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CONTENTS

BOOK REVIEWS

CLIMATE CHANGE, TECHNOLOGY TRANSFER AND ITS PATENTABILITY IN THE GLOBALIZED MARKET ECONOMY: QUEST FOR A JURISPRUDENT BALANCE

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Key words: development, environment, *salus populi suprema lex*, climate equity, *jus cogens*, international liability, *erga omnes*, compulsory licensing, etc.

ABSTRACT

While market-driven rules of Intellectual property vis-a-vis patent generate incentive(s) for inventor to accelerate creativity, there are limits of the same as well- intergovernmental arrangement vis-a-vis Climate Change Technology Transfer, which has set a mandate of concerned regime, constitutes illustration of the same. Ranging from United Nations Framework Convention on Climate Change, 1992 to Kyoto Protocol, 1997 to Bali Action Plan, 2007 and oncoming post-Kyoto world after 2012- climate change threat may be addressed through free-flow of North-South technology transfer. The focus of this effort zeroes in such unique interface between IP regime and climate change regime which constitutes a legal conundrum. Least Developed Countries and Small Island Developing States, which are likely to be first and worst victims of global climate change, cannot access to latest patented technology from industrially developed world out of economic constraint on their part while carbon-centric mode of development hemisphere constitutes their well being at real stake. This is set to create conflict all over the world.

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Under the jurisprudence of international liability, however, offering victim states CCTT may be construed as legal obligation on the part of errant states. Extension of the underlying rationale in compulsory licensing, as part of IP regime, may allow CCTT to bridge the gap. The Author hereby explores nitty-gritty of two divergent regimes and thereby demonstrates dynamics of rules of compulsory licensing as a jurisprudent way-out to get rid of international legal conundrum in global public interest.

INTRODUCTION

'Ideas rule the world'- the axiom is indeed true and more so in globalized world where trade of idea has occupied a lion's share of the idea of trade. International trade regime under the auspices of World Trade Organization (WTO) therefore accommodates the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) within its own domain though the same should not be in the WTO at all and deserves to constitute a different regime of its own.[1] Though the WTO underwent caustic criticism over the same,[2] TRIPs still remains in its umbrella with a result that intellectual property is increasingly reduced to a commodity and thereby becomes subject matter of individual rather than collective concern. Whether or how far intellectual property regime pushes people to ethical poverty is a point apart. Indeed the TRIPs regime has had rationale of its own. Without entering into the same, state may disseminate the same as per urgent requirement in collective interest of humanity. There are provisions in the hitherto IP regime to this end. So far adherence to parallel process is limited to public health though there is space for jurisprudent extension of the same to slow down climate

Vide JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 185 (2004). For virtually the first time, corporate lobbies in pharmaceuticals and software had distorted and deformed an important multinational institution, turning it away from its trade mission and rationale and transforming it into a royalty collection agency. *Supra,* n. 1, p. 183.

change. Transfer of patented technology against climate change constitutes a proposition put forth through the forthcoming paragraphs.

Under the United Nations Framework Convention on Climate Change (UNFCCC) regime, a mandate for Climate Change Technology Transfer (CCTT) is apparent on the face of record. In the UNFCCC itself- a virtual *grund norm* vis-a-vis global climate change regime- there are overt provisions bearing the mandate[3,4,5] besides umpteen covert references to this end. The Kyoto Protocol, 1997 (KP) followed the same legacy,[6,7,8] to be extended

> All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:
>
> Promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors.
> Article 4.1(c), UNFCCC, 1992. Available at: http.7/unfccc.int/resource/docs/convkp/convene.pdf accessed on September 30, 2010.

[4] The developed country Parties and other developed Parties included in Annex II shall ... also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing measures that are covered by paragraph 1 of this Article and that are agreed between a developing country Party and the international entity or entities referred to in Article 11, in accordance with that Article.
Supra, n. 3, Article 4.3, UNFCCC, 1992.

[5] The Parties shall take full account of the specific needs and special situations of the least developed countries in their actions with regard to funding and transfer of technology.
Supra, n. 3, Article 4.9, UNFCCC, 1992.

[6] Among the issues to be considered shall be the establishment of funding, insurance and transfer of technology.
Article 3.14, KP, 1997. Available at: http://unfccc.int/resource/docs/convkp/kpeng.pdf accessed on September 30, 2010.

[7] Cooperate in the promotion of effective modalities for the development, application and diffusion of, and take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies, know-how, practices and processes pertinent to climate change, in particular to developing countries, including the formulation of policies and programmes for the effective transfer of environmentally sound technologies that are publicly owned or in the public domain and the creation of an enabling environment for the private sector, to promote and enhance the transfer of, and access to, environmentally sound technologies.
Supra, n. 6, Article 10(c), KP, 1997.

[8] In the context of the implementation ... the developed country Parties **and other** developed Parties included in Annex II to the Convention shall:

through the Bali Action Plan, 2007 (BAP)[9] and the Copenhagen Accord, 2009 respectively.[10]*[11]"[12] The series of climate change (international) instruments thus set the CCTT as insignia of and *sine qua non* for the regime concerned. In the absence of any delimitation of national environment as per territorial jurisdiction of states, there is imperative for worldwide initiative toward slow down of climate change lest the same may be too late to lament for. And here lies a rationale behind CCTT operation.

INTERNATIONAL LIABILITY OF CLIMATE CHANGE

Indeed there is legal reasoning to substantiate the same as well though seemingly at its nebulous state. Despite instances of occasional departure

Also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of advancing the implementation of existing commitments. *Supra,* n. 6, Article 11.2(b), KP, 1997.

9 Enhanced action on technology development and transfer to support action on mitigation and adaptation, including, inter alia, consideration of:
(i) Effective mechanisms and enhanced means for the removal of obstacles to, and provision of financial and other incentives for, scaling up of the development and transfer of technology to developing country Parties in order to promote access to affordable environmentally sound technologies;
(ii) Ways to accelerate deployment, diffusion and transfer of affordable environmentally sound technologies.
Article 1(d), BAP, 2007. Available at: http://unfccc.int/fi les/meetings/eop_13/application/pdf/cp_bali action.pdf accessed on September 30, 2010.

10 Scaled up, new and additional, predictable and adequate funding as well as improved access shall be provided to developing countries ... to enable and support enhanced action on mitigation, including substantial finance to reduce emissions from deforestation and forest degradation (REDD-plus), adaptation, technology development and transfer and capacity-building, for enhanced implementation of the Convention.
Article 8, the Copenhagen Accord, 2009. Available at: http://unfccc.int/files/meetings/cop_15/application/pdf/cop 15 cph auv.pdf accessed on September 30, 2010.

" We decide that the Copenhagen Green Climate Fund shall be established as an operating entity of the financial mechanism of the Convention to support projects, programme, policies and other activities in developing countries related to mitigation including REDD-plus, adaptation, capacity-building, technology development and transfer. *Supra*, n. 10, Article 10, the Copenhagen Accord, 2009.

12 In order to enhance action on development and transfer of technology we decide to establish a Technology Mechanism to accelerate technology development and transfer in **support** of action on adaptation and mitigation that will be guided by a country-driven **approach and** be based on national circumstances and priorities. ***Supra,* n. 10,** Article 11, the Copenhagen Accord, 2009.

from the same, post-war world revolves around the axis of nonaggression of state by state.[13] Thus negligent activities, if the same contribute to climate change, may be construed to constitute transboundary harm against rest of the world as environment is one and not split into narrow domestic walls of the states. Aftermath of any violation at any part of the planet may affect any sundry part elsewhere including its own. Therefore no state may assure rest of the world to contain greenhouse substances produced by the same within territorial jurisdiction of its own. As the world is at the threshold of climate change, in general this may not be too remote to conclude that this is result of dark (carbon-centric) mode of development in the Occident. Had there been appropriate recourse to judicial process, (industrially) developed states may thereby be prosecuted to commit transboundary harm against the world as per customary rule of *erga omnes* to this end.

Indeed there is no legally binding treaty obligation in international law-UNFCCC is a soft law regime in its essence- a newer dimension has reached its threshold to address matters related to transboundary harm. International Law Commission (ILC), while covering responsibility of state for lawful acts, has introduced international liability for injurious consequences arising out of acts not prohibited by international law. Accordingly, the state of

origin is under a legal obligation to disseminate information in the form of notification to potential victim of risk and its assessment. Before

[13] Article 1.1, read with Chapter VII, Charter of the United Nations, 1945. Available at: http://wvvw.unesco.org/education/information/nfsunesco/pdf/CHART E.PDF accessed on October 1, 2010.

[14] If the assessment referred to in article 7 indicates a risk of causing significant transboundary harm, the State of origin shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the available technical and all other relevant information on which the assessment is based.
Article 8.1, Prevention of Transboundary Harm from Hazardous Activities, 2001; as text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. Available at: http://untreatv.un.Org/ilc/texts/instruments/enelish/draft%20articles/9_7_2001.pdf accessed on October 2, 2010.

undertaking such an activity being a potential harm to other state(s), the state of origin ought to review its cost-benefit analysis.[15] Even after an unholy happens, the state of origin, along with operator concerned, ought to rely upon technology and participate in course of disaster management.[1] And best technology is likely to be a patented one.

While there is no likelihood of so called legally-binding agreement to this end,'[7] emerging ILC jurisprudence seems sound enough to set errant state on the dock. After the same is recognized by the UN General Assembly, if at all, errant state ought to act as per rule of due diligence to get rid of farther trouble to this end.[18] Even if not yet so serious as responsibility of states for

5 In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 9, the States concerned shall take into account all relevant factors and circumstances, including:

The importance of the activity, talcing into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the State likely to be affected. *Supra,* n. 14, Article 10(b).

6 Upon the occurrence of an incident involving a hazardous activity which results or is likely to result in transboundary damage:

the State of origin, with appropriate involvement of the operator, shall ensure that appropriate response measures are taken and should, for this purpose, rely upon the best available scientific data and technology.
Principle 5(b), Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, 2006; as text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10). Available at: http://untreatv.un.Org/ilc/texts/instruments/english/draft%20articles/9_10 2006.pdf accessed on October 2, 2010.

7 That there would not be any legally-binding climate change agreement at the 16lh Conference of the Parties (COP) of the United Nations Framework Convention on Climate Change (UNFCCC) to be held in end November in Cancun, Mexico, has now become public.
D. Ravi Kanth, Climate Finance: Already in Trouble, XLV 38 EPW 17 (2010).

8 Principle 5(b) requires the State to take appropriate response measures and provides that it should rely upon best available means and technology. The State of origin is expected to perform the obligation of due diligence botlv at the stage of authorization of hazardous activities and in monitoring the activities in progress after authorization and extending into the phase when damage might actually materialize, in spite of best efforts to prevent the same.
Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries 2006; as text adopted by the International

internationally wrongful acts, their international liability for injurious consequences arising out of acts not prohibited by international law'seems no lesser evil for state(s) of origin so far as provision for allocation of loss is concerned.

A set of *opinion juris*, as delivered by the International Court of Justice (ICJ), is relevant here. Way back since mid-nineties, the ICJ asserted its concern for state intervention in terms of environment and included the same as integral corpus of international environmental law.[19] Immediately afterwards, the Court cast heavy responsibility on contracting states to accommodate relatively newer dynamics of environmental norms into preexisting treaties. The language applied by the Court may be read as virtual *jus cogens* to this end.[20] The Court put due care and caution of rationale

Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as part of the Commission's report covering the work of that session (A/61/10), clause (3), p. 167. Available at:
http://untreatv.un.Org/ilc/texts/instruments/english/draft%20articles/9_10 2006.pdf accessed on October 2, 2010.

The Court recognizes that the environment is under daily threat and ... The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

The International Court of Justice on Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, paragraph 29. Available at: http://www.ici-cii.org/docket/files/95/7495.pdfaccessed on October 1, 2010.

Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of tke 1677 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point put that newly developed norms of environmental law are relevant for the implementation of the Treaty ... These articles (of the treaty) do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

Consequently, the treaty is not static, and is open to adapt to emerging norms of international law. ... new environmental norms can be incorporated in the Joint **Contractual** Plan. The responsibility to do this was a joint responsibility. Their **implementation** thus requires a mutual willingness to discuss in good faith actual and **potential** environmental risks. The awareness of the vulnerability of the environment

behind precautionary principle and intergenerational equity as well.[21] In its recent judgment, the Court is also adhered to consideration of technology.[22] From its judgment, this seems clear that the court nowadays transcends beyond apparent aftermath to take care of relatively less apparent issues like biodiversity and habitat protection.[23] Under such circumstance, therefore, errant state will rather prefer CCTT to escape allocation of loss in terms of global climate disaster to its (dis)credit. Resort to best CCTT, on the contrary, may not only save errant state from perennial economic jeopardy

and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion.
The International Court of Justice on the Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997, p. 7, paragraph 112. Available at: http://ww\v.ici-cii.org/docket/files/92/7375.pdf accessed on October 1,2010.
The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.
Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon environment. Owing to new scientific insights and to growing awareness of the risks for mankind- for present and future generations- of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.
Supra, n. 20, paragraph 140.
To begin with, the Court observes that the obligation to prevent pollution and protect and preserve the aquatic environment of the River Uruguay ... and the exercise of due diligence implied in it, entail a careful consideration of the technology to be used by the industrial plant to be established, particularly in a sector such as pulp manufacturing, which often involves the use or production of substances which have an impact on the environment.
The International Court of Justice on the Case concerning the Pulp Mills on the River Uruguay (Argentina/Uruguay), Judgment, ICJ Reports 2010, paragraph 223, p. 65. Available at: http://www.ici-cii.org/docket/files/135/15877.pdf accessed on October 1, 2010.
The Court is of the opinion that as part of their obligation to preserve the aquatic environment, the Parties have a duty to protect the fauna and flora of the river. The rules and measures ... should also reflect their international undertakings in respect of biodiversity and habitat protection, in addition to the other standards on water quality and discharges of effluent.
The International Court of Justice on the Case concerning the Pulp Mills on River Uruguay (Argentina/Uruguay), Judgment, ICJ Reports 2010, paragraph 262, p. 74. Available^ at: http://www.ici-cii.org/docket/files/135/lS877.pdf accessed on October 1, 2010.

but also help revive diplomatic credibility in front of international community.

TECHNOLOGY TRANSFER TOWARD RESTORATIVE JUSTICE

From jurisprudent worldview, there is no constraint to this end. So far as the TRIPs is concerned, being instrument of the WTO regime, the same has had a rationale of its own toward waiver of IP monopoly in public interest.[24] North-South flow of technology transfer, in particular, is a TRIPs mandate in general.[25] Thus CCTT has had no hurdle in the IP regime. The World Intellectual Property Organization also offers support to the contention abovementioned.[26]

In fact, it may not be too hyperbolic to posit technology and the stake of its IP (read patent) at the centre of debate,[27] Till its 14"' Conference of Parties at

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
Article 8.1, TRIPs, 1994. Available at: http://www.wto.org/english/docs e/legal e/27-trips.pdf accessed on October 2, 2010.
Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.
Article 66.2, TRIPs, 1994. Available at: http://wvvw.vvto.org/english/docs e/legal e/27-trips.pdf accessed on October 2, 2010.
For the IP system was certainly not devised as a means of blocking access to technologies or denying the public the benefits of new technologies. It was created not only to stimulate the creation of new technologies, but also to provide an efficient means of widely disseminating this new technological information, and to build structures to transfer the technology and to put it to work.
Anonymous literature, Climate Change and the Intellectual Property System: What Challenges, What Options, What Solutions? Informal consultation draft, WIPO, Geneva. Available at: http://www.wipo. int/patentscope/cn/lifesciences/pdf/summarv ip climate.pdf accessed on October 2, 2010.
Technology lies at the centre of the climate change debate- the impact of technology on the climate, how to stimulate green innovation, promoting technology transfer and the diffusion of technological knowledge- these are pressing questions for policymakers. International legal instruments and global policy initiatives place high emphasis on the role of technology in addressing the challenge of climate change. It is therefore natural

Poznan, environment lobby and IP lobby were seemingly at loggerheads with a result that there was no decisive position to this end. The former called for reforms or other interventions to ensure that the IP system promotes transfer of environment-friendly technology and does not present barriers. The latter urged that current IP system is essential for the development and effective dissemination of the new technologies that will be needed to address climate change. Thereafter, however, the Poznan Strategic Program on technology transfer has settled the conundrum in its own way.

Nowadays, under the given Poznan mandate, this initiative builds on the existing technology transfer activities of the Global Environment Facility (GEF) which is the designated financial mechanism for implementation of the UNFCCC.[28] Even hardcore corporate pundits lost the game. Of late, the WIPO has put its position clear in specific context of climate change.[29] Thus, under *salus populi suprema lex*- a Latin maxim which prioritizes collective interest over and above individual interest- waiver of patent on CCTT has emerged as an axiomatic normative order in global public interest.

Thus a moot point of the hour underwent paradigm shift from whether or how far CCTT may be allowed to happen to how best to make the same

that when climate change policymakers consider the intellectual property (IP) system, they focused almost exclusively on patents.

Ibid.

Vide Anonymous literature, IP and Climate Change Negotiations: From Bali to Copenhagen, via Poznan, WIPO Magazine, Geneva, no. 2, April 2009, p. 2-3. Available at: http://www.vvipo.int/wipo magazine/en/pdf/2009/wipo pub 121 2009 02.pdf accessed on October 2, 2010.

Concerns about the access to and transfer of knowledge and technology between different actors on the national ... and the regional/international levels is becoming increasingly important, not only because creativity and innovation are crucial for competitiveness and economic growth in the knowledge based economy, but also because they may be part of the solution in some of the issues raised by complex contemporary problems and needs, for example, in the field of climate change or in the attempts to reduce the knowledge and technology gap between countries.

Vide Committee on Development and Intellectual Property, World Intellectual Property Organization, fourth session, Geneva, document no. CDIP/4/7, dated September 25, 2009. Available at: http://www.wipo.int/edocs/mdocs/mdocs/en/cdip 4/cdiD 4 7.pdf accessed on October 2, 2010.

happen.[30] Perhaps, in the wake of ever-increasing climate change tantrum, no side is confident to risk its name being posited at wrong side of the political history of climate diplomacy. At least in terms of CCTT, therefore, there is a synergy of environmental and IP regime to walk hand-in-hand.

In practice, however, widespread theoretical endorsement (in black and white) hardly helps implement the same. Among all constraints which stand on its way, funding mechanism seems to have been the worst. What may be the rudimentary roadmap for financial arrangement to channelize North-South flow of patented technology to slow down climate change? The recent meeting in Geneva (of 46 environment ministers and officials that ended in early September) hosted by the Swiss government along with Mexico did offer some tentative answers. It was an informal brainstorming meeting largely to exchange ideas on climate financing which is considered the "golden key" to unlock the Cancun meeting. The US and other industrialized countries are seeking binding mitigation commitments from the developing countries, particularly the BASIC countries. There is no guarantee now that the green climate fund or $100 billion would accrue to the developing countries who are now being accused of accelerating the climate change.[31] Thus, under given circumstance, the GEF is bound to suffer from scarcity of

> Technology transfer from developed to developing countries, and increasingly *between* developing countries, will therefore be needed on what the secretariat of the UN Framework Convention on Climate Change (UNFCCC) describes as an unprecedented scale. A major, ongoing focus of the UN discussions is how best to make this happen. Strategies include funding mechanisms, capacity-building, international collaborative research networks, public-private partnerships, and using multilateral and bilateral trade cooperation agreements to create incentives.
> Anonymous literature, Cljmate Change: The Technology Challenge, WIPO Magazine, Geneva, no. 1, p. 3 (February 2008). Available at:
> http://www.wipo.int/wipo magazine/en/pdf/2008/wipo pub 121 2008 Ol.pdf accessed on October 2, 2010. *Supra*, n. 17, p. 18-19.

resource as question of contribution is yet to be settled. Since Copenhagen Accord, first boost is received by the GEF in June, 2010.[32]

COMPULSORY LICENSING OF PATENTED TECHNOLOGY

So far CCTT has referred to the North-South transboundary transfer of patented technology. Indeed the same may be between or among developing states as well- a provision accommodated by the Patents Act, 1970 of India in its section 83(f).[33] Also there is space for the same within territorial jurisdiction of state concerned. In such case, CCTT may be operative between or among domestic stakeholders, e.g. the state, public institution, private entrepreneurship etc. and the same may be governed by compulsory licensing- a cardinal rule of IP jurisprudence- to attain optimal balance between individual and collective requirement.[34] Thus, subject to reasonable restrictions, the same purpose may be served through application of compulsory licensing within the state as well.

So far as climate change is concerned, compulsory licensing may at ease be done through extension of "public interest" as mentioned in section 90(l)(vi), read with 90(3), of the Act. Way back since late

[32] *Vide* press release, Streamlined project cycle, direct access to funds, and new country support. Available at: http://www.thegcf.org/gef/node/3363 accessed on October 3, 2010.

[33] **83. General principles applicable to working of patented inventions.** Without prejudice to the other provisions contained in this Act, in exercising the powers conferred by this Chapter, regard shall be had to the following general considerations, namely,-

(f) that the patent right is not abused by the patentee or person deriving title or interest on patent from the patentee, and the patentee or a person deriving title or interest on patent from the patentee does not resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Section 83(f), the Patents Act, 1970.

[34] *Vide* Chapter XVI, the Patents Act, 1970.

fifties, the Apex Court of India has offered maximum space to public interest alias public policy.[35] With the passage of time, its coverage becomes so wide that the same is problematic to the Court itself.[36] So far as CCTT is concerned, the same is required to slow down climate change. Since climate change is global concern, no court may treat mitigation of the same anyway falling short of "public purpose".

In its recent judgment, the Supreme Court has dealt with considerations for issuing compulsory license.[37] Indeed its judgment was delivered on the law of copyright. In the absence of comparable judgment on patent matter, the same may be inferred to be a settled position of the Court over compulsory licensing of IP in general. Here the Court has put paramount priority on public interest while considering compulsory licensing under common law system.[38]

> In its wide sense what is immoral may be against public policy, for public policy covers political, social and economic ground of objection.
> Gherulal Parakh v. Mahadeodas Maiya & Ors. MANU/SC/0024/1959, paragraph 69.
> General meaning of the phrase "public policy" has always been held to be an unruly horse by this Court.
> Devinder Singh & Ors. V. State of Punjab & Ors. MANU/SC/3989/2007, paragraph 20; also available at Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd. AND Phonographic Performance Ltd. v. Millennium Chennai Broadcast (Pvt.) Ltd. etc. etc. MANU/SC/2179/2008, paragraph 23.
> (One of the) core questions which, therefore, arise for consideration in these appeals are:
>
> What would be the relevant considerations which the Copyright Board must keep in view while deciding on the terms on which compulsory license may be issued, including the compensation? * *Vide*, Entertainment Network (India) Ltd. v. super Cassette industries Ltd. AND Phonographic Performance Ltd. v. Millennium Chennai Broadcast (Pvt.) Ltd. etc. etc. MANU/SC/2179/2008, paragraph 23.
> Finally, it is considered a social requirement in the public interest that authors and other rights owners should be encouraged to publish their work so as to permit the widest possible dissemination of works to the public at large. ... To generalize, it is true to say that in the development of modern copyright laws, the economic and social arguments are given more weight in Anglo-American laws of common law tradition, whereas, in Continental law countries with civil law systems, the natural law argument and protection of authors are given first place.

As its judgment was delivered in TRIPs regime, the Court has explored hyperlinks between the Indian Copyright Act, 1957 and international (read WIPO) regime. Thus its clear position over specific references of compulsory licensing under the Berne Convention[39] and the Rome Convention,[40] both are related to copyright, may be presumed to be similar, if not exactly the same in cases of counterparts vis-a-vis patent, e.g. the Paris Convention in general[41] and the Patent Cooperation Treaty in particular[42] to which India is a party. The Court indulges in comparative study of legal position among several states to arrive at legal position of India.[43] The Court thereby underscores an imperative for adherence toward international legal obligation of India.

The protection of copyright, along with other intellectual property rights, is considered as a form of property worthy of special protection because it is seen as benefiting society as a whole and stimulating further creative activity and competition in the public interest.
Vide Copinger and Skone James on Copyright (15th Ed. 2005, para 2- 05, page 27, Vol. 1), as stated in Entertainment Network (India) Ltd. v. Super Cassette industries Ltd. AND Phonographic Performance Ltd. v. Millennium Chennai Broadcast (Pvt.) Ltd. etc. etc. MANU/SC/2179/2008, paragraph 40.

39 Article llbis(2), read With 13(2), the Berne Convention for the Protection of Literary and Artistic Works, as amended on 1979. Available at: http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs wo001.pdf accessed on October 1, 2010.

40 Article 15.2, the Rome Convention (for the Protection of Performers, Procedures of Phonograms and Broadcasting Organizations), 1961. Available at: http://vvww.wipo.int/treaties/en/ip/rome/pdf/trtdocs wo024.pdf accessed on October 1, 2010.

41 Article 5.A, Paris Convention for the Protection of Industrial Property, as amended on 1979. Available at: http://www.wipo.int/treaties/en/ip/paris/pdf/trtdocs wo020.pdf accessed on October 1, 2010.

42 Article 29(1), the Patent Cooperation Treaty, as amended on 1979. Available at: http://www.wipo.int/pct/en/texts/pdf/pct.pdfaccessed on October 4, 2010.

43 India is a Signatory to Berne Convention. It is also a signatory to the Rome Convention. The International Conventions provide for compulsory license. Whereas U.K., Australia, Singapore, U.S.A. have framed laws for grant of compulsory license and also constituted Tribunals for the purpose of overseeing the tariff for licensing, *strjcto sensu* the Indian Act does not say so.
Vide Entertainment Network (India) Ltd. v. super Cassette industries Ltd. AND Phonographic Performance Ltd. v. Millennium Chennai Broadcast (Pvt.) Ltd. etc. etc. Paragraph 41, MANU/SC/2179/2008.

Together juridical initiatives in India- both legislative and judicial-uphold CCTT as a matter of public interest and facilitate all transboundary as well as domestic movements of patented technology to slow down climate change in accordance with international IP regime. There is no *prima facie* conflict between its IP and environmental worldviews. In terms of application, however, theoretical synergy cannot help expedient progress of the same. Despite endorsement of its *lex loci*, other things are yet to be on (right) track, e.g. capacity-building, international collaborative research networks, public-private partnerships, and using multilateral and bilateral trade cooperation agreements to create incentives over which WIPO has had concern for understandable reasons.[44]

Even otherwise jurisprudent *lex loci* is deficient as, in terms of CCTT, the same follows international IP regimes to set all its focus only on patent matter though there are parallel trajectories within the corpus of IP law which may be no less effective to slow down climate change.[45]

[44] *Supra*, n. 30.

[45] Given the essential focus on the innovation and dissemination of new technologies in the climate change debate, the patent system has borne much more scrutiny than other aspects of intellectual property law and policy. But IP is a broader field, and should not be conflated with patents alone. Several other aspects of IP law and policy may be relevant to addressing the challenge of climate change, for instance:

- The protection of undisclosed information or trade secrets for key areas of knowhow relevant to mitigation and adaptation;
- , ■ The use of certification and collective marks, geographical indications and other distinctive signs used to identify products that are particularly relevant to climate change mitigation;
- Protection of undisclosed information and regulatory data from the field testing of genetically modified crops relevant to climate change adaptation;
- The protection of traditional knowledge through conventional or sui generis mechanisms, including environmental and agricultural knowledge;
- The suppression of unfair competition, including such acts as greenwashing and misleading claims about carbon offsets.

Supra, n. 26.

Contemporary world history demonstrates the pivotal position of technology and potential of its transfer in climate change.[46] In its future course of development, more so at the crossroads of divergent legal regimes, e.g. UNFCCC and WTO, research and development of climate-friendly technology ought to be appropriated through TRIPs regime to address climate change.[47] This initiative is imperative as supplemental, and not as substitute, to the minimization (if not omission) of emission of greenhouse gases to the detriment of ozone layer in the stratosphere. Under given ambiance of hostile climate

> Technology is the principal source of the climate change caused by human activity-anthropogenic climate change, as the jargon puts it- ranging from the coal-fired industries of the industrial revolution to today's overwhelming dependence on hydrocarbon fuels for travel. Equally, however, the international community now looks to technology as a vital source of potential solutions to climate change- both technologies that could mitigate, or reduce, emissions of greenhouse gases, and those that would enable communities to adapt to the altered environment wrought by climate change. While not offering a stand-alone solution, the availability of new technologies clearly will be key to an effective global response to climate change. An international understanding on development and transfer of technology is likely to be an important component of any multilateral deal.
>
> Anonymous literature, IP and Climate Change Negotiations: From Bali to Copenhagen via Poznan, WIPO Magazine, Geneva, no. 2, special edition, April 2009, p. 2. Available at: http://www.wipo.int/wipo magazine/en/pdf/2009/wipo pub' 121 2009 02.pdf accessed on October 2, 2010.
>
> Nevertheless an overview of the potential opportunities and challenges presented by international IP rules to technology transfer under the post-2012 climate regime does present important lessons for possible next steps both in the UNFCCC and in the WTO. First, it is clear that further research and analysis will be critical to achieve any effective solutions. An in-depth study of the various aspects of the interaction between IP and the transfer of climate-related technologies could provide the basis for more efficient and evidence-based discussions.
>
> Second, ... the TRIPS Agreement has a number of provisions that could be used to promote the transfer of climate-related technologies, the use of these flexibilities has not proved easy in other areas, but there is no evidence of such obstacles in the climate change context. Existing possibilities, therefore, should be explored in full. Third, it is important to note the need for negotiating expertise in the area of technology and IP rights- an expertise that is not shared by many environmental negotiators.
>
> Anonymous literature, Climate Change, Technology Transfer and Intellectual Property Rights, International Centre for Trade and Sustainable Development, Switzerland, 2008, p. 8-9. Available at: http://www.iisd.org/pdf/2008/cph trade climate tech transfer ipr.pdf accessed on October 3, 2010.

diplomacy, negotiating expertise seems a crucial factor toward CCTT exercise.

CONCLUSION

In a nutshell, the contentious discourse vis-a-vis CCTT initiative constitutes part of a Herculean task to balance between individual and collective y interests- both have had reasoning of their own to put policymakers in perennial conundrum.[48] Initial monopoly of inventor to use or allow to use (through license) innovation and thereby avail benefit out of the same seems the basic premise of IP rationale. Thus individual is encouraged toward innovation and thereby benefit himself and in turn his community. In the absence of innovation, there is no question of its licensing to serve any sundry interest- private or public- whatever the case may be. Interest of inventor, therefore, ought to be of primary concern. At the same time, however, rationale behind offering short-term incentive to individual for his innovation serves long term interest of the community as thereafter innovation will belong [x]to society. Even when IP belongs to inventor, he is required to use the same either on his own or through licensee for dissemination of information lest monopoly may result into suppression of information to collective detriment. Thus public interest may be construed to be of paramount concern of IP regime. There is no space for confusion to this end.

> This is the challenge for policymakers- what are the key technologies now, and what will be the key technologies in the future; and how can rights over those technologies be managed and structured most effectively to deliver them to the public, to disseminate the technologies needed to tackle the climate change challenge.
> There are no simple answers to these questions: finding solutions will be a matter of continuing dialogue and cooperation, both within the international community on the policy plane, and at a practical level on the part of individual enterprises. The task of assessing the complex factual situation, and of sifting through a welter of policy options, is an immense one, necessitating widespread collaboration and the pooling of diverse expertise. The IP system undoubtedly has the potential, in principle, to deliver the outcomes society demands of it; the challenge now is to realize those principles in practice.
> *Supra.* N. 26. A

Since climate change is a global concern, and India expresses its wisdom to offer active participation toward minimization of the same, CCTT deserves to be a fit case to call for compulsory licensing under the given international IP regime (read TRIPs) along with present *lex loci* of India (read the Patents Act, 1970 as amended in 2005). This is in the interest of inventor as innovation is plausible within the given climate (of the world) and not without.

In both individual and collective interests of the inventor and his community, therefore, funding mechanism along with other strategic measures toward CCTT initiative ought to be accomplished with no farther incidental delay to this end. Resistance en the part of myopic inventor forum, if any, ought to be dealt with through restraint as hone may be aware of whose innovation may help minimize climate change. Thus this may so happen that worst critic of CCTT will be most effective contributor toward mitigation of climate change while best protagonist of the same has had nothing substantial (innovation) for dealing with the same. In the absence of ontological conflict between divergent regimes, e.g. UNFCCC and WTO, there is no substantial barrier for crusade against dark (carbon-centric) mode of development leading to the threshold of anthropogenic climate change. What seems still left is a static inertia of humankind toward its eternal propriety, as demonstrated by *Hamlet*™

> To be, or not to be, that is the question:
> Whether 'tis nobler in the mind to suffer
> The slings and arrows of outrageous fortune,
> Or to take arms against a sea of troubles,
> And, by opposing, end them?

The Tragedy of Hamlet, Prince of Denmark (1603), in WILLIAM SHAKESPEARE: THE COMPLETE WORKS, Act 3, Scene I, 669 (Stanley Wells and Garry Taylor ed., 1995).

INTERNATIONALISATION OF STATE CONTRACTS THEORY AND THE THEORY OF ECONOMIC DEVELOPMENT AGREEMENTS (ED AS) - A CRITIQUE

BY

NAVAJYOTI SAMANTA*

ABSTRACT

It is an accepted principle in private international law that a sovereign State subjects its undertakings to its own legal system, unless expressly provided otherwise. Internationalisation of state contracts refers to a situation where a dispute between a private investor and a sovereign host state is governed by a law other than that of the host state. This article would trace the evolution of internationalisation of state contracts, starting with the oil concession arbitrations of 50s and 60s, moving onto the theory of EDAs in 70s and concluding with the emergence of neo-internationalisation in the form of Bilateral Investment Treaties etc. This article would thus, not only provide a critical appraisal of grounds of internationalisation in the awards of the arbitral tribunal and the writing of publicists but would also provide a base on how best to avoid internationalisation of state contracts.

INTRODUCTION

Internationalisation of state contracts and theory of Economic Development Agreements (EDAs) is a longstanding, highly emotive topic in the realm of International law on foreign investment[1]. State contracts and EDAs refer primarily to

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Scholars tend to get polarised trying to balance the sovereignty of the host state with **that of the** financial security of private foreign investor. Delphine Nougayrde in 'Binding States: **A Commentary** on State Contracts and Investment Treaties' (2005) 6 Bus. L. Int'l 372, 375 classifies the **writers in this** field into two broad categories of *'internationalists''* as their name suggests **supporting** internationalisation and *'sovereignists'* opposing it. Internationalists would include, **though not** exclusively, Lord McNair, 'The General principles of Law Recognised by Civilized Nations' **(1957) 33** BYIL 1, Verdross, 'The Status of Foreign Private Interests Stemming from Economic **Development**

contracts between a host state (usually a developing country) and private foreign investors (usually from a developed state)[2]. It is an accepted principle in private international law that a sovereign State subjects its undertakings to its own legal system, unless expressly provided otherwise[3]. Internationalisation of state contracts and the theory of ED As remove the contract 'from the sphere of the host state's law' and subject it 'to an immutable, supranational system'[4]. It attracts controversy as it firstly goes against an established international legal principle and secondly, as it curtails sovereignty of host state on the basis of a private contract with a non-state actor.

Part I of this article would focus on the grounds on which private arbitral tribunals and publicists base their arguments in favour of 'classic-internationalisation' of state contracts and the theory of ED As until 1980s. Part II would explore the emergence of 'neo-internationalisation' of state contracts in the context of Bilateral Investment Treaties (BITs) - International Centre for Settlement of Investment Disputes (ICSID). Part III would contrast the arguments in favour of internationalisation with proposals from those opposing the idea. This article would thus critically analyse the grounds and relevance of classic-internationalisation in the backdrop of the emergence of neo-internationalisation.

Agreements with Arbitration Clauses', in Selected Readings on Protection by Law of Private Foreign Investments 117 (1964), 'Quasi-International Agreements and International Economic Transactions' (1964) 18 Yearbook of World Affairs 230, J.F Lalive, 'Contracts between a state or a state agency and a foreign company' (1964) 13 ICLQ 987; Sovereignists would include M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010), Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (1sl edn, Cambridge University Press 2007), Patrick C. Osode, 'State Contracts, state interest and International commercial arbitration: A third world perspective' (1997) 9 Afr. J. Int'l & Comp. L. 107, A. Adede, Loan Agreements with Foreign Borrowers: Issues of Sovereign Immunity, Applicable Law and Settlement of Disputes, (1987) 3 Lesotho U 101, Chukwumerije, ICSID Arbitration and Sovereign Immunity (1990) 19 Anglo-American LR166

[2] Delphine Nougayrde, 'Binding States: A Commentary on State Contracts and Investment Treaties' (2005) 6 Bus. L. Int'l 372

[3] *Serbian* and *Brazilian Loans* (Judgment No. 14, *P.C.I.J.*, Series A, No. 20, p. 42, and Judgment No. *15, P.CJ.J.*, Series A, No. 21. p. 121) ^

[4] M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 289; The 'immutable, supranational system' has been variously termed as 'international law of contracts', 'transnational law', 'general principles of civilised nations' See also Anghie (n 1)

'CLASSIC-INTERNATIONALISATION' OF STATE CONTRACTS AND THEORY OF ED AS

To a modern arbitral practitioner, choice of law is one of the least controversial issues, as in most modern arbitration agreements there is an express stipulation of the choice of law that would govern the parties in case of a dispute. However most early state contracts did not mention a choice of law, JF Lalive speculates that such an omission was 'due to an excess of caution (...) on part of the foreign corporation not to antagonise the local government [and] the government side also prefers to evade [the] issue (...) since the parties intend the contractual relationship to develop smoothly',[5] and thus usually substituted the choice of law clause with open ended phrases like 'applications of principles rooted in good sense and common practice of the generality of civilised nations'[6] or 'on the basis of good faith and pure belief[7] etc.

We can group arbitral awards favouring internationalisation based on such missing/open choice of law clause, as the period of classic-internationalisation or alternatively 'contract-internationalisation'[8]. This phase can arguably[9] be traced back to 1930 in *Lena Goldfield* v *USSR*'[0] (referred hereinafter as *Lena Goldfield* arbitration) and it reached its epoch in three arbitral awards of 1950s - *Petroleum Development Ltd* v. *Sheikh of Abu Dhabi*[u] (referred hereinafter as *Abu Dhabi* arbitration), *Qatar v. International Marine Oil Co*'[2] (referred hereinafter as *Qatar* arbitration) and *Saudi Arabia v. Aramco*[13] (referred hereinafter as *Aramco* arbitration).

[s]cfLalive(nl)992
[6] Clause 17 of the concession agreement between Abu Dhabi and Petroleum Development Ltd. As quoted in *Petroleum Development Ltd v. Sheikh of Abu Dhabi* (1951) 18 ILR 144, 149
[7] *Qatar* v. *International Marine Oil Co* (1953) 20 ILR 534, 545 See also (n 25)
[8] cf Nougayrde (n 2)
[9] cf Sonarajah (n 4) Reference may be drawn to *Deloga Bay Railway Company Case* (1900) Whiteman, *Digest*, Vol. 3, p. 1694, *Schufeldt Claim* (1930) 24 AJIL 799. cf McNair (n 1) *Goldentberg & Sons* v *Germany* Annual Digest 1927-28, Case No. 369; Zeitschrift fur auslandisches offentlisch.es Resch und Volkerrecht, 1 (2) 1929, p 87 may be the first case to deal with internationalisation.
[10] (1930) Whiteman, *Damages*, Vol 3, p 1652
[11] (1951) 18 ILR 144
[12] (1953) 20 ILR 534
[13] (1958) 27 ILR 117

These arbitrations fuelled a rapid growth in the writings of publicists in 1960s which generated the theory of EDAs, wherein state contracts were equated with development treaties and international legal protection was sought.[14] Theory of EDAs was epitomised in the 1977 arbitral award in *Texaco Overseas Petroleum Company* v. *Libya*[15] (referred hereinafter as *Texaco* arbitration).

GROUNDS OF CLASSIC-INTERNATIONALISATION IN AWARDS OF ARBITRAL TRIBUNAL

In all the arbitral awards the arbitrators first concede that *prima facie* the municipal law of the state where the contract is to be performed, should be the substantive and procedural law applicable to the arbitration. In *Lena Goldfield* arbitration the arbitrators stated unanimously 'Russian law was the proper law of contract'[16]. In *Abu Dhabi* arbitration Lord Asquith stated 'This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi.'[17] Similarly in the *Qatar* arbitration Sir Alfred Bucknill stated:

> If one considers the subject matter of the contract, it is oil to be taken out of ground within the jurisdiction of the Ruler. That fact, together with the fact that the Ruler is a party to the contract and had, in effect, the right to nominate Qatar as the place where any arbitration arising out of the contract should sit, (...) points to Islamic law, that being the law administered at Qatar, as the appropriate law.[18]

In *Aramco* arbitration Prof. Sauser-Hall stated 'The law in force in Saudi Arabia should also be applied to the content of the Concession because this State is a Party

[14] Verdross, 'Quasi-International Agreements and International Economic Transactions' (1964) 18 YWA 230
[15] (1977) 53 ILR 389
[16] cf *Lena Goldfields* arbitration (n 10) Paragraph 22 as cited in cf McNair (n 1) 11
[17] cf *Abu Dhabi* arbitration (nil) 149 (emphasis added)
[18] *cf Qatar* arbitration (n 12) 544

to the Agreement, as grantor, and because it is generally admitted, in private international law, that a sovereign State is presumed, unless the contrary is proved, to have subjected its undertakings to its own legal system.'[19]

But having admitting that municipal law is the correct 'choice of law', the arbitrators would conclude that the municipal law, which in all three petroleum arbitral cases was some variation of Islamic law, was inadequate (underdeveloped or absent) to deal with the intricacies of petroleum exploration and exploitation contracts. In *Abu Dhabi* arbitration Lord Asquith famously said:

> [M]unicipal laws were applicable. (...) But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.[20]

A similar conclusion was reached in *Qatar* arbitration where Sir Alfred Bucknill stated '[Islamic] law does not contain any principles which would be sufficient to interpret this particular contract.'[21] In *Aramco* arbitration, Prof. Sauser-Hall analogously concluded:

> The regime of mining concessions, and, consequently, , also of oil concessions, has remained embryonic in Moslem law (...) Hanbali law contains no precise rule about mining concessions and *a fortiori* about oil concessions.[22]

Apart from the ground of inadequacy of Islamic/municipal law, the arbitrators al?o recounted other grounds like a contract itself may become invalid if Islan \: , '_ applicable. For example in *Qatar* arbitration where the arbitrator stated:

[19] cf *Texaco* arbitration (n 13) 167
[20] cf *Abu Dhabi* arbitration, (n 11) 149
[21] cf *Qatar* arbitration (n 12) 545
[22] cf *Texaco* arbitration (n 13) 163

> [s][B]oth experts agreed that certain parts of the contract, if Islamic law was applicable, would be open to the grave criticism of being invalid. According to Professor Milliot, the Principal Agreement was full of irregularities from end to end according to Islamic law, as applied in Qatar'[23],

Surmising that the parties did not want to be governed by Islamic law if it expressly went against their interest as Sir Alfred Bucknill comments, 'I cannot think that the Ruler intended Islamic law to apply to a contract upon which he intended to enter, under which he was to receive considerable sums of money, although Islamic law would declare that the transaction was wholly or partially void. (...). I am sure that Sir Hugh Weightman and Mr. Allan did not intend Islamic law to apply. In my opinion neither party intended Islamic law to apply'[24], mention of any other system of laws (*Lena Goldfleld* arbitration[25], *Qatar* arbitration[26] and *Aramco* arbitration[27]), no meeting of minds as to the choice of law - in *Aramco* arbitration the arbitrator states

> 'The Tribunal wishes to point out that the Parties, inasmuch as they left to it the duty to determine what law should be applied to matters beyond the jurisdiction of Saudi Arabia, have undoubtedly examined the question of the applicable law and have failed to find a solution. *For this reason the Tribunal is unable to determine what law was tacitly chosen by the Parties.* The Arbitration Tribunal is thus called upon to reconstruct, not the choice of law which the Parties might have had in mind or intended, but, in an abstract

[23] cf *Qatar* arbitration (n 12) 545

" ibid

[25] In *Lena* Goldfield arbitration the award stated "general principles of law (...) should be regarded as the proper law of contract [as] agreement was signed (...) by foreign commissary, many of the terms of the contract contemplated the application of international law rather than merely the national principles of law' as quoted in cf McNair (n 1) 11

[26] To quote the tribunal 'It is interesting to note that in the Agreement which the Ruler made on the 17th May, 1935, to which I have referred, there is this express stipulation: "The Shaikh and the Company declare that they base action upon this Agreement on the basis of good faith and pure belief and upon the interpretation of this Agreement in a manner consistent with reason." *Qatar* arbitration (n 12) 545

[27] To quote the tribunal 'The Tribunal cannot accept the suggestion that Clause *(b)* of Article IV (which empowers it to decide what law is applicable) has a subordinate character in relation to Clause *(a)* (which provides for the application of Saudi Arabian law, *i.e.*, Muslem law as taught by the Hanbali school and as applied in Saudi Arabia).' *Aramco* arbitration (n 13) 154

> manner, the choice of law which reasonable persons would have made and intended.'[28]

Choice of neutral foreign venue would indicate a wish to break from domestic laws like in *Aramco* arbitration where Prof. Sauser-Hall concluded that:

> [T]he Parties agreed to establish the seat at Geneva. The arbitration is to take place, in all cases, outside Saudi Arabia. It is obvious, therefore, that the law to be applied to this institution is not the law of Saudi Arabia, since the Parties have intended from the very beginning to withdraw their disputes from the jurisdiction of local tribunals. This is an essential provision of their agreements, as the concessionaire wished to secure the guarantee of a neutral judge.[29]

Other grounds included economic ramifications[30] etc. to find that domestic law of the concession state did not apply.

Having established that domestic laws of the concession state would not apply, the arbitrators faced the problem of contract *in vacuo,* which would make the contract inoperable. To surmount this problem arbitrators internationalised the contract meaning that the contract was to be plucked out of the operation of domestic laws and would be subjected to an international system of law. This proved quite tricky as Permanent Court of International Justice in *Serbian^* and *Brazilian Loans*[32] cases had made it clear that Public International law cannot be invoked by a private party to seek remedy against a sovereign state[33]. To overcome this difficulty, arbitrators harnessed the problem to provide the solution. As a contract cannot exist in vacuum '[i]t is necessarily related to *some positive law* which gives legal effects to the

[28] *Aramco* arbitration (n 13) 167 (emphasis added)
[29] ibid 155
[30] ibid 167
[31] Judgment No. 14, *P.C.I.J.*, Series A, No. 20, p. 42
[32] Judgment No. 15, *P.C.I.J.*, Series A, No. 21, p. 121
[33] 'Any contract which is not a contract between States in their capacity as subjects of international law, is based on the municipal law of some country.' (Judgment of July 12, 1929, case regarding the *Payment of Certain Serbian Loans Issued in France , P.C.I.J.,* Series A, No. 20, p. 41

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reciprocal and concordant manifestations of intent made by the parties. The contract cannot even be conceived without a system of law under which it is created. Humans will only create a contractual relationship if the applicable system of law has first recognized its power to do so'[34].

In *Abu Dhabi* arbitration the solution was 'application of principles rooted in the good sense and common practice of the generality of civilised nations—a sort of *modern law of nature'*^. In *Qatar* arbitration the answer was *'the principles of justice, equity and good conscience'*[7/6]. *In Aramco* arbitration it was *'most progressive teachings in that part of private international law which deals with the autonomy of the will'*[31]. All these solutions culminated in *Texaco* arbitration as a 'new branch of international law. the *international law of contracts'*[38].

Thus as per arbitral tribunals, the perceived absence of legal principles to govern petroleum contracts in domestic Islamic laws of the concession state coupled with additional arguments like economic ramifications of the contract, choice of neutral venue, mention of any other form of applicable law etc. formed grounds to reject domestic laws and apply vague, uncertain and nebulous transnational principles of law and equity thereby leading to internationalisation of state contracts.

GROUNDS OF INTERNATIONALISATION AND THEORY OF EDAS IN WRITINGS OF PUBLICISTS

Another source of grounds of internationalisation are the writings of publicists. This is of importance as under Art. 38(1)(d) of the Statute of the International Court of Justice, writings of 'highly qualified publicists' is a source of International law, thus writings of publicists should be carefully analysed to predict the future course of

[34] Geny, *Methods d'interpretation et Sources en droit prive positif,* vol. 11, No, 172, p, 157 as cited in *Aramco* arbitration (n 13) 163 (emphasis added)
[35] cf *Abu Dhabi* arbitration (n 11) 149 (emphasis added)
[36] cf *Qatar* arbitration (n 12) 545 (emphasis added)
[37] *cf Aramco* arbitration (n 13) 167 (emphasis added)
[38] cf *Texaco* arbitration (n 15) 448

international law. In this part of the article we would focus on the grounds of internationalisation as argued by the 'internationalists'.

One of the oft cited early academic works on internationalisation was by Lord McNair, former President of International Court of Justice, titled 'The General principles of Law Recognised by Civilized Nations'[39]. After analysing the available case laws of the time, Lord McNair concludes

"when the legal system of the country in which, for the most part of the contract is to be performed is not sufficiently modernized for the purpose of regulating this type of contract (...) the system of law most likely to be suitable for the regulation of the contract and the adjudication of the disputes arising upon them are the general principles of law recognised by civilised nations."[40]

Lord McNair can also be credited with the first use of the term 'Economic Development Agreement' (EDA) to describe a contract between 'corporations (or less commonly individuals) belonging to countries which have capital and skill to spare, and Governments of certain countries which have natural resources awaiting development but not enough capital or skill available for that purpose'[41]. However he did not advocate *en masse* internationalisation of the contract on the sole basis of it being an EDA, rather he proposed selective internationalisation in cases where the law of the host state is deficient in principles which would apply to the contract.

Lord McNair's article in 1957 *andAramco* arbitration (which for the first time hinted at theory of EDA in arbitral award) in 1958 opened flood gates for articles supporting internationalisation on the theory of EDA. Schwebel[42], Jennings[43], Verdross[44],

[39] cf McNair (n 1)
[40] ibid 19
[41] ibid 1
[42] M Schwebel,'International Protection of Contractual Arrangements' (1959) 53 Am Soc'y Int'l L Proc 266
[43] RY Jennings, 'State Contracts in International Law' (1961) 37 BYIL 156

Curtis[45] and others[46] drew directly from Lord McNair but added another major argument for the 'internationalists', that of equating a state contract or 'economic development agreement' to an international treaty. EDAs have since then been defined as 'a broad term covering direct investments which characterise the role of investment, the term implying mutuality of obligation'[47], 'agreements which embody the terms under which private capital is invited into a developing country for a long term investment'[48].

Thus proponents of theory of EDA argue that to provide stability and protection to foreign investors so that they may contribute in the development of the host state, it is imperative that the investors are granted immunity from legislative changes which may interfere with the performance of the contract.[49] To further bolster the argument of immutability of EDAs, reference is drawn to the provisions of *pacta sunt servanda* (agreements must be kept) in the EDA. If any dispute arises due to change in the host state position, which may lead to changes in the working of the EDA, commentators argue that *pacta sunt servanda* being a principle of public international law would by default lift the private contract into the sphere of public international law.[50]

[44] Verdross, 'The Status of Foreign Private Interests Stemming from Economic Development Agreements with Arbitration Clauses', in Selected Readings on Protection by Law of Private Foreign Investments 117 (1964), 'Quasi-International Agreements and International Economic Transactions' (1964) 18 Yearbook of World Affairs 230

[45] Christopher Curtis, 'The legal security of Economic Development Agreement' (1988) 29 Harvard ILJ 317

[46] P Weil, 'Contrats entre Etats et particuliers', in Recueil des Cours de l'Academie de Droit International de la Haye, Vol 128, 1969-III (1969), p 118; P Weil, 'Les clauses de stabilit ou d'intangibilit insbrbes dans les accords de dveloppement 6conomique', in Milanges Offertsd Charles Rousseau (Paris Ptdone, 1974), p 21; 'The State, the Foreign Investor, and International Law. The No Longer Stormy Relationship of a Mtnage A Trois' (2000)15 ICSID Rev-FILJ 401; C Greenwood, 'State Contracts in International Law - the Libyan Oil Arbitrations' (1982) 53 BYIL 27; M Dickstein, 'Revitalizing the International Law Governing Concession Agreements' (1988) 6 Int'l Tax & Bus Law 71; C Curtis, 'The Legal Security of Economic Development Agreements' (1988) 29 Harvard Int LawJ 317; DMazzini,'Stable International Contracts in Emerging Markets: an Endangered Species?' (1997) 15 BU Int 343; as cited in Christopher Curtis, "The legal security of Economic Development Agreemerit' (1988) 29 Harvard ILJ 317

[47] Hyde, 'Economic Development Agreements' (1962) Hague Recueil De Cours 271, 283 as cited in Tom J Farer, 'Economic Development Agreement: A functional analysis' (1971) 10 Colum. J. Transnat'l L. 200

[48] ibid

[49] See generally Curtis (n 44) 331

[50] ibid 328

Therefore the major grounds for internationalisation of state contracts and the theory of EDAs as construed in the writings of publicists, are gaps in legal principles of municipal laws of the host state. EDAs are special kind of contracts as they entail large investment, long period of performance, the host state encourages the investor to take a risk in good faith and finally the presence of *pacta sunt servanda* in form of a stabilisation clause elevates the EDA, in breach of the stabilisation clause, to a subject matter of public international law.

THEORY OF EDAS IN ARBITRAL AWARDS

As has been stated earlier, *Texaco* arbitration[51] was the first arbitral award which internationalised a state contract on the basis of theory of EDAs. Dupuy the sole arbitrator of the award differentiated *Texaco* from other previous awards of classic-internationalisation by writing:

> It should be noted that the invocation of the general principles of law does not occur only when the municipal law of the contracting State is not suited to petroleum problems. Thus, for example, the Iranian law is without doubt particularly well suited for oil concessions but this does, not prevent the contracts executed by Iran from referring very often to these general principles.[52]

Dupuy justified internationalisation even when there was no gap in the municipal law by stating '[i]t is (...) justified by the need for the private contracting party to be protected against unilateral and abrupt modifications of the legislation in the contracting State: it plays, therefore, an important role in the contractual equilibrium intended by the parties.'[53] Dupuy argued that PCIJ in *Serbian and Brazilian Loans*[54]

[51] cf *Texaco* arbitration (n 15)
[52] cf *Texaco* arbitration (nl5) 453-454
[53] *Texaco* arbitration (nl5) 454
[54] cf(n31,32)

had provided for internationalisation of state contracts provided it satisfied triple criteria of 'nature of the obligations, the circumstances of their creation and the will of the parties'[55]. Extending his argument, Dupuy claimed that an EDA is by default internationalised[56] because:

- EDAs 'tend to bring to developing countries investments and technical assistance, (...) Thus, they assume a real importance in the development of the country where they are performed (...) The party contracting with the State was thus associated with the realization of the economic and social progress of the host country.'"
- '[T]he long duration of these contracts implies close cooperation between the State and the contracting party and requires permanent installations as well as the acceptance of extensive responsibilities by the investor.'[58]
- '[B]ecause of the purpose of the cooperation (...) and the magnitude of the investments (...) the investor must (...) be protected against legislative uncertainties (...) Hence, the insertion (...) of stabilization clauses (...) tend to remove all or part of the agreement from the internal law and to provide for its correlative submission to *sui generis* rules as stated in the *Aramco* award, or to a system which is properly an international law system.[59]

Thus as per theory of EDAs proposed by Dupuy once a state contract is classified as an EDA, it would be governed by public international law and by virtue of *pacta sunt servanda* would be immutable to any unilateral executive or legislative changes by the host state. Post *Texaco* arbitration theory of EDA slowly diminished[60] paving way for treaty based neo-internationalisation.

[55] cf(n54)
[56] *Texaco* arbitration (n 15) 460
[57] ibid 456
[58] ibid
[59] *Texaco* arbitration (n 15) 456-457
[60] *Aminoil* v *Kuwait* (1982) 21 ILM 976 referred to EDAs

NEO-INTERNATIONALISATION

With the decline of classic-internationalisation and theory of EDAs, the centre stage was occupied by treaty and convention based internationalisation along with internationalisation based on private commercial practices like *lex mercatoria* , which may be cumulatively termed as neo-internationalisation.

With the advent and proliferation of Bilateral Investment Treaties (BITs), states mutually bound themselves on a host of foreign investment issues ranging from compensation on expropriation to repatriation of profit. BITs also included the dispute settlement mechanisms like choice of law, seat of arbitration etc. Thus in case a state has signed a BIT, which specified that disputes arising out of state contracts with foreign investor of the co-signor state would be governed by 'general principles of law', any dispute which fulfilled such condition may be automatically internationalised.[62]

Yet another class of cases relating to neo-internationalisation arose out of International Centre for Settlement of Investment Disputes (ICSID) convention.[63] Article 42(1) of the ICSID convention states '[T]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and *such rules of international law as may be applicable'* (emphasis added). Thus in case of a dispute arising out of a contract, which does not have a choice of law clause, between a foreign investor

[61] *Lex mercatoria* translates as 'merchant law' and refers to loosely codified transnational principles relating to international trade and commerce. See generally Keith Highet, 'The Enigma of Lex Mercatoria' (1988-89) 63 Tul. L.Rev 613, Michael Frischkorn, 'Definition of the Lex Mercatoria' (2005) 7 Eur.J.L Reform 331

[62] There are conflicting case laws on this point *Vivendi annulment* ICSID Case No ARB/97/3 and *SGS v Pakistan*, 18 ICSID Rev-FILJ 307 (2003) rejects automatic internationalisation of state contract based on BIT while *SGS* v *Philippines* , ICSID Case No ARB/02/6 favours protection of foreign investors through internationalisation. See Nougayrde (n 2) 384-390, Sonarajah (n 1) 304

[63] ICSID is a World Bank institution with aims to 'provide facilities for conciliation and arbitration of international investment disputes.' < http://icsid.worldbank.org/ICSID/Index.jsp> accessed 22 December 2010

and a country which is party to ICSID, the dispute may be internationalised if the contract mentions ICSID as a dispute settlement body and if the state party has signed the ICSID convention.

The final category of neo-internationalisation is relating to *lex mercatoria,* a national loosely defined set of general international commercial legal principles, thus a contract which refers to *lex mercatoria* as the choice of law, may potentially be internationalised if arbitrators decide to choose *lex mercatoria* as the law governing the dispute.[64] *Lex mercatoria* has its own set of arbitral rules which may not be compatible to the municipal laws of the host state, thus in effect by mentioning *lex mercatoria* the state contract opens up unnecessary debate on choice of law clause.

APPRAISAL OF GROUNDS OF CLASSIC-INTERNATIONALISATION OF STATE CONTRACTS AND ED AS

As per 'internationalists' classic-internationalisation is based on grounds like gaps in legal principles of municipal law of the host state etc. while EDAs being special kind of contracts involve large investment, lead to 'development' of host state, and finally that the presence of *pacta sunt servanda* in the form of a stabilisation clause elevates the EDA as a subject matter of public international law.

Most of the grounds mentioned above in favour of internationalisation have been effectively debunked by 'sovereignists' and it is important to reiterate a few major points. Firstly, in the light of recent academic writings from legal scholars in Middle-East it may have been incorrect for the arbitrators of the petroleum arbitration cases to suggest that Islamic law did not contain any principle relating to petroleum arbitration , assuming *arguendo,* there were no principles to govern petroleum

[64] Rensmann, 'Anational arbitral awards - legal phenomenon or academic phantom?' (1998) 15/2 Journal of International Arbitration 37, 40, See also Hans-Joachim Mertens, *Lex mercatoria:* A self-applying system beyond National Law?' in Gunther Teubner (ed), *Global law without a state* (Dartmouth 1997) 36

[65] Khaled Muhammad Funah, 'Arab state contract dispute: Lessons from the past' (2002) 17 Arab L.Q. 215, Muhammad Abu Sadah, 'International arbitration contract principles: analysis of Middle East

contracts in Islamic jurisprudence, the European jurisprudence drew a blank on them too. For the sake of fairness arbitrators used 'general principles', but they found these principles in 'modern law of nature' of England[66], even after accepting that Islamic law is based on equity[67]. Further the early arbitral awards seem to be the best cases of cherry picking, while Islamic law is used to bolster the claim *of pacta sunt servanda* as the stabilising clause and Islamic jurisprudence is then discarded in favour of some nebulous 'international commercial law'[68]. Secondly, the theory of ED As can be discredited as being too 'paternalistic' in its approach of treating developing countries with a different yardstick from developed countries and thereby violating equality of sovereign nations in public international law.[69] Also foreign investors may not come to a country with any noble motive of development, but with the sole motive of making profits.[70] Thirdly, the claim that presence *of pacta sunt servanda* with stabilisation clause in a state contract would elevate the contract to public international law, merely because *pacta sunt servanda* is a general principle of international law, suffers from inherent fallacy because it is a fundamental principle of public international law that a state can curtail its sovereignty only in a treaty with an actor recognised in international law, thus a state cannot limit its sovereign power of municipal legislation based on a contract with a private party.[71]

CONCLUSION

With the advent of neo-internationalisation the arguments against classic-internationalisation can no longer be used against all forms of internationalisation. It is because under treaty based neo-intemationalisation, instead of arbitration through 'conceptual manipulation' forcing internationalisation to 'appear to be possible' -

perceptions' (2010) JITL&P 148, Ahmed Al-Ghadyan, 'The changing phases of arbitration in Saudi Arabia' (1997) Arbitration 130

[66] cf (n 35) See also Anghie, (n 1) 229, F A Mann, 'The Proper Law of Contracts concluded by International Persons' (1959) 35 BYIL 34

[67] cf (n 35) See also *Qatar* arbitration (n 12)

[68] cf Anghie (n 1)230

[69] cf Anghie (n 1)229

[70] cfSornarajah(n4)291

[71] See generally Patrick C. Osode, 'State Contracts, state interest and International commercial arbitration: A third world perspective' (1997) 9 Afr. J. Int'l & Comp. L. 107

states have 'willingly' entered into BITs-ICSID. Thus any state contract covered under any such bilateral or multilateral treaty is liable to automatic internationalisation. Though 'sovereignists' have been quick to point out that 'intention of states' is still relevant but conflicting case laws have shown that absence of intention is interpreted as affirmation to internationalisation.[72] Therefore the only sure way to stop internationalisation of any kind is to state the intention of non-internationalisation unequivocally in every state contract and to refrain from signing BITs blindly or other international treaties which may lead to internationalisation of state contract. Reference may be drawn to the 'India model'[73] which has been highly successful in preventing internationalisation. Thus grounds of classic-internationalisation are still relevant today as it provides an invaluable historical contrast for developing states on perils of internationalisation and an indication on how to best avoid them in any proposed multilateral investment agreements in future.

[72] cf(n62)

[73] India is not a signatory of ICSID (it is important to note that many of the fastest growing developing countries and members of G20 like Brazil, South Africa, Mexico are also not part of ICSID), further the choice of law clause in state contracts signed by India contains provisions which subordinates international law to domestic law and thus is an unambiguous indication to steer clear of any perceived intention of internationalisation. See Nougayrde (n 2) 380

UNDERSTANDING THE LOGIC OF LAW- -A PERSPECTIVE IN INDIAN JURISPRUDENCE

DR ASHA BHANDARI, DIVYA SRIKANTH, AMAN *

The use of logic is fundamental to the process of decision making and hence a quintessential part of the legal process. Law and its interpretation do require a basic understanding of logic, reasoning being the key factor involved. In the legal field, obtrusively or otherwise we do make use of the basic principles of logic. One can find various instances where, with the use of principles of logic one can find loopholes in the arguments put forth by others while on the other hand some fallacies of reasoning may be used as a tool to buttress the argument. Also any legal argument is evolved only with the help of these principles of reasoning and the conclusion that is arrived at is only after testing both the arguments not only on the yardstick of substantive or procedural law but also on the principles of logic. The aforementioned intersection of logic and its use in judicial functioning has been explored in the paper. The paper deals with the nature of disputes and how the tools of inductive and deductive reasoning or even fallacies affect the legal process, right from investigation, inquiry, collection of evidence to the giving of decision. An effort has been made to study the same using case laws given by various courts in India.

Law is a mechanism to regulate human conduct.[1] All three wings of the State, viz. the Legislature, Judiciary and the Executive perform this function of the law, from within

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1 *Per rationes pervenitur ad legitimam rationem.* By reasoning we come to legal reason.; The law's insistence on sound, explicit reasoning which keeps lawyers and judges from making arguments based on unuttered, unprincipled and undisciplined hunches. Aldisert, Ruggero, J., Clowney, *Logic for Law Students: How to Think Like a Lawyer*, University of Pittsburgh Law Review,47 (2007)

their own well-defined spheres of action. Of these wings, the role of the Legislature is paramount due to its solemn duty to frame laws and all the responsibilities and need for consideration associated with this duty. Apart from the legal rules that guide a valid law as not being violative of any provision of the Constitution, not being against public policy and so on, there lies one basic rule that must be adhered to while making as well as interpreting any law-and that is the quintessential rule of logic. Every law enacted must be in conformity with certain rules of logic or in simpler terms, every law must be logical and not otherwise.

Logic, thus, anchors the law.

The principal function of the judicial system is dispute resolution; a trial may be needed to ensure that such a resolution is definitive and fair. Logical principles are of great use in such a situation, as basic logical principles including conditions for validity, basic rules of deduction and principles for evaluation of inductive inferences are universally applicable by virtue of their being undiluted by context.

Keeping all of the above in mind, the objective of this article is to show the immense utility of logic in law, the way logical principles apply in the world of law including courts, through the study of several instances and some of the landmark cases in Indian Jurisprudence.

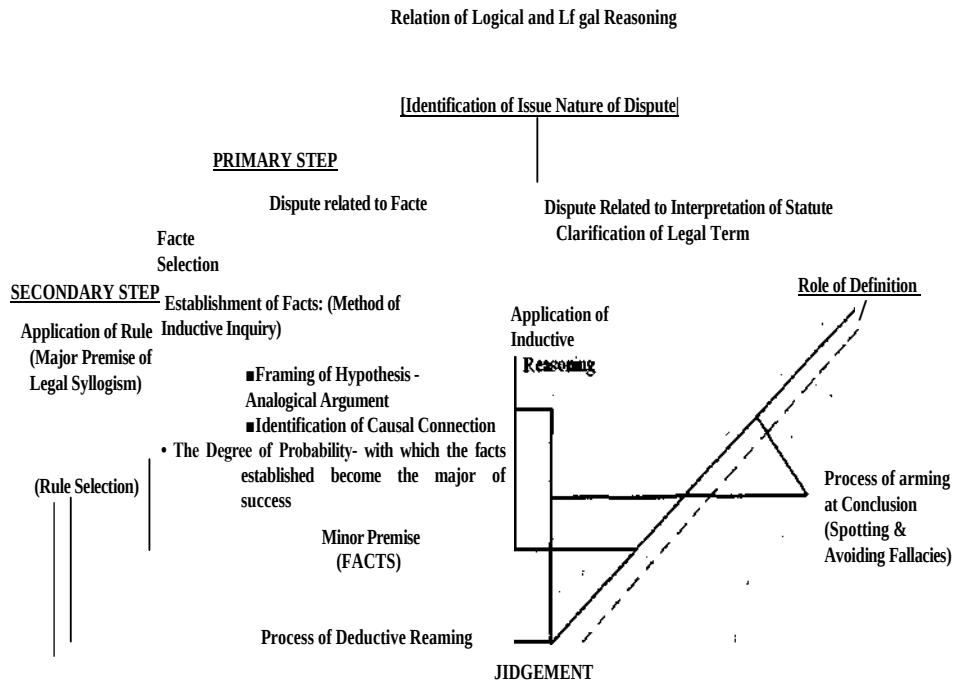
PARADIGM OF LEGAL REASONING[2] -A PREVIEW

The role of logic and reason looms large in the field of law. The courts apply many methods of logical analysis while examining the facts and possibilities presented by

[2] Based on the three comprehensive studies on legal reasoning: Levi, Edward H., *An Introduction to Legal Reasoning* (Chicago: Chicago University Press, 1948); MacCormick, Niel, *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, 1978); Burton, Steven J., *An Introduction to Law and Legal Reasoning* (Boston: Little Brown, 1985).

cases, prior to passing of judgment. The entire process, beginning with the investigative and fact-finding stage, is inextricably bound with logic and its principles; these principles are applied when the facts are collected and identified, the

witnesses are examined, arguments are presented, judgments given, and even in the drafting of legislations. The following figure attempts to indicate the role of logical principles in the legal process:



Summary of Fieure (Diasramkiatic Presentation of Relationship of'Logical and Legal Reasoning)

- Identification of nature of dispute/issue (Dispute Related to facts, Dispute related to Interpretation and application of legal rule)
- Collection of facts (Application of Inductive Reasoning: Use of analogy Generalization, probability, Causal relationship)
- Rule-selection (Application of deductive model, use and limits of syllogistic reasoning)

(This process will be discussed in greater detail in the course of this article).

Decisions of judges in courts constitute the main body of legal reasoning. Here the analysis is largely deductive; however such deductive process is secondary in nature. The primary reasoning process in law is inductive.[3] The first step to resolve a legal problem is the identification of the material issue/facts, which requires inductive analysis by way of generalization /analogy and hypothesis. This is a principal requirement when any case is tried in court. In doing this, the inductive reasoning is mainly used. Once the facts have been established the next task is the application of the appropriate rule by the Court leading to a practical conclusion. The legal rule carefully formulated is one premise of a deductive argument; the statement of facts exhibiting their relation to that rule is the second premise. Applying the rule to the facts will lead to the judgment, the conclusion. Legal results or holdings result from the judge's application of a rule to the facts of a case. This application is a formal process exercising the logic of deduction. The overall structure of a legal argument is deductive in nature, the syllogism created consisting of a rule together with the facts of the case as premises, and the judgment of the court as conclusion. The syllogistic form is central to legal reasoning and legal professionals proceed through the form of a categorical syllogism to prove the validity of their legal conclusion. The above figure represents the deductive form as operating when the lawyer determines the rule that forms the major premise for the categorical syllogism applicable in the particular case.

.[3] John Dewey's extravagant claim of deductive or syllogistic logic exercising the greatest influence on legal decision-making was rejected by the realists of the 1920's and 1930's for being unimaginative and mechanical. Modern theorists however accept logic as a partial means to understand legal reasoning processes, albeit with reservations.

Edward Levi's classic conception of reasoning from cases also involves both deductive and inductive forms. In his work, 'An Introduction to Legal Reasoning', he provides the following explanation for reasoning from cases:[4]

The application of the syllogistic deductive model of judicial reasoning presupposes that the court has (i) identified the legally relevant facts of the case, (ii) determined exactly which legal rule applies to that case, and (iii) determined how that legal rule applies to those facts. Obviously the distinctive features of judicial reasoning involve determining the relevant facts, determining the appropriate rule, and fitting the rule to the facts. The inductive processes arise in determining: (I) the facts that are relevant to identifying the pertinent rule; (2) the content of the rule (the major premise of the syllogism) when the rule must be synthesized from multiple sources; and (3) the facts that are relevant to determining the content of the minor premise.

Reasoning as applicable in the legal process may be summarized in the words of Samuelson David:

"First the decision-maker through a species of inductive logic identifies the legal issues presented by the facts of a case. Issue-selection then yields to rule-selection. Rule-selection takes place in both easy and hard cases, resulting from the analogical process in both contexts. Further, rule-selection may flow from legal principles, which in turn often invite dicta. Legal outcomes or holdings obtain from the application of rules to the facts of a case, a process involving deductive logic. These outcomes can be justified variously by the legal syllogism, by-precedent, and by policy. Policy, finally, is shaped by rhetorical arguments, either of the quotidian or the philosophical mode."[5].

Wellman, Vincent, *Practical Reasoning and Judicial Justification: Towards an Adequate Theory*, 57 University of Colorado Law Review, 45-47 (1985) [5] Samuelson, David, *Introducing Legal Reasoning,* 47 Journal of Legal Education 571 (1997)

In sum, although many texts emphasize one form over the other, legal professionals engage in. both inductive and deductive forms of thinking in their problem solving. The two traditional forms of legal analysis, reasoning from statutes and from cases, both utilize deductive and inductive processes. Civil Law requires adjudication to rely primarily on deductive reasoning. In Common Law countries, adjudication relies on inductive, deductive, and analogical reasoning, each used at different stages of the analytical process.

The above figure is representation of the overall structure of legal reasoning; the remaining portion of the article is an effort to understand the roles of deduction as well as induction as two independent forms of inference.

APPLICATION OF LAWS OF LOGIC TO LOGIC OF LAW

Logic and the Resolution of disputes

Law has various functions, but its role is generally confined to rule making and dispute-resolving. Law and logic intersect in the dispute-resolving function of law. A study of disputes in logic, for example, enables the lawyer (or adjudicator) to identify the essential elements of the dispute, paring away the superfluities and classifying it accordingly, thus providing the basis on which to solve it. The absolutely central role of argument in resolving legal controversies justifies special attention to the way logical principles apply in the world of law and the courts.[6]

Logic recognizes three kinds of disputes: genuine, verbal, and factual masquerading as verbal. These distinctions are on the basis of the depth of dispute in question.

In the first case, either the facts, or the parties' attitude towards those facts are in question. To resolve such a dispute would require investigation of the facts themselves, and checking of what is in logic called 'material validity', or the factual

[6] Copi, Irving M. and Cohen,Carl, *Introduction to Logic, (New* Delhi: Pentice Hall of India, 9* Ed, 1999)

correctness of the information. Such disputes have been identified in several cases, including several watershed judgments of the Supreme Court of India. One such case is *OLGA TELLIS & ORS.* V. *BOMBAY MUNICIPAL CORPORATION & ORS.*[1], where the Supreme Court held that Section 314 of the Bombay Municipality Act was *not* unreasonable or violative of Article 21 because no person has the right to encroach upon public pathways and the Municipal Corporation is right in clearing up pavements and roads which have been encroached upon by slum dwellers. Also the Supreme Court told the BMC to keep its promise of assisting the petitioners and other affected persons to find new accommodation.

The dispute in the case was a genuine one of the Petitioners wanting an injunction against a Government Order which they contended violated Article 21, as against the belief of the Bombay Municipal Corporation that the execution of the Order was perfectly in line with their duty, and that there was nothing wrong in the removing of encroachments. Thus this was a disagreement due to the different attitudes of the parties in relation to the same facts; it involved no ambiguity of expression. The dispute was resolved by examining the facts themselves and reaching a conclusion.

In the second case of VERBAL DISPUTES, the dispute is more superfluous and perhaps easier to resolve. The dispute in this case arises due to some ambiguity in the expression of important terms in the belief, due to which the parties do not realize that unbeknownst to them, they have similar beliefs and are actually arguing for the same side. This kind of dispute is fairly common, and not as easy to recognize as a factual dispute; however, unlike factual disputes, once identified the dispute can be cleared up merely by clarifying the term(s) causing confusion. Out of the many Indian cases, whose point of dispute is verbal, one such case is that of *SHIBUSOREN* V. *DAYANAND SAHA & ORS.** which, incidentally, deals with one of the more

[7] *Olga Tellis & Ors. v.Bombay Municipal Corporation & Org* (1985) 3 SCC 545
[8] AIR 2001 SC 2583

interesting verbal disputes recently in the public eye, viz. what constitutes an office of profit?

The judgment of the Supreme Court in the said case was to uphold the decision of the High Court, allow the Election Petition, and dismiss the appeal of the appellant, Shibu Soren. The counsel for the appellants had tried to prove through their arguments that the office held by the appellant was not an office of profit, and even if it were, it was exempted by legislative action; however this did not hold in either the High Court or the Supreme Court. This landmark case clarified and defined the term of contention, 'office of profit', the understanding or non-understanding of whose meaning gave rise to the entire dispute. On clarification of the key term, the dispute was immediately resolved. This thus is a perfect illustration of a VERBAL DISPUTE.

The last kind of dispute is the APPARENTLY VERBAL BUT ACTUALLY GENUINE DISPUTE, which is, simply put, a genuine dispute masquerading as a verbal dispute. These disputes can be identified for what they are onfy by careful study of the situation. In these disputes, the parties may realize that they had been Using certain terms ambiguously - indicative of a verbal dispute, on the surface - however the dispute is not resolved even on the clarification of these terms, as they realize that their criteria in defining or understanding the term itself were different - this is the factual dispute underlying the verbal dispute. A case illustrating this dispute would be the watershed judgment of P. *RATHINAM\. UNION OF INDIA*[9] , dealing with attempt to commit suicide as a crime. The plaintiff contended that Section 309 of the Indian Penal Code, 1860, which stated that the attempt to commit suicide is a crirne, is violative of Article 21 and is unconstitutional. The Supreme Court held that the right to life under Article 21 of the Constitution includes the right not to live a forced life, and thus attempt to commit suicide cannot be an offence.

[9] AIR 1994 SC 1844

The dispute here was, on the surface at least, verbal, i.e. whether the interpretation of the term 'Right to life' within Article 21 could be extended to include the 'right to die'. However, this verbal dispute was only on the surface, and the real dispute was in the parties' contrasting attitudes towards a person's right to die. The plaintiff believed that the right to life included the right to end it by choice, when the concerned person did not want to live anymore. The State on the other hand believed that all persons attempting suicide should be punished so as to deter people from having suicidal tendencies. Also, it is the duty of the State to protect the life and liberty of the people, and thus it was contended by the State that allowing people to commit suicide would be against public interest and policy. It was thus obvious that far from being clarified by elucidation of the term 'Right to Life' alone, the resolution of the dispute would require going into the facts themselves, as the actual dispute lay in the attitudes of the parties. This is an APPARENTLY VERBAL BUT ACTUALLY GENUINE DISPUTE.

It is thus pretty obvious, that though adjudication is a legal process, bare-bones resolution of disputes is almost entirely logical. Relevant acts and precedents merely support the existing logical process. Without clarity with respect to the type of dispute, there is no scope for, or possibility of, effective dispute resolution.

Types of Arguments

Deduction Defined

Deduction is one of the two main types of arguments traditionally distinguished, the other one being induction. A deductive argument is one in which conclusions are drawn by applying the general rule to the appropriate particular set of facts to draw an inference about the set of facts in question. In a deductive argument, the conclusion remains within the ambit of the premises; thus if one is sure of the truth of the premises, the truth of the conclusion naturally follows. A deductive argument can

in this manner be said to provide ground for its conclusions. The following sections of the article discuss the role of deductive reasoning, explained in the legal context.

Role of Deductive Reasoning in Legal Argumentation

Deductive reasoning is based on two types of systems. One is the judge-made law wherein a lower court is bound by the rulings of the higher courts. This is known as the ; DOCTRINE OF PRECEDENT or *stare decisis.* This is prevalent in Common law countries but not in Civil law countries. Although judge-made laws provide the scope for deductive reasoning, it is not limited to the same; when a case with a unique fact-situation comes to light, the courts may apply deductive reasoning by directly examining the law related to the subject and thereby move from the idea (given by law) to the facts (of the case). This becomes essential in areas of law, which are new. For example, in the area of Intellectual Property Rights (IPR) which deals with copyrights, patents and trademarks, the courts usually do not get guidelines from judge-made law on account of the unique nature of the subject. The court therefore applies the law laid down by the legislature in the Copyrights Act, Patents Act and the Trademarks Act. In the area of Cyber laws, the court has to rely on the Information Technology Act. Even in cases dealing with the traditional laws, the courts often apply deductive reasoning not only for judge-made laws but also for laws laid down by the parliament[10].

[10] This point of law is illustrated by the case of ***Vina Singh* v. *The State of Punjab*** AIR 1958 SC 465 , where a man had attacked another with a dagger and killed him, and the Hon'ble Supreme Court ruled that the accused was guilty on one count of murder. However, the latter case of ***JayaraJ* v. *State of Tamil Nadu*** AIR 1976 SC 1519, wherein the facts were similar, was differentiated on the grounds that the the medical experts had not stated that the stab wound inflicted was sufficient in the ordinary course of nature to cause *death* as required under Section 302 of the Indian Penal Code. Thus, we see that the accused got away on technical grounds due to strict application of the law laid down by the Parliament and differentiation ofthefects,

The understanding of law in the context of logic is central to the understanding of the process of deductive reasoning. The following section of the article deals with the various facets of deductive reasoning:

Syllogistic Nature of Legal Reasoning

The first analytical skill that a legal professional is required to learn is briefing of a case. This reduces a judicial decision to an argument of deductive logic stated in categorical form -a syllogism. The classic example of syllogism is:
Question- Is Socrates mortal?
Minor premise- Socrates is a man.
Major premise *Ak*\\ men are Mortal.
Conclusion- Socrates is Mortal.
This relationship is explicit in the form of Syllogism. "

Among all forms of logic, deductive or syllogistic logic exercises the greatest influence on legal decision-making. The legal rule carefully formulated is one premise of the deductive argument. The statement of facts exhibiting their relation to the rule is the second premise and applying the rule to the facts will lead to the judgment or conclusion. This is applicable in both civil and criminal law. If the defendant in the civil suit is held liable, an appropriate remedy must then be awarded to the plaintiff. If the accused is found to be guilty through criminal trial, an

[1,] Suppose that a married woman Radha is unable to bear children by reason of having undergone a hysterectomy, but has retained her ovaries and can produce healthy ova. She wishes to have a child and her sister consents to carry it. An embryo is created in-vitro with gametes from Radha and her husband, and implanted in Rita's uterus, with the latter giving the child to Radha after parturition. These facts are the minor premise of a legal syllogism.
The question arising now is whether Radha or Rita is to be considered as mother of that child. The relevant major premise is the rule of law defining the persons who are 'legal mothers'. If there is a rule that 'the woman who gives birth to the child is the legal mother', Rita could be concluded to be the legal mother. In summary:
Issue - Who is the legal mother of a child?
Fact- Rita gave birth to the child.
Law- the woman who gives birth to the child is the legal mother.
Holding- Rita is the legal mother of the child.
This shows the syllogistic aspect of legal reasoning.

appropriate punishment must be imposed. But the overall scheme in either case is deductive in nature, which consists of a legal rule together with the facts of cases as premises, and the judgment as the conclusion flowing from it.

Deductive syllogisms are immensely useful in law; every argument can be reduced to the form of a syllogism and a large fraction of these syllogisms are deductive in nature. In such arguments, the truth of the conclusion being absolutely guaranteed, they have immense force of persuasion, even in a courtroom.

Deductive syllogisms comprises of a Major premise, which is the general rule, the Minor premise, which is the relevant fact, and the conclusion, which offers a new insight related to the fact, which is known to be true based on the premises. In the legal context, especially in the context of criminal law, the structure of the deductive syllogism would be roughly as follows:

MAJOR PREMISE: [Doing something] [violates the law]
MINOR PREMISE: *[The defendant]* [did something]
CONCLUSION: *[The defendant]* [violated the law][12]

Thus deductive syllogisms are invaluable in their ability to bring clarity and focus to an argument by stripping it to its essentials. Every argument can be simplified to a syllogism; this is indicated by the following legal examples.

Consider the case of *SVNDER SINGHAND ORS.* v. *STATE OF PUNJAB*[13]

MAJOR PREMISE: When a criminal act is done by several persons in furtherance of the common intention of all each of such persons is liable for that act in the same manner as if it were done by him alone, under Section 34 of Indian Penal Code, 1860. MINOR PREMISE: The accused persons committed the criminal act in furtherance of the common intention of all.

[12] Aldisert, Ruggero J., Clowney, et.al, *Logic for Law Students: How to Think Like a Lawyer*, University of Pittsburgh Law Review (2007)
[13] *Sunder Singh and Ors.* v. *State of Punjab* (1999) 6 SCC 172

CONCLUSION: Each of the accused persons is liable for that act in the same manner as if it were done by him alone, under Section 34 of the Indian Penal Code, 1860

Consider the case of *STATE OF ANDHRA PRADESH* V. *K SRINIVASULU REDDY AND ANR*[U]. :

MAJOR PREMISE: When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone under Section 34 of the Indian Penal Code, 1860.

MINOR PREMISE: Accused Al and A2 committed a criminal act not in furtherance of ' the commonlntention of all

CONCLUSION: Accused Al and A2 will not be guilty under Section 34 of the Indian Penal Code, 1860.

There are various other forms of syllogism including Hypothetical [15](This form is mostly used in determining the punishments or compensations in case of particular acts.) and Disjunctive syllogism [I6](This is mostly used in determining the appropriate choices of remedies or punishments.) as well as Polysyllogism which has immense utility in legal reasoning. As Judge Aldisert observed, "often a series of syllogisms are linked with conclusions of previous ones forming the premises of those which follow. A case brief is in fact a chain of logical arguments, proceeding from the root premises of the court to its final decision. By using a "polysyllogistic" approach, one may trace the court's reasoning from its underlying assumptions about the law to its ruling in the case before it."

[14] *State of Andhra Pradesh* v. *K Srinivasulu Reddy and Anr* (2003)12 SCC 660

^Hypothetical Categorical Syllogism- To affirm the antecedent is to affirm the consequent in the conclusion :Anybody who acts negligently (P) is liable to make good the damage caused due to his negligent act (Q)

[18] Disjunctive Categorical Syllogism- A possibility of choice to select one of the available under a given set of facts and related principles.

Anybody who commits murder is punishable with imprisonment for life (P) or death (Q)

All arguments are in fact, some kind of syllogism or the other, and identification of the syllogism within the verbosity will help the lawyer immensely, as once the syllogism is unearthed, fallacies and flaws in argument become immediately apparent. These can be removed and the argument strengthened. The use of syllogisms in arguments simultaneously crystallizes them, bringing into focus their essential points, and clarifying them, thus providing the judge invisible signposts for him to direct his application of the law.

But the soundness of any syllogism may be challenged by attacking either the minor premise or the major premise. An attack on the minor premise of a legal syllogism tests whether the rule is applicable to the facts, while an attack on the major premise tests its validity. Furthermore, the syllogistic approach to briefing cases reveals that there are two types of hard cases: cases where the rule of law to be applied is ambiguous and cases where the validity of a rule is in question.[17] Questions of ambiguity arise when the minor premise of a proposition of law is challenged, while questions of validity arise when the major premise of a proposition of law is challenged[18]. Hard cases are those where two or more valid legal arguments lead to contradictory conclusions. "Although legal reasoning may be logical in form, in substance it is

[17] Ronald Dworkin noted that questions of validity create "hard cases," just as questions of ambiguity do: "Judges often disagree not simply about how some rule or principle should be interpreted, but whether the rule or principle one judge cites should be acknowledged to be a rule or principle at all." Dworkin, Ronald, *Hard Cases*, 88 Harvard Law Review 1057-1089 (1975)

[18] The relevant rule of law may be stated in hypothetical form as follows: if a woman gives birth to a child, then she is its lawful mother. This rule is not ambiguous in the context of gestational surrogacy; all the words of the fact portion of the rule have but one meaning as applied to this case. But we know intuitively that this is not an easy case, even though the rule of law is unambiguous. The difficulty arises because in this context the rule itself seems to be an incorrect or unfair statement of the law. This type of case is hard because the validity of the rule is in question, even though its meaning is clear. The law is volitional, not phenomenological. The root premises of law are value judgments. Though law is logical and rational in form, in substance it is evaluative, the result of intentional value choices. Samuelson, *David, Introducing Legal Reasoning*, 47 Journal of Legal Education 571(1997)

19 For example, if a person purposefully and without justification or excuse causes the death of another, then the person is guilty of homicide. An intruder who deliberately shoots and kills a sleeping homeowner in the course of a burglary is clearly guilty of murder; this is an easy case. However the case of a woman who has suffered years of serious physical abuse at the hands of her husband, killing her sleeping husband raises questions. The law of self-defense requires that the defendant reasonably believe that her actions were necessary to defend herself against the aggressor's imminent use of unlawful force. The guilt of the defendant is debatable because of ambiguity in the meaning of the word "imminent" in the

evaluative. Accordingly, although syllogistic reasoning plays a central role in briefing judicial opinions, formal logic alone cannot describe hard cases. In spite of the heavy use and dependence of law upon deductive reasoning, and the various forms of *antecedent-consequent relations,* there are certain limitations that are encountered when *deductive reasoning* is associated with *legal reasoning.*

Induction Defined

In the realm of deductive logic, the central task is to clarify the relation between premises and conclusion in valid arguments, and thus to allow us to differentiate valid from invalid arguments.

An inductive argument makes a very different claim: not that its premises give conclusive grounds for the truth of its conclusion, but only that its premises provide some support for that conclusion. Inductive arguments, therefore, cannot be "valid" or "invalid" in the sense in which these terms are applied to deductive arguments. Of course, inductive arguments may be evaluated as better or worse, according to the degree of support given to their conclusions by their premises. Thus, the greater the likelihood, or probability, that its premises confer on its conclusion, the greater the merit of an inductive argument. But that likelihood, even when the premises are all true, must fall short of certainty.

Application of Inductive Reasoning In Law

Thus deductive reasoning forms a major part of the legal reasoning process; however the nature of law is such that it is never a purely deductive process, as a deductive process is merely the application of an accepted truth - in legal context, an accepted legal principle. There must exist some process that produces the required principle. This process is known as induction. The end product of inductive reasoning is what is

rule defining self-defense. This is a hard case because of the ambiguity inherent in the word "imminent.", making possible two different interpretations of the rule[4]

in logical parlance known as a *Universal Real Proposition,* whose truth-value is guaranteed. There is an equal need for induction, or moving from analysis of specific cases to making inferences. This is the basis on which newer laws are formed, and newer legal principles evolved, especially in the common law context. India being a common law country, knowledge of induction and its application in law has especial importance for Indian lawyers, in order to both effectively understand and intelligently apply principles. Inductive reasoning generally takes one of two forms, reasoning by analogy or inductive generalization.

Analogy

Analogies are of one type in inductive arguments. As with all types of inductive reasoning, analogies do not have the quality of definite occurrence; probability is all that is claimed of them. Analogies emerge from past experience; to draw an analogy between two or more entities is to indicate one or more respects in which they are similar. Following this, a conclusion may be drawn that the case in question is similar to the cases compared to in one respect additional to the rest.[20]

Analogies in Law [21]

Analogies are heavily relied upon during dispute-resolution in the legal field; expert testimony by special witnesses most often take the form of analogies with their past

[20] When analyzing an inductive argument, the advocate should first "identify the two things being compared (X and Y) and the property (M) that is being attributed to Y in the conclusion., and next, look for "the property (S) that is to make A and B similar.

[21] "The importance of legal reasoning by analogy cannot be overstated. It is the heart of the study of law; it lies at the heart of the Socratic method in the classroom and the courtroom." Aldisert, Ruggero J., Clowney, *Stephen and Peterson, Jeremy D., Logic for Law Students: How to Think Like a Lawyer,* University of Pittsburgh Law Review (2007).
Other texts similarly stress analogical reasoning even though they may not use the nomenclature "analogical reasoning" per se. For instance, in his book, *A Student's Guide to Legal Analysis: Thinking Like a Lawyer,* Patrick McFadden contends that in legal analysis students primarily take on an "archaeological perspective" by reading and discussing what happened in past cases, however, they also learn how to "switch" perspectives and assume "contemporary" perspectives in order to analyze the cases' applicability in modern situations. To do this, students must employ principles of analogical • reasoning even though the process is not phrased as such, by McFadden.

experiences, in which they give their opinion on the case at hand by comparing the facts of the case with the situations that they have faced in the past, evaluating similarities in those cases and this one, and finally concluding whether the current case is sufficiently similar to the past ones for them to make a reasonably probable conclusion that would answer the questions in the given case.[22] Analogies are one of the fundamental bases for decision making in the common law system; for application of judicial precedents, one is required to examine the similarities in past cases before making an analogy and reaching a conclusion, and thus a verdict.

Consider, for example, the *ST. THERESA'S TENDER LOVING CARE HOME AND ORS.* V. *STATE OFANDHRA PRADESH*™ where the decision of the Family Court was based on an analogy with the single case of *LAXMIKANTPANDEY* v. *UNION OF INDIA AND ORS*[24]. Both cases were concerning the issue of adoption across different nations; moreover, the grounds of the decision in the referred case was the trafficking of children, which was the same as what was referred to as the 'inhibition factor' in the current case. On account of these two functional and pertinent similarities in the cases, the family Court made its decision based on the rules[25] set forward in the referred case. This decision was supported by the Supreme Court as well.

The analogy may be rejected if the comparison is based on irrelevant or inconsequential similarities or ignores dissimilarities.

The strength of an analogy is evaluated on similar considerations. The size of the sample, the percentage of the sample containing the property, the similarities or positive resemblances, the relevance of the similarities or dissimilarities, the diversity within the sample, and the breadth of the conclusion must all be considered. It is "not required that the example used as an analogy be exactly like the example in the conclusion." Instead, the analogy requires "relevant similarities." Thus analysis is based on relevance of similarities.
Weston, Anthony *A Rulebookfor Arguments* 19 (Hackett Publishing Company Inc., Indianapolis, 3"* Edn., 2001)

[23] AIR 2005 SC 4375

[24] AIR 1992 SC 118

25 Paragraph 7, *Id.*

Generalization In Law

In contrast to analogical reasoning, the other primary form of inductive reasoning i.e. inductive generalizations is much less emphasized in the legal reasoning texts. This is problematic because legal professionals often engage in such reasoning through their process of "synthesizing cases" and examining multiple cases to find certain "common threads among them." Through these techniques, lawyers often induce new general principles that they, in turn, seek to apply to the case at hand.

Consider the case of *DK BASU* V. *STATE OF WEST BENGAL*[26] which was a Public Interest Litigation. The judge examined several cases concerning the infringement of rights, including *JOGINDER KUMAR* V. *STATE OF U.P. AND ORS.*[27] , *SMT. NiLABATI BEHERA ALIEAS LALITA BEHERA* V. *STA TE OF ORISSA AND OTHERS*[21], and *STATE OF MADHYA PRADESH* V. *SHYAMSUNDAR TRIPATHY*[29], identified the problem as well as the cause, and concluded *in general* that monetary compensation must be awarded. This, along with consideration of **Article 5 of the Universal Declaration of Human Rights** which states that,

> 'Wo *one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*." and **Sections S3, 54 and 167** of the **Criminal Procedure Code, 1973** which aim at procedural safeguards to a person arrested by police, led to the judgment. This case employed the method of examination of several individual cases to reach, through generalization, a new truth in the given case. Thus, this is an example of induction through generalization.

If a conclusion is based on inadequate evidence, then the generalization is faulty. There is a need to determine whether the evidence that has been used, as the basis for the generalization is relevant, whether it is representative, and whether it is numerous

26 AIR 1997 SC 610
27 *Joginder Kumar* v. *State of U.P. and Ors.* (1994) 4 SCC 260
28 *State ofMadhya Pradesh* v. *Shyam Sundar Tripathy* (1993) 2 SCC 746
29 (1995) 3 SCALE 343

enough to permit the conclusion. Any of these can be a basis for undercutting the grounds for generalization.[30]

Inductive reasoning has its own pitfalls, in that no matter how many individual cases may be analyzed before drawing a conclusion in general, one can never be. completely sure of the validity of the conclusion, as it is not humanly possible to analyze every existing situation and neither is it possible to predict whether every future situation will agree with the existing ones. Yet with a careful study of the circumstances, it is possible to pare the probability of correctness to an acceptable level. Thus induction is invaluable in its ability to help in making of intelligent predictions using what is known as an 'inductive leap' or more commonly, a 'jump in thought'; which is necessary in the framing of laws. Knowledge of logic thus greatly strengthens the potential to use law to one's advantage *for* legal professionals of every kind, right from the novice student to the experienced legal counsel to the renowned judges.

LOGIC AS A TESTING DEVICE

By reducing judicial decision to a logical form we are able-to detect flaws and fallacies that might otherwise remain hidden under the gown of rhetoric. Avoiding fallacies is best accomplished by acquiring a thorough familiarity and understanding of them. In the absence of its understanding, merely good intentions are not enough to prevent fallacies from creeping in our arguments nor is wariness sufficient to protect against being mislead when opponents use fallacies. Recognizing fallacies in practical arguments may be difficult since arguments are often structured using rhetorical patterns that obscure the logical connections between assertions. Fallacies may also exploit the emotional or intellectual or psychological weakness of the interlocutor so having the capability of recognizing logical fallacies in arguments will

_____ v _____

[30] To assess the strength of an inductive generalization, consider the size of the sample relative to the size of the target. Where the analysis is based on a complete set, the conclusion will be strong, and vice versa.. The advocate must test the strength of the conclusion by examining the sample's size and its representative ness and must also consider the strength and numberof any counterexamples. Kelley, David, *The Art of Reasoning*, p. 498 (New York City : W.W. Norton & Co., 3^Edn., 1998)

hopefully reduce the likelihood of such occurrences. It is also true in the case of legal process.

Fallacy Defined

A fallacy is a type of incorrect reasoning and the study of fallacies is a sub species of logic[31]. Fallacy in a strict logical sense is typical an error or mistake that arises commonly in ordinary discourse, and devastates the argument in which it appears. A fallacious argument is one that appears correct and may even be extremely persuasive, but which proves upon closer examination to be logically invalid. Fallacies find an important place in legal regimes comprising of various laws and legal systems. Fallacies are directly involved in cases relating to the interpretation and enactment of provisions. Fallacies in Law

In a conclusion drawn from an argument which is insufficiently supported by its premises, the reasoning is said to be bad and the argument is considered fallacious. Fallacies, for the most part, and in most contexts, cause the argument in question to become invalid; however some circumstances exist in which they are not only not fallacious, but also advantageous. Fallacies of different kinds exist in both inductive and deductive arguments, but this article, in the following section, will address only some fallacies that are commonly seen in law.

[31] Fallacies are typical errors found in everyday situations that distort the argument in which they appear. Aristotle was both, the first formal logician- codifying the rules of correct reasoning and the first informal logician- cataloging the rules of incorrect reasoning, namely fallacies. He was also the first to name types of logical errors and categories them. The result is the book *On Sophistical Refutation.* However, Aristotle's teacher, Plato deserves credit for being the first philosopher to collect examples of bad reasoning, an important preliminary piece of work before naming and cataloging. Plato's *Euthedemus* preserves a collection of fallacious arguments in dialogue form, attributing the perhaps exaggerated examples to two sophists, for which reason fallacious arguments are sometimes called sophisms and bad reasoning sophistry. Aristotle referred to some of these as instances of his named fallacies.
In the centuries since Plato and Aristotle, many great philosophers have contributes to fallacy studies, among them John Locke, John Stuart Mill, Jeremy Bentham are important names.

Fallacies in Adjudication:

The usage of inductive processes in adjudication often witnesses the commission of certain fallacies, with respect to reliance on precedents. Inductive generalization involves reference to several instances - in this context, precedents - to reach a probable conclusion. However in law, not all judicial precedents have the same value, and hence cannot be treated as such. By virtue of Article 141, 32 of the Constitution of India, all Indian courts are bound by the law as declared by the Supreme Court. Thus in the event that a Supreme Court precedent exists in relation to a case before a High Court, the latter is obliged to comply with the former, whereas the decision of a High Court would have no authority except a persuasive one, on another High Court. It happens only too often, however, that binding precedents are treated on par with persuasive ones, resulting in misleading conclusions, inevitably culminating in questionable judgments. Examples include the judgment of Mr. Justice M.Srinivasan in *MADRAS LABOUR UNION* V. *BINNY LIMITED*™. In this case the legal question involved was whether a writ could be issued against a company formed under the Indian Companies Act; alternatively, whether such a company would be considered an "Authority" as under Article 226 of the Constitution of India. The Supreme Court had already dealt-with this question in *ANADIMUKTHA TRUST V. RUDAN?** holding that the scope of 'Authority' extended beyond statutory authorities and instrumentalities of the State to include bodies on whom a *'positive obligation'* existed by virtue of the nature of the duty imposed on them. However Justice Srinivasan in his exposition of the case, not only fallaciously treated this authoritative and binding precedent at par with twenty other cases, mostly High Court decisions of not more than persuasive value, but also changed 'positive obligation' to 'public duty', leading to a questionable judgment where the act of the management of Binny

[32] Law declared by the Supreme Court to be binding on all courts - The law declared by the Supreme Court shall be binding on all courts within the territory of India. " 1995 1 CTC 73

Ltd. could not be held responsible for depriving workers of their livelihood, as the settlement under Sec. 12(3)of the I.D. Act was not a 'public duty'. Thus the principle evolved by the Supreme Court was not correctly utilized and applied.

A similar case is *TAMILARASAN*[35] where the question was whether a writ could be issued against a Cooperative Society, i.e. whether it could be regarded as State. Puzzlingly, despite the progression of cases decided by the Supreme Court, including that of *AJAY HASIA* V. *KHALED*[36] where various tests were described for the same, Justice Venkatasamy in this case took the stand that there was no relevant authoritative precedent, and instead chose to rely on several persuasive precedents by single and division benches of other High Courts, to reach the conclusion that a writ cannot lie against a Cooperative Society. The issue of whether 'authority' under Article 226 would include societies in light of the *ANADIMUKTHA*[31] Case was not examined. Such reasoning and such conclusion, arrived at through a faulty process, is thus fallacious.

Another common misstep is with respect to deduction in adjudication, as is illustrated by the celebrated case of *INDIRA SAWHNEYV. UNIONOFINDIA™′*, where the question before the Court was the constitutional validity of executive orders passed pursuant to the Mandal Commission Report, leading to deliberation on whether 'Class' as used in Article 15(4) of the Constitution includes 'caste', due to the two terms being interconnected in the Commission Report. However, even as a golden opportunity was presented to the Apex Court to conclusively resolve the agonizing choice between rights of downtrodden minorities and the existing unemployment crisis, all the judges chose to rely overwhelmingly on the speeches of Dr. Ambedkar, the architect of the Constitution of India who, while an acknowledged statesman and luminary of his time, could not have been expected to be aware of either the ground

1991(2)M.L.W.408
Ajay Hasia v. *Khaled* 1981 1 SCC 722
Supra Note 45
AIR 1993 SC 477

realities of the 1990s or the Mandal Commission Report. This precedent which formed the major premise in the strictly syllogistic approach followed was inappropriate and meaningless. Thus the judgment itself, following as a conclusion, would logically speaking, be faulty.

An interesting case is one of *THOMPSON V.BANSTOWNCORPORATION*[39]. The facts of this case were that a boy had received severe burns while climbing a pole carrying high tension wires. At this point, the facts are not in conflict; however the legal category to be applied is. One approach is to consider that the boy was trespassing on the pole belonging to the Corporation, whereas a diametrically opposite but equally applicable perspective is that the Corporation is responsible for a very dangerous agency thereby owing a very high duty of care in rem. The logical processes of induction would come into place only after the Court makes the creative choice of which approach to take, and which precedents to apply. Thus the conclusion, though achieved by logical process, is actually a function of the creative choice made by the Court with regard to approach.

As can be seen, logical processes must be correctly applied in order to yield relevant conclusions. Fallacies are also committed in more straightforward ways, both in the use of formal and informal logic, as shall be illustrated further.

Consider the case of *STATE OF PUNJAB* V. *GURMEET SINGH AND ANR.*[W] in which the respondent was raped, and the Trial Court gave a verdict of not guilty. The reasoning of the trial court was based on the fact that the hymen of the respondent was ruptured, and her speculum was two fingers wide. The Trial Court concluded on the basis of these facts that when a female's speculum is two fingers wide or more, the possibility of her having had regular sexual intercourse cannot be ruled out. However, it is to be noted that if the dispute was whether the respondent had had regular sexual

1953 C.L.P 619 AIR
1996 SC 1393

intercourse or not, then it would be the age or oldness of the tear in the hymen that would be the determining factor, and not the tear itself which would be present either way. Thus the conclusion of the respondent not having been raped does not follow from the premises; this would constitute the FALLACY OF NON-SEQUITOR[41].

The Supreme Court quashed the above judgment and stated that the Trial Court, apart from erroneously disbelieving the prosecutrix, also characterized her as a *"girl of loose morals"* without any justification. The Trial Court went on to comment that,

> *"The more probability is that the (prosecutrix) was a girl of loose character, she wanted to dupe her parents that she resided for one night at the house of her maternal uncle, but for reasons best known to her she does not do so and she preferred to give company to some persons. "*

Such unqualified and baseless comments on behalf of the Trial Court, that cast a stigma on the prosecutrix's character, amounted to the FALLACY OF ATTACK ON PERSONAL CHARACTER or AD HOMINEM[42]. The Supreme Court went on to say that,.

' *"It appears that the Trial Court searched for contradictions and variations in the statement of the prosecutrix microscopically, so as to disbelieve her version "*

Thus it was stated by the Supreme Court that the Trial Court, having already assumed the truth of their belief that the statements of the prosecutrix were erroneous and non-admissible, followed a method of examination and reasoning process with an objective to prove their belief. The Trial Court thus additionally committed the FALLACY OF PETITIO PRINCIPII.

[41] If an argument contains the fallacy of Non-sequitor, it means that the premises provide insufficient grounds for conclusion

[42] "Ad hominem" means "to the man or person," and such a fallacy occurs when an advocate makes a personal attack on the opponent, not the substance of the opponent's argument.

Consider the case of *DILIP SINGH AND ANR* V. *STATE OF BIHAR*** which was a case concerning the offence of rape. The victim had at one point gone for a walk at midnight in a wheat field with the appellant following which, she alleged that she was raped by the appellant which resulted in a pregnancy. One of the questions before the Supreme Court was whether she had consented to the sexual act that followed the walk. The Court assumed that since she had consented to the walk with the appellant at that 'unearthly hour' she had also, implicitly or otherwise, consented to the sexual act that followed. This is a clear commission of the FALLACY OF COMPOSITION, in which the truth of the whole is assumed on the basis of the truth of one of the Constituent parts. The Court thus failed to understand that the situation was constituted of two distinct parts, the first, of going for the walk and the second, the sexual act. Consent to the first part had no bearing whatsoever on the second. The Court also took into consideration the fact the victim had had previous (consenting) sexual relations with the appellant; but forming such a conclusion is again incorrect, as consent for one act does not imply consent for another.

AD iGNORATIUAf[4] is another fallacy commonly committed; this fallacy occurs when, when one side is unable to prove that something is false so it is assumed to be true; the converse also holds. This situation is quite common in the context of law, where several instances exist, of persons being acquitted due to 'lack of evidence', or when the offence is assumed not to have occurred when its occurrence cannot be proved 'beyond reasonable doubt'. It is thus not only common but often appropriate in the context of the common law system practiced in India, which operates on the principle that (subject to some exceptions), the accused is 'innocent until proven guilty'.

Interestingly, some other fallacies, such as AD HOMINEM, discussed in cases above, though not acceptable in regular argument, are often valid inside a courtroom. In legal proceedings, it is not only acceptable but often effective for counsel to draw

[45] AIR 2005 SC 203
[44] Refer *Siddharth* v. *State of Bihar* (SC-2005-20) and *Basdev* v. *State ofPepsu* (AIR 1956 SC 488)

attention to the unreliability of the witness for the opposing party, and in doing so, undermine the claims upheld by the testimony of that witness. This may be done by showing (conclusively) that the witness had lied, or by exhibiting the great benefits that would accrue to the witness on acceptance of the testimony. These are all examples of the commission of Ad Hominem, yet they are not fallacious due to the special context of application.

Fallacies in law are thus quite common, and it would be advantageous to the legal professional to know of the existence of such fallacies and some basic information about the conditions for the same, so that he may be able to both avoid them in his own work as well as spot them in the arguments of his opponents.

CONCLUSION

Logic has been central to legal education and thinking for many years. In the late 19th Century, legal reasoning was dominated by formalistic analysis. Judges and lawyers reasoned deductively from basic principles. Around 1910, legal realism—or policy analysis— entered the domain of legal reasoning[45]. This approach took almost a diametrically opposite view of the basis of law. The fact however remains that as long as the rule of law requires like cases to be treated alike and judges to apply statutes and the interpret the Constitution as written, logic remains an important part of any argument on appeal and reasoning remains a primary determinant of judicial decision-making. Thus, logic is critical on appeal and remains the philosophical backbone of legal education.

[45] In the 1800s, when Christopher Columbus Langdell, Dean of Harvard Law School, published the first modern casebook, the classical system was based on the view that law was a formal, ordered system that was objective and consistent, capable of providing unique and correct logical solutions for every case in question, applying to the specific case the appropriate abstract rule derived from earlier cases; such an approach was grounded in logic, and was thus believed to be appropriate for use in legal education. This trend reversed with the advent of legal realism, however, with the law now considered to be a function of experience. The erstwhile purely deductive approach was rejected in favor of analysis in light of purposes and possible consequences. Justice Oliver Wendell Holmes, at the forefront of this movement, made obvious his skepticism of the older approach by his famous statement, "The life of the law has not been logic: it has been experience."

Logical processes are the bases for both the formation and application of law. Besides the fact that logic is necessary for fair administration of law, some basic knowledge of logical processes is advantageous to the lawyer as well. Any lawyer would hence be benefited by some basic knowledge of logical reasoning, in order to aid both his research and analysis, for logical processes help in both bringing to focus the actual issue at hand, lost in the heap of mostly irrelevant facts that a case brings, and narrowing the scope of research required to argue the same. The study of law without an understanding of logic would be a comparatively mechanical process, where one would through observation, learn the trends of decision making, but never quite understand why those inferences are made and those conclusions reached and none others.

Knowledge of basic logical processes is essential for law students. Law students are taught the skill of persuasion through the activity of Moot Courts. To be able to argue effectively in a moot, one must have a specific proposition in mind that one wishes to get the opposing party to acquiesce to. Deductive and inductive analogies play an important role in these arguments. Judicial precedents are quoted on the basis of material similarity of facts; in this sense, they are used as analogies, which are a component of inductive reasoning. The mooter may also not always have sufficient legal knowledge to answer some of the interjections or questions by the Bench; in such a situation, the only way out is through rationalizations and logical argument. Therefore, every student of law should be made familiar with logical processes, so that he may make complete and enlightened use of his knowledge.

UTILITY OF EXTRA-TERRITORIAL JURISDICTION OF COMPETITION COMMISSION OF INDIA.
RESEARCH PAPER.

SOUVIK CHATTERJI

ABSTRACT

India had the experience of metamorphosis of two competition regimes in the last 50 years. The Previous Competition Regime under Monopolies and Restrictive Trade Practices Act, enacted in 1969 catered to the needs of the society during an age when the country was under command and control regime. Significantly the competition agency at that point, the Monopolies and Restrictive Trade Practices Commission (MRTPC) did not have extra-territorial jurisdiction. After liberalization in the 1990s, the country needed a new competition regime. The Competition Act, 2002, as amended by The Competition (Amendment) Act, 2007, is the new law which have extra-territorial jurisdiction. The Paper examines the requirement of the extra-territorial jurisdiction and its utility in the present open market scenario.

UTILITY OF EXTRA-TERRITORIAL JURISDICTION OF CCI.

INTRODUCTION

Anti-competitive activities, abuse of dominant positions and anti-competitive mergers and acquisitions had gained cross-border dimensions in the last 10 years. Due to globalization and extension of business of giant companies across jurisdictions, anti-competitive activities had assumed international dimension.

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As a result, US and other developed countries of the world had used their extra-territorial jurisdiction to address anti-competitive activities which took place outside their geographical borders but had effect within its own jurisdiction.

In India, the Monopolies and Restrictive Practices Commission did not have extra-territorial jurisdiction. It had powers to give cease and desist orders. When such powers were exercised against international companies, such companies questioned the extra-territorial jurisdiction of MRTPC.

The MRTP Act, 1969, empowered the Central Government of India to set up an authority called the MRTP Commission to perform advisory, investigative and adjudicatory functions. The MRTP Commission was also created to oversee the functions of the MRTP Act. The MRTPC could investigate into any restrictive trade practice, on a complaint from any trade or consumer associations or upon a reference made by the Central or State Government or upon an application made by the Director General of Investigation and Registration (DGIR), or on suo motu basis.[1] Under the MRTP Act, the only power vested with the MRTPC with respect to restricted trade practices like cartels, was to issue ceased and desist orders or to permit the parties to a collusive agreement to modify the agreement so that it was no longer prejudicial to public interest.

In respect of lack of extra-territorial jurisdiction, the best example of MRTPC facing the challenge of addressing a cartel case under restrictive trade practice include the case of *American Natural Soda Ash Corporation (ANSAC)* v. *Alkali Manufacturers Association of India (AMAI) and others?* ANSAC, a joint venture of six soda ash producers of USA attempted to ship a consignment of soda ash to India. AMAI, whose members included the major Indian soda ash producers, complained to the MRTPC to take action against ANSAC for cartelized exports to India. Under the

[1] Section 10 and 37 of the MRTP Act, 1969.
[2]1997 (5) CTJ 288.

MRTP Act, 1969, cartels were not defined. Cartels were categorized as restrictive trade practices. Cartel was defined as trade practice which has or may have the effect of preventing, distorting or restricting competition.[3] But cartels were defined by the Supreme Court in cases like *Union of India & Others v. Hindustan Development Corporation.*

Cartel was defined as an association of producers who by agreement amongst themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity. The MRTPC in the ANSAC case instituted an enquiry and passed an ad-interim injunction on ANSAC.

The injunction restrained ANSAC from continuing cartelized exports to India. In June, 1997, the Commission rejected ANSAC's petition for vacating the injunction. Quoting from the ANSAC membership agreement, it held that ANSAC was prima-facie organization which was carrying out part of its trade practices in India, giving the Commission jurisdiction under section 14 of the MRTP Act, even though the cartel was formed outside India.

The Commission confirmed its earlier injunction, on the ground that ANSAC was prima-facie a cartel. ANSAC then appealed to the Supreme Court of India, on the following grounds - (a) Under the MRTP Act, 1969, the MRTPC had no power to stop the import, (b) the MRTP Act, 1969, did not confer extra-territorial jurisdiction to the MRTPC, and (c) action could only be taken if an agreement involving an Indian party could be proved and that too only after the goods had been imported into India. In this case, the shipment did not actually take place.

The Supreme Court did not go into the allegation of cartelization,.but instead held that the wording of the MRTP Act, 1969, did not give the MRTPC any extra-territorial jurisdiction. The MRTPC therefore could not take action against foreign

[3] Section 2 (o) of the MRTP Act, 1969.
[4] 1994 CTJ 270 (SC) (MRTP).

cartels or the pricing of exports to India, nor could it restrict imports. Action could be taken only if an anti-competitive agreement involving an Indian party could be proved, and that too after the commodities had been imported into India. The Supreme Court overturned the order of the MRTPC.

In 1998, the All India Float Glass Manufacturer's Association (AIFGMA) filed a complaint to the MRTPC against three Indonesian Companies manufacturing float glass on grounds of predatory pricing. It was alleged that the three companies with Indian importers resorted to restrictive and unfair trade practices. The sale of float glasses by the alleged companies would have created anti-competitive effect in the float glass market in India. The MRTP Commission issued an injunction against the Indonesian from exporting float glass to India.[5]

On appeal before the Supreme Court, the extra-territorial jurisdiction of the MRTPC came up for consideration. The Supreme Court held that the MRTPC had no extra-territorial jurisdiction in the Float Glass case. The Supreme Court added that allowing challenge to the actual import would tantamount to giving the MRTP Commission jurisdiction to adjudicate upon the legal validity of the provisions relating to import and that the Commission did not have the jurisdiction.

The Supreme Court categorically said that the action of an exporter to India when performed outside India would not be amenable to jurisdiction of the MRTP Commission. The MRTP Commission cannot pass an order determining the export price of an exporter to India or prohibiting him to export to India at a low or predatory price.

So the Competition Commission of India was given the extra-territorial jurisdiction by the Indian Competition Act, 2002, as amended by the Competition (Amendment)

[5] Pradeep Mehta, *A Functional Competition Policy for India*, Academic Foundation, New Delhi, India, page 65.

Act, 2007. The CCI has the power to investigate into any anti-competitive activity, abuse of dominant position or anti-competitive combination taking place outside India, but having potential effect within India.

Extra-territorial jurisdiction had been granted to CCI through the 'effects doctrine'. The doctrine implies that even if an action or practice occurs outside the shores of ' India but has an impact or effect on competition in relevant market in India, it can be brought within the ambit of the Act, provided the effect is appreciably adverse on competition. The doctrine had been used in other jurisdictions as well. In the *Wood Pulp* Case,[6] the European Court of Justice established the 'effects doctrine'.

It was a case where wood pulp producers, having their registered offices outside the EC, in different countries, but not carrying on business within the EC entered into price-fixing agreements among themselves covering supplies to be made to purchasers within the EC. Some of the applicants raised submissions regarding the Community's jurisdiction to implement its competition rules to them. Their contention was regulation of conduct restricting competition .adopted outside the territory of the Community merely by reason of the Economic repercussions. The European Court of Justice rejected this contention and held that these supplies were to be held as to be in competition for the supply of wood pulp in the Common Market and that the rules of the EC competition applied to their conduct also and upheld the fines levied on some of the applicants.

In that respect India is not the only jurisdiction which had adopted the 'effects doctrine". The application of the doctrine in the American and European jurisdiction had been examined before adopting it in the Indian Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

[6] *A. Ahlstrom Osakeyhtio and others v. Commission of the European Communities,* Judgement of the European Court of Justice of 27 September 1988.

The CCI shall, notwithstanding that (a) an agreement referred to in section 3 has been entered into outside India; or (b) by any party to such agreement is outside India; or (c) any enterprise abusing the dominant position is outside India; or (d) a combination has taken place outside India; or (e) any party to combination is outside India; or (f) any other matter or practice or action arising out of such agreement or abuse of dominant position or combination is outside India, have power to inquire into such agreement or abuse of dominant position or combination if such agreements or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.[7]

CONCLUSION:

In conclusion it can be said that anti-competitive activities, abuse of dominant positions and anti-competitive combinations had acquired cross-border dimensions. The vitamins cartel,[8] and the lysine cartel in USA had resulted in greatest economic losses in the last century in respect of anti-competitive activities stretching over continents. The only reason that USA could address the concern and give landmark fines which still stand out as the greatest fines issued in the history of anti-trust laws all across the world was because it had the extra-territorial jurisdiction.

When we look back at the performance of the MRTPC set up under the MRTP Act, 1969, we realize the lack of extra-territorial jurisdiction did not allow it to create a deterrent effect in the minds of international players which were involved in anti-competitive activities or abuse of dominant positions in the past. Whenever the cease and desist order of the MRTPC were challenged in the Supreme Court of India, the orders were overturned.

India has learned from experiences. The 'effects doctrine' had been retained in the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007. It

[7] Section 32 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.
[8] Koob C. and Antoine O. (2006), *"Getting the Deal Through - Cartel Regulation 2006"*, Global Competition Review.

can turn out to be one of the most useful tools in the hand of the Competition Commission of India.

The CCI had started working very recently. There are not very many examples or cases that the CCI had investigated till now where cross-border issues were involved. But with huge number of cross-border mergers and acquisitions taking place in telecom, electricity, retail and many other sectors in India, the major cases that the CCI will be required to investigate will definitely having cross-border dimensions.

In that scenario, the decisions or orders of the CCI would be upheld by the Appellate jurisdictions. Neither will the international players be able to challenge the decisions of the CCI, nor will be able to continue with their anti-competitive activity, or abuse of dominant position or anti-competitive combination. Experts of competition law within the country believe that the extra-territorial jurisdiction will be used at random in future. The success of the CCI to address anticompetitive activities, abuse of dominant positions and anti-competitive combinations will depend on the best utilization of the extra-territorial jurisdiction under the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

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CASE COMMENT: A PRAGMATIC INSIGHT INTO THE 'NAZ FOUNDATION' RULING

ARUNABHA BANERJEE

This comment seeks to advance a critique of *Naz Foundation* v. *NCT & Others*[2], a recent pronouncement by the Honourable High Court of Delhi on the issue of constitutionality of Section 377[3] of the Indian Penal Code, 1960 pertaining to unnatural offences - which criminalizes consensual sex between two adults in private. This writ petition had been preferred by Naz Foundation, a NGO as a Public Interest Litigation. It was initially submitted by the Petitioners that Section 377 IPC should apply only to non-consensual penile non-vaginal sex and penile non- vaginal sex involving minors. The writ petition was dismissed by the High Court in 2004 on the ground that there was no cause of action in favour of the petitioner and that such a petition could be entertained to examine the academic challenge to the constitutionality of the legislation. The Honourable Supreme Court of India however *vide* order dated 03.02.2006 set aside the said order of this Court observing that the matter did require consideration and was not of a nature which could have been dismissed on the said ground. The matter was therefore remitted to the High Court for reconsideration. After perusing the rival submissions, Ajit Prakash Shah CJ in his judgement came to the conclusion that Section 377, insofar criminalising consensual

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[2] WP(C) No. 7455/2001, Decided On: 02.07.2009, (2010) Cri L.J 94

[3] Section 377 reads thus

Unnatural offences

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with J [imprisonment for life], or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine.

Explanation. -Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

sexual acts of adults in private, is violative of Articles 14, 15 and 21 of the Constitution of India. The matter is yet to be taken up by the Supreme Court leaving the judgement amenable to intellectual debate till an element of finality can be attributed to the position of law in this regard. The reasoning behind the judgement, in the humble opinion of the author of this article, suffers from certain deficiencies which will form the core subject matter of this critique. For a fair analysis of the propositions involved, it will be pertinent to have a brief overview of some of the contentions of the Petitioner that the Court upheld in formulating its judgement.

One of the initial contentions which was found to be of substance by the Court was the marginalization of the gay community, MSM or trans-gendered individuals, under the cover of enforcement of Section 377 IPC which exhibited a discriminatory attitude on part of the state agencies renderring the organizations working for the cause of these high risk behaviour groups (HRG's) helpless.[4]

However, attributing the underground nature of the operation of HRG's to the existence of Section 377 appears to be devoid of logic. In a study conducted in Hyderabad, approximately 73.75% (590) of the respondents were ready to take care of their spouse/child, but only 18.13% (145) were willing to care for any other HIV positive family member. Almost nobody was willing to reveal the HIV status to others if he or she or other family member turns out to be reactive, which could be basically due to the fear of discrimination from society. 51.13% (409) of the respondents wanted the public list of the positive people so that they can avoid them. Only 24.13% (193/800) were aware that Andhra Pradesh has very high figures of HIV/AIDS, an important information that the state government has to stress upon. Despite the surveyed population's high level of HTV/AIDS knowledge, their own risk

[4] *Ibid, "The petitioner claims to have been impelled to bring this litigation in public interest on the ground that HIV/AIDS prevention efforts were found to be severely impaired by discriminatory attitudes exhibited by state agencies towards gay community, MSM or trans-gendered individuals, under the cover of enforcement of Section 377 IPC, as a result of which basic fundamental human rights of such individuals/groups (in minority) stood denied and they were subjected to abuse, harassment, assault from public and public authorities."*

perception of potentially becoming infected with the virus is very low in almost all groups. Approximately 78.88% people thought that they were personally safe from getting infected with HIV.[5]

As regards social acceptance, the position is aptly reflected in the 42" Law Commission Report which states that the Indian society, by and large, disapproves of homosexuality and this disapproval is strong enough to justify it being treated as a criminal offence even where adults indulge in it in private.[6] Though the 172nd Report has advocated deletion of Section 377, the fact-remains that in developing countries, AIDS related stigma interacts with pre existing stigmas in various ways.[7]

According to a survey by Sahodaran, an organization working for gay rights in Pondicherry, there are 19,197 homosexuals in Pondicherry most of them being forced to leave their education halfway. Such people end up as commercial sexual workers since they are not accepted in any office.[8] The risks faced by the gay community range from social discrimination and societal and domestic violence to health care risks both psychological and physical.[9]

It is also hard to digest the Court's approach in ignoring the societal disapproval, which is a major driving force behind the workability of any law. Also Article 19(2) of the Constitution of India[10] expressly permits imposition of restrictions in the

[5] *Ibid*
[6] The Law Commission of India Report (No. 42) of,1971 p. 281
[7] Goffman E. Notes on the Management of Spoiled Identity, Ed. N.J. Englewood Cliff. Prentice Hall, London, 1962, Albert, E. Illness and deviance: The response of the press to AIDS. In: The Social Dimensions of AIDS. Eds. D.A. Feldmand and T.M. Johnson. Preager, New York, p. 163, 1986, *c.f.* ICMR Bulletin, Live and Let Live : Acceptance of People Living with HIV/AIDS in an era where Stigma and discrimination persist, Vol. 32, No, 11 & 12, November-December, 2002, Available at icmr.nic.in/bunovdec02.pdf
[8] Their unusual behaviour lands them in trouble, The Hindu, May 18,2006
[9] M. M. Salahudeen, Gay rights activism and health care issues, The Hindu, August 16,2009
[10] Article 19 (2) reads thus
Nothing in sub-clause (a) of clause (I) shall affect the operation of any existing law, or prevent the State from making any law. insofar as such law imposesjreasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the

interest of decency and morality. For this, a brief analogy may be drawn in respect, of the term 'obscenity' used in Section 292 of the Code[11] designed to protect the society against the potential harm that may flow from obscene material wherein the Honourable Apex Court has observed that the concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book.[12]

The Supreme Court, drawing from the observations of Lord Sumner in *Bowman* v *Secular Society Ltd.*[13] with regard to Article 19 (2) has stated that the inter connection and the inter-dependence of freedom of speech and the stability of society is undeniable. Freedom of speech and expression in a democracy ensures that the change desired by the< people, whether in political, economic or social sphere, is brought about peacefully and through law.[14]

But at the same time vital importance of our social interest in *inter alia* public order and security of our State is to be underestimated only at our own peril. It is for this reason that oiir Constitution has rightly attempted to strike a proper balance between

security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

[11] Section 292 (1) reads thus

' *For the purposes of sub-section (2), a book, pamphlet, paper, writing, 'drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.*

[12] Samaresh Bose and Anr. v. Amal Mitra and Anr. (1985) 4 SCC 284

[13] [1917] A.C. 406, *"The words as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault, In the present day meetings or processions, are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before.... After all, the '■ •testion whether a given opinion is a danger to society is a question of the times and is a question of fact. I desire to say nothing that would limit the right of society to protect itself by process of law from the dangers of the movement, whatever that right may be, but only to say that, experience having proved dangers once thought real to bejiow negligible, and dangers once very possibly imminent to have new passed away, there is nothing in the general rules as to blasphemy and irreligion... which prevents us from varying their application to the particular circumstances of our time in accordance with that experience."*

[14] Secretary, Ministry of Information and Broadcasting, Govt, of India and others y. Cricket Association of Bengal and others with Cricket Association of Bengal and another v. Union' of India and others, (1995) 2 SCC 161

the various competing social interests.[15] It has permitted imposition of reasonable restrictions on the citizen's right of freedom of speech and expression in the interest of, *inter alia*, public order, security of State, decency or morality and impartial justice, to serve the larger collective interest of the nation as a whole.[16]

The decision of the United States Supreme Court in *F.C.C. v. National Citizens Committee for Broadcasting",* provides a decisive pointer where it has been held that to deny a station license because the public interest requires it is not a denial of free speech. It is significant that this was so said with reference to First Amendment to the United States Constitution[18] which guarantees the freedom of speech and expression in absolute terms. The Courts thus cannot be unmindful of these limitations in conferring unfettered liberties under Part III of our Constitution.

A brief insight into the legitimacy of some of the sodomy statutes in some of the states of United States of America further strengthens this argument. Gay rights have

[15] See also Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881, *"Speaking in terms of the Constitution it can hardly be claimed that obscenity which is offensive to modesty or decency is within the Constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292, Indian Pendl Code, manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality."*

[16] Santokh Singh v. Delhi Administration, (1973) 1 SCC 659. See also Hari Khemu Gawali v. The Deputy Commissioner of Police, Bombay and Anr., AIR 1956 SC 559, *"Article 19 of the Constitution has guaranteed the several rights enumerated under that article to all citizens of India. After laying / down the different rights to freedom in clause (I), clauses (2) to (6) of that article recognize the right of the State to make laws putting reasonable restrictions on those rights in the interest of the general public, security of the State, public order, decency or morality and for other reasons set out in those sub-clauses, so that there has to be a balance between individual rights guaranteed under article 19(1) and the exigencies of the State which is the custodian of the interests of the general public, public order, decency or morality and all other public interests which may compendiously be described as social welfare. For preventing a breach of the public peace or the invasion of private^ rights the State has sometimes to impose certain restrictions on individual rights.'"*

[17] [1978] 436 U.S. 775

[18] Associated Press v. United State, 326 US 1, 89 L. Ed. 2013, 65 S Ct 1416 (1945); New York Times Co. v. Sullivan 376 US 254, 11 L Ed. 2d 686, 84 S Ct 710, 95 ALR2d 1412 (1964); Abrams v. United States 250 US 616, 63 L Ed. 1173, 40 S Ct 17 (1919) (Holmes, J., Dissenting). *"Speech concerning public affairs is more than self-expression; it is the essence of self- government".* Garrison v. Louisiana 379 US 64, 13 L Ed 2d 125, 85 S Ct 209 (1964). See Brennan, *The Supreme Court and the Meiklejohn interpretation of the First Amendment,* 79 H L R 1 (1965).

evolved significantly over time in USA following the decision of the US Supreme Court in *Bowers* v. *Hardwick}*[9] As a result of the groundwork done by various organizations working in this area, the levels of tolerance have increased significantly in recent times.[20]

A considerable amount of social and cultural stigma associated with homosexuality however continues to persist in modern American society, irrespective of increased acceptability as an alternative lifestyle. In contradiction to the increasing acceptability of homosexuality as an alternative lifestyle,, according to a mid May 2001 national survey on the perceived morality of a variety of contemporary issues ranging from medical testing on animals to human cloning, a majority (fifty three percent) of Americans expressed the belief that homosexual behavior is morally wrong.[21]

Arriving at the next contention of indiscriminate torture by the Police by virtue of operation Section 377, it would be noticed that this premise lacks concrete foundations. A survey conducted by the Human Rights and Democracy Forum (HRDF) amongst 192 respondents coming from 126 different villages or cities located in 8 of the 17 districts of Punjab: Amritsar, Bathinda, Fategarh, Jalandhar, Ludhiana, Moga, Ropar, and Sangru revealed eighty four police stations or detention centers in Punjab as torture sites.[22]India's refusal to ratify the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984[23]

[19] 478 U.S. 186(1986)

[20] Gallup Poll News Service, Moral Issues (May 10-14, 2001), /
available at http://www.gallup.com/poll/indicators/indmoral.asp. The survey further revealed that only forty percent of Americans believe that homosexuality is "morally acceptable," three percent believe that it would depend on the situation, one percent believe that homosexuality is not a moral issue at all, and another three percent expressed no opinion on the issue whatsoever, *c.f* Eric K.M. Yatar, *Defamation, Privacy and the changing social status of homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence,* 12 Law & Sexuality 119 at 129

[21] *Ibid,* See also See R.D. Dodson, Homosexual Discrimination and Gender: Was Romer v. Evans Really a Victory for Gay Rights?, 35 Cal.W.L. Rev. 271(1999).

[22] Ami Laws and Vincent Iacopino, Police Torture in Punjab, India: An Extended Survey, **Health and** Human Rights, Vq. 6 No. 1, 195-210 at 201, Available at
www.hhrjournal.org/archives-pdf/4065321 .pdf.bannered.pdf

[23] Available at

was primarily based on the contention that its laws were adequate enough to deal with crimes committed by the representatives of the State. Section 330[24] and 331[25] of the Indian Penal Code, 1860 have been enacted to punish those who voluntarily cause hurt or grievous hurt with an object to coerce the sufferer to confess to his guilt or give information respecting the commission of a crime or a misconduct, or to restore property or satisfy any claim or demand respecting thereto. Though the sections are generally worded, the provisions are mostly brought into requisition against police personnel acting in furtherance of obtaining confession through illegal methods.[26] As observed by the Honourable Apex Court in the case of *Sube Singh* v. *State of Haryana*[21], lack of training in scientific investigative methods, lack of modern equipment, lack of adequate personnel, and lack of a mindset respecting human rights, are generally the reasons for such illegal action. A report recently documented by the South India Cell for Human Rights Education and Monitoring (SICHREM) in six districts of Karnataka since 2006 has shown 800 instances of custodial deaths owing to police torrure.[28]The observations of the Supreme Court in the case of *State*

http://www.un.org/documents/ga/res/39/a39r046.htm

[24] Section 330 reads thus

Voluntarily causing hurt to extort confession, or to compel restoration of property - Whoever voluntarily causes hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, shall also be liable to fine.

[25] Section 331 reads thus

Voluntarily causing grievous hurt to extort confession, or to compel restoration of property - Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[26] Dr. Krishan Vij, Dr. Dasari Harish, Dr. Amandeep Singh, Torture and the Law: An Indian Perspective, JIAFM, 2007 - 29(4); ISSN: 0971-0973, Available at medind.nic.in/jal/t07/i4/jalt07i4pl25.pdf

[27] (2006) 3 SCC 178

[28] Special Correspondent, Poor are the worst victims of police torture: tribunal, The Hindu, December 10, 2008

of MP v. *Shyamsunder Trivedi* [29]assume much relevance in this regard. It was pointed out that the police personnel prefer to remain silent and even pervert the truth to save their colleagues. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an Unrealistic approach of the Courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, because there would hardly be any

The lack of effectiveness of legal provisions provides a glaring pointer to the futility of the same. Hence, the argument of solving the crisis through mere declaration of unconstitutionality of Section 377 is far from convincing as it would make little difference to the inadequacies of the Police. The problem has deeper roots within the system which calls for a greater quantum of internal checks instead of directions coming from the higher rungs of the administration or the judiciary. The health factor remains an equally grave area of concern. Drawing a comparison with the situation in USA, according to community medicine experts, the pattern of spread of HIV infection in the U.S. could be closely traced to the increasing rate of practice of homosexuality^ Proctitis (anal canal inflamhiation and infection) and anal cancer rates are alarmingly high among gay men.[30]

In the light of the above analysis, the Indian society is clearly not equipped enough to usher into an era of recognizing fundamental rights for the HRG's under Article 14, 15 and 21 of the Constitution of India. The impediments are manifold. The societal

[29] (1995) 4 SCC 262, See also See also Dalbir Singh v. State of Uttar Pradesh, Writ Petition (Crl.) No. 193 of 2006, Decided On: 03.02.2009

[30] *Ibid*, See also Akshay Khanna, The Right to Health and Sexuality.Centre for Enquiry into Health and Allied Themes, Mumbai, March, 2007, ISBN: 81 -89042-49-1, p. 1-20 at 11, Available at www.cehat.org/humanrights/akshaykhanna.pdf

"Clearly, simple access to health care is not adequate for the realization of a person's right to health. In a homophobic social environment, in which secrecy about sexuality is the norm, proper and full attention to health needs are impossible. Ensuring a right to health therefore entails entering into a process of educating health care professionals about issues related to homosexuality. Access must be to services that are unbiased, sensitive and supportive of sexual difference, and the particular concerns related to them."

stigma is yet to subside which calls for spreading better awareness similar to that undertaken by various governmental as well as nongovernmental organizations in USA. There is a dire need to introduce reforms in the functioning of Police and impart proper training to them instead of putting the blame merely orr the operation of Section 377. The health care services need to be beefed up in a more confrontational approach to solve the problem directly instead of attributing the same to Section 377 driving the HRG's underground. Until and unless the social acceptance of the homosexual community is promoted in a more systematic and integrated manner, the empowerment in respect of fundamental rights shall make little or no difference. The administration therefore should be addressing the ground realities in a better manner prior to unfettered liberties being granted to the homosexuals under Part III of the Constitution. It is this line of this reasoning that compels the author to feel that the Honourable High Court of Delhi appears to have erred in declaring Section 377 unconstitutional insofar criminalising consensual sexual acts of adults in private.

MEETING THE GLOBAL FACE OF CORRUPTION: CHALLENGES FOR INDIAN LEGAL PARADIGM

ALOK CHATURVEDI* & SHASHANK AMARN ATH+

Corruption has become a way of life -paying bribes for the electricity bills, driving licence or even securing a bonafide certificate are the most common forms of corruption that an average Indian is usually acquainted with. However, while meddling with the trials and tribulations of his daily life, he is neglects a gigantic form of corruption — Global Corruption — which though is invisible, has as tragic consequences as any other form of , corruption. Apart from being a concern for the social outlook of a polity the menace of Global Corruption has emerged as a contemporary discussion in the arena of Corporate Governance. When economies across the globe have been facing debacles as scams and swindles, the Indian Legal System has failed to deliver in both qualitative and quantitative terms. The Prevention of Corruption Act has failed to evolve with changing needs of a Globalised World. The phenomenon of corruption has failed to acquire global dimensions - corruption at local levels has been the central and continued focus of the legislations. Sometimes, the need of stringent legislation is debated that whether we are ready for breakthrough legislation like the FCPA of the USA or not? The answer to the question lies in the event when India chose to become a part of the larger Global setup - when globalisation and liberalisation were adopted as the prime legislative policies. The fruits of globalisation cannot be enjoyed to a fuller extent until and unless we fulfil the obligations of being the part of a larger global community. With the arrival of major foreign players on the Indian

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commercial stage it has become imperative that Indian law adapts to the requirements of a new world when the life. When all the major trading partners of India have made major advances in the field, the moot question is not whether we need a stringent legislation catering to the global face of corruption but whether enough safeguards are inherent in our system that such a move will be palatable for our indigenous industry?

INTRODUCTION

Corruption has emerged as a global menace during the twentieth century. Corruption, as a social evil, has been present ever since the advent of the organised form of State, but the catastrophic form of this social menace came to stay in the society during the last century. No crevice of the sea of human civilisation seems to be unaffected by this more or less flagitious but institutionalized practice.

The presumed positive correlation between corruption and the democratic deficit,[1] in the recent times, has been disproved at several occasions. The plausible reason for the aforesaid presumption seems to be the tendency to identify the spectacle of corruption with the background of public dealing of the Government at local levels. However, the increased volume of international free trade after the advent of globalisation, the global face of corruption has gained prominence.

In the recent times, because of breakthrough innovations in the applied sciences which are essential for the development of every nation, viz. the IT Industry, arms and ammunitions' industry and the nuclear power industry, there has been a lot of commotion in the rights *related* field of these giant potential centres of capitalism. It "is pertinent to note here that while the sole proprietors of technology are the developed nations, major demand comes from the third world countries, after the exhaustion of the developed countries market. The obvious result of the state of

[1] Joint External Evaluation of Anti Corruption Approaches, Note prepared by Norway, www.oecd.org/dataoecd/40/52/38834924.pdf

affairs is the cut throat competition in the developed world to be the first one to sell their pseudo - essential technological products in the major developing country markets. *

Since the pace of technology transfer has been extremely slow, the only option for the buyer countries is to allow the major firms of the developed world to sell their products in these countries. Then another phase of the economic dealings commences which vindicates another harsh reality of the market that nothing comes for free; a price for acquiring the rights has to be paid. However, the payment of price is not as much a matter of concern as to whom the price is being paid and whether a *quid pro quo* exists for the real users of the products. The major portion of the price paid by these corporate giants goes to the politicians and the bureaucrats who act as facilitators and make sure that the bid goes in favour of these corporates.

This whole transaction has major repercussions for the tax payers as well as it is antithetical to the practice of free trade and the interests companies of those who run business in line with *business ethics.* This papers attempts to discuss the efficacy of anti corruption laws as a deterrent to unfair trade practices. The most significant advancements, in the field have been achieved by the USA followed by the UK, Canada and a few other developed countries. A section of the paper has been devoted to discuss the basic premise and postulates of anti corruption laws of the UK and the USA. The growth in India in this field has not been much encouraging. Therefore, drawing inputs from the overseas laws, the researchers have suggested some major corrections that are need of the hour to preserve the elements of honesty, integrity and fair dealing in the Indian Business Scenario.

i A HISTORICAL PREVIEW OF THE ANTI - CORRUPTION LAWS

Though the need of anti corruption laws has long been felt, the recent surge in the cases of corruption has led to many countries enacting laws in the form of anti - corruption and anti - bribery Acts. The latest members to join the club of countries

having anti corruption laws are China and Russia. The most significant development in the history of anti corruption laws relates to the United States which passed the *Foreign Corrupt Practices Act* in 1977 in the background of the Watergate and Lockheed scandals[2] which continued to be standalone legislation for many years.

The precursor to the FCPA was the *Securities and Exchange Act* of 1934 which was used by the SEC as the basis for enforcement against corporate -bribery, including actions against corporate giants like Ashland Oil Company, Gulf Oil Corporation, Northrup Corporation, Philips Petroleum and United Brands.[3] However, when the Watergate scandal was exposed and investigations were conducted in the post -*Nixon* scenario, the corporate world was bombarded with the exposures of bribing and anti - corruption practices accepted to be indulged in by as many as 400 US companies.[4] This scenario was shocking as well as alarming for the simple fact that the reputation of US business houses was at stake. The situation was critical for the US Government had no escape, either to take earnest measures to supress the menace and interfere with the easy ways of its major corporate houses or face embarrassment on the global platform.

The whole drama ended with the passing of the FCPA Act with a few resolutions to curb corruption at the International forums like United Nations[5] and the Organization of American States.[6] However, still a large part?of the world was unaware of or rather reluctant to react to this 'anti - corruption' sentiment. The next significant initiate was the *OECD Convention on Contacting Bribery of Foreign Public Officials in International Business Transactions* of 1999 which established legally binding

[2] Tamara Aldar, *Amending the Foreign Corrupt Practices Act of 1977: A Step Towards Clarification and Consolidation*,
The Journal of Criminal Law and Criminology (1973-), Vol. 73, No. 4
[3] Peter W. Schroth, *The United States and the Anti Bribery Conventions*, ASCL, Vol. 50, Autumn 2002
[4] *Ibid; Disclosure of Payments to Foreign Government Officials Under the Securities Acts*, 89 Harv. L. Rev. 184$ (1976).
[5] "Measures Against Corrupt Practices of Trans-national and Other Corporations, Their Intermediaries and Others Involved, passed in 1975
[6] Behavior of Transnational Enterprises Operating in the Region and Need for a Code of Conduct to Be Observed by Such Enterprises, passed in 1975, Source cited from *Supra* note 1

standards to criminalise bribery of foreign public officials in international business transactions.[7] Another major achievement was *The United Nations Global Pact, 2000* which, as a corporate responsibility initiate,[8] took a holistic view of the business practices and tried to align them in a direction that would further the cause of anti - corruption, labour, human rights and environment.

The latest development in the field is the enactment of the Bribery Act of 2010 in UK which attempts to curb the global face of corruption by laying down special emphasis on bribing the foreign officials. In 2011, China amended its criminal law to introduce penal provisions for bribing foreign officials to secure illegal benefits. Russia has sought to make major alterations to its corruption curbing mechanism by introducing provisions which slap enormous amounts of fine on the parties that indulge in offering bribes as well as accepting bribes.

However, the change has been slow in India. The only legislation that caters to the problem of corruption in India is the *Prevention of Corruption Act*, 1988. The Act has remained to be ineffective for the simple fact that it has remained immune to the realities of the corporate world and redresses the needs to the business sector only in a tangential way with its sole philosophy driven to check corruption at local level in the functioning of local Government.

THE OMNIPRESENT CORRUPTION

The major economic crimes include corporate fraud and abuse, foreign bribery, health care fraud, procurement fraud, securities and commodities fraud, mortgage fraud and mass-marketing fraud. In today's light it still shines as one of the stained human practices in the white collar jobs of the world business. It has become yet more evident in developed nations as they try and enforce the mechanism to curb the same.

[7] http://www.oecd.org/dataoecd/4/18/38028044.pdf [8] http://www.unglobalcompact.org

In 2008, there were 16 enforcement actions against individuals and companies-the most in anyjone year since the passage of the Foreign Corrupt Practices Act (FCPA) in 1977.[9] This included major dispositions against ten companies and/or their subsidiaries, involving total payment of mdre than $50 million in penalties. The following section throws light on some of the major swindles that disturbs the euphoria associated with the transnational trade.

Nigerian case[10]

At the Southern District of Texas, the Section of Department of Justice, charged Willbros, a publicly traded company that, provides construction, engineering and other services in the oil and gas industry, and its international subsidiary on one count of conspiring to make more than $6.3 million in bribe payments to Nigerian and Ecuadoran officials, secondly on counts of violating the FCPA in connection with the authorization of specific corrupt payments to officials in those countries, and three counts of violating the FCPA by providing falsified books and records relating to the corrupt payments and a tax fraud scheme.

The China fraud

In the AGA case," the Section charged the medical device manufacturer with conspiring to bribe and bribing doctors which were employed by the state-owned hospitals in China in order to induce the purchase of AGA's products and other officials to induce the approval of pending patent applications. The two-year-old case pits Plymouth-based medical device maker AGA Medical Corp. against its onetime distributor in China, the Beijing Science Medical Scientific Co. (BSMS). U.S.

[9] Fraud Section: http://www.usdoj.gov/criminal/fraud/
[10] Fraud Section Activities Report Fiscal Year 2008 *(October 1, 2007, Through September 30, 2008),* Page 3 -
[1] Fraud Section Activities Report Fiscal Year 2008 *(October 1, 2007, Through September 30, 2008),* Page 3

District Judge James Rosenbaum issued an injunction prohibiting BSMS from representing itself as AGA's distributor.

The Energy commodities fraud (B.P.)[12]

BP America Inc. was charged in criminal information on one count of conspiring to violate the Commodity Exchange Act to commit mail and wire fraud stemming from the manipulation of the TET propane market in February 2004, resulting in a loss to other market participants of more than $53 million. BP America and the government entered into a 3-year Deferred Prosecution Agreement in which the company agreed to pay a $100 million penalty, a $25 million payment to the U.S. Postal Inspection Service Consumer Fraud Fund, a $53 million payment to a restitution fund, and a civil penalty of $125 million to the Commodity Futures Trading Commission. BP and named subsidiaries also agreed to cooperate with an independent monitor and with ongoing investigations of others involved in the propane manipulation scheme.

World-Wide Volkswagen Corp. v. *Woodson* [n]

The act of bribing has been defined as per the FCPA, in the given case. The Supreme Court stated that the due process for the application of FCPA requires "that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being hauled into court there."

ANALYSIS OF THE FCPA AND THE U.K. BRIBERY ACT

In spite of the recent recession in the World Economy in which US and UK were the worst hit nations, the total profit by the top Fortune 500 companies was still more than 1 lakh million dollars which is much higher than the annual budget of many African and Latin American Nations. However, when such economic transactions of

[12] Fraud Section Activities Report Fiscal Year 2008 *(October 1, 2007, Through September 30, 2008),* Page 4
[13] 444 U.S. 286,297(1980).

such great volumes take place between the transnational firms, the FCPA presents an efficient and effective mechanism which has been successful in checking the wrongdoing and illicit trade practices within and beyond its borders.

The FCPA adopts a two prong strategy of procedural control as well as the remedial control to discourage the practice of corruption. The whole scheme of FCPA can be divided into 2 parts: a) Maintaining the Internal Controls[14] & b) Anti Bribery Provisions.

A. Maintaining the Internal Controls

This part of the Act is under the control of the Securities Exchange Commission which, with few criminal law dimensions, primarily focuses on the civil side of the Act. The Act mandates that every issuer of the security must file its annual report as well other documents and information required by the Commission. Another requirement of the Act is that every issuer must make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer as well as devise and maintain a system of internal accounting controls. These internal controls must assure that the transactions were conducted with the management's general or specific authorization.[15] The Act also requires that the transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets. With regard to the interpretation of 'reasonable', leverage seems to be given in the Act that the terms "reasonable assurances" and

[14] Internal control is broadly defined by *Committee of Sponsoring Organizations of the Treadway Commission* as a process, effected by an entity's board of directors, management and other personnel, designed to provide reasonable assurance regarding the achievement of objectives in the following categories:

1. Effectiveness and efficiency of operations.
2. Reliability of financial reporting.
3. Compliance with applicable laws and regulations. Available at www.coso.org

[15] Martin T. Biegelman & Dnaiel R. Biegelman, *Overview of the Foreign Corrupt Practices Act*, Foreign Corrupt Practices Compliance Guidebook, 2010

"reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.[16]

Importantly, the Issuers are responsible for requiring their majority-owned subsidiaries, wherever they may be located in the world, to have adequate internal accounting controls; since the 1988 amendments, however, issuers need make only a "good faith attempt" to establish such controls in foreign companies in which they hold minority interests.[17]

B. Anti Bribery Provisions of the Act

The anti bribery provisions of the Act are divided into 3 major parts, each applying to: foreign trade practices of the Issuer, Domestic Concern and persons other than issuers or domestic concerns. The primary responsibility of enforcing these provisions rests with the Justice department which prescribes civil as well as criminal penalties under the Act. The Act states that it shall be unlawful to bribe[18] any foreign official purpose for the purpose of influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.[19] The same bribe if given to any foreign political party or official thereof or any candidate for foreign political office or any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any

[16] Compliance Education and Training, Foreign Corrupt Practices Act, Lockheed Martin Corporation *y Supra note* 1, pg 1
[18] Section 78
[19] Section 79

foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, shall be illegal as well.

The significance of FCPA regulations can be understood from the case of *pyrethroid* insecticide where in a 114 million US$ anti - malaria project, four European companies formed a cartel among themselves to avoid fair competition.[20] Similarly, *Westinghouse Air Brake Technologies Limited*[21] had to pay huge fines for its Indian subsidiary paid bribes at the Indian Ministry of Railroads. Similarly, Kraft Foods, the US acquirer of Cadbury in India is facing investigation under FCPA for its alleged involvement in corrupt practices.[22]

However, the Act makes an exception that any payment made to expedite or to secure the performance of a routine governmental action shall be beyond the application of this Act. The affirmative defence provided under the Act that the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country leaves a wide leeway for the companies offering bribes to secure favours in those nations where the anti - corruption mechanism is not strong enough or the global corruption is not given due considerations as against the mere local level corrupt dealings.

The UK Bribery Act of 2011

The much awaited UK Bribery Act was finally passed in 2010. The Act has major implications for the global trade as the UK continues to be a significant player in the World Trade especially with the South East Asia.[23] Section 6 of the Act deals with bribing of foreign public officials if the intention is to influence, the foreign official in

[20] M. Voith, *Collusion Alleged among Pyrethroid Makers,* Chemical & Engineering'News, 24 January 2008.
[21] SEC's Litigation Release No. 20457 (February 14,2008). < „
[22] www.fcpablog.com
[23] A Natural Harmony?: Government Business and British Interest in South East Asia

his capacity as an official to obtain or retain business or an advantage in the business. The Act further makes it clear that to influence the foreign official includes not **only** omission to exercise his functions but to use his position as such an official, even if not within his authority. The extension of the business to mean any 'profession' as well implies that the Section can as well be used when the credentials of the pure service providers like lawyers, or accountants are in question.

Section 7(2) makes a commercial organisation vicariously liable if any person associated with the organization perpetrates the crime under the Act. However, a broad exception has been provided under the Act with no defining and concrete parameters that it shall be a defence for such organization to prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct. However, the penalties imposed by this Act for commission of an offence within the meaning of the Act are much lesser than that provided under the FCPA.[24]

Another country to take the lead in enacting penal provisions for bribing the foreign officials is China. However, the Chinese law has many loopholes as to the definition of foreign officials and the extent to which the payments and privileges provided to these facilitators can be brought within the ambit of the Act. The Russian model, on the other hand takes a unique and innovative standpoint where huge emphasis is laid on imposing hefty fines, even to the tune of 100 times the bribe amount in some cases, on the offenders as the prison punishment is time consuming and has not been much effective in checking the menace. However, this legislation does not cater to bribing the foreign officials, in particular.

After discussing the nuances of anti corruption laws of various countries, the next section analyses the Indian situation where the *Prevention of Corruption Act,* **1988**

The maximum imprisonment prescribed is 12 months.

has proved to be not of much avail in checking the advances of the practice of corruption.

AN ANALYSIS OF THE INDIAN ANTI - CORRUPTION SCENARIO

India is still perceived to be among the most corrupt countries by the Transparency International in its annual corruption perceptions. India has been ranked 84th in the list of 180 countries in terms of public-sector corruption, which is perceived to be highly corrupt.[25]

Understanding the Statute

The Prevention of Corruption act, 1988 is the sole legislation that defines the boundaries of corruption, as it has risen from the Indian Pena Code. It explains the primary ambit of'public servant' and 'public duty'[26]. The definition of public servant encompasses any person who is paid by the government or local authority or remunerated by way of fees or commission for the performance of or is in the service of a corporation established by or under a Central, Provincial or State Act, or an authority or body owned or controlled or aided by the Government company. An individual who is a member, employee, chairman of any service commission or Board or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on their behalf.

The Provisions Defining Corruption

Taking gratification other than legal remuneration in respect of an official act, and if the public servant is found guilty shall be punishable with imprisonment which shall be not less than 6 months but which may extend to 5 years and shall also be liable to

http://www.expressindia.com/latest-news/India-ranks-84th-in-global-corruption-perception-list/542786/ [26] Section 2 of prevention of corruption act

fine.[27] As clearly exhibited the PAC act does not objectify to have a **transnational** jurisdiction of the acts of the companies listed in the exchange of the country. **The** jurisdiction is bound by the territoriality nexus as the angle of looking at the act is as per the 'public servant' of India and not anywhere else. The 'issuer' or the giver of the bribe has not been defined as extensively to discuss private, natural or juristic individuals.

Under Section 19 of the Prevention of Corruption Act, 1988, and in cases covered by Section 197 of the Criminal Procedure Code, previous sanction of the Competent Authority/Government is required for launching prosecution in a Court of Law against a Public Servant. The competence of the sanctioning authority in cases other than those in which the Central /State Government is the sanctioning authority, should be investigated like a fact. The Central Bureau of Investigation has registered 2,439 cases of corruption against public servants in the last three years, including 78 against senior officers. Even the cases that were more than a year old have decreased from 373 to 230. There have been 795 cases registered under the PCA in 2009, as against 744 in 2008 and 688 in 2007, presenting a clearer upw"af<rtrend.[2S]

The Prevention of Corruption Act 1988 was meant to make anti-corruption laws more effective, the extant law needed important changes based on actual experience in its implementation, and also in consonance with the recommendations of the Law Commission of India[29] and the Committee on Civil Services Reforms (Hota Committee).[30]

The *Law Commission* in its 166th report suggested enactment of a separate law providing for forfeiture of property acquired by holders of public office through corrupt means. The recommendations were examined and it was considered that the

[27] Section 7 of the Prevention of Corruption act
[28] CBI annual report of performance for the year 2009, page-8. Available at: http://cbi.nic.in/annualreport/annualreport.php
[29] http://lawcommissionofindia.nic.in/101-169/indexl01-169.htm
[30] Available at: http://arc.gov.in/10th/ARC_10thRepor

confiscation of illegally acquired property could be achieved by incorporating, with suitable modification, provisions of the Criminal Law (Amendment) Ordinance, 1944 in the Prevention of Corruption Act (PCA) 1988 itself. Accordingly, it is proposed that a new Chapter IVA be inserted in the PCA to empower the special judge to exercise the powers of attachment before judgment.

SUGGESTIONS

The need for new improvement in the sphere of stringent anti-corruption laws has been discussed and as well what the new improvements should be. As per the trend in the global scenario, it is very important for India to encapsulate some changes as per the anti-corruption laws of the country.

A. Need for extra territoriality application

As per the current scenario India and China are going to be the most preferred destination for foreign investments in the coming future. It is not yet the time to rejoice due to the remnants of the financial crisis faced by most of the big corporate houses in the world. It is very pertinent that the finance at hand, is actually very limited. In such an instance it is very much necessary for the government to tread cautiously into the web of laws and internal control mechanism for such frauds, bribery etc. As per the enactment of FCPA, it has been clear that the United States wish to deal with global corruption with an iron fist. *It so goes that most of the major companies are registered in the stock market exchange of the United States and some of them which have been caught as per the activity report of the U.S. have faced a lot of public humiliation and lost out on government contracts as well.* They have had to face a parallel investigation on the foreign land as well for the acts committed by them. Hence as per the trend seems to flow, U.S. is determined to establish free trade standard in the world.

It is because these companies have mended there ways of doing business in countries that allow practice of corruption and hence give other companies not listed on the U.S. stock exchange to facilitate bribes. In this way the governing bodies of other developing nation will be forced to give out stringent laws in relation to corruption and bribery so as to uphold the law that U.S. and the OECD wished to substantiate as a global standard. The reason being naturally to invite the foreign investment from the companies listed at the U.S. stock exchange. Hence in the light of new stronger standards required for providing a safer playground and inviting more foreign investors, it is imperative that India also has extra territorial laws with the nexus and effect of these in the main land.[31]

B. Requirement for preparing internal control

As discussed earlier, it has been seen that the FCPA requires the companies to provide an internal report on the functioning of the company to the SEC. As this provides an imperative in-sight in assessing the probability of corruption practices that might be performed by the company for paying the bribes to foreign officials. Hence the United States not only provides a platform for taking remedial action as per the occurrence of the corruption but it also ensures a prompt mechanism for catching corruption which affects honest and free trade. While this is one of the very significant improvements of the FCPA, India continues to struggle to deal with the same through its loosely knitted laws. Hence it is the need of the hour to enact a stringent regulatory legislation to set India as one of the more inviting grounds for foreign investments.

C. More independence to Investigating Authority

Most of the corruption cases are checked by the Central bureau of Investigation and some of the cases taken by the Central Vigilance Commission of India. It has issued

[31] *GVKInds. Ltd. andAnr.* v *The Income Tax Officer andAnr.* 2011(3)SCALE111

the circulars in the website as how to file a complaint for the same. The central bureau of investigation seems to be ineffective in some of its cases as per the provision of section 197 of Code of criminal procedure which requires that the CBI needs to get a sanction or written permission from the superior authority for prosecuting a public servant. This inadvertently affects the object of the statute. The intent of this provision has been considered by the judiciary as to avoid frivolous litigation against the public servant. On the very issue at hand, it was said that this was the biggest draw back in the Indian legislation. It leads to the unjust acquittal of the accused as well it lead the loss of evidence to prosecute the accused.[32]

D. Deal with the 'Supply Side' of the transaction

As discussed that the FCPA regulates the company as a 'legal person' who bribes the foreign public official and not provide any action against that official who accepts or makes such a demand for bribe. Hence in accordance to the last mentioned criticism, the statute can be moved to revolve around the individual in comparison the public official if it obstructs the functioning of the daily function of the government. No prior sanction will be required to prosecute the company as well. This would ensure a 'two-way' effect on the corruption and decrease the inefficacy of the anti-corruption law.

E. Inclusion of Public Interest Disclosures

The report includes the whistle blower law which is called the public interest disclosure. It relates to forming laws as per the case involving the protection of the whistle blowers. The Central Vigilance Commission is looking in the matter of corruption and mismanagement in the government and the same can be reported

K.G. Balakrishnan, in Anti Corruption Seminar, as per CBI annual report, 2009 available at: CBI annual report of performance for the year 2009, Available at: http://cbi.nie.in/annualreport/annualreport.php

about the government by filling out the circulars and adhering to the instruction on the web site. The individual who is reporting, his identity shall be left as secret so as to provide protection against victimization and harassment.

CONCLUSION

Corruption is not a tangible aspect of public life; however, the repercussions of the diabolic scenario of corruption on the moral standards and the progress of any economically prospering society cannot be ignored. The statistics show that economies suffer a great deal because of this unregulated menace and it even has the capacity to affect the political stability of any country to a great deal.

It is quite clear from the comparison between the Indian and the US anti- corruption laws that Indian laws are not efficacious while the spectacle continues to be less edifying for the present economic scenario is tainted every day with new and still newer cases of corruption. The basic tenets of Corporate Governance which expects honesty and fair dealing are being overshadowed by the collusions between the parties supplying bribe and the parties demanding bribe. The whole system including the esteemed public prganizations like ISRO seems to be reeling under the rot. The scenario seems to be challenging because corruption has been accepted by the majority as a *way of life,* every new scam is replaced by another scam with an attitude of indifference taking a strong hold on the right *versus* wrong differentiating capability of the masses.

Therefore, to conclude with, it is suggested that even though India does not have enough bureaucratic machinery, both in terms of quality and quantity, to implement a law of the stature of the FCPA, a display of strong willpower on the part of Government is the call of the present. The message, in a tangible manifestation as legislation, must reach the public or else India will be the most suitable stage for another *post-Nixon* drama.

A CRITIQUE OF THE *NARCO* JUDGMENT: A CONSTITUTIONAL DEBATE

PIYUSH KUMAR & PULOMA MUKHERJEE

ABSTRACT

The Judgment of the Supreme Court on 5th May 2010 declaring the use of Narcoanalysis unconstitutional has added fuel to the long standing debate regarding the constitutionality of these methods that are used in the investigative process. This Article seeks to examine the core of this debate and analyze the efficacy of the Judgment. In respect of the above, the scope and extent of Article 20(3) and 21 is considered along with possible infringement of Human Rights. The purpose is to try to find a balance between protecting the rights of the accused and the providing justice to the victim.

INTRODUCTION

The use of Narcoanalysis goes quite far back in the history of interrogative methods of investigation. One of the first instances of its use was by Dr. House, a Dallas Texas Obstetrician, in 1922. The suspects who claimed to be innocent by virtue of this test were acquitted and Dr. House went on to be declared the 'Father of Truth Serum'.[2] Since then its use in the International and National scenario went unbidden until the distant cries of the Humanitarian organizations began to hit home. It was

[1] Students National law University, Jodhpur, piyush.nlu@gmail.com, puloma.m@gmail.com

[2] Article: C.W. Muechlberge, Interrogation Under Drug Influence. The So-Called "Truth Serum" Technique, The Journal of Criminal Law, Criminology and Police Science, Vol. 42, No. 4 (Nov-Dec 1951) pp. 513-528)

labeled as a manner of getting around third degree means of torture and added to what were known *as fruits of the poisonous tree.*[3] In India, though several High Court Judgments dealt with the constitutionality of this method, it was only this year that the Supreme Court passed a judgment, Smt. Selvi and Ors. v. State of Karnataka[4] finally declaring the same as unconstitutional. However the efficacy of such a means of interrogation and its obvious advantages cause us to once again look into this judgment and weigh these advantages against the infringement of rights caused by the use of Narcoanalysis. The paper has considered in detail the infringement of Fundamental Rights under Article 20(3) and 21 as observed by the Supreme Court. Under the prior, concepts such as the .fear of prejudice', 'doctrine of privilege' etc. in the light of the 'Right to silence' which has developed over a history of Indian judgments[5] and under the latter possible infringement of human rights along with rights such as 'Right to privacy', have been analyzed. Through this paper we seek to ascertain whether a balance can indeed be drawn between such a method of interrogation and the Fundamental Rights enshrined in our Constitution.

ARTICLE 20(3)

With respect to the Judgment, certain concepts need to be remembered. Firstly it is important to see how disclosure made under the influence of drug attracts debate of Article 20(3). The Apex Court has carved out three uses of revelation under drug influence viz. direct, transactional and derivative. *Direct use* means, findings which can be directly relied upon by the prosecution to strengthen their case by submitting the disclosure per se as evidence in a court. *Transactional use* means, when the information revealed can prove to be helpful for the investigation and prosecution in cases other than the one being investigated. Lastly, *derivative use* stands for using the fruits of revelations made under[1] influence of the impugned tests. This essentially means that prosecution shall not rely on any revelation made by the subject of the

[3] Article: Robinson O. Everett, New Procedures of Scientific Investigation and the Protection of the Accused's Rights, Duke Law Journal, Vol. 1959, No. 1 (1959), pp. 32-77

[4] AIR 2010 SC 1974

[5]Nandini Satpathy v. P L Dani, (1978) 2 SCC 424

impugned test, while undergoing the test; but when information revealed during questioning leads to the discovery of independent materials, thereby 'furnishing a link in the chain of evidence', the same shall be used by the prosecution.

With respect to the direct use of revelations made under the influence of the drug, the Apex Court has deliberated extensively, referring to a catena of foreign authorities wherein findings of Narcoanalysis test were not allowed as evidence because there was discord among the scientific community with regard to its reliability. Authenticity of Narcoanalysis test has been widely debated, and the Supreme Court is also in accord with the foreign courts and prohibits using findings of the test directly as evidence. In transactional use, subject triggers his prosecution in a different case, other than the one being investigated. Here the findings of the impugned test can be used in two ways; either the prosecution directly relies on the finding and tries to use them in a court or uses the fruits of the finding in the form of materials discovered by virtue of disclosures made under the test. Since direct use of revelations in some other case, is same as using them in the case being investigated, hence, no such use is possible in both cases. Therefore that leaves us with only the derivative use of such revelation.

Concept of derivative use is actually derived from Section 27 of the Evidence Act wherein derivative use of confession made in police custody is allowed. Many-a-times investigating agencies find quite a bit of evidence, but fail to complete the chain required in order to eliminate reasonable doubt and bring about conviction. For instance, in a murder case there are witnesses who have seen the accused exiting the crime scene, and his absence from his residence at the time of commission of crime is also established, but such an overlap in time may be coincidental. If in this situation, the accused, under the influence of the impugned test, ends up telling the place where he concealed the murder weapon, and subsequently the dragger is discovered, and the blood group of the stains on it matches that of the deceased, then the fruits of such revelation fill the 'snap in the chain of evidence' and conviction is possible. This is

called derivative use, for which the High Courts have allowed Narcoanalysis to be used as an investigating tool.[6] When, in the above case, the test being conducted, the accused may not reveal anything to the help of prosecution and hence, using the Narcoanalysis test as an investigating tool is not always successful. There is a possibility that some material discovered under the test might start a fresh chain of evidence when no evidence is available at all. It is also admitted that testimonial compulsion would include direct as well as derivative use, if the information leading to any discovery is proved to have been taken under compulsion.[7] The Apex Court is of the opinion that the protection under Article 20(3) is wide enough to cover situations like derivative use of Narcoanalysis, and hence held information revealed under Narcoanalysis is offensive to article 20(3).

Amongst all judgments which the Supreme Court has considered while invalidating Narcoanalysis, three of them require mentioning. The first is that of *Raymond Cens,*[s] wherein at the trial, testimony of the findings under Narcoanalysis were admitted attracting a lot of controversy, and hence the Paris Bar Council passed a resolution prohibiting the use of such techniques. It should however be noted, that the findings of Narcoanalysis in the *Raymond Cens case* were admitted directly and not used as an investigating tool. The Apex Court has referred to several cases on similar lines where the controversy arose only when admission of findings under the influence of drug was insisted upon. Following this are the cases of Townsend v. Sain,[9]and Horvath v. R.[10]The former was delivered by the US Supreme Court and the latter by the Supreme Court of Canada. They both have sufficient bearing upon the present Judgment because therein Narcoanalysis was held as unconstitutional. In the *Townsend case*, the US Supreme Court held that a confession induced by administration of drugs is constitutionally inadmissible in a criminal trial. Along the

[6]Srnt. Selvi and Ors. v. State by Koramangala Police Station, 2004 (7) Kar LJ 501; Santokbcn Sharmanbhai Jadeja v. State of Gujarat, 2008 Cri LJ 68

[7]Nandini Satpathy v. P.L. Dani, AIR 1978 SC 1025 [8] Para 48

[9]372US293(1963) [10][1979] 44 C.C.C. (2d) 385

same lines, but a step further, the Court, in the *Horvath case* held that statements made in a hypnotic state were not voluntary and hence could not be admitted as evidence, and if the post- hypnotic statements related back to the contents of what was said during the hypnotic state, these statements would also be inadmissible. In the Canadian case the Court went on to state that the meaning of voluntariness should not be confined within the boundaries of 'fear of prejudice' .and 'hope of advantage' but should be given a natural meaning. The scope and meaning of expressions such as *fear of prejudice* and *hope of advantage* have been dealt with subsequently in greater detail.

'FEAR OF PREJUDICE' AND 'HOPE OF ADVANTAGE'

When an accused is threatened, the situation is one of choice between alternatives, either one disagreeable to be sure, but still subject to a choice.[u]For instance, the accused has to choose either to continue undergoing torture or confess, which essentially means there is always a fear of prejudice. Similarly, when any transactional promise such as lesser punishment is made, there is always an option before the accused to make a choice. There exists a hope of advantage. The Apex Court is of the opinion that protection of Article 20(3) should not be confined to the above expressions. Hence the expression "voluntary" cannot be taken to simply mean a "conscious choice"[12] and it should be given its natural meaning. Nevertheless, it is also true that the precise definition of'voluntary' is riot possible, and countries where jurisprudence has passed through a long span of time, in order to define the term 'voluntary', have ended up creating clouds over itThe question of voluntariness has long been one which defies absolute definition.'[3]Moreover the word 'voluntary' may be deemed to be somewhat misleading.[14] One of the determining factors therefore, is the nature of options available. If one of the options is torturous or luring enough, so

[1] -3 Wigmore, Evidence §826
[12] 3 Wigmore, Evidence §826
[13] R v. Harz, (1966) 3 WLR 1241
[14] Harlan J. dissenting in Miranda

as to extract even a false confession, such confession will be hit by Article 20(3). [15]On the other hand, no such choice is required to be made under Narcoanalysis. Under Narcoanalysis, the subject is not facilitated with a choice to choose the lesser of the two evils. Observations made in the last two lines initiate the need to explore the origins of the doctrine of privilege, dealt with subsequently.

ORIGIN OF DOCTRINE OF PRIVILEGE

The Supreme Court has agreed that there are competing versions of the historical origin of the 'doctrine of privilege'.[16] Under the first version, the maxim has its origin in protest against the inquisitorial methods of interrogating accused persons, primarily against self-incriminating questions posed by the English common law courts, and the ex-officio oath delivered by the Star Chamber and the High < Commissions in England. Under an ex officio oath, the defendant was required to answer all questions posed by the judges and prosecutors during'the trial and failure to do so would attract punishments often involving physical torture.[17] Both' these courts were abolished in 1641 AD. The Judgment further states, that even though the threat of physical torture for remaining silent had been removed after trie abolition of the Star Chamber and the High Commissions, the defendant would still face a high risk of conviction if he did not respond to the charges by answering the material questions posed by the judge and the prosecutor. [18]The Court has also referred to the landmark judgement of Nandini Satpathy v. P. L. Dani,[19] highlighting that this monumental right traces its history to the maxim *"nemo tenetur seipsum tenetur'*.[20] Until the expulsion of the Stuarts from the British trirone in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, such unjust methods of interrogation were not uncommon even in England. It

[15]Note that falsity of a statement is not the only determining factor to attract Article 20(3), voluntariness is another important factor.

[16]Para85

[17]Para85

"Para88

"(1978) 2 SCC424

[20]'A man cannot represent himself guilty'.

is important to note that even before the abolition of the Star Chamber and the High Commissions, exclusionary rule was applied since there is always a fear of compelled testimony being false. After the origin of the privilege doctrine, exclusionary rule is applied not just because confession might be false, but also because it is involuntary. The Supreme Court puts forth these two reasons as well, for the application of the exclusionary rule.[21]

When Narcoanalysis is used as an investigating tool, and its derivative use furnishes a link in the chain of evidence, the question of falsity is almost negligible, because before any material discovered by virtue of revelations made under the influence of drug is admitted, it has to undergo scrutiny in court. Thus, the determining factor for constitutionality of the impugned test is voluntariness of the revelations made. If the protection of Article 20(3) is really wide then administering the said test is unconstitutional. The Supreme Court has agreed with this proposition and held revelations made under the influence of drug as compelled.

The Apex Court also referred to the landmark verdict in Miranda v. Arizona[22]. After this judgment,administering a warning to the accused-of his right to silence during custodial interrogations and obtaining a voluntary waiver of the prescribed rights, has become a ubiquitous feature in the U.S. criminal justice system. The Apex Court states that the majority decision in *Miranda* was not a sudden development in U.S. constitutional law. The scope of privilege against self-incrimination had been progressively expanded in several prior decisions.[23]It *h* the constitutionally entrenched status of the right against self-incrimination, along with earlier verdicts[24]on the same issue, which prompted the Apex Court to deliver this Judgment. How far the Supreme Court is accurate in extending the protection under Article 20(3), is a matter of debate. Criticism of such wide treatment finds support in

[21]Para91 ;
[22]384 US 436 (1966)
[23] Para 106; the Court is basically discussing the stage of protection against self-incrimination.
[24] Townsend v. Sain, 372 US 293 (1963), Horvath v. R, [1979] 44 C.C.C. (2d) 385

Wigmore on Evidence. Prof. Wigmore argues that the exclusionary rule is not intended to protect the guilty. The very purpose of criminal justice system is ascertainment of truth and protection of the innocent. He further states that *if medical or psychic science, represented by an accord amongst experts in the scientific community, establishes the trustworthiness of a confession induced by artificial means known to such science, then confession so induced should be admissible.*[25] *S'mce* there is no sufficient consensus in the scientific community, admission of such confession is unacceptable. But when there is no impairment to the right against self-incrimination, provided the consensus exists, there is no harm in using them as an investigating tool. K has already been stated earlier that using this test as an investigating tool carries negligible chances of bringing false conviction. It is also required to note that such kind of investigating tool does not only find culprits, but also helps in proving innocence.

The Apex Court has erred in extending the protection of Article 20(3) to such an extent, when the very origin of privilege doctrine was due to torturous methods adopted in interrogation and impending risk of conviction for remaining silent. It is indeed true that right against Self-incrimination has undergone manifold progress in all democratic jurisdictions, but at the same time it is also a glaring truth that new methods of committing crime and rise of terrorism often leaves law enforcement agencies unaided.

OTHER RELEVANT ISSUES

The Apex Court has shown considerable concern over frequent resort to such tests, which is likely to make investigating agencies lethargic. Allowing Narcoanalysis as an investigation tool in situations where there is no way-out for the investigating agencies, and with the permission of the court would hardly hamper the diligence of investigating agencies.

3 Wigmore, Evidence §84la

A very curious situation has also been highlighted by the Supreme Court that it is plausible for the investigators to obtain statements from individuals by threat of administering any of these tests. The person could possibly make self-incriminating statements on account of apprehensions of these techniques extracting the truth. The Court has refrained from making any conclusive remark on this aspect in the entire judgment. In Pinter v. State,[26] the Supreme Court of Mississippi admitted the confession of the accused who was informed of the existence of a machine having the capacity to read his mind and product other psychological reactions. In fear of this he confessed; which was challenged as incompetent to be sustained. While admitting the confession, the Court observed that *"...it would seem that his fear was not of the machine but of its capacity to elicit truth. It was therefore a fear of the truth and its consequences"*. In other words, the person not volunteering for Narcoanalysis in fact fears the probability of speaking the truth which is what curtails his free will, and not any external physical or mental pressure put on him.[27]

Thus far in this article, one aspect has been consciously avoided, that is, the discretion of the accused to choose between speaking and remaining silent; the Right to Silence under Article 20(3). Right to silence is subject to limitations in some. countries.[28] In UK and Australia, the silence of the accused may lead to adverse inference. Though it is argued that legal structure and constitutional safeguards in those countries are different from that of India, concerns have been shown in India as well about inviolability of the right to silence.[29]Lastly, the Court points out that in an ordinary confession, the accused always has a liberty to revert back from his confession but no such option is available in case of Narcoanalysis. This unreasonable reasoning forces us to wonder whether the basic purpose of criminal justice system is for making false confessions or apprehending culprits.

[26]203 Miss* 344, 34 So.2d 723

[27] See Commonwealth v. Jones, 341 Pa, 541, 19 A.2d 389 (1941)

"Especially Australia and UK, 180th report of the Law Commission of India

[29] Dr. L.M. Singhvi Constitution of India, (Modern Law Publishers, Nagpur, 2004) 13th Edni, p. 906-907

ARTICLE 21 AND HUMAN RIGHTS

Article 21 is the cornerstone of the constitution and no act can be validated by **its** infringement. The landmark judgment of Maneka Gandhi v. Union of **India,**[30] prescribed that any act abridging Article 21 must *be fair, just and reasonable.* **The** use of Narcoanalysis has come under undeniable scrutiny since it may affect this Fundamental Right of the individual. The Judgment puts forth a detailed discussion of the same.

The first right discussed is that of the Right to Privacy protected under Article 21. Although in *Kharak Singh?*[1] such right was upheld as a Fundamental Right, several judgments hence forth have provided that such right is not absolute but subject to reasonable restrictions.[32]Subsequent judgments have curtailed this right in view of *prevention of crime, disorder, and protection of rights and freedom of others.* The procedure, for use of Narcoanalysis indeed seems to violate this fundamental right; however the method by which it is carried out and its inherent purpose justifies its use in the form of reasonable restrictions. The procedure for Narcoanalysis involves induction of the accused into a 'hypnotic stage'. Moreover, this process is carried out in the presence of a forensic psychologist, an anesthesiologist, a psychiatrist, a general physician and other medical staff, ensuring the safety of the process. In brief, the process is conducted in the presence of experts who are well trained in this procedure. Furthermore, the fact that the questioning is done by a forensic psychologist and not a police officer is of great significance as it reduces the chances of misuse of this procedure by the police force. Furthermore the practice followed by the High Courts in their erstwhile judgments permitting the use of Narcoanalysis **was** that, they had done so only after the permission of the Judicial Magistrate **has been**

[30] AIR 1978 SC 597

"Kharak Singh v. State of U.P., AIR 1963 SC 1295

"Govind v. State of M.P., AIR 1975 SC 1378 "'X' v.

Hospital 'Z\ (1998) 8 SCC 296

[34]This is the second of four stages that follow the use of this drug depending on **the concentration in** which it is used and the rate of its administration.

sought.[35] At the same time, it is also pertinent to note that any law carries with it some scope of misuse[36].

The inherent limitations of Narcoanalysis are the absence of absolute success, possibility of revelation of irrelevant information, possibility of misuse etc. Therefore, the Judgment, as a word of caution states that the use of Narcoanalysis may lead to the accused revealing information that is personal in nature and irrelevant to the case as he has no control over his speech during this process. Thus, it becomes important to understand the need for Narcoanalysis and the purpose for which it is used. Firstly, it is the last resort, implemented only when the investigating authorities have reached a dead end. The Right to Privacy has never been looked upon as a right in its absolute sense[37] and the society has the right to be protected against the criminal,[38] and all of the society's rights are manifestly superior to those of the criminal.[39] Therefore, such an intrusion is warranted in the light of protection of its subjects by the State.[40]

The other impediment to the use of Narcoanalysis is the protection of Human Rights. Article 21 in its scope of personal liberty encompasses within itself the protection of 'bodily integrity and dignity of person who are in custodial environments'. In Coralie Mullin v. Union Territory of Delhi,[41] the Hon*bie Apex Court observed that *"...any form of torture or cruel, inhuman treatment would be offensive to human dignity...be prohibited by Article 21* ".In spite of its alleged involuntary nature which has been considerably discussed earlier which may excite the question of Human Rights, the

[35] Supra note 1

"People's Union for Civil Liberties and Anr. v. Union of India, AIR 2004 SC 456

"State of Maharashtra v. Madhukar Narayan Mardikar, AIR 1991 SC 207

[38] Whether the suspect is innocent or guilty cannot be ascertained beforehand, and no one knows the truth better than does the suspect himself. It, therefore, stands to reason, that where there is a safe and humane measure existing to evoke the truth from the consciousness of the suspect, that society is entitled to have the truth cf. Dr. RE. House's address at the First Annual Meeting of the Eastern Society of Anesthetists in the year 1925

[3?] 'salus populi est suprema lex'

[40] Govind v. State of M.P., AIR 1975 SC 1378

[41] AIR 1981 SC 746

procedure as such cannot be called cruel, or inhuman. The judgment refers to the Universal Declaration of Human Rights,[42] the International Covenant on Civil and Political Rights,[43] and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[44] However, if the definition provided in Article 1 of the last Convention is carefully read, it is rather difficult to imagine Narcoanalysis as fitting within its folds. Firstly, the definition speaks of severe physical or mental pain. In Narcoanalysis, physical pain is negligible. As for mental suffering, the reasoning that realization of the consequences of the possibility of making incriminatory statements results in mental suffering of the individual as aforementioned seems unsteady. On the other hand, as per the verdict, Narcoanalysis is conducted in a catena of cases,[45] by experts and the accused is continuously monitored during the entire process. The accused is examined before conducting the test so as to ensure that he is capable of undergoing it. The second part of the definition is true for any kind of interrogation process i.e. it is used for extracting information. The question of inherent dignity of an individual is however one of far greater importance. Numerous atrocities have been committed on Prisoners of War and those merely accused of crime attracting the paramount need for enforcing Human Rights in the process of interrogation. However, the fact that in earlier circumstances the practice of conducting Narcoanalysis was with the permission of a judicial authority, the very nature of Narcoanalysis with regard to the ambunt,of physical and mental pain that was inflicted along with the procedure as mention above greatly reduces the possibility of misuse and makes it difficult to consider Narcoanalysis on the same plane as third degree method of interrogation.

[42] Article 5

[43] Article 7

[44] Articles 1 and 16

[4S]Smt. Selvi and Ors. v. State by Koramangala Police Station, 2004 (7) Kar LJ 501; **Santokben** Sharmanbhai Jadeja v. State of Gujarat, 2008 Cri LJ 68: before subjecting an accused to Narco-analysis Test, his/her medical fitness will be ascertained and thereafter only accused **will be subjected** to Narco-analysis Test. Furthermore the dosage level required to take a person **to** the **hypnotic stage is** found to be 3-4 times smaller than those required for stages beyond.

The last right allegedly affected by the procedure is the Right to Fair Trial. The Judgment has raised several concerns with regard to the same. First is the absence of legal advice during the time of questioning. However, the interrogation that takes place during Narcoanalysis is markedly different from the regular interrogation. The questioning is not by a police officer and thus any evidence adduced cannot be admitted in the court of law. Further as mentioned several times before, the purpose of Narcoanalysis is to provide a break in the investigation when all other means have been exhausted. Another concern raised is the questionable reliability of this process being incompatible with the standard of proof beyond reasonable doubt. The fact that Narcoanalysis is not a fool-proof method is not denied; however the concern of 'proof beyond reasonable doubt' would not arise unless the same is directly admitted in court. Since the evidence adduced from Narcoanalysis is merely used as an investigating tool, this concern is also frustrated. The last concern raised by the court is that howeyer of considerable import; the use of Narcoanalysis may affect the parity between the prosecution and the defence. In this regard, it is pertinent to state that the very concept of fair trial is a *triangulation of interests of the accused, the victim and the society* and the interests of the society cannot be treated as *persona non* grafa.[46]The Supreme Court has also held that the rules and procedures involved in a fair trial are continually in a state of flux, changing according to the needs and exigencies of the situation, the crime, and those involved etc.[47] Though the right of the accused stands to be infringed by the use of Narcoanalysis, the same must be weighed against the right of the victim and the society to receive justice. The fear that the process of Narcoanalysis unduly affecting the parity between the prosecution and the defence is thereby vitiated and if present is justified by virtue of the larger interests of the community.

'K Anbazhagan v. Superintendent of Police, AIR 2004 SC 524

CONCLUSION

In conclusion it is admitted that the procedure of Narcoanalysis **requires much** more refinement before it can reach perfection and be used **without concern for the safety** and rights of the individual. However, what is required **are Guidelines similar to** those provided for the *polygraph test,*[4]* and rules regarding **the implementation of** this test,[49] rather than declaring the use of the test to be void in law. Denial of Narcoanalysis as a tool of investigation merely for fear of its misuse will be a blatant disregard of the rights of the society as against that of the accused.

[48]Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused by the National Human Rights Commission [49]In this regard an amendment can be proposed for express inclusion of Narcoanalysis in the Code of Criminal Procedure along with rules regarding its implementation so as to prevent its misuse.

RULE OF INSANITY: A COMPARISON OF THE ENGLISH AND INDIAN PERSPECTIVE

MANU THADIKKARAN[1]

ABSTRACT:

Insanity is a defence in civil matters, widely accepted across all jurisdictions. However, the application of the same differs remarkably in different jurisdictions. This article seeks to bring out such differences present in the Indian and English perspective for the defence of insanity in contract law.

Under English law, insanity is a valid defence against a valid contract only when the person claiming insanity could prove his insanity as well the knowledge of the opposite .party of the same. Such situations are categorized as equitable fraud leading to 'unfairness' by the English Courts. However, the Indian perspective merely requires a person claiming the insanity defence to prove of his irrational state of mind at the time of entering into the contract. Nevertheless, this perspective also has its limitations inasmuch as it results in a contract with a lunatic being absolutely void.

This fundamental difference in the application of law can be attributed to the creation of the same in both these legal systems. The English system has no written Constitutions and the Judges are given the duty to evolve law. The history of the defence of insanity in England can be traced back to the

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case of *Motion* v *Camroux"*, which is regarded as the starting point of law in this regard. Ever since, the law has been constantly evolving through various judgements and there lies the possibility of the same evolving even further with future decisions. However, the Indian perspective of insanity was codified and laid down as law and hence, the same allows very little discretion to the judges in interpreting the same according to factual circumstances. Hence, despite having a common law system, the defence of insanity under Indian and English law differs considerably in source and application.

INTRODUCTION:

Law is a system created to ensure justice and fairness to citizens. The objective **of** law and legal system is to arbitrate over disputes and penalise the wrongdoer according to the laid down norms. To ensure complete justice, law only penalises those who intended a particular wrong and committed the same. Hence, if an individual, due to his peculiar state of mind, could not intend a wrong, the law would not punish him for it even if he has committed the same. The reason for this is **that** the individual did not understand the consequences of his action and hence, did **not** intend any wrong to be committed and in such a case, it is against the principles of fairness and justice to penalise such a person. This concept, in modern law, is termed as 'insanity'.

Insanity, as defined in Black's Law Dictionary, refers to any mental disorder severe enough that it prevents a person from having legal capacity and excuses the person from criminal or civil responsibility. It means that if a person is not in a sane state of mind, he cannot be held responsible for his actions, as he does not intend the same. The defence of insanity has been prevalent in law, whether civil or criminal, **for a** long time. In criminal law, the defence of insanity is put fbrth by a person **to** establish that he did not intend to commit a particular crime, as he was not in the **appropriate** state of mind to understand that his act was a crime. In civil law, insanity is used as **a**

[2] (1845) 4 ExCh. 17

defence in many areas and contract law is one of them. In contract law, a person takes the defence of insanity to establish that he did not have the intention to enter into the contract in question due to his lack of mental capacity and hence, there is no *consensus ad idem* between the parties in such a contract.

Although both Indian and English law recognises the defence of insanity in contract law, there exists a considerable difference in its application in both the legal systems, as English law requires the lunatic to prove the other party's knowledge of his condition. In this sense, the rule of insanity under English law can be regarded as broader in scope than the Indian law.

THE ENGLISH PERSPECTIVE:

Under English law, the well settled principle regarding the validity of a contract entered into by a person of unsound mind is that the contract is voidable at the option of that person if he can prove that he was of unsound mind while entering into the contract and that the other party knew of his insanity and took advantage of it.

The starting point of this modern rule of insanity in English contract law can be traced back to the case *of Molton* v Ca/wroux^hereinafter the *Molton* case), where a life assurance society granted the annuities in the ordinary course of its business to a mentally unsound person. In this case, it was held that when the state of mind of the lunatic was not known to the other party, and *no advantage was taken of the lunatic,* the defence of insanity cannot prevail, especially when the contract has been executed in whole or part and the parties cannot be restored altogether to their original position. Further, the judge in this case also referred to the case of *Dane* v *Viscountess Kirkwall*[4], where it was held that a person of unsound mind can have the contract set aside if the other 'imposed' the same upon him, or 'took advantage' of his unsoundness of mind. Thus, this case listed a 'fair and bona fide' contract as a

[3] (1849) 4 ExCh. 17
[4] {1838) 8C&P679

circumstance to conclude that a contract with a lunatic, apparently of sound mind, is valid.

After the *Molton* case, the rule of insanity was discussed in the case of *Beavan* v *M'Donnell*[5], where the word 'fairly' was again picked up. In this case, it was held that if a purchase is made without any knowledge of the incapacity of the person, Courts of Equity will not interfere to set aside the contract. Further, it was also held that if advantage of the lunatic was taken while entering into a contract with him, that contract is not 'fair' and hence, *it* cannot be enforced in a Court of Law.

The next landmark judgement regarding insanity as a defence in contract law, which has been constantly referred to, is *Imperial Loans Company Ltd.* y iSto/je^hereinafter the *Imperial Loans* case). In this case, Lopes, L.J. stated that a contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other contracting party. A defendant, who seeks to avoid a contract on the ground of his insanity, must, plead and prove the plaintiffs knowledge of his insanity along with his incapacity, and unless he proves these two things, he cannot succeed.

The principle laid down in the *Imperial Loans* case was again referred to in **the case** of *Loudon & Co.* v *Hunter*[7], where the Court held that the plaintiff company **could** not sue the defendant for damages for the breach of a contract entered into by him when he was of unsound mind, as his unsoundness of mind was disclosed **to the** plaintiff company.

[5] (1854) 9 Ex.309
[6](1892)1QB599
'1923S.L.T226

Again; in 1985, the case of *Archer* v Cttf/er[8](hereinafter the *Archer* case) stated that a contract entered into by a person of unsound mind is voidable at his option if it is proved either that the other party knew of his unsoundness of mind or, whether or not he had that knowledge, the bargain was unfair. Thus, 'unfairness' of the terms of a contract was also an important constituent to decide whether the contract made by a person of unsound mind was invalid. This 'unfairness' can be determined in two ways- First, it may be unfair by reason of the unfair manner in which it was brought into existence such as undue influence, and second, it may be unfair by reason of the fact that the terms of the contract are more favourable to one party than to the other. The case of *Archer*, in order to distinguish the latter from procedural unfairness, gave it the name contractual imbalance. Thus, the Court, here, emphasised on the importance of 'fairness' as an ingredient in an enforceable contract with a lunatic, whose condition of mind is unknown to the party. -

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The judge, while deciding the *Archer* case, relied on the judgement of the *Imperial Loans* case, where it was held that the mental capacity of a lunatic must be known to the other contracting party in order to avoid a 'fair' contract on the grounds of insanity. This was interpreted in the *Archer* case to mean that the knowledge of the insanity of a lunatic is unnecessary to avoid a contract which is unfair in the sense of contractual imbalance. Thus, the *Archer* case stressed on the invalidity of a contract»' entered into by a lunatic due to the reason of 'contractual imbalance' and 'unfairness'.

c

The present rule of insanity in English contract law has been discussed elaborately in the case of *Hart* v *O'Connor*[9]. In this case, the principle laid down in Archer case was discussed and set aside by the Privy Council. Here, a vendor entered into a contract with the defendant to sell the land, of which he was the trustee, while he lacked the required mental capacity to do the same, due to his old age. Although the

[8] (1980) 1 NZLR 386
[9] (1985) 3 WLR 214

case was decided in favour of the petitioners by the Courts in first and **second** instance, the Privy Council ruled in favour of the defendant validating **the contract** The reason given by the Council for the same was that the defendant was **unaware of** the insanity of the vendor at the time'of entering into the contract.

In this case, it was further held that the principle in *Archer* case is illogical **and** unsupported by authority. Thus, the new principle laid down in this case was that the validity of a contract entered into by a lunatic is to be judged by the same standards as a contract by a person of sound mind, and is not voidable by the lunatic or his representatives by reason of "unfairness" unless such unfairness amounts to equitable fraud which would have enabled the complaining party to avoid the contract even if he had been sane. Thus, the judges, in the case of *Hart* v *O'Connor,* stressed **the** importance of the knowledge of the other party regarding the insanity of the first party, and thereby brought in the principle of equitable fraud. Hence, a contract made by a lunatic **can** be set aside only if it can be proved that the other party knew of the condition of mind of the lunatic and took advantage of Jhe same, which amounts to the concept of equitable fraud. In such a case, the contract is voidable at the option of the party, who was the victim of equitable fraud.

The point of difference between the cases of *Archer* and *Hart* v *O 'Connor* is that while the former held that any contract made by a lunatic, which was unfair, was to be invalid, the latter stated that the contract made by a lunatic would be invalid only if the other party knew of the insanity of the first party and took disadvantage of **the** same, which amounts to equitable fraud.

Further, it should also be noted that English law considers drunkenness on the **same** footing as that of unsoundness of mind[10]. As stated in the case of *Cooke* v *Clayworth",* equity will grant relief to a drunken party if he can show **that his**

[10] *Moltonx Camroux,* (1849)4ExCh. 17
"(18U)18Ves.Jr. 12

condition was known to the other party at the time the contract was made and some unfair advantage has been taken of him by the other party. The Courts consider a drunken person as one who does not understand the consequences of his actions and hence, provides him the same safeguards as provided to a lunatic in the event of a contract.

Thus, it can be seen that the rule of insanity under English contract law evolved through various case laws, with minor differences and the present position of law states that the contract to which a lunatic is a party can be held voidable only if it can be shown that the other party knew of his state of mind. In the absence of that knowledge, a contract with a lunatic is enforceable by law.

LIMITATIONS:

As can be seen in various case laws, the defence of insanity can prevail in English contract law only if the other party knew about the unsoundness of mind of the first person. The reason behind this rule is based on the norms of equity as the law attempts to safeguard the rights of both the parties in the event of a contract with a lunatic. The logic behind this is that if a person knew about the state of mind of a person to be unsound and still enters into a contract with him, it indicates an ill will on the part of the former to take advantage of the disability of the latter and thereby, gain benefits. The law aims at preventing such an equitable fraud being committed against a person who is mentally unsound and incapable of entering into a contract. It should also be noted that in the event of a contract with a lunatic, whose condition was known to the other party, the law would hold the contract only voidable, and not void. Hence, the person whose advantage was taken of has a choice of either going forward with the contract, or revoking it. Thus, law provides a safety net over those who are incapable of entering into a contract due to unsoundness of mind.

On the other hand, English law also aims to safeguard the rights of the other party in a contract with a lunatic. If a person, unaware of the mental instability of the other

party, enters into a "fair" contract with him, and acts under this contract, then the latter cannot go back on the contract by pleading insanity. This is to ensure that the rights of the sane party, who has already acted under the contract, is not taken away merely because of the state of mind of the other party, which was not apparent, and such a contract would be enforceable under law, like any other contract. In this perspective of law, the application of the norms of equity is clear and obvious.

Even though the law tries to balance between the rights of both the parties in a contract with a lunatic, it can be seen that the law is less favouring the person, who is not of sound mind. The law says that if the other party did not know of the state of mind of the lunatic, the contract is enforceable. This can have a lot of adverse effects in many cases. A lunatic person is not capable of understanding the consequences of his action. Thus, anything they do in that state of mind clearly amounts to acting without any thought. Thus, if the lunatic enters into a contract without knowing the consequences of his act, it can put him or his dependants at a great disadvantage, even though the contract may be "fair"' at its face. In such a case, even if the defendant was acting *bona fide,* the contract would result in a greater harm to the lunatic. For example, if a person A, who has a wife and three children, contracts to sell his house to B for a "fair" price, when he is of unsound mind without knowing the consequences of his action, the contract would be enforceable under English law. But, even though the contract is "fair*, the result would be that the lunatic, along with his wife and children, would be left homeless. In such a case, mere fairness of the terms of the contract does not ensure equity to the lunatic, who is already incapacitated by nature.

Hence, it can be said that though English law attempts to apply the norms of equity in the defence of insanity, the same is not applied equally to the mentally unstable as his delicate mental condition is being treated on par with that of a sane person, if the latter was unaware of his condition.

THE INDIAN PERSPECTIVE:

Under Indian Law, the contract entered into by a person, who was of unsound mind at the time of entering into the contract, is absolutely void. Unlike English law, where the rule of insanity was evolved through case laws, Indian law has codified and specifically laid down the effect of a contract with a mentally unsound person, under Section 12 of the Indian Contract Act, 1872.

Section 11 of the Indian Contract Act talks about the capacity and competency of a person to enter into a valid contract, where it states that a person who is not of a sound mind is incompetent to enter into a contract. Section 12 of the Act states that,

"A person is said to be of sound mind for the purpose of making a contract, if at the time when he makes it, he is capable of understanding it and of forming a rational judgement as to its effect upon his interests.
A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.
A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind. "

Thus, this section lays down the test of soundness of mind and states that a person should be of a sound mind, while entering into a contract.

A mentally ill person, as stated in Section 2(1) of the Mental Health Act, 1987, is one who is in need of treatment by reason of any mental disorder other than mental retardation. But, the only requirement for a person to be mentally unsound under contract law, as stated in the first part of Section 12 of the Act, is that he should be in such a state of mind whereby he cannot understand the consequences of his actions and decide what is beneficial for him. It is a state where the person not only lacks full understanding of the contract which he is entering into, but also the lack of awareness

that he does not understand it[12]. This understanding of the transactions varies with the nature of each transaction.

The major stress in the first part of Section 12 is that a mentally unsound person, even if not so in normal appearance, is one who is not capable of forming a rational judgement about the consequences of his act upon him, while entering into a contract, and such a contract is rendered absolutely void[13]. The crucial point here is to find out whether the lunatic is entering into the contract after he has understood it and has decided to enter into that contract after forming a rational judgement in regard to his interests[14]. Thus, unlike in English law, Indian law does not require the mentally unsound person to show that the other party, while entering into the contract, knew of his state of mind, so as to render the contract invalid.

Further, Indian law also considers old age to be a reason for lack of mental capacity to enter into a contract. In the case of *Govindswami Naicker* v *K.N.Srinivasa Rao*[h], the gift deed made by a man aged 70 years of age giving his properties to his daughter was held void as the person suffered from senile dementia and was having delusions that he owned around 129 acres of land. The Court further stated that he could not form a rational judgement of the effect of such a deed to his own interests and hence, he lacked the necessary contractual capacity of a sane person.

The second part of Section 12 emphasises on the required state of mind of a person at the time of entering into a contract. According to this, a person, who is usually of unsound mind, but occasionally of sound mind, may enter into a contract when he is of sound mind and such a contract would not be rendered void under law[16]. Many instances show that even though a person is of unsound mind, there are lucid

[12] Pollock & Mulla, *Indian Contract and Specific Relief Acts (VOL I),* Lexis Nexis Butterworths, 13th Edn. (2009), p.399
[13] *Indar Singh* v *Parmeshwardhari Singh,* AIR 1957 Pat.491
[14] *Ibid*
[15] AIR 1940 Mad.73
[16] *Jai Narain* v *Mahabir Prasad,* AIR1926 Oudh.470

intervals when he becomes sane and is capable of understanding the consequences of his action. Thus, a lunatic can enter into a valid contract under Indian law, provided he had the required mental capacity and stability to understand the effects of such a contract upon his interests. In such a case, the burderrto prove that a person was of a sound mind while entering into the contract lies on the person who affirms it[17].

The second part of Section 12 also states that even if a person is of sound mind, a contract entered into by him may be rendered void, if it can be established that the person lacked the necessary mental capacity to form a rational judgement as to the effects of such a contract, while entering into the contract. This especially applies to drunken parties as such people, although sane, lacks the necessary mental capacity to enter into a contract during the drunken state. In such cases, the burden of proof of the disability lies on the one who alleges that such a disability did exist at the time of entering into the contract.

Further, Section 68 of the Indian Contract Act states that if a person supplies another person, who is incapable of entering into a contract, or to anyone whom he is legally bound to support with necessary conditions to his life, the former is entitled to be reimbursed of the same from the property of the latter. Thus, if a person supplies a lunatic or his family with necessary conditions like shelter, clothes, etc., he is entitled to reimburse this cost from the property of the lunatic. In such a situation, if a man supplies necessaries to a lunatic, the law will imply an obligation to repay him for the services so rendered, and will enforce that obligation against the lunatic.

A very recent case decided by the apex Court regarding insanity in contract law is the case of *Sona Bala* v *Jyotirindra Bhatacharjee*[18], where a person A, who was mentally unsound, sold his entire property to the respondents and thereby made himself and

[17] *Bahadur Singh* v *Bir Bahadur,* AIR 1956 Cal.213
[18] (2005) 4 SCC 501

his family homeless. The apex Court, while declaring the contract void due to lack of mental capacity on part of A, held that insanity does not mean total deprivation of reason. It merely means an inability of perception, memory and judgement to do the act in question or to understand its nature and consequences.

Hence, the position of law regarding insanity as a defence in contract law remains settled in India by virtue of Section 12 of the Indian Contract Act, 1872, whereby a contract made by or with a person of unsound mind is rendered absolutely void and unenforceable.

NARROW SCOPE OF INDIAN LAW:

The rule of insanity in Indian contract law, as stated before, is clear and far from any ambiguities as far as it says that if a person can establish that he was not of a 'sound mind' while entering into the contract, the contract becomes void. Thus, Indian law is completely a one-sided law, favouring the mentally unsound party in a contract made by him. It regards a mentally unsound person as someone who cannot form any sort of rational decisions and hence, assumes that all the actions done by him in that state of mind would not be beneficial to him in any manner.

The Indian position of law, in a way, is not favouring the norms of equity. It renders a contract with a lunatic as absolutely void without any remedy to the other party, even if the condition of the lunatic was not known to the latter and no advantage had been taken of him. In such a situation, the sane party in the contract, who had no ill will or intention to commit fraud, remains at a loss with no remedy at all, because he has already fulfilled his part of the contract. Hence, the law fails to balance the rights of both the parties in the event of a contract with a mentally unsound person, if both the parties are innocent.

Further, the Indian point of law regarding insanity is very narrow. It does not give any scope for the Courts to apply the principles of equity and fairness in cases of

contracts with lunatics. The only point the Courts have to determine in such cases is whether the person, who was a party to the contract, had the necessary mental capacity to form a rational judgement regarding the consequences of his act. The Courts in India, once insanity is established, need not go into other aspects such as the terms of the contract, degree of fairness, loss to the other party, etc. This narrow and rigid rule of insanity in India can lead to a lot of misuse of the same. Even if a person, who was sane while making the contract, manages to prove that he was insane, by any means, the Courts would rule the case in his favour without going into any other question and thus, puts the other party at a great advantage. Thus, people would use this defence for non performance of contracts, without any moral justification.

But, it should also be noted that Indian law renders a contract with a lunatic absolutely void. Thus, if a person establishes his unsoundness of mind while entering into the contract, the only result would be that the contract would be considered as one which never existed. It is not upto the lunatic, like in English law, to decide whether to go forward with the contract. Further, provisions like Section 68 of the Indian Contract Act provides for reimbursement for necessaries supplied to a lunatic from his property. Although this provision exists to ensure that the norms of equity are followed, it cannot be said to have a balancing effect on the rights of an innocent party in a contract with a lunatic.

Hence, it can be said that the Indian position of law regarding the defence of insanity in contracts is very narrow and one sided and cannot be considered to be in accordance with the principles of fairness and equity.

CONCLUSION:

Insanity is a defence for non-performance of a contract both in English and Indian law. Both these laws render a contract with a mentally unsound person as invalid. In English law, for the defence of insanity to prevail, the mentally unsound person must

establish not only that he was not in a sane state of mind, but also that the other party knew about this condition of mind of his and took advantage of the same. The English Courts, while evolving this defence, stressed on the necessity of "fairness" of the contract entered into with a lunatic. But, the new trend in English law is to assume that if the other party knew that the person was insane, and still entered into a contract with him, it indicates an intention on the other party to commit equitable fraud, and hence, such a contract cannot be held valid on account of "unfairness".

Indian law, on the other hand, has codified and has clearly laid down that in the event of a contract with a lunatic, if it can be established that he was unable to form a rational judgement as to the effects of his action while entering into the contract, the contract would be rendered absolutely void. It does not require the lunatic to prove anything further, if he can prove his insanity at the time of entering into the contract.

Another point of difference between Indian and English law in this regard is that while Indian law renders a contract with the lunatic as absolutely void, English law renders it voidable at the option of the lunatic. Thus, while a lunatic can carry on with a contract declared invalid due to insanity in England, no such option lies in India.

Thus, although both India and England recognises the defence of insanity in contract law, there is a remarkable difference between applications of both, as the English position is more based on principles of equity rather than on codified law. The reason for this trend in England is that the defence of insanity was evolved through various case laws, all of which were decided keeping in view the principles of equity, while in India, the law regarding insanity was laid down by the law makers in a codified document and hence, was confined within its limits.

Domestic Enquiry & Punishment, Ranadhir Kumar De, Eastern Law House, Kolkata, 2010, Fourth Edition, Pp.5-84 + 671. Price: Rs.750.

Law is a social science. It grows and develops with the growth and development of society. New developments in society create new problems and law is required to deal with those problems. To keep pace with the social development which is favorably responded by the Apex Court of the country, the law relating to domestic enquiry and punishments has undergone a radical change. If we look to our experiences in this subject of law, we find that the laws halted as the stage of innovative methods of conciliation of disputes raised by the trade unions and groups of workmen who had the strength and ability to disrupt the industrial peace. There was lack of responsibility in the working class due to newer provisions to benefit workman, individual or collectively added with indulging court decisions. A need was felt for responsible behavior and participation from labour to that of the requirement of natural justice and fairness in employer. This led to the quick action from the Supreme Court of India, and it adopted the strategy of balance, in giving firm decisions to the cases relating to domestic enquiry. This resulted in developing the jurisprudence on modern labour relations.

The author asserts and rightly so, when he stresses on the modern trend on the concept of misconduct. The author searches deeply into each and every aspect of disciplinary action. Disciplinary action begins with the issuance of charge sheet, appointment of enquiry officer, conducting the enquiry and culminating with appropriate punishment. The book has dealt with each and every aspect of the subject in the light of the views, opinions and judgements of the various High Courts and the Apex Court of the country. Even certain debatable topics find its place in this book, like dismissal without domestic enquiry, prohibitory punishment, protection of workers, ingredients of misconduct, form of charge sheet etc. Even recent topics find

a place of discussion in this book like the remedial measures for the ends of justice. The author has dealt with the new changes in law. The book draws a moral line, which the employer and the labour should not cross, if industrial co-operation is to be established for the welfare of both the labour as well as the management.

The book under review quenches the thirst of inquiry about the core issues in industrial relations. It has presented the subject in a lucid style. The author brings to the readers the entire gamut of the subject, stating principles in a codified form for proper comprehension. The basic principles are culled out & enunciated in a codified form. With the perspective in mind that there is inadequacy of standard books on domestic enquiry and punishment, the author has written this book by searching principles from important judicial pronouncements & perplexing statutory principles. The complexity of the subject is due to the emergence of principles from intermingling of statutes, statutory rules, & judicial decisions of the High Court & Supreme Court of India. It has been comprehended by the author with precision & clarity.

The whole gamut of the industrial relations is a struggle to maintain a balance between the master and the servant. In India labour is cheap, unorganized and this class lacks in their ability to bargain and therefore exploitation of labour by the entrepreneurs has been witnessed in this country. Abolition of bonded labour has been enforced by enactment of statutory laws but the vast majority of labour falls prey to the pseudo-industrialists who inspite of legal principals deny even minimum wages to the labourers, a class engaged in the nation-building activities. The author has meticulously explored every sphere of industrial relations in a comprehensive manner.

Author of the book under review, has divided the various areas of domestic enquiry and punishment into eleven chapters, the twelfth being the epilogue. In the first chapter the author goes on with a general discussion about the disciplinary

jurisdiction of Industrial management. The author has traced out the meaning of discipline, its application, nature, need for the purpose of disciplinary action, mode of enforcement of discipline, conditions for exercise of managerial responsibilities, difference between punitive and non-punitive actions. The author has briefly discussed the provisions relating to the Industrial Employment (Standing Orders) Central Rules 1946, Industrial Disputes Act 1947. The termination of service, expiry of the term of employment and termination under certified standing. The author is justified when he says that the definition of the term 'discipline' is to be gathered from variety of senses in different context as there exists no statutory definition. The author has linked the basic idea of discipline with master and servant relationship. This is also very clear from the judgement delivered by the Supreme Court in the case of *Chiranjit Lai* v. *Union of India'*. In this case the Apex Court said that:

(a) a servant must be obedient to, and amenable to, the directions of the master; and

(b) the master must have the power to discharge or dismiss him.

In case the master has no control over his employee, or has no power to discharge or dismiss him, there cannot be a relationship of master and servant between them.

Second chapter of the book deals with the misconduct in employment. There are two factors relatable to labour having direct influence over industrial development which is discipline and efficiency. In fact the latter is dependent on the former, which also accounts for industrial peace. Want of discipline in work place, or for that matters in walks of life, creates chaos that is one of the major causes of fall in production and resultant sickness of the industry. It is therefore necessary to meet the misconduct in workplace by providing for appropriate penalties both as a deterrent and as a measure of correction of misconduct. The author in this chapter discusses all facets of misconduct right from dismissal for disproportionate absenteeism to employee misconduct which is to be viewed with a broader social perspective.

'AIR 1951 SC 4

The third chapter is titled charge-sheets for misconducts. It defines what charge means in the context of departmental proceedings. There is brief discussion on the purpose of charge-sheet. The author has cited the case of *N.Prabhakaran* v. *Tirupati Devasthanam*[2] which points out the necessary things to be kept in mind for charge-sheet. The author stresses the fact that the authority to issue charge-sheet is limited to very responsible authorities, i.e., the employer or the head of the department or the manager or the person responsible only to the employer. The author has also suggested the forms of charge-sheets for some specific misconduct which can benefit the private employers.

In fourth, fifth, sixth and seventh chapter, the author goes on to discuss the concepts like suspension, principles and procedures to be adopted in cases of domestic enquiry, the factors which may vitiate a domestic enquiry, the stages of domestic enquiry and the report of the enquiry officer.

From eighth to eleventh chapter the subject-matter of discussion is punishment, the laws and principles behind it, award of final order, protection for punishment in certain cases and the last chapter is on reinstatement, back wages and compensation. It is clear from a study of the eleventh chapter that the Civil Court has jurisdiction to entertain a suit by a workman in connection with an industrial dispute arising out of the right or liability under the general or common law, and not under the Industrial Disputes Act.

The relationship between the management and the segment of workers is a continuous process of trial and error. Labour management needs to be entrusted to enlightened managers who are able to see it as a human problem rather than how best to discipline misconduct. Prevention, is always better than cure. An order of dismissal results in the loss of a trained worker.

[2]1991 Lab IC (NOC) 157 (AP)

Overall, the book under review makes a good reading on the various facets of industrial relations in India. The exposition is clear. The language and style are lucid and simple. The contents are educative and informative. Author's profound insight coupled with his clear and concise style of explaining various complicated issues make this book helpful for not only the students of law but also administrators, lawyers, labour welfare organizations, labour-class and also the entrepreneurs.

Dr.Mononita K.Das*

Bhaumick on The Railways Act, H.K. Saharay, Eastern Law House, Kolkata, India, 2010, Nineth Edition, 1989, Price - Rs 980.

Law relating to the Railways Act, 1989 is taught in the under-graduate and post-graduate Course in different Universities across the world. The area is also taught under the broad subject titled law of infrastructure development in certain universities.

The author had successfully reiterated the details relating to Rail Land Development Authority, construction and maintenance works, procedure relating to opening of Railways, liabilities of Railways for death or injury to passengers relating to accidents, penalties and offences. But the discussion relating to land acquisition had not been adequate in the book. The author had devoted Chapter IV A relating to land acquisition for a special railway project.

In the past it had been seen that most controversies in India took place in respect of acquisition of private land by the Government for public purpose including building railway projects. Whenever agricultural lands were acquired controversy arose. Whenever compensation granted was inadequate, controversy arose. The Land Acquisition (Amendment) Bill, 2007 had come up with a proposal for social impact assessment study in relation to displacement of people whenever private lands are acquired by the appropriate government for public purpose.[1] The author could have addressed the issue as lack of social impact assessment study had led to controversies relating to displacement of people in related cases in the past. Also the manner of evaluation of market value of land had been adequately addressed under the Land Acquisition (Amendment) Bill, 2007, which required discussion.[2]

[1] Section 3 A of the Land Acquisition (Amendment) Bill, 2007.
[2] Section 1 IB of the Land Acquisition (Amendment) Bill, 2007.

The Rehabilitation and Resettlement Bill, 2007, had gone one step further and discussed the procedure for carrying out the social impact assessment study in the context of setting up of any infrastructure project including railway projects.[3] The author only mentioned that the National Rehabilitation and Resettlement Policy, 2007, shall apply on the 81st page, but elaborate discussion relating to the compensation paid and the impact assessment done should have been mentioned.

There had not been elaborate discussion relating to the aspect of privatization of certain areas of Railways. For example, the Ministry of Railways has the following nine undertakings, (a) Rail India Technical & Economic Services Limited (RITES); (b) Indian Railway Construction (IRCON) International Limited; (c) Indian Railway Finance Corporation Limited (IRFC); (d) Container Corporation of India Limited (CONCOR); (e) Konkan Railway Corporation Limited (KRCL); (f) Indian Railway Catering & Tourism Corporation Ltd (IRCTC); (g) Railtel Corporation of India Ltd. (Rail Tel); (h) Mumbai Rail Vikas Nigam Ltd. (MRVNL); (i) Rail Vikas Nigam Ltd. (RVNL). The author did not elaborately mention about the performance of the undertakings.

Besides the Public Private scheme in Indian Railways like (a) own your own wagon scheme, (b) build-own-lease-transfer scheme, (c) dedicated freight corridors, (d) special purpose vehicle routes, (e) wagon investment schemes, were not discussed at length in the book.[4] Also the development of catering services, budget hotels and food plazas had not been elaborately discussed in the book. Indian Railway Catering and Tourism Corporation (IRCTC) had already been mandated to develop catering services, budget hotels and food plazas at major stations through involvement of private entrepreneurs. IRCTC intends to take up around a hundred such budget hotel projects in the next five years with public private partnership. 20 such concessions have already been awarded. The hotel will be set up under the name of Rail. The

[3] Section 4 of the Rehabilitation and Resettlement Bill, 2007.
[4] http://www.pppinindia.com/pdf/ppp_position_paper_railways_1021c9.pdf

development of these areas within the railways will depend on the Central Government's capability of creating a level-playing field for both the public player and the private player in these schemes.

But the author had dealt with the concepts of res ipsa loquitur and the burden of proof issues in cases involving the Indian railways very well. The author had also elaborately examined the concept of contributory negligence and explained the law on that aspect very well. The author had also elaborately discussed owner's risk rate and claims for compensation in cases involving the Indian Railways. The author had also discussed at length the law relating to carriage of goods and carriage of passengers.[5] The author also had explained the procedure of working of Railways Rates Tribunal very well.[6] The constitution of such tribunal, powers of such tribunal, reliefs being given by such tribunals had been lucidly explained by the author.

Another area which had not been touched by the author is the development models of railways of certain other jurisdictions across the world. Even if the models of the developed world like US or UK could be ignored, India could learn from other developing countries like Brazil or Asian countries like China.

In conclusion it can be said that the Book is well researched by the Author, but the suggestions that are mentioned should be incorporated to make the subject updated and knowledgeable to the readers. As the discipline is ever-changing and challenging the Authors of books relating to the Railways Act should be prepared for incorporating the changes both national and international in nature which are relevant to the Indian railways.

Souvik Chatterji*

[5] Chapter VIII and Chapter IX of the Book, from pages 112 to 181. [6] Chapter VII of the Book, from pages 94 to 108. * Assistant Professor of Law, National Law University, Jodhpur Assistant Professor, National Law University, Jodhpur

B.B.Mitra's- The Limitation Act, M. R. Mallick, Eastern Law House. Pvt. Ltd., Kolkata, 2011, Price: Rs. 1450

The aim of the Law of Limitation is to make a litigant person vigilant in pursuing his remedy and also prevent harassment to the opposite party by bringing stale claims before the forum. The Act sets out various periods of limitation for different suits or proceedings and maximum period of limitation prescribed is thirty years. For the recovery of possession, the limitation provided for is twelve years and if no suit is filed by the owner of the property, dispossessed for more than twelve years, then the remedy of recovery of possession is extinguished. The limitation Act of India is not only a law of limitation but also a law of prescription. In the law of Limitation only remedy is extinguished but not the right. On the contrary, law of prescription extinguishes not only the remedy but also the right.

The present book for review is broadly divided into two sections. Each section is further divided into parts. In the first section author discusses exhaustively all the relevant provisions of Limitation Act, 1963. Section is divided into preamble and five parts. Preamble is followed by history and salient features of the Act. References to English decisions in interpreting Indian Limitation Act are made. Further discussion on Preamble significantly gives place to rule of harmonious construction, the extent to which statutes of limitation are retrospective and the applicability of the Act.

Part I introduce the readers to preliminary part of the Act and include various definitions under the Act. Part II throws light on the aspects of limitation of suit, Appeals and Applications under S.3 to S. 1 l.Part III deals with computation of period of limitation and relatively deals with exclusion of time, effect of acknowledgement and substitution under S.12 to S.24. Part IV deals with Acquisition of Ownership by Possession under S.25 to 27. Under Part V miscellaneous provisions like provision

for suits for which the prescribed period is shorter than the period prescribed by the Indian Limitation Act, 1908 and provisions as to barred or pending suits are discussed.

Second Section comprises of'The Schedule- Periods of Limitation'. This Section is divided into three divisions.

First division relates to the 'Suits' and if further divided into ten parts. Part I deals with suits relating to Accounts. Part II deals with contracts which includes suits related to price, money lent and payable, bill of exchange, arrears of rent, specific performance of contract, compensation for breach of contract and other contracts. Part III deals with suits relating to Declaration and in Part IV author discuss the suits relating to immovable property which includes issues related to mortgagor, mortgagee and possession of immovable property. Part VI on the contrary relates to the aspect of movable property. Issues like dishonest misappropriation, conversion and recovery of movable property are included into it.

Part VII deals with suits relating to torts and includes compensation for malicious prosecution, libel, slander trespass upon immovable property, infringing copyright and other tort related cases. Part VIII includes Suits relating to Trust and Trust Property. Part IX incorporates suits relating to miscellaneous matters like right of pre-emption, set aside of sale by civil or revenue courts, suits for possession of hereditary office etc. Part X deals with suits for which no period of limitation is provided elsewhere in the schedule.
Second division cast floodlight on appeals and includes appeals from an order of acquittal, provisions under procedural laws and appeals from decree or order of any High Court to the same court.

Third division is divided into two parts. Part I deals with applications in specified cases under procedural laws, Arbitration Act 1940 and Special Leave to Appeal to

the Supreme Court. Part II deals with the application for which no period of limitation is provided elsewhere under the division of applications.

Appropriate discussion of the judgments of the Supreme Court of India, High Courts and some foreign courts has been done with the relevant topics. Besides, recent amendments have also been incorporated in the book.

In conclusion, I would fairly admit that it is not only an exhaustive treatise on the Law of Limitation but also an amended and updated version on the Law of Limitation. It would prove to be a useful legal literature for academics, law students, practitioners and Judicial authorities.

Dr. Prinkal Joshi*

Laws Relating to Electricity in India, P.K. Sarkar, Eastern Law House, Kolkata and New Delhi, India, 2011, Rs 1390.

Laws relating to Electricity in India are taught in the under-graduate and post-graduate Course in different Universities in India. The discipline is also taught under the broad subject titled "Law of Infrastructure Development" in certain Universities.

Laws relating to Electricity are very technical in nature. As far as the present book is concerned, the author has extensively explained the provisions of the Indian Electricity Act, 2003. The aspect relating to generation, transmission and distribution is dealt with very elaborately. The powers and functions of the regulatory commissions have been dealt with very elaborately by the author in Part X of the Book, ranging from pages 365 to 383. In respect of electricity sector, the role of the Central Electricity Regulatory Commission and the State Electricity Regulatory Commissions are very important.[1]

Even the role of the Appellate Tribunal for Electricity has been elaborately addressed by the author.[2] It has been dealt with in Part XI of the Book, ranging from pages 397 to 411. Other provisions relating to investigation and enforcement and provisions relating to offences and penalty has been well addressed by the author.

The part that is missing from the book, is the evolution and growth of the Electricity Sector in India over the last 100 years. The electricity sector in India developed during the pre-independence period, when India was under Colonial rule. Discussion

[1] Section 76 of the Electricity Act, 2003, deals with the Constitution of Central Electricity Regulatory Commission. Section 82 of the Electricity Act, 2003, deals with the constitution of the State Electricity Regulatory Commissions.
[2] Section 110 of the Electricity Act, 2003, deals with establishment of Appellate Tribunal for Electricity in India.

was required in the respect of the Enactment of the Electricity (Supply) Act, 1948, which has created the three statutory bodies like Central Electricity Authority (CEA), State Electricity Boards (SEBs) and Regional Electricity Boards (REBs). There should have been discussion in respect of privatization of electricity during the British regime in India, then nationalization after independence, and again liberalization after the 1990s.

There should have been serious discussion of the Electricity Regulatory Commissions Act, 1998, which has given birth to the regulatory commissions in India.[3] The other important aspect relating to licensing has not been dealt with elaborately. The Government has few exemptions in respect of licensing. The efficacy of the provisions should have been discussed elaborately.

Other miscellaneous provisions which require special treatment included concepts like wheeling. Besides, there is huge debate going on across the globe in respect of privatization of electricity. In the Indian context the utility of privatization of electricity and the areas where there are private participation, required express mention. Comparison with the electricity sectors of few other countries like South Africa, Brazil could have given better insight to the students who have taken up this subject. The other books whjch cover these areas elaborately include Naushir Bharucha's book entitled "Guide to the Electricity Laws", which can be of help the students.[4]

In conclusion it can be said that the Book is well researched by the author, but the suggestions that are mentioned above may be incorporated, in the future editions, to make the subject updated and knowledgeable to the readers. As the discipline is ever-changing and challenging the authors of books relating to the Electricity Laws in

[3] Both the CERC and SERCs emerged in India after the enactment of the Electricity Regulatory Commissions Act, 1998.
[4] Naushir Bharucha, *Guide to the Electricity Laws*, ISBN - 978-81-8038 -212-13, 4th Edition, Lexisnexis Butterworths, Wadha Nagpur Publication, 2004.

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India should be prepared for incorporating the changes both national and international in nature which are relevant to the Indian Electricity Sector.

Souvik Chatterjl*

Textbook on Muslim Law, Dr. Rakesh Kumar Singh, Universal Law Publishing Co., New Delhi, 2011, Pp.371, Price: Rs.295

Muslim law remains one of the most baffling areas of family law in India, for students, academicians and even for judges. This is often attributed to the existence of different schools with varied rules and interpretations and absence of codification. Muslim law as it exists today, as a renowned author observes, is the result of a continuous process of development during the fourteen centuries of the existence of Islam.[1] In other words it is, inextricably tied to the religion of Islam. The role of Indian judiciary in this continuous process of evolution cannot be ignored. Judicial interpretations over the years have been successful in fashioning the age old principles of Muslim law to accommodate the changing notions of justice. Thus, a proper understanding of Muslim law would necessitate a combined reading of Islamic principles and its modifications in the form of statutes and precedents.

The book under review is a textbook on Muslim Law which, according to the author, is intended for academicians, students, legal practitioners and judges. Spread across thirteen chapters, the book discusses almost all aspects of Muslim Law which *inter alia* are marriage, dissolution of marriage, maintenance, parentage and guardianship, *wakf*, gifts, inheritance and pre-emption. The annexure containing The Muslim Women (Protection of Rights on Divorce) Act, 1986, The Muslim Women (Protection of Rights on Divorce) Rules, 1986, The Muslim Personal Law *(Shariat)* Application Act 1937, and the Dissolution of Muslim Marriages Act, 1939 provide an easy reference for the readers.

Chapter 1 titled 'Origin and Historical Development of Muslim Law' discusses in detail the origin and development of Islamic faith. The existence of *Sunni* and *Shia*

[1] Asaf. A.A Fyzee, Outlines of Muhammaden Law (Oxford, New Delhi), 5th Edition, 2008, p.I.

schools along with the sub-schools, which is one of the basic premises of Muslim law also finds place here. A law student might find it unnecessarily long and lacking concision which the author promises in the preface. Sources of Muslim Law are discussed in 2nd chapter which also contains matters of interpretation and application of Muslim law in India. Though the chapter contains a lucid narration of the sources of Muslim law, the latter part is insufficient even for a student cramming for examinations. The criteria laid down in the 1923 decision of the Madras High Court,[2] which has consistently been relied upon by the Indian judiciary in determining 'who is a Muslim' for the purpose of application of Muslim Law does not find a place here. Further, discussion of the Muslim Personal Law *(Shariaf)* Application Act 1937 is confined to mere reproduction of the bare provisions.

Chapter 3 deals with various aspects of Muslim marriage like nature, **essentials,** types, and ceremonies. The concept of *iddat* is also discussed in the same **chapter.** Though the author has discussed 'age of puberty' as relevant for **determining the** capacity to marry and traditional rules relating to determination of **puberty, a** reference is not made to the relevant statutory provision.[3] The fourth **chapter is** dedicated to the discussion on *mehr* or dower which contains a thorough **discussion** of the concept in its various dimensions including the right of retention.

Dissolution of marriage finds place in Chapter 5 which discusses various forms of *talaq* and divorces by judicial intervention. The concise enumeration of forms of divorces with its essentials given at the end of the chapter is useful to the readers. **The** controversy regarding the desirability of triple *talaq* is dealt with in some **detail** including the All India Muslim Personal Law Board's proposed changes. **But the** author has failed to point out the attempts the Indian judiciary has made in **this** context which is confined to a passing reference to an Allahabad High **Court** judgement of April 1993 without a mention of the name of the case and citation.

[2] *Narantakath Avullah* v. *Parakkal Mamu and Others,* AIR 1923 Mad 171.
[3] Dissolution of Muslim Marriages Act, Sec. 2(vii)

Chapter 6 discusses Muslim personal laws regarding maintenance and a divorced wife's right to maintenance under Sec. 125 Cr. P.C.. It also includes a discussion on the *Shah Bono 's* case and the Muslim Women Protection of Rights on Divorce Act, 1986. Law of guardianship is dealt with in Chapter 7 and contains various aspects like types of guardians, mother's right to *hizanat*, the distinction between guardianship and custody etc. Chapter 8 titled 'Law of Parentage' deals with the rules of Muslim law regarding maternity and paternity. The concept of acknowledgement of paternity is discussed quite elaborately. The question whether Muslim law allows adoption which is a matter of considerable uncertainty is also addressed.

Chapters 9 and 10 are about laws of Gift and Will respectively. Muslim law relating to gifts or *hiba* is discussed concisely touching almost all aspects. The chapter on law of will or *wasiyat* contains discussion as to the essentials of a valid will, contingent and conditional wills, revocation of will etc. A chart at the end of the chapter summarises the differences between *Sunnis* and *Shias* with respect to the law of will. Inclusion of more illustrations and a mention of the relevance of a marriage solemnised or registered under the Special Marriage Act, 1954, in ousting the application of Muslim law of *wasiyat* would have been made the chapter more comprehensive. The law relating to wakfs and pre-emption forms the content of the subsequent chapters. Chapter on succession or inheritance is the final one which is divided in to three parts viz. general principles, *Sunni* and *Shia* laws of succession. Definition of relevant terms is also included in the initial part. Though the chapter touches upon all aspects of Muslim law of succession, absence of adequate illustrations may prove to be a hurdle for a reader who is new to the subject.

The book summarises the personal laws applicable to Indian Muslims with respect to most of the matters. It is a good reference for a reader interested in Muslim law, that too in a concise form. However, there are certain inadequacies, which cannot be ignored. Absence of case laws, most particularly recent case laws is one major shortcoming. Though the author certifies the book to be updated with case laws till

2009, it may be noted that a reader procuring a 2011 edition textbook expects much more than that. The subject index is too short to provide a helpful reference. It is also doubtful how far it can be recommended as a text book for law students keeping in mind the style of narration, the length of contents, occurrence of ' typographical errors and more importantly the other available textbooks on family law. To conclude, it may be said that the book is a good attempt that comes in a reasonable price, but needs revision and updating if it has to serve the purpose of a text book.

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