly no *prima facie* oppression in the agreement.

No waiver of the arbitration clause

Another reason why the Delhi High Court held that it would have jurisdiction to the exclusion of the jurisdiction of the arbitral tribunal was because of the fact that the plaintiffs withdrew their application made to the CLB under S.45 for reference to arbitration. Such a conclusion was not logical in light of the entirety of the facts of the matter, as well as the law prevalent on the waiver of arbitration clauses. The criticism pertaining to waiver can be analyzed at three levels.

Firstly, as held in *Financiers And Fibre Dealers Ltd. v. Sankarlal Sardar*,³⁶ reference to arbitration in accordance with the agreement *can* be made even after a party withdraws a suit, or even while a suit is pending. Furthermore, the Supreme Court in *MSM*³⁷ took the aforementioned stand further by laying down that any contentions pertaining to waiver or abandonment of an arbitration clause between the parties must be first raised with the arbitral tribunal, in consonance with the doctrine of *Kompetenz-Kompetenz*, as the issue of waiver is not a constituent of any of the three constituents under the non-obstante clause under S.45.³⁸

Secondly, in the present case, the court, discussing *MSM*³⁹, recognized that there is *per se* no requirement under S.45 to make an application for

³⁴ Arthur Rovine, CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION, (2014), pp. 466-67.

³⁵ LCIA Arbitration Rules, Art. 16.4.

³⁶ AIR 1961 Cal 46.

³⁷ *Supra* note 13.

³⁸ *Id.*, ¶ 29.

³⁹ *Supra* note 13.

reference to arbitration, and that a mere request on part of either party shall suffice.⁴⁰ Hence, when there is no statutory requirement under S.45 for an application, its withdrawal is itself infructuous. Following from this, the withdrawal cannot be deemed to be a waiver of the arbitration agreement.

Thirdly, even if the doctrine of waiver is arguable under S.45, in light of the policy in favour of arbitration, waivers are not to be construed lightly⁴¹ and therefore one of the essentials for constituting the waiver of the right to arbitrate is that there should be prejudice caused to the other party.⁴² Moreover, the waiver of the right should be an intentional, unequivocal, and deliberate release of the right later sought to be enforced.⁴³ The court, or the plaintiff, in light of the facts, has not justified any of the aforementioned attributes being applicable through the backing of reasons.

Arbitral proceeding pursuant to termination of JVA is a separate dispute altogether

It is to be noted that the court in *Vikram Bakshi*⁴⁴ proceeded with an understanding that the anti-arbitration injunction would be valid as there were overlapping proceedings taking place in the CLB as well as in the LCIA. This is open to serious criticism on account of the fact that McDonald's had instituted the proceedings in the LCIA subsequent only to the termination of the JVA. As per the arbitral agreement between the parties, termination is arbitrable and therefore constitutes a separate dispute as distinguished from the dispute pertaining to oppression and

⁴⁰*Id.*, ¶ 21, *supra* note 1, ¶ 48.

⁴¹California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC*, No. S204032.

⁴²J.H. Carter & J. Fellas, *INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK*, (2010), p.277.

⁴³*ACD Tridon v. Tridon Australia*, [2002] NSWSC 896.

⁴⁴*Supra* note 1.

mismanagement in the CLB.⁴⁵ The Supreme Court in *Dolphin Drilling Ltd. v. ONGC Ltd.*,⁴⁶ recognized that where there are different disputes, the remedy of arbitration can be invoked for each such dispute, and it does not mean that once an arbitration clause is invoked for a dispute, it cannot be invoked for another dispute.⁴⁷ Thus, the approach of the court in proceeding with the injunction on the ground that the disputes pertaining to oppression and that of termination of the JVA being one and the same dispute was flawed, as both of them constitute separate disputes. In the present case, the court had to decide the injunction in respect of *termination* of the JVA, while it ended up basing its reasons contemplating that the arbitration instituted in LCIA was to decide on the dispute of *oppression and mismanagement*.⁴⁸

Conclusion

The judgment is disputable because of multifarious reasons. It wrongfully assumes that arbitration cannot go on while a suit is pending in court by undermining the established doctrine of *Kompetenz-Kompetenz*, and wrongfully interprets the mandate of S.45 of the Act; it also disregards the existent law that issues of oppression and mismanagement are arbitrable. Furthermore, it wrongfully proceeds on the misapplication of principles pertaining to *forum non conveniens*, which clarify that voluntary submission to an arbitral venue by parties cannot be a ground for injunction. Also, withdrawal of the application under S.45 cannot be said to constitute waiver of the arbitration clause. Lastly, any discussion pertaining to arbitral proceedings pursuant to termination of JVA being a separate dispute

⁴⁵*Supra* note 1, ¶ 3 (See Clause 40 of the agreement between the parties).

⁴⁶ (2010) 3 SCC 267.

⁴⁷*Id.*, ¶ 7.

⁴⁸*Supra* note 1, ¶ 59.

altogether was completely ignored by the court in reaching the conclusion that it did. Though the decision cannot be expected to contribute to the jurisprudence on the subject, as it is confined to its own facts- which form a major reason for the court deciding on the basis of *MSM*⁴⁹- the decision has cautioned the arbitration world, and has reminded the investor community of the holocaust of the pre-*BALCO*⁵⁰ days.

⁴⁹ *Supra* note 13.

⁵⁰ *Supra* note 6.

The New Scope of ‘Debentures’ Under the Companies Act, 2013: Does it cover Commercial Paper?

- Shriya Nayyar*

Abstract

Since its enactment on August 29, 2013, the Companies Act 2013 (“2013 Act”) has progressively gained notoriety for opening up a can of worms and unsettling the status quo on many previously settled legal positions. One such debate concerns the changed definition of ‘debentures’ under the 2013 Act which, according to some, has blurred the distinction between negotiable instruments and marketable securities and could lead to the inclusion of negotiable instruments like Commercial Paper (“CP”) within the ambit of ‘debentures’. This issue has much relevance in commercial circles as the issuance of CP is one of the most common routes taken by corporates and NBFCs (Non-Banking Financial Corporations) for short-term investments and working capital. Many in corporate circles have expressed concerns, that owing to this change, a CP issue could now require compliance with norms related to debentures under the 2013 Act. However, no clarity on this issue has emerged from the MCA. In this comment, the author has tried to reconcile this debate by conjointly reading the 2013 Act with the Securities Contract (Regulation) Act, 1956 (“SCRA”). It is the author’s analysis that the changed definition is not an attempt to include all negotiable instruments within the ambit of debentures. Instead, the definition merely attempts to align the 2013 Act with prior judicial pronouncements of the Supreme Court. However, upon a conjoint reading

of the 2013 Act with the SCRA, it may now be possible to include a CP within the ambit of a debenture.

Genesis of the controversy

The contentious definition of ‘debentures’ in the 2013 Act which kick-started this controversy is provided in Section 2(30).¹ It reads as follows:

*‘debenture’ includes debenture stock, bonds and **any other instrument evidencing a debt**, whether constituting a charge on the assets of the company or not.* (Emphasis supplied).

The parallel provision under the Companies Act 1956 (“1956 Act”) was Section 2(12), which read as follows:

*‘debenture’ includes debenture stock, bonds and **any other securities of a company**, whether constituting a charge on the assets of the company or not.* (Emphasis supplied).

Thus, while in the 1956 Act a debenture could only be a ‘security’, under the 2013 Act, it has now been amended to include ‘*any other instrument evidencing a debt*’. In the light of this, many believe that CP will now be covered in the definition of debentures.² However, to resolve this, one must find affirmative answers to the following two questions:

1. Are all instruments evidencing debt now debentures?

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¹ Section 2(30) was notified by the MCA on 12 September, 2013.

² *Companies Act, 2013: NBFC Fundraising Tough*, THE FIRM, April 14, 2014, available at http://thefirm.moneycontrol.com/story_page.php?autono=1069181, as viewed on May 14, 2014.

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2. Has the scope of ‘debentures’ expanded in any way or are the changes merely syntactical?

Resolving the controversy

In attempting to resolve this controversy, one must invariably start at its source. The reason for many believing that CPs can now be included within debentures is the fact that a CP is essentially a promissory note and promissory notes themselves are an acknowledgement of debt. Section 4 of the Negotiable Instruments Act, 1881 defines a ‘promissory note’³ and illustration (b) to this section stipulates that a promissory note is an acknowledgement of a debt.⁴ The same has also been held in several judicial pronouncements and is a settled position of law.⁵ However, while one may make a preliminary argument based on this premise, it certainly cannot settle the debate once and for all. This is because such an assumption leads to the fallacious premise that any negotiable instrument evidencing debt can also be included in the definition of debentures. This leads us to the first question raised above: *Did the legislature intend to include any and all negotiable instruments within the ambit of debentures?*

³ Section 4, Negotiable Instruments Act, 1881: A promissory note is an instrument in writing (not being a bank-note or a currency note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

⁴ Illustration (b) to Section 4: “I acknowledge myself to be indebted to B in Rs. 1,000 to be paid on demand, for value received.”

⁵ *Bal Mukund v. Munna Lal Ramji Lal*, AIR 1970 P&H 516; *Shah Chimanlal Jagjivandas v. Khambhla Savji Bechar* AIR 1955 Sau 74; see Bhashyam & Adiga, THE NEGOTIABLE INSTRUMENTS ACT (19th ed. 2012) pp. 60-70.

This seems highly unlikely. Instead, the change proposed in the 2013 Act seems to be aimed at achieving a different purpose altogether. The changed definition doesn't seem out of context when considered in light of the Supreme Court's judgment in the 1990 case of *Narendra Kumar Maheshwari v. Union of India*⁶, which defined debentures as an acknowledgement of debt, with a commitment to repay the principal with interest.⁷ Since the Supreme Court defined a debenture as an acknowledgement of a debt, the intent seems to be to align the Companies Act with this position. Thus, it is most likely that the inclusion of the phrase '*any other instrument evidencing a debt*' is merely an attempt to include all instruments which essentially acknowledge a debt but are known by different names, within the meaning of debentures. Thus, to assume that the changed definition includes any and all negotiable instruments within the ambit of debentures seems incorrect.

The next question which naturally arises is: ***Whether the ambit of debentures has changed at all or is the change merely syntactical?***

It is this question which lies at the heart of this debate and demands a deeper scrutiny. Since it does not seem that the intent of the legislature was to include all negotiable instruments within debentures, it is unlikely that the underlying concept of debentures has undergone change. In light of this, a possible solution to this conflict can be given by construing '*debentures*' on a combined reading of the 2013 Act and the SCRA. This is because a

⁶ *Narendra Kumar Maheshwari v. Union of India*, 1989 SCR (3) 43

⁷ *Narendra Kumar Maheshwari v. Union of India*, AIR 1989 SC 2138.

debenture is essentially a ‘security’ under the SCRA and its true import cannot be estimated in isolation with the SCRA. For the purposes of both the 1956 and the 2013 Act, ‘securities’ has been defined in Section 2(h) of the SCRA.⁸ Section 2(h) (i) of the SCRA defines ‘securities’ to include “shares, scrips, stocks, bonds, debentures, debenture stock and other marketable securities of a like nature”. Thus, it would not be wrong to say that only those instruments evidencing a debt which are also securities can be debentures under the 2013 Act.

This naturally leads one to another question: *What are securities?*

Interestingly, although the SCRA defines securities, the same is not an exhaustive definition. According to the Supreme Court in *Sudhir Shantilal Mehta v. Central Bureau of Investigation*⁹, the definition is inclusive and must be interpreted expansively. The Apex Court has also held that to fall within this definition, a security must be “marketable”, and that for this purpose, “marketable” means “saleable”, i.e. a security which is capable of being freely bought and sold in a market regardless of whether it is listed in a stock exchange.¹⁰ However, to determine the true import of a ‘security’ under SCRA, a decisive test was laid down by the Gujarat High Court in

⁸ This is reflected in Section 2(81) of the 2013 Act (notified by the MCA on 12 September, 2013) and Section 2(45AA) of the 1956 Act.

⁹ [2010] 155 CompCas 339 (SC).

¹⁰ *Naresh K. Aggarwala and Co. v. Canbank Financial Services Limited*, AIR 2010 SC 2722; *Bhagwati Developers Private Ltd. v. Peerless General Finance & Investment Co. Ltd.*, (2013) 5 SCC 455.

Essar Steel Ltd. v. Gramercy Emerging Market Fund,¹¹ where the court had to decide whether floating rate notes (FRNs) were securities. In deciding this, the Court laid down the following test:

*“The fundamental purpose underlying Securities Acts is to eliminate serious abuses in a largely unregulated securities market. There is virtually limitless scope of human ingenuity especially in the creation of the numerous schemes devised by those who seek the use of money of others on promise of profits. The inclusive definition of the term 'security' is wide enough to include within that definition many types of instruments that might be sold as an investment. The term 'Note' is relatively broad to encompass instruments having different characteristics depending on whether issued in a consumer context as a commercial paper or in some other investment context. If the notes are issued in a commercial or consumer context, they will not be treated as securities while those issued in investment context would be securities. Whether the Note is issued in investment context can be ascertained on the basis of the circumstances surrounding the transactions. **In order to determine whether a transaction involves a 'security', the transaction has to be examined to assess the motivations that would prompt a reasonable seller and buyer to enter into it. If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a 'security'. On the other hand, if the note is exchanged to***

¹¹ 2003 116 CompCas 248 Guj.

*facilitate the purchase and sale of a minor asset or consumer goods, or to advance some other commercial or consumer purpose, such note cannot be classified as 'security'. One other factor to be examined would be whether the Note in question is an instrument in which there is common trading for speculation or investment and how is it views (sic) by the investing public [See *Reves v. Ernst & Young* 494 US 56 (1990)].”(Emphasis supplied).*

Thus, to be a security, an instrument must both be marketable and used in an investment context. When one adopts such an approach, it becomes possible to include a CP within the ambit of a debenture without destroying the status quo. This is because:

Firstly, a CP is a “*marketable*” instrument. The RBI’s treatment of the instrument makes this abundantly clear.

Secondly, a CP is used in the investment context in India. The RBI Master Circular on Commercial Papers, which presents the regulatory framework for CPs in India, sees CPs as a “*source of short-term borrowings and an additional instrument for investors*”.¹² Although it uses the term “investment”, this could indicate either of the two contexts and is ambiguous. To complicate matters further, while laying down the above test, the Gujarat High Court in *Essar Steels* also mentioned that CPs are

¹² RBI Master Circular- Guidelines for Issue of Commercial Papers dated 1 July, 2014.

used in the consumer context.¹³ Yet, this observation of the court is merely an *obiter* and cannot be treated as a decisive pronouncement on the subject. Moreover, one can argue that a CP is used in an investment context. The thrust of this argument can be derived from the accounting treatment given to CPs in India. Under Section 133 of the 2013 Act, the Central Government is required to notify accounting standards to be used by companies in preparing their financial statements.¹⁴ Since the Central Government hasn't notified any accounting standards under the 2013 Act so far, the MCA has clarified that till such standards are notified, the standards notified under the 1956 Act shall continue to prevail.¹⁵ Accordingly, accounting for investments is currently covered by AS 13 (Accounting Standard). According to the ICAI, under AS 13, CP is seen as a current investment and is to be covered as a separate head under 'Investments' in a company's annual financial statement.¹⁶ This provides a strong indication that CP is used in the investment context and can thus be covered under 'securities' in the SCRA. This would also justify its coverage under debentures.

¹³ *Supra* at note 10.

¹⁴ Section 133, Companies Act 2013: The Central Government may prescribe the standards of accounting or any addendum thereto, as recommended by the Institute of Chartered Accountants of India, constituted under section 3 of the Chartered Accountants Act, 1949, in consultation with and after examination of the recommendations made by the National Financial Reporting Authority.

¹⁵ Ministry of Corporate Affairs, General Circular No. 15/2013, dated 13 September, 2013.

¹⁶ *Compendium of Opinions*, Vol. XII, Expert Advisory Committee, ICAI, New Delhi, Query No. 1.21; *Compendium of Opinions*, Vol. XIX, Expert Advisory Committee, ICAI, New Delhi, Query No. 28;

Inclusion of CPs in debentures- opening another can of worms?

Based on the discussion above, one can reasonably conclude that there exist some potent arguments to justify the inclusion of CPs in the ambit of debentures. However, even if CPs are included within debentures, the problems won't end there. In fact, that would open yet another can of worms under the 2013 Act. Some possible issues which could arise are as follows¹⁷

- a. Would provisions related to private placement under Section 42 of the 2013 Act now also apply to CPs? If so, this would automatically mean companies won't be able to do a new CP issue without the previous one having closed. However, this seems counterintuitive since in practice, a CP issue usually closes and ends on the same day.
- b. If provisions related to private placements apply to CPs, privately placed CPs will also not be exempt from the requirement of creating a Debenture Redemption Reserve ("DRR") and putting 50% of the money raised through the CP issue into the DRR ahead of redemptions. Likewise, the liquidity requirement of having 15% of the total redemptions at the beginning of each year would also apply to a CP, since this now applies to a debenture.
- c. Will issue of a CP need a Board Resolution under Section 179(3) of

¹⁷ *Supra* note 2; Nidhi Bothra, *The Changing Definition of Debentures*, INDIACORPLAW, available at <http://indiacorplaw.blogspot.in/2014/05/guest-post-changing-definition-of.html>, as viewed on May 14, 2014.

the 2013 Act or would it need a special resolution as per Section 42 of the 2013 Act?

One possible resolution to this problem could be under Section 1 (4) (e) of the 2013 Act, which states that the provisions of a special Act shall prevail over the provisions of the Companies Act, 2013. Considering the fact that a CP issuance is regulated by RBI under the powers derived from the RBI Act, which is a special Act, a CP is likely to continue to be regulated by the RBI and not under the 2013 Act.

Conclusion

On the basis of the foregoing analysis, we can conclude that although a CP can potentially be covered under the 2013 Act, there is still no clarity on the same. This uncertainty shall continue to prevail till such a time as the MCA decides to clarify on the same. However, in the meantime, it seems that a large number of companies have decided to err on the side of caution. According to public disclosures on websites of several companies, a CP issue is now being seen as a debenture and governed by Sections 42 and 71 of the 2013 Act. In order to enhance ease of business and bring clarity on this issue, the MCA must swiftly clarify the same. However, until this happens, the matter remains open to debate and further interpretation.



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